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

BETWEEN:

THE ATTORNEY GENERAL OF ONTARIO

Appellant
(Intervenor)

and

M.

Respondent
(Respondent)

and

Respondent
(Appellant)

RESPONDENT M.'S FACTUM ON APPEAL AND CROSS-APPEAL

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FACTUM ON APPEAL

> Because I have now gone through the emotional process of realizing how much of myself I have had to shut down in order to function as a lesbian woman in Canadian society, I know that other doors must still lock important parts of my heart. And now that I am a member of a family, I know that important parts of my children's hearts are under lock and key as well. They know, as do I, that many areas of concrete discrimination and social disapproval still affect all of us. They know, as do I, that our entire family is still legally incapacitated in many ways that would never even occur to other people.

Kathleen A. Lahey, *Are We 'Persons' Yet, Law and Sexuality in Canada* (Toronto: University of Toronto Press, 1998) (forthcoming) at 262-263.

PART I — THE FACTS

(a) Introduction

1. If a man and a woman have cohabited for more than three years, either spouse can bring an interim motion for support within days of separation. The interim support motion and family law's case management system provide a forum for the resolution of all issues for the couple. Disclosure obligations, possession of property, division of household contents, and the sale or buy-out of property can be negotiated and addressed in a timely way under the family law framework. If two women or two men cohabit, they do not have access to support rights or to the family law system that would civilize their separation. As M. has argued successfully in the two lower courts, this is a denial of the equal protection and benefit of the law in the most essential and punitive sense.

(b) Adjudicative Facts

2. In 1980, M. and H. met while travelling with a group in Nepal. They fell in love, moved in together and started their own business. They cohabited for the next ten years, sharing virtually every part of their lives.

Affidavit of H. sworn June 16, 1993 at para. 3-4, Case on Appeal, Tab 14, p. 101 ("H.'s Second Affidavit"); Affidavit of M. sworn August 18, 1994 at para. 4-16, Case on Appeal, Tab 23, pp. 191-196 ("M.'s Affidavit Summarizing the Admitted Evidence"); Reasons for Judgment of Epstein J., dated October 12, 1993, Case on Appeal, Tab 34 at pp. 307-310 ("Interim Relief Motion"); Reasons for Judgment of Epstein J., dated February 2, 1994, Case on Appeal, Tab 35 at p. 325 ("Summary Judgment Motion").

3. M. and H. formed an entirely integrated emotional and economic union. They lived an affluent lifestyle, vacationing several times a year and spending their weekends in the country. M. performed significant household labour, doing all of the cooking, most of the laundry, and all physical tasks such as gardening and maintenance. In 1985, M. and H. made mutual wills. They celebrated their anniversary each year on October 15th.

M.'s Affidavit Summarizing the Admitted Evidence, at para. 6, 13, pp. 195-196, Exhibit 1, p. 206-207, 213-214.

4. In 1982, the parties started an advertising business together, with H.'s advertising contacts and M.'s entrepreneurial experience. H. had the great majority of client contact, and after 1987, managed all of the financial issues. M. developed advertising concepts, collected accounts and handled administration. The business enjoyed immediate success and for the next ten years H. drew $6,000 per month in net income. The business paid for substantial personal expenses, including $100,000 in renovations and furniture. M. received no salary.

M.'s Affidavit Summarizing the Admitted Evidence, at para 8, pp. 193, Exhibit 1, pp. 208-213.

5. M. and H. acquired and developed two properties as joint tenants. They incorporated a second business. The details of all major transactions conducted by the parties are found in Appendix 1, a chronology of admitted facts. Revenues from their joint businesses and corporate borrowings funded the purchase of real estate and produced the great majority of the parties' income. M. and H. lived such an integrated financial lifestyle that is virtually impossible to sort out the extent of either one's individual financial contribution. There is no doubt that they were financially interdependent. When M.'s mother became fatally ill, H. told her to not to worry about pursuing outside employment, and that "everything else would be looked after." H. has admitted that she consciously waited to end the relationship until she had paid off debts and was "financially capable" of separation.

M.'s Affidavit Summarizing the Admitted Evidence at para 6, pp. 191-192, Exhibit 1, pp. 207, 208-213; Appendix 1: The Relationship Between M. and H. - A Chronology of Admitted Facts.

6. When the parties separated, M. had no savings, no assets apart from a jointly-owned country property, and no source of income apart from the jointly-owned business. She took a few personal possessions with her, leaving behind all of the property that she and H. had acquired together. H. changed the locks to both homes and shut the business down, while continuing to earn significant income from former clients. She told the answering service and business contacts not to accept calls from M. She told the accountant not to give M. any information about the business. And she told M. that she was not entitled to anything – that the law didn't recognize her because she had been in a lesbian relationship.

M.'s Affidavit Summarizing the Admitted Evidence at para. 19-25, pp. 197-200, Exhibit 1, pp. 214; Interim Relief Motion at 310; Summary Judgment Motion at 325-326; Affidavit of M. sworn October 14, 1992 at para. 35-36, Case on Appeal, Tab 12, p. 91 ("M.'s Originating Affidavit"); H.'s Affidavit sworn October 19, 1992, Case on Appeal, Tab 13 at para. 4, 36-37, 39-40 ("H.'s Originating Affidavit"); Excerpt from transcript of the Cross-Examination of H. conducted June 17, 1997, Q. 2150 at p. 372, M.'s Book of Authorities.

7. M. commenced an application shortly after separation, claiming partition and sale of the jointly owned country property, a constructive trust interest in the city home and various remedies under the *Business Corporations Act (Ontario)*. Her initial application included a claim for monthly support and was amended on April 27, 1993 to specifically challenge the opposite-sex definition of "spouse" in s. 29 of the *FLA* and to claim support under that section. Five years of aggressive litigation followed. The history of the litigation is summarized in Appendix 2, a Statement of Prior Legal Proceedings under family law case management rules that summarizes each judicial determination in the case.

8. During the five years following separation, M. continued to suffer from the effects of the relationship breakdown. She attempted to retrain, and supplemented her meagre income by personal and institutional borrowing. The parties never divided personal property or household contents. H. successfully moved for a separate trial of the Constitutional Question in February, 1994, and the resulting order put all other issues in the litigation, including disclosure obligations, on hold for more than three years. M. was cut off from all of the capital that the parties had built together. In December, 1996, H. resisted a motion for the partition and sale of the jointly-owned country property, and the parties consented to an order that the property issues between them proceed to trial separately from the

constitutional issues. When the parties settled during a mid-trial settlement conference, 65 months had passed since the separation of the parties. Throughout that time, H. continued to earn income from the business' former clients and her economic lifestyle remained unchanged.

Reasons for Judgment of Epstein J., Ontario Court (General Division) dated February 9, 1996, Case on Appeal, Tab 37 at pp. 363-365 ("Trial Decision"); M.'s Affidavit Summarizing the Admitted Evidence, para. 17-31. pp. 197-202; Summary Judgment Motion at 325-326; Affidavit of M., sworn March 12, 1997, Respondent's Record: Leave Application, Vol. 1, Tab 2 at pp. 5-8; Appendix 2: Statement of Prior Legal Proceedings.

9. The family law system, which holds out the admirable goal of protecting individuals like M., failed her. In fact, although a man in M.'s situation could have had an interim support hearing within days of separation, M. was told that she could not even issue her claim in the family law division because her case involved two women. Three years after separation, the constitutional judgment of Epstein J. granted M. the right to a support hearing within 30 days. However, the Court of Appeal granted H.'s motion for a stay pending appeal, notwithstanding the fact that support orders, at least between heterosexual couples, are exempt from such stays. In all, M. has endured more than five years of litigation over whether she could *apply for* support on the breakdown of a same-sex relationship.

M.'s Affidavit Summarizing the Admitted Evidence, at para 25, pp. 199; Appendix 2: Statement of Prior Legal Proceedings; Order and Reasons of Moldaver J.A. dated February 20, 1996, M.'s Book of Authorities.

10. In January, 1998, after three days of trial concerning the property disputes between the parties, M. grew tired of fighting. The joint business had little asset value for purposes of division, and without a support claim, M. could not access the ongoing income that she had helped H. to generate. H.'s theory of the case, which she supported by personal denigration and denial of any contribution, was that M. had contributed "nothing" to the business and had lived with her for a "free ride." M. saw virtually no hope of an end to this aggressive and intensely personal litigation, with the Constitutional hearing, appeals of the property decision, and, potentially, a spousal support trial, all looming before her. The settlement terms required H. to pay an amount equivalent to M.'s equity in the country property. In exchange for

this payment, M. waived her claims for a proprietary interest in the city home, damages for oppression under the *OBCA* and all claims for spousal support.

M.'s Affidavit Summarizing the Admitted Evidence at para. 24-25, pp. 199-200, Exhibit 1, p. 215; H.'s Originating Affidavit, para. 2, 6, 10 and 8, pp. 86, 88, 90, 91; H.'s Second Affidavit, para 14, 35, pp. 104, 109; Affidavit of M. sworn February 3, 1998 at para. 3-4, pp. 1-2.

11. In recognition of her years of struggle for equality, and on behalf of all other gays and lesbians disadvantaged in relationships, M. asks that this Court give substance to the *Charter*'s promises. Gays and lesbians in Ontario cannot apply for spousal support, regardless of the disadvantaged person's actual financial need, uncompensated contribution to the relationship, or extensive personal and financial sacrifices. All that M. has ever asked for in this case is fair treatment. Gays and lesbians are entitled to live secure in the knowledge that family law courts will serve them equally.

(c) Legislative Facts

12. M. accepts the history of the legislative facts in Ontario's Factum on Appeal. However, Ontario's *characterization* of the legislative facts is inaccurate. In particular, M. submits that:

(a) the impugned provision does not result from a conscious process of incremental reform. Rather, it shows a refusal to recognize the reality of the spousal relationships of gay men and lesbians;

(b) amending the provision to accord with the *Charter* will not displace "an integrated system of spousal rights in Ontario" but will advance both the purposes of the *Charter* and of the *Family Law Act,* as is constitutionally required;

(c) the spousal support regime was not designed to apply just to women or to those in relationships in which heterosexual sex between the parties can give rise to procreation. Instead, it addresses relationships of cohabitation, marked by economic interdependence and sacrifice; and

(d) the 1993 Ontario Law Reform Commission's *Report on the Rights and Responsibilities of Cohabitants* did not reach the conclusions suggested by Ontario. Rather, it concluded that the current legislative regime was constitutionally indefensible and demanded reform to recognize same-sex cohabitants.

Ontario Law Reform Commission, *Report on the Rights and Responsibilities of Cohabitants under the Family Law Act* (Toronto: Ministry of the Attorney General, 1993).

13. These conclusions are supported by the following review of the legislative history, including the first provision that extended spousal support rights to unmarried couples, the passage of the impugned provision, and law reform recommendations and efforts since that time.

(i) Family Law Reform Act, 1978

14. In the wake of *Murdoch*, the *Family Law Reform Act,* ("*FLRA*") was the first Canadian statute that extended support rights to unmarried heterosexual couples. When it was introduced in 1976, the Hon. R. Roy McMurtry, the Attorney General, identified some of its purposes and its limits. He stated:

> Certainly it is more desirable to place a support obligation on common law spouses than to have a large number of persons who are living common law looking to public welfare for support instead.... [T]his obligation of support would arise only where the person claiming was unable to support himself or herself and the other person had the means to provide support. Much of the criticism we have heard comes from people living in a common-law relationship who feel that this proposal is an infringement of their personal freedom because they entered into an arrangement "with no strings attached." These are the very people who will be unaffected by this legislation because they do not form a financial dependency on each other.

Ontario, Legislative Assembly, *Official Report of Debates (Hansard)* (26 October 1976) at 4103; Ontario. Legislative Assembly, *Official Report of Debates (Hansard)* (18 November 1976) at 4793; Appendix 3: Historical Perspective.

15. On November 22, 1976, as the second reading debate on the *FLRA* continued, MPPs commended the Attorney General for his "great courage" in introducing the extended definition of spouse. As to its opponents, Mr. Givens observed:

> There is a group that has said, "I don't want to be hassled by the law. I want to be able to enter into any kind of relationship that I please...." I think the Minister was right in facing up to that situation and saying, "No, you cannot do this to a person. You cannot take people and exploit them and then throw them on the scrap heap of humanity and not bear any kind of responsibility for those particular people. You must invoke the law for the purpose of taking care of them, of being responsible for them." .... Then there is the other school of thought that says: "No, this is an illicit relationship. This is an illegal relationship. The hell with them. Let them stew in their own juice. We shouldn't look after them." I say to people like that, whose nose are we cutting

> off to spite whose face? If the dependent person is going to wind up on the welfare rolls and society has to pay in the final analysis, whom are we taking care of, who is the ultimate person who has to pay the shot? We have to pay the shot ....
>
> Ontario, Legislative Assembly, *Official Report of Debates (Hansard)* (22 November 1976) at 4890 - 4891. See also, Ontario, Legislative Assembly, *Official Report of Debates (Hansard)* (23 November 1976) at 4942; Ontario, Legislative Assembly, *Official Report of Debates (Hansard)* (18 October 1977) at 898.

16. The preamble to the *FLRA* sums up its purpose: "to recognize the equal position of spouses" and to treat their relationship as a "partnership." As Members of the Legislature recognized during debate, the references to "marriage" in the preamble do not reflect the full purpose of the impugned provision, which establishes support rights for *unmarried* couples.

> Ontario, Legislative Assembly, *Official Report of Debates (Hansard)* (18 October 1977) at 904.

17. The *FLRA* was proclaimed into law on March 31, 1978. It defines "spouse" for support purposes in s. 14(b)(i):

> "spouse" means a spouse as defined in s. 1 [a party to a valid, void or voidable marriage], and in addition includes,
>
> (i) either of a man and a woman not being married to each other who have cohabited,
>
> (A) continuously for a period of not less than five years, or
>
> (B) in a relationship of some permanence where there is a child born of whom they are the natural parents,
>
> and have so cohabited within the preceding year.

18. The *FLRA* was retroactive in its application to the extent that it affected people who were cohabitating or had cohabited during the year preceding its proclamation.

(ii) Family Law Act, 1985

19. When the *Family Law Act, 1985* (*"FLA"*) was introduced for first reading, then Attorney General the Hon. Allan Pope announced that the only change to the definition of spouse was that the period of cohabitation required for spousal status would be shortened from five years to three years.

Again, the statute was retroactive to the extent it affected people who were cohabiting or had cohabited in the two years preceding its proclamation.

> Ontario, Legislative Assembly, *Official Report of Debates (Hansard)* (6 June 1985) at 24.

20. The *FLA* was proclaimed into law on March 1, 1986. It defines "spouse" for support purposes:

> "spouse" means a spouse defined in subsection 1(1) [a party to a valid, void, or voidable marriage], and in addition includes either of a man and a woman who are not married to each other and have cohabited,
> (a) continuously for a period of not less than three years, or
> (b) in a relationship of some permanence if they are the natural or adoptive parents of the child.

21. Unmarried, opposite-sex couples in Ontario have had spousal support rights and obligations since 1978. Apart from the shortening of the required period of cohabitation to three years in 1985, the legislative scheme has remained unchanged since 1978.

(iii) The Ontario Law Reform Commission's 1993 Report on the Rights and Responsibilities of Cohabitants

22. In 1993, the Ontario Law Reform Commission ("OLRC") recommended setting up a system of registered domestic partnerships to give same-sex couples the same rights and obligations given to married persons throughout the *FLA*.

> Our fundamental conclusion is that the ambit of the Act should be expanded to include two kinds of relationship that are today partly or wholly excluded: those between cohabiting heterosexual couples, and those between cohabiting couples of the same sex.
>
> *OLRC Report* at 1.

23. On the question of whether spousal status should be ascribed to same-sex couples *who choose not to exercise their right to become registered domestic partners*, the OLRC saw "much merit in treating them in the same way -- so that economic inequalities and exploitation will be minimized in all familial relationships." However, it wanted more information about the attitudes and expectations of cohabiting same-sex couples on this issue. This "need to study" assumes that gays and lesbians are

necessarily "different" and is therefore discriminatory. Nevertheless, the materials that M. and Ontario have filed in this case provide the comprehensive information necessary to address any factual gaps that concerned the OLRC.

> *OLRC Report* at 3; Reasons for Judgment of the Ontario Court of Appeal dated December 18, 1996, Case on Appeal, Tab 39 at 486, Charron J.A. ("Appeal Decision").

(iv) Bill 167

24. In June, 1994, then Attorney General, the Hon. Marion Boyd, adopted and expanded upon the *OLRC* recommendations. Bill 167 would have eliminated all legislative discrimination against gays and lesbians, redefining "spouse" in 57 Ontario statutes, including the *FLA*. In her introductory remarks on first reading, the Attorney General said that giving gays and lesbians equal status as spouses was "constitutionally necessary." On June 9, 1994, Bill 167 was defeated by a margin of 68:59 on a "free vote."

> Bill 167, *Equality Rights Statute Law Amendment Act,* Appellant's Book of Authorities, Tab 17; Explanatory note to the *Equality Rights Statute Law Amendment Act,* Speaking Notes for Attorney General Marion Boyd at 2; W. Walker, "Historic 68-59 vote deals heavy blow to gay rights cause" *Toronto Star* (10 June 1994) A1; "Liberal cynicism kills same-sex bill" *Toronto Star* (10 June 1994) A22; M. Mittelstaedt, "McLeod hit by same-sex shrapnel" *[Toronto] Globe & Mail* (11 June 1994) A4; T. Walkom, "Same-sex struggle mismanaged from the start" *Toronto Star* (11 June 1994) C1; "Meet Lyn McLeod" *[Toronto] Globe & Mail* (11 June 1994) D6; T. Walkom, "Ontario's parties cloaked in shame" *Toronto Star* (10 June 1994) A1.

25. Legislative debate on Bill 167 was marked by overtly discriminatory statements. For example, it was suggested that gay men and lesbians are responsible for AIDS, engage in electric shock torture, and are the cause of the breakdown of the traditional family and an increase in crime. Then, when the Bill was defeated, Ontario Provincial Police and security guards, carrying billy clubs and wearing rubber gloves, ejected observers from the public gallery. As Rev. Brent Hawkes deposes, the experience that day in the Legislature illustrates the pervasive hatred and open disgust shown to gay men and lesbians.

> Ontario, Legislative Assembly, *Official Report of Debates (Hansard)* (2 June 1994) at 6626-6635; Affidavit of Rev. Brent Hawkes, sworn August 12, 1994 at para 11, Case on Appeal, Tab 19, pp. 155-156 ("Rev. Hawkes"); C. McInnes, M. Mittelstaedt, and J. Rusk, "Ontario bill on gay rights defeated" *[Toronto] Globe and Mail* (10 June 1994) A1; C. Blatchford, "Shame on N.D.P." *Toronto Sun* (10 June

1994) 5; P. Edwards and J. Lakey, "Irate lesbians, gays, protest MPPs' vote" *Toronto Star* (10 June 1994) A10.

26. No one can realistically expect an Ontario government to introduce same-sex legislation in the near future. If judicial deference were to send the issue back to the political arena, the results would neither be certain nor rights-respecting, since this is a highly contentious issue in which political stakes run high. Bill C-33, *An Act to Amend the Canadian Human Rights Act (1996),* provides a useful example. Beginning in 1979, the Canadian Human Rights Commission recommended that sexual orientation be included in the *CHRA 's* list of prohibited grounds of discrimination, describing the failure to do so as "a fundamental abdication of our human rights responsibilities." As a result of continued government inaction, the Ontario Court of Appeal read sexual orientation into the *CHRA* in *Haig*, and the federal government did not appeal the decision. It was only in 1996, after almost two decades of significant pressure, that Bill C-33 was introduced, and it almost foundered due to the level of animosity and fear engendered by the issue. Even if a bill remedying s. 29 of the *FLA* was introduced in response to a court ruling, history and expert evidence reveal the strong possibility of its defeat.

Exhibit "A" to the Affidavit of Dr. Graham White, sworn August 10, 1994, *Opinion with Respect to "Same-Sex" Legislation in Ontario*, dated August 10, 1994, Case on Appeal, Tab 16, pp. 113-114, 118-119 ("Dr. White"); Trial Decision at 379; *Haig* v. *Canada* (1992), 9 O.R. (3d) 495 (C.A.) ("*Haig*"); *House of Commons Debates* (7 May 1996) at 2449-2451; 2453-2454; 2457-2458; Bill C-33, *An Act to Amend the Canadian Human Rights Act*, 1996, 2nd Sess., 35th Leg., Canada, 1996; House of Commons, *Equality for All: Report of the Parliamentary Committee on Equality Rights* (Ottawa: Queen's Printer for Canada, 1985) (Chair: J. Patrick Boyer) at 26-30; House of Commons, *Toward Equality: The Response to the Report of the Parliamentary Committee on Equality Rights* (Ottawa: Communications and Public Affairs, Department of Justice, 1986) at 13; Canadian Human Rights Commission, *Annual Report 1995* (Ottawa: Minister of Supply and Services Canada, 1996) at 14-15, 50 (Chair: Maxwell Yalden); McIlroy, A., "Ringma Resigns as Whip After `Unequivocal Apology'" Globe and Mail *(Toronto)* A1; McIlroy, A., "Reform Suspends Alberta MP for Statement on Gay Workers" *Globe and Mail (Toronto)* A4.

27. Two years into this case, after a change of government, the current Attorney General for Ontario, the Hon. Charles Harnick, changed the Crown's position and took a position opposing M.'s claim. He has refused to address the issue of equality for gay men and lesbians, stating in debates and in the media that this is a matter for the courts to determine, while his legal arguments in this case call for deference

to the Legislature's agenda. In the five years since the OLRC reported, there has been no family law reform. In fact, shortly after assuming office, the Attorney General abolished the OLRC.

> Ontario, Legislative Assembly, *Official Report of Debates* (Hansard) (1 June 1994) at 6583; J. Rusk, "Act fast on same-sex laws, Ontario told" *[Toronto] Globe & Mail* (27 June 1997) A2; "Tories eliminate 22 advisory groups," *[Toronto] Globe & Mail* (30 May 1996) A4.

28. The political debates on gay and lesbian equality issues make a mockery of the respect for individual persons that is the foundation of democracy, and illustrate that the unchecked legislative process is failing gays and lesbians in their search for equality. Politicians, purporting to speak on behalf of the "will of the majority," openly declare that gays and lesbians are unnatural and immoral. In two notorious cases, politicians who voted against same-sex equality actually reversed on electoral platforms that had won them significant support from gay and lesbian voters. The debates over the issue proceed as if there is no *Charter* guarantee of equality, and warnings to the contrary go unheeded. The discrimination against gay men and lesbians is overt, often unabashedly admitted, just as it once was against Jews, women and people of colour. This failure of democracy is precisely the evil that the legislators were addressing when the equality provisions of the *Charter* were enacted. As McLachlin J. stated in *Miron*,

> In the course of the past century, free and democratic societies throughout the world have recognized that the elimination of such discrimination is essential, not only to achieving the kind of society to which we aspire, but to democracy itself.

> *Miron* v. *Trudel*, [1995] 2 S.C.R. 418 at 495 ("*Miron*"). See also Appendix 3: Historical Perspective, including reversals by Liberal Leader Lyn McLeod (1994) and U.S. President Bill Clinton (1996).

(d) Evidence

29. M. filed eight volumes of factual materials on the trial hearing. This included her Affidavits in this action and transcripts and summaries of the cross-examinations. Six of these volumes contained extrinsic evidence and academic articles, which have been updated in M.'s Brandeis Brief for this Court. The balance of M.'s evidence consists of nine Affidavits from experts and members of the gay and lesbian community.

> Appeal Decision, at 456 - 458, Charron J.A.; Reasons for Judgment of Epstein J., dated June 28, 1996, Case on Appeal, Tab 38 at pp. 405-407 ("Costs Decision of Epstein J.").

(i) Selected Extrinsic and Expert Evidence

30. There was no option on the 1996 Statistics Canada Census forms for individuals to report that they were living in same-sex relationships. Accordingly, there is no Census data relating to the number of same-sex cohabiting couples in Canada.

31. Same-sex relationships involving cohabitation are common and highly valued by lesbians and gay men, as the following evidence shows:

(a) About two-thirds of gay men and three-quarters of lesbians consider a permanent living arrangement with a same-sex partner to be of great personal importance;

(b) About half of gay men and three-quarters of lesbians are currently involved in such a relationship;

(c) About one-third of those relationships have lasted for at least five years;

(d) The longest have lasted over thirty-five years and are clearly lifetime commitments; and

(e) Of those involved in couples, 66% of gay men and 80% of lesbians live together; over half of all couples combine their incomes.

Exhibit "A" to the Affidavit of Dr. Rosemary Barnes, sworn August 12, 1994, *"Expert Opinion from Dr. Rosemary Barnes Prepared Re: M. v. H. August 12, 1994,"* Case on Appeal, Tab 18, pp. 128-129 ("Dr. Barnes"). Appendix 5: Psychological and Sociological Research on Interdependence in Gay and Lesbian Relationships.

32. Expert evidence shows that lesbians and gay men form long-term relationships, which involve emotional support, loyalty, love and affection, economic sacrifices, and an expectation of permanence. Many rear children together. As occurs in heterosexual couples, cohabitation in an intimate relationship with a view to spending a lifetime together naturally leads to the cooperation, compromise, and sharing that may create a need for compensatory support on relationship breakdown.

Exhibit "A" to the Affidavit of Professor John Alan Lee, sworn September 7, 1994, *"Report Prepared by Prof. Lee in connection with M. v. H."* Case on Appeal, Tab 29, pp. 243, 251-252 ("Professor Lee"); Affidavit of Meredith Cartwright, sworn August 17, 1994 at para. 8-9, Case on Appeal, Tab 22, pp. 176-177 ("Ms. Cartwright"); Affidavit of Michael Haddad, sworn August 26, 1994 at para. 5-10, Case on Appeal, Tab 27, pp. 222-225 ("Mr. Haddad"); Dr. Barnes at 128-129; Rev. Hawkes at para. 4-6, pp. 152-154; Affidavit of Dr. Margrit Eichler, sworn September 20, 1994 at para. 29-37, Case on Appeal, Tab 31, pp. 275-277 ("Dr. Eichler"); Appendix 4: Social Context; Appendix 5: Psychological and Sociological Research on Interdependence in Gay and Lesbian Relationships; Appendix 6: Gay and Lesbian Parents.

33. Some lesbian and gay couples and some heterosexual couples form highly egalitarian relationships. Other same-sex couples and other opposite-sex couples organize themselves according to the exclusive breadwinner/homemaker model. In short, heterosexual, gay male, and lesbian relationships reveal great diversity among couples within each group and substantial similarity across all groups. The differences among individual couples within each group are apt to be much greater than the differences across groups. Regardless of sexual orientation, families share essential social characteristics, and a relationship of intimate cohabitation will likely involve an intermingling of a couple's personal and economic lives. Indeed, many experts, including Dr. Barnes, suggest that societal prejudice makes gays and lesbians *more* emotionally and economically interdependent than other couples.

Dr. Eichler, para. 31, pp. 275-276; Dr. Barnes, Tab 18, at p. 132; Appendix 5: Psychological and Sociological Research on Interdependence in Gay and Lesbian Relationships.

34. The Court of Appeal summarized the evidence as follows:

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

Appeal Decision at 495, Charron J.A.

(e) The Evidence of H. and Ontario

35. H. filed one volume of extrinsic evidence and the transcripts of all cross-examinations in this matter. Her evidence included no expert Affidavits nor any evidence from members of the lesbian and gay community.

36. Before it reversed its stance in this matter, Ontario filed an Affidavit from Dr. Margrit Eichler, a prominent Canadian expert in the sociology of families. She concludes that same-sex couples should be treated in the same way that opposite-sex couples are treated, since both relationships involve comparable levels of financial and emotional interdependence. Dr. Eichler's evidence counters each of

the arguments that Ontario currently advances. Her Affidavit was not withdrawn from the Court file, nor was any new material filed. The only witness called by Ontario in this case undermines its position entirely.

Dr. Eichler at para 29-33, pp. 275-276; Appeal Decision at 427, Finlayson J.A.

37. Ontario has supplemented its material for this court by citing seven articles and studies on the nature of gay and lesbian relationships. All of these materials underscore M.'s evidence, showing that lesbians and gay men form close, resilient, and satisfying love relationships. All of the authors who discuss financial matters describe lesbian and gay relationships as economically interdependent. In particular, an authoritative study cited by Ontario shows that gay and lesbian couples tend to be *more* economically interdependent, and to more frequently pool their incomes, than opposite-sex cohabitees.

Costs Decision of Epstein J., Case on Appeal, Tab 38 at pp. 405-407; Appeal Decision at 484-486, 495, Charron J.A.; Dr. Eichler at para. 33, p. 276; P. Blumstein and P. Schwartz, *American Couples: Money, Work, Sex* (New York: William Morrow and Company, 1983) at 51-111; N. Eldridge & L. Gilbert, "Correlates of relationship satisfaction in lesbian couples" (1990) 14 *Psychology of Women Quarterly* 43 at 57-59; L. Peplau, "Lesbian and gay relationships", in J. Gonsoiorek & J. Weinrich, eds., *Homosexuality: Research implications for public policy* (Newbury Park: Sage, 1991) 177 at 179-196; Appendix 4: Social Context; Appendix 5: Psychological and Sociological Research on Interdependence in Gay and Lesbian Relationships.

(f) National and International Review

38. Democratically elected legislatures in Canada and around the world now recognize that ending discrimination against gays and lesbians requires that same-sex relationships be given equal legal status to heterosexual relationships. In Canada, lesbians and gay men living in British Columbia may apply for spousal support and can have their orders enforced under the provincial family law regime. Similar provisions exist in Australia, where same-sex relationships are also recognized in dependant relief provisions that apply on the death of a spouse. In Denmark, Norway, Greenland, Sweden, Iceland, France and most recently the Netherlands, same-sex couples may obtain virtually every right of matrimony through registered partnership regimes. Appendix 10 contains a detailed international summary of statutory provisions that have extended equal status to lesbians and gay men.

39. Courts have also intervened to ensure equality of status for gays and lesbians where legislatures have refused to do so. In *Re K.*, s.15 of the *Charter* was used to change the definition of spouse for provincial adoption legislation, so that lesbian couples can now apply to jointly adopt children that they are parenting together. In *Kane*, the definition of "spouse" which limited entitlement to death benefits under the *Insurance Act* to married couples or opposite-sex cohabitees was found to be unconstitutional insofar as it excluded same-sex couples.

> Appendix 10: International Summary of Legislative and Judicial Acts Conferring Equality of Status on Lesbians and Gay Men; Appendix 3: Historical Perspective; *Re K.*(1995), 23 O.R. (3d) 679 (Prov. Div.) ("*Re K.*"); *Kane* v. *Ontario (Attorney General)*, [1997] O.J. No. 3979 (Gen. Div.) (QL) ("*Kane*").

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40. By recognizing the spousal status of same-sex relationships, legislatures and courts are remedying discrimination in its most fundamental form. Nothing can be more central to a definition of humanity than respect for the importance each of us places upon enduring relationships.

> The Honourable Chief Justice of the Family Court of Australia Alastair Nicholson, "The Changing Concept of Family: The Significance of Recognition and Protection" (Conference Paper from "Sexual Orientation and the Law", September 1996), published in (1996) 3:3 *Murdoch University Electronic Journal of Law* at 1 ("Nicholson J., *Changing Concept of Family*").

41. Ontario's refusal to provide full legal status to same-sex couples imposes an unjustifiable burden
20 on gays and lesbians. Measured against the legislative and judicial recognition of gay and lesbian relationships around the world, Ontario's position is intolerant. Measured against the fundamental values that define us as a country and as a leader in human rights jurisprudence, Ontario's position is unseemly and hypocritical. If we want to live up to the constitution's promise that Canada is a free, diverse and fair country, we must join other leading nations in according equal rights to gay men and lesbians.

PART II — ISSUES

42. M. will argue that:

(a) s. 29 of the *Family Law Act* offends s. 15(1) of the *Charter*; and

(b) Ontario cannot meet the onus of demonstrating that the provision should be saved under s. 1.

PART III — ARGUMENT

(a) Section 15(1)

43. Section 15(1) must be interpreted generously and purposively. The provision serves two distinct but related purposes. First, it expresses a commitment – deeply ingrained in our social, political and legal culture – to the equal worth and human dignity of all people. Secondly, it instantiates a desire to rectify and prevent discrimination against particular groups suffering social, political and legal disadvantage in our society.

> *Eldridge* v. *British Columbia (Attorney General)*, [1997] S.C.J. No. 86 at para 54, La Forest J. ("*Eldridge*"); *Andrews* v. *Law Society of British Columbia*, [1989] 1 S.C.R. 143 at 175, McIntyre J. ("*Andrews*"); *R.* v. *Turpin*, [1989] 1 S.C.R. 1296 at 1333, Wilson J. ("*Turpin*").

44. The question of whether discrimination has occurred should be viewed from the perspective of the person claiming a *Charter* violation. The central focus is the *effect of the impugned provision on the disadvantaged group*. This can be seen only by examining the effect or impact of the distinction in the larger social, political, legal and economic context of the legislation *and the lives of the individuals it touches*.

> *Miron* at 488, McLachlin J.; *Egan* v. *Canada*, [1995] 2 S.C.R. 513 at 603-604, Cory J. and at 546, 552-553, L'Heureux-Dubé J. ("*Egan*"); *Andrews* at 165, McIntyre J., and at 152, Wilson J.; *Turpin* at 1332, Wilson J.

45. M.'s claim must therefore be situated within the social and historical context of pervasive and long-standing discrimination experienced by gays and lesbians. As many as three-quarters of gay men

have been victims of a violent hate crime. Lesbians are put in mental institutions and subjected to aversion therapy. Gays and lesbians are fired from their jobs solely because of their sexual orientation. The vicious vocabulary of homophobia is socially acceptable. Gays and lesbians lose respect, are alienated from friends and family, and are isolated from community and religious institutions. Government sanctions the homophobic view that same-sex relationships are meaningless and transitory by refusing to recognize them. In the lives of individuals that sexual orientation discrimination touches, the exclusion of same-sex relationships strikes at the core of humanity and freedom. Legal invisibility denigrates the strong, loving and healthy relationships of same-sex couples.

D. Greenberg, *Social Construction of Homosexuality* (Chicago: The University of Chicago Press, 1988) at 466-467; Ms. Cartwright, at para. 22, p. 181; Appendix 4: Social Context of Gay and Lesbian Life; Appendix 5: Psychological and Sociological Research on Interdependence in Gay and Lesbian Relationships.

46. Legislation that denies persons equal treatment on the basis of sexual orientation also denies them the essential democratic right of moral independence. As McLachlin J. wrote in *Miron*, the *Charter* requires the state to respect "a matter of defining importance to individuals," namely, "the individual freedom to live life with the mate of one's choice in the fashion of one's choice."

Miron at 497; R. Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* (Cambridge: Harvard University Press, 1996) at 25 ("Dworkin, *Freedom's Law*").

47. In *Eaton* and *Eldridge*, this Honourable Court recognized that persons with disabilities have suffered discrimination because society has been structured on the assumption that everyone is able-bodied. Similarly, gays and lesbians are denied full and equal participation in society, and access to the justice of its courts, because institutions, laws and traditions are based on an assumption of heterosexuality. This is discrimination.

Eaton v. *Brant County Board of Education*, [1997] 1 S.C.R. 241 at 272 ("*Eaton*"); *Eldridge* at para 65-66; *Egan* at 600-602, Cory J., and at 566-567, L'Heureux-Dubé J.; *Leshner* v. *Ontario (No. 2)* (1992), 16 C.H.R.R. D/184 at D/211-212 (Ont. Bd. of Inq. (HRC)) ("*Leshner*"), Dawson.

48. Our contemporary understanding of human rights became possible only when societies began to reach consensus that "civil incapacities" should not be used to strip some human beings of their full legal

personhood and attendant social and economic power. Gay men and lesbians are currently denied personhood by the same societal constructs of prejudice that have oppressed Jews, women and people of colour. Denying gays and lesbians the legal capacity to bring an application for support sends a metamessage that same-sex couples are not fully evolved human beings, that their capacity to love and to share is less real and less legitimate than that of heterosexuals.

Kathleen A. Lahey, *Are We 'Persons' Yet, Law and Sexuality in Canada* (Toronto: University of Toronto Press, 1998) (forthcoming), Chapters 4 and 5.

(i) The FLA Draws a Distinction on the Basis of Sexual Orientation

49. Section 29 of the *FLA* expressly requires that support claimants be of the opposite sex to their partners. The words "of the opposite sex" create a facial distinction related to the personal characteristic of sexual orientation. As Cory J. stated in *Egan*, the legislation denies equal benefit and protection of the law not on the basis of merit or need, but solely on the basis of sexual orientation, since M. and many other same-sex spouses could assert a claim for support under s. 29 were it not for the fact that their spouses are of the same sex. M.'s sexual orientation, a protected ground of discrimination, is the single factor that excludes her from the definition of spouse in s. 29.

Appeal Decision at 464, 469, Charron J.A.; *Egan* at 604, Cory J.

50. Courts have developed a list of indicia to define cohabitation and distinguish between spouses and non-spouse groupings like roommates. In *Molodowich* v. *Penttinen*, Kurisko D.C.J. established the test for cohabitation that has been consistently applied by Canadian courts. The definition is a list of attributes, not of all which must be satisfied in each case: shared shelter; sexual and personal behaviour; services; social; societal; economic support; and children.

Molodowich v. *Penttinen* (1980), 17 R.F.L. (2d) 376 at 381-382 (Ont. Dist. Ct.); *Re Stoiktewicz and Filas* (1978), 21 O.R. (2d) 717 (Unif. Fam. Ct.); *Bellis* v. *Innes* (1980), 21 R.F.L. (2d) 40 (B.C. Co. Ct.) at 45; *Re Harris and Godkewitsch* (1983), 41 O.R. (2d) 779 (Prov. Ct. Fam. Div.); *Tanouye* v. *Tanouye*, [1994] 2 W.W.R. 735 (Sask. Q.B.).

51. The definition of "cohabitation" in the *FLA* includes the term "conjugal." In some cases, "conjugal" has been defined in heterosexual terms, such as "living together as husband and wife," which

may be rooted in a colloquial connection with heterosexual sex. These interpretations are as discriminatory as the requirement "two persons of the opposite sex" and are unsupportable under the *Charter*. Further, the courts have established that a couple can cohabit if they do not have a sexual relationship. The etymological origin of the term is the Latin root *conjugo*, meaning "joined or yoked together." Conjugality is correctly understood as a descriptor of the term "cohabitation," and Charron J.A. recognized this when she used the terms "cohabitation" and "conjugal" interchangeably at this stage of the analysis.

> Appeal Decision at 463-467; *Bewley* v. *Ontario*, [1997] O.H.R.B.I.D. No. 24 at para. 22 (Ont. Bd of Inquiry (HRC)) (QL); *Thomas* v. *Thomas* [1948] 2 K.B. 294 at 297 (H.L.).

52. The uncontroverted evidence filed in this case indicates that many same-sex couples cohabit and would qualify as spouses within the meaning of s. 29, were it not for their sexual orientation. Although both Courts below felt no need to comment on the relationship between the parties in this case, it is notable that on the basis of the admitted evidence alone, the parties clearly cohabited within the meaning of the *FLA*.

> See also *Anderson* v. *Luoma* (1986), 50 R.F.L. (2d) 127 (B.C.S.C.); *Forrest* v. *Price* (1982), 48 E.T.R. 72 (B.C.S.C.) ("*Forrest*"); *Brunet* v. *Davis*, [1992] O.J. No. 1586 (Gen. Div.) ("*Brunet*").

53. In the alternative, or in addition, the differential treatment accorded to same-sex couples can be viewed as sex discrimination. If M. was a man, she would qualify to claim support; the *Act* denies her claim solely on the basis of her sex. The differential treatment is based on the prejudicial assumption that every woman must have a man as her primary source of emotional, sexual and economic support. This stereotype furthers women's disadvantage, and is therefore discriminatory.

> *Baehr* v. *Lewin*, 852 P.2d 44 (Hawaii, 1993); *Baehr* v. *Miike*, 80 Haw. 341, 910 P 2d. 112 (1996); R. Wintemute, "Sexual Orientation Discrimination as Sex Discrimination: Same-Sex Couples and the *Charter* in *Mossop, Egan* and *Layland*" (1994) 39 McGill L.J. 429 at 476 ("Sex Discrimination"); C. N. Kendall, "Homophobia as an Issue of Sex Discrimination: Lesbian and Gay Equality and the Systemic Effects of Forced Invisibility" (Sept. 1996) 3:3 *Murdoch University Electronic Journal of Law* at http://www.murdoch.edu.au/elaw; D. Majury, "Refashioning the Unfashionable: Claiming Lesbian Identities in the Legal Context" (1994) 2 C.J.W.L. 86; S. Pharr, *Homophobia: A Weapon of Sexism* (Little Rock: Chardon Press, 1988) at 1-52; G.M. Herek, "Stigma, Prejudice and Violence Against

Lesbians and Gay Men" in J.C. Gonsiorek and J.D. Weinrich, *Homosexuality: Research Implications for Public Policy* (Newbury Park: Sage Publications, 1991) 60 at 75.

(ii) The Effects of the Provision are Discriminatory

54. The most obvious effect of the exclusion from the *FLA* is to block access to the courts for gay men and lesbians who are suffering through a period of economic hardship. M., unlike her opposite-sex counterparts, cannot access the system of remedial justice that the *FLA* provides, regardless of the spousal nature of her relationship and her very real need. M.'s exclusion from the *Act* left her destitute, while H. continued to profit from the income and assets that the parties had accumulated. Closing the doors of the family law court system to M. and other gays and lesbians is a denial of equal protection and benefit of the law in the most basic sense.

Rev. Hawkes at para. 9, pp. 154-155; Mr. Haddad at para. 10-11, pp. 224-225.

55. The effects of an impugned provision must be judged from the perspective of the person claiming a *Charter* violation. M. submits that her evidence and that of Ontario demonstrates that the impugned provision has the following discriminatory effects:

(a) It reinforces the view that same-sex spouses are less valuable than opposite-sex spouses, expressing censure towards same-sex relationships.

Dr. Barnes at pp. 125-126, 132-133, 135; Rev. Hawkes at para. 13, pp. 156-157; Appendix 5: Psychological and Sociological Research on Interdependence in Gay and Lesbian Relationships

(b) This in turn affects the children raised in same-sex relationships, and the extended families of same-sex couples, authorizing broader social stigma, hostility and alienation. It leaves individuals who have been involved in same-sex relationships without predictable remedies on the breakdown of the relationship. This reinforces the view that the relationship was less valuable;

Dr. Barnes at 135; Rev. Hawkes at para. 6, pp. 153-154; Ms. Cartwright at para. 18, pp. 179-180. Nicholson J., *Changing Concept of Family* at 8; Affidavit of Ellen Faulkner, sworn August 16, 1994 at para. 11-16, Case on Appeal, Tab 20, 164-166 ("Ms. Faulkner"); Appendix 5: Psychological and Sociological Research on Interdependence in Gay and Lesbian Relationships; Appendix 6: Lesbian and Gay Parents.

(c) The Act's failure to allow couples to be recognized as spouses denies them the ritualistic passages of the family life cycle, which bind all extended family members together. Arrangements without legal cognizance undermine the lesbian and gay couple morally, psychologically and socially.

Dr. Barnes at 133-134; Appendix 4: Social Context; Appendix 5: Psychological and Sociological Research on Interdependence in Gay and Lesbian Relationships.

(d) Discrimination against lesbians and gay men reinforces sex discrimination. Many lesbians and gay men challenge dominant meanings of gender in our society, by not falling into stereotypical "male" and "female" roles, and by allowing a vision of equality in relationships.

Ms. Cartwright at para. 37, p. 187; Appendix 4: Social Context; Appendix 5: Psychological and Sociological Research on Interdependence in Gay and Lesbian Relationships.

(e) It leaves same-sex couples standing outside of the law, both metaphorically and literally. Since the law articulates community standards, lesbian and gay people may internalize such an exclusion as a denial of worth. This internalization eats away at the place that love starts: self-love and the recognition of oneself as a valuable human being.

Ms. Cartwright at para 22-23, pp. 181-182; Trial Decision at 371; Appendix 4: Social Context; Appendix 5: Psychological and Sociological Research on Interdependence in Gay and Lesbian Relationships.

(f) It leaves lawyers, counsellors and social workers who are trying to help gay and lesbian couples on relationship breakdown without guidelines to promote compromise.

Ms. Cartwright at para. 19, p. 180; Rev. Hawkes at para. 6, pp. 153-154; Mr. Haddad; Appendix 5: Psychological and Sociological Research on Interdependence in Gay and Lesbian Relationships.

(g) It denies same-sex couples the default rules that provide protective safeguards and facilitate negotiation when a spouse lacks the knowledge, resources, state of mind, or power within the relationship to consider or address its breakdown.

Rev. Hawkes at para. 9, pp. 154-155; Mr. Haddad; Appendix 5: Psychological and Sociological Research on Interdependence in Gay and Lesbian Relationships.

(h) It discourages people from making sacrifices for each other and encourages them to be economically selfish. In this way, the provision creates a fundamental alienation between the partners, without the constraints of a legal forum for fair play and a modicum of economic security.

Ms. Cartwright at para. 19-20, p. 180-181; Rev. Hawkes at para. 5, p. 153; Mr. Haddad at para. 10, pp. 224-225.

(i) It encourages gay men and lesbians to stay in relationships marked by abuse and/or power imbalances, since they have neither the prospect of economic security nor professional help, and it allows economic exploitation.

Ms. Faulkner at para. 8, 12, pp. 162-165; Mr. Haddad at para. 11-12, pp. 225-256; Rev. Hawkes at para. 6, pp. 153-154; Appendix 5: Psychological and Sociological Research on Interdependence in Gay and Lesbian Relationships.

56. The effects of the exclusion are highly damaging, especially when considered from the perspective of the economically vulnerable spouse, already a member of a disadvantaged group.

(iii) The distinction is irrelevant to the purposes of the legislation

57. Just as this Court concluded in *Benner*, *Eaton* and *Eldridge*, a consideration of relevance under s.15 will not change the result in this case. Sexual orientation is irrelevant to the purposes of the legislation. As will be discussed further beginning at paragraph 62, the *FLA* addresses the fundamental reality that spousal support is often necessary on the breakdown of intimate relationships. The exclusion of same sex relationships undermines the legislative purposes of preventing exploitation in spousal relationships and reducing demands on public funds.

Benner v. *Canada (Secretary of State)*, [1997] 1 S.C.R. 358 at 393 ("*Benner*"); *Eaton* at 270; *Eldridge* at para. 58.

58. As recognized by a majority of this Court and discussed extensively by commentators, the relevance of a distinction should not be determinative of whether there has been a breach of s. 15(1). The relevance approach imports a justificatory analysis which properly belongs under s. 1 of the *Charter*;

it focuses narrowly on the ground of the distinction; it takes the purpose of the legislation as a given without subjecting it to scrutiny; and it excludes the crucial analysis of the discriminatory impact. It permits proof of relevance, standing alone, to negate a finding of discrimination, and it invites circular reasoning. A distinction may be relevant to a legitimate legislative purpose and still have a disadvantaging, prejudicial effect on a group suffering pre-existing inequality.

> *Miron* at 491, McLachlin J.; *Egan* at 548, L'Heureux-Dubé J.; *Thibaudeau* v. *R.*, [1995] 2 S.C.R. 627 at 700, Cory J.; *Andrews* at 197, La Forest J.; *McKinney* v. *University of Guelph*, [1990] 3 S.C.R. 229 at 279, La Forest J. ("*McKinney*"); M. D. Lepofsky, "The Canadian Judicial Approach to Equality Rights: Freedom Ride or Rollercoaster?" (1992) 1 N.J.C.L. 315 ("Lepofsky"); H. Lessard *et al.*, "Developments in Constitutional Law: The 1994 – 95 Term" (1995) 7 (2d) Supreme Court L.R. 81 ("Lessard et al."); D. Pothier, "M'Aider, Mayday: Section 15 of the *Charter* in Distress" (1995) 6 N.J.C.L. 295; R. Wintemute, "Discrimination Against Same-Sex Couples: Sections 15(1) and 1 of the *Charter: Egan* v. *Canada*" (1995) 74 Can. Bar Rev. 682.

59. Gay and lesbian relationships must not be consigned to an unprotected class of "non-spouses" against whom discrimination is permitted. Such an argument reflects the similarly situated test, rightly rejected in *Andrews,* and it contains the internal circularity cautioned against by this Court in *Turpin.* Same-sex couples are not "just like" two brothers and sisters who live together chastely. The "non-spouse" argument denies the reality of gay and lesbian love and is offensive to human dignity.

> *Egan* at 596, Cory J.; *Turpin* at 1332; *Leshner* at D/217; J. Tussman and J. tenBroek, "The Equal Protection of the Laws" (1949) 37 Cal. L. Rev. 341 at 345; G. Brodsky and S. Day, *Canadian Charter Equality Rights for Women: One Step Forward or Two Steps Back?* (Ottawa: Canadian Advisory Council on the Status of Women, 1989) Chapter 7.; N. C. Sheppard, "Recognizing the Disadvantaging of Women: The Promise of *Andrews* v. *The Law Society of British Columbia*" (1989) 35 McGill L.J. 207 at 220.

60. M. submits that s. 29 offends both the spirit and the terms of s. 15(1) of the *Charter*. As the U.S. Supreme Court recognized in *Romer* v. *Evans,* wholesale exclusion of gays and lesbians from essential legislation "defies" the concept of equal protection. A "state cannot so deem a class of persons a stranger to its laws."

> *Romer* v. *Evans*, 517 U.S. 620, 116 S. Ct. 1620 at 1628-29 (1996), Kennedy J.; M. Nava and R. Dawidoff, *Created Equal: Why Gay Rights Matter to America*, (New York: St. Martin's Press, 1994) at 67-74.

(b) Section 1

61. Ontario argues that the impugned provision can be saved under s. 1. As both Courts below concluded, there is no evidence to justify the discrimination. Unsupported and inaccurate notions of legislative purpose and loose concepts of deference cannot act as substitutes for constitutional facts in condoning discrimination.

> To meet its burden under s. 1 of the *Charter*, the state must show that the violative law is "demonstrably justified." The choice of the word "demonstrably" is critical. The process is not one of mere intuition, nor is it one of deference to Parliament's choice. It is a process of *demonstration.*
>
> *RJR-MacDonald Inc.* v. *Canada (Attorney General)*, [1995] 3 S.C.R. 199 at 328-29, McLachlin J. ("*RJR-MacDonald*"); *R.* v. *Oakes*, [1986] 1 S.C.R. 103 ("*Oakes*"); *Miron* at 503; *Egan* at 605, Iacobucci J.; *Eldridge* at para 84.

(i) Articulating the Legislative Objective

62. The Courts below accurately identified the objectives of the impugned provision and the *FLA* as a whole. The purpose is to provide for "the equitable resolution of economic disputes that arise when intimate relationships between individuals who have been financially interdependent break down." Charron J.A. added "a second underlying purpose of alleviating demands on public funds and requiring individuals to be responsible for the ramifications of their relationships."

> Appeal Decision at 480-481, Charron J.A.

cf next p.

63. M. submits that all of the evidence confirms the accuracy of the lower Courts' articulation of the objective, and reveals some ancillary purposes. The statute itself describes the purposes of a support order in s. 33(8) of the *FLA*, as relieving financial hardship and recognizing the contribution or disadvantage of a spouse. The *FLA*'s definition of spouse protects persons who were parties to a void or voidable marriage, including polygamous marriages and marriages that violate consanguinity or age of consent restrictions. This demonstrates that the objective is related to relieving financial hardship arising out of the relationship or its breakdown, rather than the nature of the relationship. This Court's decision in *Moge* confirmed that the purpose of spousal support is "to achieve a fair and equitable distribution of resources to alleviate the economic consequences" of the relationship or its breakdown

"for both spouses, regardless of gender." Further, the legislative history indicates that the provision was aimed at preventing exploitation in intimate relationships by having retrospective application, and by recognizing a diverse and evolving concept of family.

Moge v. *Moge*, [1992] 3 S.C.R. 813 at 849, 853, 869 ("*Moge*").

64. Accordingly, M. submits that the legislative objectives can be summarized as follows:

(a) to alleviate the economic consequences of cohabitation or its breakdown for both spouses, regardless of gender;

(b) to protect disadvantaged or exploited spouses even if that means intruding on the autonomy of advantaged individuals;

(c) to alleviate demands on public funds; and

(d) to recognize an evolving and diverse concept of family, consistent with the remedial purposes of family law.

65. These objectives reflect the statute itself and focus on the function of the relationships given protection, rather than sexuality. Accordingly, they will be referred to as the "Functional Objectives."

(ii) Ontario's Suggested Objectives are Discriminatory

66. Ontario suggests that the legislation is aimed at protecting heterosexual couples, because only they get married, only they have heterosexual sex, or only they have dependent relationships. Alternatively, Ontario suggests that the provision is aimed "primarily" at protecting dependent women and children. These purported purposes will be referred to collectively as the "Heterosexist Objectives."

67. The Heterosexist Objectives conflict with the guidelines for determining legislative intent, as follows:

(a) The objective cannot be based on discrimination or stereotype, even if those views are widely-held;

R. v. *Big M. Drug Mart*, [1985] 1 S.C.R. 295 ("*Big M*"); *Re K.*; *Egan* at 558-559, L'Heureux-Dubé J.

(b) Where legislation is underinclusive, the Court should take a "broad and purposive" approach to determining the nature of the benefit provided, having regard to the underlying purpose of the measure, *not the specific terms of the benefit itself*;

Battlefords and District Cooperative v. *Gibbs*, [1996] 3 S.C.R. 566 at 586-92, Sopinka J., and at 594-97, McLachlin J.; *Brooks* v. *Canada Safeway* [1989] 1 S.C.R. 1219 ("*Brooks*").

(c) The objective should not be framed in terms that reinforce the discrimination (such as "to provide support for heterosexual families") since the resulting reasoning will be circular and analysis under the *Oakes* test will be compromised;

Egan at 547-548, L'Heureux-Dubé J., and at 596, Cory J.; *Miron* at 488, McLachlin J.; *Re K.* at 699; P. W. Hogg, *Constitutional Law of Canada*, 3d ed. (Supp.) (Scarborough: Thomson Canada, 1992) at 35-18 ("Hogg").

(d) The objective must be based on *evidence*, not speculation or conjecture;

Egan at 568, L'Heureux-Dubé J.; *RJR-MacDonald* at 331, McLachlin J.; *Symes* v. *Canada*, [1993] 4 S.C.R. 695 at 772, Iacobucci J.

(e) The objective must be *reflected in the statute;*

Egan at 588, Cory J., and at 607, Iacobucci J.; *Miron* at 501, McLachlin J.; *Moge* at 848, 849, 857, L'Heureux-Dubé J.

(f) The objective cannot require that same-sex relationships be "just like" heterosexual relationships in all respects. That would demand that M. lose the identity for which she claims protection. It is this very characteristic — sexual orientation — that forms the basis of the discrimination,

> and that would form the basis of the exclusion under Ontario's analysis. Viewing heterosexuality and heterosexual sex as legitimate grounds for distinction is the antithesis of equality.
>
> Appeal Decision at 483, Charron J.A.

68. Underlying the Heterosexist Objectives is the notion that the relationships of same-sex couples are inherently different from and inferior to those of opposite-sex couples. Ontario's own expert witness, Dr. Eichler, specifically refutes this contention. As Epstein J. recognized, citing Cory J. in *Egan*, such assumptions "are the fruit of stigmatizing stereotype." The Heterosexist Objectives rely on discriminatory views about opposite-sex relationships and same-sex relationships that do not accord with current demographics or the realities of modern day family life. The evidence conclusively demonstrates that both opposite-sex and same-sex cohabitation are marked by economic and emotional interdependence.

Trial Decision at 366; *Egan* at 610; Dr. Eichler, at para. 29-33, pp. 275-276.

Marriage is not in issue

69. Section 29 expressly applies to *unmarried* opposite-sex couples, so arguments about the sacred or vital nature of the marriage bond have no place in the analysis. Charron J.A. described this as a "very important" distinction:

> ... if the selected group for comparison includes married couples, we run the risk of getting lost in a maze of irrelevant considerations.... Any line of comparison which may be drawn between same-sex couples and married couples is essentially outside the purview of this debate.
>
> Appeal Decision at 462, Charron J.A.; Appendix 4: Social Context; Appendix 5: Psychological and Sociological Research on Interdependence in Gay and Lesbian Relationships; Appendix 7: Changes in Families.

The objective is not related to children

70. Section 29 applies whether or not cohabiting couples have children. The support provisions address any situation under which one spouse has a need for support arising from the relationship or its breakdown.

Appeal Decision at 477-479, Charron J.A.

71. As Dr. Barnes highlights in her expert opinion, about one-third of lesbians and one-tenth of gay men are parents. In the past decade, increasing numbers of children are being conceived and reared in lesbian and gay families as a result of adoption, surrogacy and donor insemination. In fact, this trend is so prevalent among lesbian couples that popular writers refer to it as the "lesbian baby boom." In Ontario, same-sex couples have the right to adopt their spouses' children. In all provinces, same-sex couples can claim custody of and access to the children with whom they have cohabited, and have child support rights and obligations. The spousal support regime cannot be motivated by a desire to support children or the parents who care for them, since it excludes the entire class of lesbian and gay parents.

Re K.; *Buist* v. *Greaves*, [1997] O.J. No. 2646 at para.31 (Gen.Div.) (QL); Appeal Decision at 479, Charron J.A.; *Children's Law Reform Act*, R.S.O. 1990, c. C.12 (as amended) ss. 21, 24(1), (2); Dr. Barnes at 134-135; Appendix 6: Lesbian and Gay Parents.

72. Ontario suggests that the province should be entitled to exclude families headed by same-sex couples, in the interest of the "conditions in which children are raised." This implicit condemnation of gay and lesbian parenting is motivated by highly damaging and completely discriminatory beliefs. In actuality, there are no differences between the outcomes for children of heterosexual parents and gay and lesbian parents.

Dr. Barnes at 11-12; Appendix 6: Lesbian and Gay Parents.

The objective is not related to "traditional family values"

73. Undoubtedly, there are some who will claim that same-sex couples should not be allowed to apply for support, because they feel that same-sex couples violate so-called "traditional family values." In their view, only a married couple can create a good family, and the ideal family is headed by a male breadwinner and a female homemaker. These beliefs do not have constitutional status. It is the morality articulated by the *Charter* which must govern, and as this Court has reiterated in many equality cases, the *Charter* establishes the essentially secular nature of Canadian society, the freedom to live life with the mate of one's choice, and the central place of freedom of conscience in the operation of our institutions.

Big M. at 353; Cossman and Ryder at 98;"Equality Rights Speaking Notes for Attorney General Marion Boyd" at 2; Explanatory Note to the *Equality Rights Statute Law Amendment Act, 1994*; Appendix 3: Historical Perspective; Canada, *Canadian Human Rights Commission Annual Report, 1995* (Ottawa: Minister of Supply and Services Canada, 1996) at 14-15, 50-52.

88. The Heterosexist Objectives are rooted in stereotypical and discriminatory assumptions about gays and lesbians, and they reflect an oppressive desire to foster and protect only heterosexual relationships. Just as it would be discriminatory to foster Christianity or to protect only Christians because that religion was considered to advance values that were morally correct and good for the community, the privileging of heterosexuality is a discriminatory purpose.

89. Constitutional integrity demands that the interpretation of the *Charter* be disciplined so that it exclusively reflects the *Charter's* values. The *Charter* invokes Canadian principles of ethics and justice that supersede any individual formulation of morality.

L. Tribe, *Constitutional Choices* (Cambridge: Harvard University Press, 1985) at 26; Dworkin, *Freedom's Law* at 10, 24-26. See also R. Dworkin, *Taking Rights Seriously* (Cambridge: Harvard University Press, 1978) at 32 ("Dworkin, *Taking Rights Seriously*").

90. The Heterosexist Objectives are discriminatory, so there is no need to proceed with the proportionality test. The law's purposes are antithetical to *Charter* values, constitutionally intolerable, and "simply cannot be pursued consonant with *Charter* s. 1, regardless of the means employed."

Attorney General (Quebec) v. *Quebec Protestant School Boards*, [1984] 2 S.C.R. 66; *Big M.* at 353, Dickson J. (as he then was); Lepofsky at 345.

(v) The Proportionality Test

Rational Connection

91. Under the first step of the proportionality test, Ontario must demonstrate that the rights violation carefully targets the objective of the legislation, and that the law's laudable purposes are furthered by the limitation of the right.

Andrews at 184; *Benner* at 404.

92. Even if the Heterosexist Objectives — promoting marriage or reproduction or traditional family values, or assisting women who experience disadvantage in relationships — are legitimate, excluding same-sex couples from remedies on relationship breakdown does not advance these purposes. As both Courts below emphasized, opposite-sex relationships would not be affected in any way if same-sex couples were given support rights *inter se*. The exclusion does not encourage heterosexuals to marry. It does not protect all parents who care for children. It does not increase rates of reproduction. It does not assist all women who experience disadvantage after cohabitation. There is no rational connection whatsoever. Even if Ontario's suggested objectives are pressing and substantial, they are not rationally connected to the rights violation. As Alaistair Nicholson, Chief Justice of the Family Court of Australia, has said:

> One of the fundamental misconceptions ... is the failure to understand that heterosexual family life in no way gains stature, security and respect by the denigration or refusal to acknowledge same-sex families. The sum social good is, in fact reduced, because when a community refuses to recognise and protect the genuine commitments made by its members, the state acts against everybody's interests.
>
> Nicholson J., *Changing Concept of Family* at 8.

93. Ontario cannot demonstrate that the exclusion of same-sex couples from s. 29 is reasonably related to the Functional Objective of providing for the equitable resolution of economic disputes that arise when financially-interdependent intimate relationships break down. As both Courts below concluded, the inclusion of same-sex couples would advance the Functional Objectives, and their exclusion only ensures that economically disadvantaged persons are denied the spousal support they need.

94. The Court of Appeal concluded its rational connection analysis as follows:

> The proponents of the legislation have fallen quite short of meeting the onus upon them. In fact, I have been unable to identify any evidence to support the proposition that the exclusion of same-sex couples would further the objectives of the legislation. Rather, the overwhelming weight of the evidence supports the converse position. The *inclusion* of same-sex cohabitees in a

> relationship of some permanence would only serve to further the desirable goals of the legislation. A greater number of persons with similar needs would have access to the dispute-resolution mechanism set up by the legislation and fewer persons would look to the public purse for their needs. As counsel for the intervener, the Foundation for Equal Families, has aptly put it: as the law presently stands, the government is paying a premium to maintain inequality.
>
> Appeal Decision at 498, Charron J.A.

Minimal Impairment

95. The minimal impairment test requires the Court to consider whether the legislation sets markers for entitlement that impair the right as little as possible. If the number of anomalies is so high that it significantly undermines the relevance of the group marker, or if other more reasonable markers are available, the law may be invalid because it impairs the right more than reasonably necessary to achieve the legislative goal. With respect to the Functional Objectives, the opposite sex requirement is an extremely poor marker. Dependent gays and lesbians and their children are not "minor anomalies." The inclusion of same-sex couples would advance the goals of the legislation, and their exclusion undermines those values and gravely impairs the equality rights of a disadvantaged group.

> Trial Decision at 384-385; *Miron* at 507, McLachlin J.; *Big M.* at 352.

96. The exclusion of same-sex couples demands especially compelling justification when the nature of the right is considered. Surely the government must shoulder a heavier burden where a discriminatory provision bears upon the exercise of fundamental rights.

> The right at stake ... is the right to one's access to... the courts, to assert that one has been victimized.... It is the right to one's day in court on a vital issue. When so critical an entitlement is denied to a person ... section 1 demands the most compelling justification to ensure that the discriminatory denial of this right is absolutely required to serve critical societal goals. It is not to be shrugged off as lacking sufficient gravity.
>
> Lepofsky at 338 (addressing human rights protection against age discrimination); *Oakes* at 139-40; *Rocket* v. *Royal College of Dental Surgeons*, [1990] 2 S.C.R. 232 at 246-249 ("*Rocket*"); *Egan* at 560-561, L'Heureux-Dubé J.

97. The legislation makes no attempt to tailor the limiting measure, by using appropriate, relevant markers. Instead, an entire class of otherwise eligible citizens is absolutely excluded from s. 29. This is maximum impairment of the right. As both the lower Courts have concluded, the legislature has failed

to select a marker that is related to its legislative goal. In fact, the marker undermines the goal, since inclusion of same-sex couples would further the objective. Charron J.A. cited *Miron* in concluding:

> ... if the issue had been viewed as a matter of defining who should have access to the legislative scheme on a basis that is relevant to the goal or functional values underlying the legislation, alternatives substantially less invasive of *Charter* rights might have been found.
>
> Appeal decision at 500, Charron J.A.; *Miron* at 506; *Eldridge* at para. 93.

98. In the present case, the government cannot demonstrate that it had a reasonable basis for denying same-sex couples the right to apply for spousal support under the *FLA*. Accordingly, the exclusion more than minimally impairs the equality rights of gay men and lesbians.

Adverse Effects

99. The last step of the proportionality test requires the Court to consider whether the adverse effects of the exclusion outweigh the importance of the objective of the limiting measure. If the effects of the rights violation are more damaging than the laudatory purposes of the exclusion, then the provision fails s. 1 scrutiny. The more severe the deterious effects of a measure, the more important the objective must be if the measure is to be reasonable and demonstrably justified in a free and democratic society.

> *Oakes* at 140, Dickson C.J.; *Dagenais* v. *Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835 at 889.

100. M. has summarized the effects of the limiting measure in paragraph 55. These are very serious rights violations, especially when viewed through the filter of s. 15(1). From the perspective of the contextualized individual rights-holder, the limiting measure perpetuates widespread discrimination. Those who are most seriously injured by the effects are economically disadvantaged spouses, vulnerable members of an already disadvantaged group. Since the goals of the legislation are undermined by exclusion of same-sex couples, the limiting measure cannot outweigh the damaging effects.

101. Even if the legislation is considered in Ontario's terms of marriage, biology or "traditional family values," the damaging effects cannot be balanced by any promotion of these objectives.

102. In addition to infringing equality rights, the deleterious effects intrude upon dignity, family bonds and freedom. The protection of these basic values in a free and democratic society must be more important than a "tradition" of exclusion. The U.S. Supreme Court made this very point in *Loving* v. *Virginia*, when the ban on mixed-race marriage was found to implicate both liberty and equality.

> *Loving* v. *Commonwealth of Virginia*, 87 S.Ct. 1817 (1967), Warren C.J.; W.N. Eskridge, Jr., *The Case for Same-Sex Marriage* (New York: The Free Press, 1996) at 153-182; 123-152.

(vi) Legislative Deference

103. Courts have played a vital role in all of the great social struggles of this era, including the achievement of equal status for women, desegregation and religious freedom. Throughout, opponents have argued that the judiciary should not interfere with the legislative function of fashioning social policy. The controversy ignores the fact that ours is a *constitutional* democracy, and that the *Charter* was itself enacted through the democratic process. Many Supreme Court Justices have made this point since the *Charter* was enacted, often emphasizing that the courts are "thrown into the breach" and forced to address controversial issues that the legislature has managed to "duck."

> The Honourable Madam Justice Bertha Wilson, "The Charter of Rights and Freedoms" Addres to the student body of the College of Law at the University of Saskatchewan (12 November 1984), published in (1985) 50 Sask. L. Rev. 169; The Honourable Mr. Justice Antonio Lamer, "Address to the Empire Club of Canada," (April, 1995) [unpublished], as cited by Epstein, J., Trial Decision at 395; Appendix 9: Summary of Cases, Articles and Addresses on Legislative Deference. *Reference Re B.C. Motor Vehicle Act* [1985] 2 S.C.R. 486 at 497, Lamer J. (as he then was).

104. The notion that majoritarian legislatures and constitutional courts are incompatible has had "a potent grip on the imagination of constitutional scholars and lawyers," and this fundamental fallacy will remain confused until it is addressed directly. This case presents an opportunity to do so, and to provide a simple answer: democracy and equality are aspects of the same ideal, not, as is often supposed, rivals. As Bastarache J. has noted, "rather than inimical to democracy, the role of the Court is essential to the flourishing of democratic institutions."

> The Honourable Mr. Justice Michel Bastarache, "Experience, Morality, and the Liberty Interest in the Charter" Address to The Lawyers Club (5 January 1998, Toronto) at 6 [unpublished]; Dworkin, *Freedom's Law* at 18. Appendix 9: Summary of Cases, Articles and Addresses on Legislative Deference.

105. The majoritarian premise supposes that the political power of individual citizens is weakened when decisions are taken from the legislature and given to the courts, and that individual freedom is thereby compromised. While democracy puts power in the hands of the people, no democracy provides genuine equality of political power. As this Court has noted, there are "groups in society to whose needs and wishes elected officials have no apparent interest in attending." If these well-known "defects in the egalitarian character of democracy" go unremedied, there can be no healthy, functioning democracy. If majoritarian rule prevents women from voting or silences the experiences of gay men in the legislature, the democratic principle of "government by the people" is not achieved. Section 15 cures this natural imbalance and thereby promotes the ideal of democracy.

10 *Andrews*at 152; J.H. Ely, *Democracy and Distrust*: *A Theory of Judicial Review* (Cambridge: Harvard University Press, 1980) at 74-75 ("Ely"); Appendix 9: Summary of Cases, Articles and Addresses on Legislative Deference.

106. Given the pervasiveness of discrimination, judicial deference when equality rights are at stake poses a particular threat to democratic values:

> [I]f the *Charter* is to fulfil its initial promise - not only to protect individual rights, but to promote a more truly democratic society - the courts must be more attuned to the *Charter*'s democracy-related objectives. In other words, government decisions which violate individual rights should not automatically be assumed to be legitimate and defensible in democratic terms.
> 20 At the same time, individual rights should not be perceived simply as barriers surrounding individuals, protecting them from government and from community, but rather as affirmative mechanisms for ensuring that individuals can participate fully in Canadian society and its democratic institutions.

M. Jackman, "Protecting Rights and Promoting Democracy: Judicial Review Under Section 1 of the *Charter*" (1997) 34:4 Osgoode Hall L.J. 661 at 663.

The Legal Principles of Deference under Section 1

107. Legislative deference is addressed at the minimal impairment stage of the proportionality analysis. If an impugned provision cannot pass the rational connection test, deference cannot be a legitimate
30 consideration. Even where the decision of the legislature ought to be accorded a degree of deference, if the adverse effects of the rights violation outweigh the importance of the exclusion, the infringement cannot be justified under s. 1.

Miron at 478, 480; *Eldridge* at para. 86, La Forest, J.; Appendix 9: Summary of Cases, Articles and Addresses on Legislative Deference.

108. Deference is not warranted where it would frustrate the *Charter* values of equality, diversity, social inclusiveness and participation. The concept of deference is rooted in respect for the legislature's honest effort to address complex issues in a necessarily imperfect or arbitrary fashion: where it seeks to balance the interests of competing constitutional rights-holders, to draw a line at an admittedly arbitrary point, to protect a socially vulnerable group, or to address conflicting social science evidence on the cause of a social problem. It cannot apply when the government has refused to deal with an issue because of discriminatory attitudes against a vulnerable minority. All justifications for infringing *Charter* rights, including deference, must *advance Charter* values, not frustrate them.

Adler v. *Ontario*, [1996] 3.S.C.R. 609 at 667-668, L'Heureux-Dubé, J.; *RJR-MacDonald* at 329, McLachlin, J.; Appendix 9: Summary of Cases, Articles and Addresses on Legislative Deference.

109. Many Canadian courts and tribunals have chosen not to defer to the legislature when considering the equality rights of gays and lesbians, given the egregious prejudice against gays and lesbians in our society. As McLachlin wrote in *RJR*,

> [d]eference must not be carried to the point of relieving the government of the burden which the *Charter* places upon it.... The courts are no more permitted to abdicate their responsibility than is Parliament. To carry judicial deference to the point of accepting Parliament's view simply on the basis that the problem is serious and the solution difficult, would be to diminish the role of the courts in the constitutional process and to weaken the structure of rights upon which our constitution and our nation is founded.

RJR-MacDonald at 332-333, McLachlin, J.; Appeal Decision at 458-459; Appendix 3: Historical Perspective; Appendix 9: Summary of Cases, Articles and Addresses on Legislative Deference.

Deference in McKinney and Egan

110. The deference shown in *Egan* and *McKinney* has no application to the facts before this Court. This case is not about groups competing for public funds: the inclusion of same sex couples in s. 29 will relieve strain on the public purse. This case is not about a legislature that has balanced competing social science data and "drawn the line" at an arbitrary point: the evidence is uncontroverted. This case is not

about government incrementally expanding groups to whom a statutory benefit is given: since its passage in 1978, the impugned provision has excluded an entire class of citizens from its protection, despite the introduction of the *Charter* and the recognition of sexual orientation as an analogous ground of discrimination. The foundering of Bill 167 negates any possible suggestion that Ontario has engaged in incremental reform.

111. Since *Andrews*, we have aspired to a substantive vision of equality that is aimed at eliminating discrimination in society. This case tests our commitment to substantive equality, and presents a choice: equality for gay men and lesbians at law can be recognized, or it can be deferred. For the reality is that the struggle will not end with a negative decision from this Court. As the years have passed, and discrimination has gone unremedied, injustice against gays and lesbians has fostered continuing disadvantage and created victims. Discrimination tears at our whole social fabric, a cloth woven out of a cherished vision of equality and respect for individual freedom. The time has come for a remedy that is right in law and justice.

> To conclude otherwise would be to stand like King Canute, ordering the tide to recede when the tide in favour of equality rolls relentlessly forward and shows no sign of ebbing. If I am to be criticised — and of course I will be — then I prefer to be criticised, on an issue like this, for being ahead of the times, rather than behind the times. My hope ... is that I am in step with the times.
>
> *Fitzpatrick* v. *Sterling Housing Association Ltd.* (unreported) (23 July 1997), Ward L.J. (U.K. C.A.).

FACTUM ON CROSS-APPEAL

112. M. has been granted leave to cross-appeal on the issues of suspension, constitutional exemption and costs. Because M. and H. have settled the issues between them, M. has withdrawn her cross-appeal on the issue of exemption. The factum on the cross-appeal will briefly address the issues of reading in and suspension, and then turn to the issue of costs.

REMEDY

(a) Determining Remedy in *Charter* Cases

113. The guidelines established by this Honourable Court in *Schachter* v. *Canada* and restated in *Miron* v. *Trudel* properly set out the purposive approach to be taken in determining remedy: the Court must integrate its remedy with the particular *Charter* right violated to ensure that *Charter* values are protected and vindicated. Where the violation of an individual's right to equality is at issue, the Court must be guided first by the fact that the *Charter's* equality provisions have a "large remedial component," intended to protect disadvantaged minorities. As Sopinka J. stated in *Osborne* v. *Canada (Treasury Board)*:

> In selecting an appropriate remedy under the *Charter* the primary concern of the court must be to apply the measures that will best vindicate the values expressed in the *Charter* and to provide the form of remedy to those whose rights have been violated that best achieves that objective. This flows from the court's role as guardian of the rights and freedoms which are entrenched as part of the supreme law of Canada.
>
> *Osborne* v. *Canada (Treasury Board)*, [1991] 2 S.C.R. 69 at 104, Sopinka J.; *Schachter* v. *Canada*, [1992] 2 S.C.R. 679 at 701-702, Lamer C.J. ("*Schachter*"); *Andrews* at 171, McIntyre J. (dissenting in part). *Miron* at 510, McLachlin J.

(i) Case for Extension is Factually "Clear"

114. M. submits that Lamer C.J.'s admonition, in *Schachter*, that reading in is appropriate only in the "clearest of cases" must be placed in context. In *Schachter*, the Court was constrained by the poverty of the record, and questions about the need to defer to the Legislature in fashioning remedy sprang from

a deeper doubt about the very existence of a constitutional violation. In *Miron*, this Court filled a comparable evidentiary gap by appointing an *amicus curiae*. The Court faces no lack of evidence, given the complete record in this matter. The case for extension is clear.

Schachter at 695, 718, Lamer C.J.

(b) Determining the Correct Remedial Option

(i) Nature and Extent of the Inconsistency

115. The inconsistency between the equality principles of the *Charter* and the provisions of the *FLA* arises from the exclusion of same-sex couples from Part III of the *FLA*: the definition of spouse in s.29 of the *Family Law Act* is underinclusive. In cases such as this, the remedial goal must be to equalize the benefit, either by reading in the excluded group or striking down the provision in its entirety. It is premature, at this stage, to consider whether the Legislature itself should deal with the issue -- the remedial options are to strike down or judicially amend. Because the constitutional deficiency lies not in whom the statute includes, but who it wrongly excludes, s.52 commands that the deficiency be corrected by reading in.

Schachter at 698, Lamer C.J.; *Brooks* at 1240, Dickson C.J.; *Haig* at 506.

(ii) Remedial Precision

116. Reading in will only be ordered where the necessary amendment can be defined with precision. The words to be read in must be simple and obvious and consistent with the legislative objective. They must not significantly alter the statutory scheme.

Schachter at 705, Lamer C.J.

117. The requirement of remedial precision is met where the "insertion of a handful of words can ensure the validity of the legislation and remedy the constitutional wrong." The defect in the definition of spouse in the *FLA* is simple: the phrase "of the opposite sex" excludes same-sex partnerships from the *Act's* support provisions. Moreover, this defect can be easily corrected by replacing "of the opposite

sex" with the words "two persons". In doing so, both Courts below remained faithful to the support scheme of the *FLA*.

Egan at 621, Iacobucci J.; *Schachter* at 702, Lamer C.J.; *Haig* at 506.

118. At paragraph 48 of her factum, the Respondent, H. has argued that there are specific problems with extension, in that it does not create the possibility for same-sex domestic contracts. The provision for unmarried domestic contracts is a legislative anachronism, as several courts have noted. It provides no more than the law of contract, which has been consistently applied to enforce same-sex domestic contracts.

10 *Sleeth* v. *Wasserlein* (1991), 36 R.F.L. (3d) 278 (B.C.S.C.); *Chrispen* v. *Tophan* (1986), 3 R.F.L. (3d) 149 at 154 (Sask. Q.B.).

119. Ontario makes a similar argument when it suggests that the decisions below affect many other statutes. This case is about one section in one statute. To argue, as Ontario does, that this Court must consider ninety other statutes because a similar word is used in each statute, ignores the specifically individual nature of *Charter* analysis and misconstrues the essential tenets of *stare decisis*. All ninety statutes that use the term "spouse" have different objectives that must be individually weighed. Even those family law provisions across the country which appear to be similar to s. 29 of the *FLA* must be individually considered to ascertain particular legislative intent.

20 *Egan* at 617, Iacobucci J.

120. Ontario's appendix of "Spousal Distinctions in Ontario Statutes" is inaccurate when it describes various statutes as having definitions "as in s. 29." Only nine Ontario statutes directly refer to s. 29 or to a person who has support obligations under the *FLA*. The balance of the statutes in the compilation that reference the *FLA* do not import s. 29 directly, but merely use similar terminology to refer to relationships in a gender-neutral way. These nine statutes incorporate the definition of spouse in s. 29 purposely. For one reason or another, they recognize the emotional and economic partnership that arises between cohabitees.

The nine statutes are: *Retail Sales Act*, R.S.O. 1990, c. R.31; *Pension Benefits Act*, R.S.O. 1990, c. P.8 *Land Transfer Tax Act*, R.S.O. 1990, c. L.6; *Community Economic Development Act*, S.O. 1993, Chap. 26; *Labour Sponsored Venture Capital Corporations Act*, 1992, S.O. 1992, Chap. 18; *Small Business Development Corporations Act*, R.S.O. 1990, c. S.12; *Toronto Islands Residential Stewardship Act*, 1993, S.O. 1993, Chap. 15; *Family Benefits Act*, R.R.O. 1990, Reg. 366; *General Welfare Assistance Act*, R.R.O. 1990, Reg. 537. Both the *Family Benefits* and the *General Welfare Assistance Acts* are scheduled to be repealed by Bill 142, the *Social Assistance Reform Act*, expected April, 1998.

10 121. Both Ontario and H.'s arguments about remedial precision are flawed. They suggest that equality rights will only be protected when a claimant appears before the court with facts that are so broad as to be unattainable. In *Egan*, when similar arguments were raised, Iacobucci J. stated that such "problems" were superfluous to the question before the Court, and would have to wait until they arose in other cases to be considered. Just as this Court has expressed a willingness, when striking down, to sever portions of invalid provisions from otherwise valid portions, it should also be willing to limit and define the effect of the portion to be read in. M. does not ask for relief that cannot be sustained by the facts before the Court; she asks for *Charter* protection. To deny an individual a *Charter* right, simply because a constitutionally invalid word is used elsewhere in the statute book, is to institutionalize the unconstitutional on the basis of the drafting lawyer's linguistic habits.

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(iii) Consistency With Legislative Objectives

122. The suitability of a particular remedy is determined, in part, by balancing the values expressed in the *Charter* with the objectives embodied in the legislation. M. submits that "reading in" does not require changes to the *FLA* that are inconsistent with the functional objectives of the *Act*. The core objective of the *FLA* — relieving against dependency and disadvantage in spousal relationships — is better served by extending the *Act* to all spousal relationships, than by the *Act's* invalidation. In modestly increasing the ambit of the *FLA* to include same-sex spousal relationships, constitutional standards are met and constitutional values are preserved, without impairing the *Act*'s core objectives.

Schachter at 707, Lamer C.J.

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123. Further, it is reasonable to assume that the legislature, if faced with the choice of no spousal support regime or one that extends to same-sex couples, would have chosen the latter. In *Egan*, the old age security and spousal allowance regimes were described as "significant and durable aspects of Canadian society." A similar conclusion can be drawn with respect to the spousal support regime in the *FLA*. According to the *Schachter* test, such a finding strengthens the assumption that the legislation would have been enacted without the impermissible omission.

Egan at 621, Iacobucci J; *Schachter* at 712, Lamer C.J.

(iv) No Change to Nature of Act

124. A further level of inquiry is to consider the statutory scheme or means selected by the legislature to implement the *Act*'s objectives. Reading in has no budgetary consequences and does not radically change the nature of the support scheme in the *FLA*; it merely alters the *Act's* scope. Reading in does not involve substantial change in the cost or nature of the legislative scheme: the purposes of support orders and the framework for determining quantum, as set out in s. 33 of the *FLA*, are untouched. The nature of the *Act* remains the same.

Schachter at 708-709, Lamer C.J.

(v) Relative Size of the Excluded Group

125. In cases, such as this, where the question is whether benefits should be extended to a group not included in the statute, the inquiry shifts to focus on the relative size of the included and excluded groups. The excluded group is small in size in comparison with the groups already included in the statutory support scheme. Extending the support regime to same-sex relationships is far less intrusive than to strike down the regime as it applies to opposite-sex cohabitees.

Knodel v. *British Columbia (Medical Services Commission)*, [1991] 6 W.W.R. 728 at 763 (B.C. S.C.); *Schachter* at 711-713, Lamer C.J.; *Egan* at 623, Iacobucci J.; *Haig* at 507; *Re K.* at 713, Nevins J.

(vi) Conclusion on Reading In

126. M. submits as follows:

(a) The inconsistency is easy to define and can be corrected, as both courts below have now found, with the replacement of two words.

(b) Reading in is the appropriate remedial option because:

(i) it precisely describes the group wrongly excluded;

(ii) it furthers the objectives of the legislation, and thus is not overly intrusive;

(iii) there are no budgetary consequences, and the group to be added is significantly smaller than the group now benefitting; and

(iv) opposite-sex cohabitees have had the benefit of access to spousal support provisions for 20 years. It is difficult to conceive that a legislature would abandon provisions for the spousal support of cohabitees, in favour of a modest extension to include same-sex couples.

127. The spousal support provisions for opposite-sex cohabitees are an integral part of family law in Ontario. For all of these reasons, it is submitted that reading in is the correct remedial option, since it flows with precision from the requirements of the *Charter*, and is in accordance with, and in fact furthers, the legislative intent of the provision. As Abella J.A. has stated,

> Family law is and should be a leader in the legal system because it matters so much to so many. And that is why it is worth spending the time and energy on trying to get it as right as reality permits.
>
> Abella, R. S. (The Honourable Madam Justice), "The Law of the Family in the Year of the Family" Keynote Address to the 1994 National Family Law Programme, Federation of Law Societies - Canadian Bar Association (18 July 1994, Victoria, B.C.) [unpublished]; *Haig* at 508.

(c) Suspension of the Remedy

128. The Court of Appeal agreed with Epstein J. that reading in was the appropriate remedy in the circumstances of this case. However, the Court suspended its declaration of invalidity for one year. M. submits that this result is antithetical to the purposes of the *Charter*.

Schachter at 716, Lamer C.J.; *Miron* at 509, McLachlin J.

129. It bears noting that only H., and not Ontario, argued for the temporary suspension of any declaration of invalidity. When Epstein J. declined to suspend her declaration of invalidity, it was H., and not Ontario, who unsuccessfully argued before the Court of Appeal that the declaration should be stayed pending appeal. A suspended declaration is an indulgence granted to the legislature to allow time to bring a legislative provision into line with its constitutional obligations. It is not an indulgence granted to private litigants who are seeking to deprive deserving persons of their rights under the law.

Order and Reasons of Moldaver J.A. dated February 20, 1996, M.'s Book of Authorities.

(i) Reasons for the Suspension and Response

130. Charron J.A. did not give lengthy reasons for granting the suspension. She dealt with the issue as follows:

> The extent to which any of the legislative provisions [that were the subject of Bill 167] would likely withstand constitutional scrutiny in light of the unconstitutionality of s.29 of the *FLA* is obviously not a matter for consideration on this appeal and these reasons should not be interpreted as reflective on these issues. However, it is a matter that the legislature may wish to address. If left up to the courts, these issues can only be resolved when raised in a piece-meal fashion in the context of individual cases at great costs to private litigants and to the public purse.
>
> The Legislature should be given some latitude in order to address this equality issue in a more comprehensive fashion or in order to devise its own approach if it so chooses. I am particularly mindful of the recurring plea for legislative reform as the most effective means of meeting the equality requirements of the *Charter* contained in the material before us.
>
> Further, the remedy sought by M. in this case does not simply serve to confer a benefit on some persons in a like situation but also serves to impose a potential burden on others. Hence the concerned members of the public should have some opportunity to arrange their own affairs as they see fit to the extent that they may be able to do so.
>
> Appeal Decision at 505-506, Charron J.A.

(ii) Allowing the Legislature Time to Respond

131. The suspension was granted, in part, to allow the legislature time to address the issues in a more comprehensive fashion or to devise its own approach. M. submits that the time for such a response has passed, and that Ontario's position in this and similar cases belies any prospect of meaningful, *Charter*-

respecting reform. In bringing this Appeal, and by specifically not asking for a suspension, Ontario has shown its preference to have Courts engage in this politically-troublesome area. As one intervenor submitted to the Court in *Vriend,* Ontario has thrown this Court the gauntlet. This Court should not throw it back.

(iii) Deference as a Remedial Issue

132. Charron J.A. suspended her remedy partly because she felt that the evidence presented "a plea for reform." The optimistic view that the plea will be answered by the legislature ignores the history of legislative discrimination against gays and lesbians. Had Charron J.A. considered the role of the court in a constitutional democracy, she might have interpreted the "plea for reform" differently. Appendix 3: Historical Perspectives, summarizes the gay and lesbian struggle for equality, and its message is that the political and democratic process is failing gays and lesbians. The dream of equality for same-sex couples will remain unrealized unless the courts respond to these "pleas for reform."

133. Refusing to "assume the full mantle of legislative review" by suspending a remedy of reading in is a real threat to the legitimacy of the process. "This is particularly so if the Court's courage falters exactly when called upon by the vulnerable minorities whose protection from majoritarian neglect arguably justifies this exercise of judicial power in the first place." Undue deference to legislative politics at this stage of the analysis throws the problem back at the community that is suffering from discrimination, and threatens to produce perilously uncertain and unfair results.

> Lessard et al. at 117; Dworkin, *Principle* at 27-28; Dworkin, *Freedom's Law* at 24-26; *Hill* v. *Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130 at 1175, Cory J.; Ely at 151; *Andrews* at 152, Wilson J.; Katherine E. Swinton, *The Supreme Court and Canadian Federalism: The Laskin-Dickson Years* (Toronto: Carswell, 1990) at 327.

134. In a critique of *Egan*, H. Lessard *et al.* bluntly describe the consequences of deference and incrementalism in same sex equality rights:

> [It] has virtually ensured that we will continue to witness the spectacle of courts and legislatures passing the law reform buck to each other in the coming years. The burden of law reform remains where has been, namely, on lesbian and gay litigants.

Lessard et al. at 115.

135. Lamer C.J. stated in *Schachter* that suspended declarations should not be used "as a panacea for the problem of interference with the legislature." Deference to the Legislature when determining remedy should only be given priority "[w]hen the values of the *Charter* are not sacrificed thereby." "The underlying remedial role for the Court is to bring legislative objectives in line with constitutional constraints, not to adapt the constitution to fit legislative preferences."

Schachter at 701, 716, 717, Lamer C.J.; *Haig* at 508; Dr. J.D. Whyte, "*Charter* Rights Without Remedies: Non-Discrimination Rights for Lesbian and Gays: A Case of Judicial Abandonment?" (Paper presented at the Canadian Bar Association - Ontario, Institute of Continuing Legal Education, Lesbian and Gay Issues and Rights Programme, Toronto, 31 January 1997) at 9 [unpublished] at 8.

(iv) Suspension and Reading In

136. Charron J.A.'s one-year suspension was coupled with the remedy of reading in. Suspension is usually required when the remedy of striking down has been ordered, in order to avoid a "constitutional emergency" of a sort that does not exist here. As this Court has held, there is no reason to suspend the declaration if reading in is appropriate because this would "perpetuate discrimination which the court has found to violate the *Charter*, when the obvious remedy... remains available."

Miron at 510, McLachlin J.; *Schachter* at 716-717, Lamer C.J.; *Reference Re Language Rights under the Manitoba Act, 1870*, [1985] 1 S.C.R. 721 at 768, supplementary reasons, [1990] 3 S.C.R. 1417; *R.* v. *Swain*, [1991] 1 S.C.R. 933 at 1021-1022, Lamer C.J.; *Dixon* v. *British Columbia (Attorney General)* (1989), 59 D.L.R. (4th) 247 at 282-283 (B.C.S.C.).

137. No decision has ever combined the remedies of reading in and suspension. In *Egan*, Iacobucci J. would have granted a suspension, but only because he feared that the remedy might *increase* disadvantage to gays and lesbians. In *Miron*, McLachlin J. rejected the approach as unworkable and unfair as it would leave affected parties without a remedy.

Miron at 510, McLachlin J.

(d) Retroactivity

138. This case does not involve either a retroactive or retrospective application of the *Charter*. The discrimination began in 1992, upon the breakdown of the parties' relationship, when M. was denied the right to apply for spousal support because of her sexual orientation. This was long after s. 15 came into effect. The denial is therefore subject to *Charter* scrutiny.

Benner at 381-389.

139. Legislation which has been declared unconstitutional is inoperative *ab initio*, as though it was never passed. A finding of unconstitutionality will always, therefore, be retroactive in the sense that it involves the nullification of the law from the outset. Accordingly, actions taken under an unconstitutional statute cannot be justified on the basis that the actions were constitutional at the time they were undertaken. If this Court finds that s. 29 is unconstitutional, advantaged spouses should not be permitted to rely on the unconstitutional to advance their own economic interests.

Hogg at 55-1; *Nielsen* v. *Canada (Employment and Immigration Commission)*, Marceau J.A. (1997), 215 N.R. 208 (F.C.A.).

140. The presumption against retroactivity only operates when legislation applies to facts *all of which have ended* before the statute's coming into force. A support order, if granted, is not about a strictly past event. Entitlement to support reflects immediate and ongoing need, a continuing fact.

R. Sullivan, ed., *Driedger on the Construction of Statutes*, 3d ed. (Toronto: Butterworths, 1994) at 508-525 ("Sullivan, *Driedger*"); P.-A. Côté, *The Interpretation of Legislation in Canada*, 2nd ed. (Cowansville: Éditions Yvon Blais, 1991) at 115-137 ("Côté"); E. Driedger, "Statutes: Retroactive Retrospective Reflections" (1978) 56 Can. Bar Rev. 264 ("Retroactive Retrospective"); R. Sullivan, *Statutory Interpretation* (Concord: Irwin Law, 1997) at 186-194.

141. Further, the presumption against retroactivity does not apply to statutes intended to be protective rather than penal. The particular focus of the *FLA* is the protection of disadvantaged spouses from exploitation. "Since the [judicial] amendment in issue here is designed to protect the public, the presumption against the retrospective effect of the statutes is effectively rebutted."

Brosseau v. *Alberta Securities Commission*, [1989] 1 S.C.R. 301 at 321, L'Heureux-Dubé J.; *Re A Solicitor's Clerk*, [1957] 3 All E.R. 617 at 619; *R.* v. *Vine* (1875), 10 L.R.Q.B. 195 at 199.

142. The presumption is also countered by the clear intention of the legislature, as evidenced by a general statutory pattern of retroactivity in family law. Despite complaints of unfairness, it was a primary objective of the legislature to prevent exploitation in relationships of cohabitation, even if that required interference with an advantaged party's expectations. Both the *FLRA* and *FLA* were retroactive in application.

> Ontario, Legislative Assembly, *Official Report of the Debates (Hansard)* (6 June 1985) at 24; *OLRC Report* at 68.

143. Courts and legislatures have consistently rejected claims that we should not change the rules on which relationships are built. What parties intend at the beginning of a relationship and what actually occurs are often very different, and the nature and form of a relationship are not always the choice of both parties. It would be contrary to the legislative intention, and discriminatory, for advantaged spouses to be able to assert a vested right to avoid support obligations.

> No one has a vested right to continuance of the law as it stood in the past; in tax law it is imperative that legislation conform to changing social needs and governmental policy. A taxpayer may plan his financial affairs in reliance in the tax laws remaining the same; he takes the risk that the legislation may be change.
>
> *Gustavson Drilling (1964) Ltd.* v. *Minister of National Revenue* (1976), [1977] 1 S.C.R. 271 at 282-283; Dworkin, *Taking Rights Seriously* at 14-45.

144. The application of statutory or equitable rules in the family law context has always been done with a view to preventing exploitation and providing fair results on the breakdown of intimate relationships, whatever the initial expectations of the parties. "One cannot speak of "autonomy" or "free choice" without first asking *whose* autonomy one seeks to preserve, and at *what cost* to others."

> *Miron* at 470-474, L'Heureux-Dubé J., and at 498, McLachlin J.; Ontario, Legislative Assembly, *Official Report of the Debates (Hansard)* (6 June 1985) at 24; *G. (L.)* v. *B. (G.)*, [1995] 3 S.C.R. 367; *Santosuosso* v. *Santosuosso* (1997), 32 O.R. 143 (Gen. Div.); J. McLeod, Annotation to *Rawluk* v. *Rawluk* (1990) 23 R.F.L. (3d) 337 at 340; *Rathwell* v. *Rathwell*, (1978) 83 D.L.R. (3d) 289 at 307, Dickson C.J.; *Pettkus* v. *Becker*, [1980] 2 S.C.R. 834; *Sorochan* v. *Sorochan*, [1986] 2 S.C.R. 38; *Rawluk* v. *Rawluk*, [1990] 1 S.C.R. 70; *Peter* v. *Beblow*, [1993] 1 S.C.R. 980; *Anderson* v. *Luoma* (1986), 50 R.F.L. (2d) 127 (B.C. S.C.); *Brunet*; *Forrest*.

145. The trial decision is in accordance with the general principles of family law and the intentions of the legislature. It is important to remember that this is a family law case as much as it is a *Charter* case, and that the fairness of imposing support obligations can be addressed by a family law judge on a case-by-case basis, with regard to all the circumstances. It was one of the purposes of the *FLA* to recognize a variety of family forms. We must ensure that our family law expands to meet changing family law needs, especially in this area of basic fairness and civility in relationships. As one legislator commented in the debates over the *FLA*:

> [The bill] has to be viewed not as an individual piece of legislation but as part of a continuum. It is part of the development of family law. It grows out of a tremendous need to civilize our relationships. The law is a living thing and it changes, and this law and the *Family Law Act* will change over time as well.
>
> Ontario, Legislative Assembly, *Official Report of Debates (Hansard)* (6 June 1985) at 1027b and 24.

146. Above all, the Court must remain mindful of a fundamental purpose of the *Charter*: the advancement of the equality rights of the disadvantaged, *not* the protection of expectations arising out of a history of discrimination. M. left her relationship destitute, after contributing to the economic well-being of her partner.

> If choices sometimes have to be made, and they do, human rights argues that the choices be on behalf of the arbitrarily disadvantaged group, not the temporarily inconvenienced individual. To integrate individuals, we must integrate their groups, and integrating their groups may mean imposing on other individuals and restricting their autonomy or exclusivities. Inclusion of those who were previously excluded may require and usually does require active interference with someone's right to decide ..., but as unfair as that may seem to the individual who seeks to preserve autonomous judgment, it is the only way to reduce inequality.
>
> The Honourable Madam Justice Rosalie Abella, "Human Rights in the Twentyfirst Century: A Global Challenge" Keynote Address at Faculty of Law, University of Calgary (9-12 November 1990, Banff, Alta.), page 48 and 50.

147. To deny a remedy to persons like M. and others who have been disadvantaged in their relationships would be to perpetuate the effects of a discrimination which the Court has found to violate the *Charter* when the obvious remedy, an ability to claim spousal support, remains available. Like *Miron*, this is a case where retroactively "reading up" a statute is justified. Bill 167 provides the best

possible evidence of what the Legislature would have done had if it had addressed the problem in a *Charter*-respecting manner. The claim is readily satisfied and would not impose any additional burden upon the public purse. Those individuals in a relationship in which one spouse has been disadvantaged would simply be forced to account for the consequences of their relationship. Most importantly, retroactively reading in would cure an injustice which might otherwise go unremedied. Permitting underinclusion would only be a backhanded way of permitting discrimination.

Miron at 480-481, L'Heureux-Dubé J., and at 508-510, McLachlin J.; *OLRC Report* at 68; *Rodriguez* at 578-579, Lamer C.J.; *Moore and Akerstrom* v. *Canada* (June 13, 1996) Human Rights Tribunal at 33 (K. Norton, Q.C.; J. Ellis; J.G. Sinclair).

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COSTS

148. M. also appeals the costs award in the Court below. At trial, Epstein J. ordered Ontario to pay M.'s costs and the decision was unanimously upheld on appeal, but Charron J.A. did not order any costs of the appeal. This Court gave Ontario leave to appeal on the condition that it pay M.'s costs at this level regardless of the result. The costs portion of the cross-appeal is limited to the costs before the Ontario Court of Appeal. M. also requests that the order granting her costs before this Court be extended so that she receives her costs on a solicitor and client basis.

20 149. M. submits that the Court of Appeal erred generally in the exercise of its discretion with respect to costs and more particularly in its failure to follow the customary rule entitling a successful party its costs. In declining to order any costs on the appeal, Charron J.A. stated only that the matter was of "significant public importance." While this rationale might have been justified if the result benefitted only M., it strains logic that an individual citizen should bear the burden of legislative inertia when her success benefits society generally.

Appeal Decision at 509, Charron J.A.

150. In the present case, there was a serious challenge to a provision of the *FLA* of a kind that was admitted by Ontario to be a *prima facie* violation of the *Charter*. Nevertheless, Ontario has appealed

this case in an unconcealed attempt to obtain judicial clarification as to the existence and extent of its obligation to gay and lesbian couples. Ontario's interest in this case, at this Court and at the Court below, is not related to the *lis* between the parties. However helpful Ontario may find it to have its obligations under the *Charter* clarified, M. should not be forced to underwrite this "law making exercise" on behalf of the public. The extension to the *FLA* sought by M. is an amendment which should have and could have been achieved by legislative enactment.

Ontario (Attorney General) v. *Dieleman* (1995), 22 O.R. (3d) 785 at 792 (Gen. Div.) ("*Dieleman*").

151. In all the circumstances of this case, M. submits that Ontario's conduct should be censured, in this Court and in the Court below, by an award of costs on a solicitor and client scale. While such awards are traditionally reserved for cases where the Court wishes to express its disapproval of conduct found to be oppressive, a second and more relevant factor underlies solicitor and client costs: the successful party should not be put to any expense for costs in the circumstances. This is such a case.

Apotex Inc. v. *Egis Pharmaceuticals* (1991), 4. O.R. (3d) 321 at 325 (Gen. Div.).

152. Further support for this proposition can be found in *Little Sisters Book and Art Emporium* v. *Canada*, where an award of "special" costs (the equivalent in British Columbia to the solicitor and client scale in Ontario) was justified because, *inter alia*, the issues raised were of "great importance not only to the Plaintiffs but to all Canadians;" the case was difficult and expensive to present; and, the plaintiffs had provided a full evidentiary basis for consideration of the issues raised. In her decision on costs in this case, Epstein J. took specific note of Ontario's failure to provide a "detailed background addressing the statute in issue or the policy rationale for the law." Even Finlayson J.A., who accepted Ontario's views in his dissent, criticized Ontario's evidence and legislative record. Ontario's change of position and subsequent failure to provide adequate evidence in support of its position has shifted the burden to M. to provide the Court with all of the materials necessary to do justice in this case. M. states that Charron J.A., in failing to consider these relevant and significant factors, erred in the exercise of her discretion as to costs. An Order requiring Ontario to pay M.'s solicitor and client costs at the Court of

Appeal and before this Court would ensure that the *Charter* is a meaningful and accessible instrument to those who seek its protection.

> *Little Sisters Book and Art Emporium* v. *Canada* (1996), 134 D.L.R. (4th) 286 at 292 (B.C. S.C.); *Schachter* at 726, Lamer C.J.; Costs Decision, at 405-406, 418.

153. Litigation involving the *Charter* should not be beyond the reach of citizens of ordinary means, especially when the government has launched — unsuccessfully to date — appeals which the citizen must defend. The protection provided by the equality provisions of the *Charter* is meaningless if the neediest parties are denied access to justice because of the high costs of litigation. In fact, costs have been awarded against a *successful* Attorney General where litigation raises an issue of great importance and where *Charter* protection is sought because of a violation of a fundamental freedom. Individual citizens should not be used freely as "guinea pigs" to fashion social and economic policy before our Courts. The clearest statement of this principle arises in *Thibaudeau*, where both the majority and the dissenting justices recognized the considerable legal battle waged by Ms. Thibaudeau and awarded costs throughout — in spite of the fact that her appeal had failed. In refusing to award M. her costs, the Court of Appeal failed to apply this equitable principle.

> *Re Lavigne and Ontario Public Service Employees Union (No. 2)* (1987), 41 D.L.R. (4th) 86 at 126, White J. (Ont. H.C.J.); M. M. Orkin, *The Law of Costs*, 2d ed., (Aurora: Canada Law Book, 1995+) at para. 219.5 ("Orkin"); *B.(R.)* v. *Children's Aid Society of Metropolitan Toronto*, [1995] S.C.R. 315 at 390. La Forest J.; Costs Decision at 409-418; *Canadian Newspapers Co. Ltd.* v. *A.G. (Canada)* (1986), 32 D.L.R. (4th) 282 at 305-6 (Ont. H.C.J.); *Thibaudeau* at 699, Gonthier J. (Sopinka, Cory and Iacobucci JJ. concurring), and at 736, McLachlin J. (L'Heureux-Dubé concurring.).

154. As Epstein J. found in her Costs Decision, although Ontario conceded for the first two years of this litigation that the *FLA* was unconstitutional, the legislature did not remedy the problem. The Province merely forced M. to bear the responsibility of challenging admitted discrimination by government. Ontario's change of position and the inadequacy of the record on the s. 1 justification as found unanimously by the courts below further support an order that the government should pay M.'s costs on a solicitor and client basis.

> *R.* v. *Trask*, [1987] 2 S.C.R. 304 at 307-8, McIntyre J.; *Marchand* v. *Simcoe County Board of Education* (1986), 12 C.P.C. (2d) 140 at 143 (Ont. H.C.J.), Sirois J.; *Coronation Insurance Co.* v.

Taku Air Transport Ltd., [1991] 3 S.C.R. 622 at 646-648, Cory J.; Ontario, Legislative Assembly, *Official Report of Debates (Hansard)* (9 June 1994) (Statement by the Hon. Bob Rae) at 6795-6796.

CONCLUSION

155. In conclusion, M.'s Cross-Appeal requests a remedy consistent with *Charter* values. The decision below resulted in a case of *Charter* rights without remedies. M. succeeded on a hollow, abstract level: she had no effective remedy and was required to bear the costs of her success. This result and the central purposes of the *Charter* are fundamentally in conflict. M. asks this Court to live up to the spirit of the *Charter* and the promise that it is a meaningful and accessible instrument to those who seek its protection.

156. In *Egan*, this Court held that gays and lesbians are entitled to protection from discrimination on the basis of sexual orientation. Since family law defines our individual relationships and our humanity, the recognition of same-sex couples must be a starting point for our substantive vision of equality. If *Egan* means anything, the discrimination in s. 29 of the *Family Law Act* must be remedied.

> We must use time creatively, in the knowledge that the time is always ripe to do right. Now is the time to make real the promise of democracy... Now is the time to lift our national policy from the quicksand of injustice to the solid rock of human dignity.
>
> Martin Luther King, Jr., *Letter from Birmingham Jail*, April 16, 1963.

PART IV — ORDER REQUESTED

157. M. asks that the appeal be dismissed and that her cross-appeal be allowed, so that,

(a) the remedy of reading in is not subject to suspension; and

(b) Ontario is ordered to pay M.'s costs at the Court of Appeal, and her costs before this Court, on a solicitor and client basis.

ALL OF WHICH IS RESPECTFULLY SUBMITTED,

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PART V – TABLE OF AUTHORITIES

Statutes and Bills

Cases

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Articles, Speeches and Publications

Newspaper Articles

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Appendix 1:

THE RELATIONSHIP BETWEEN M. AND H. - A CHRONOLOGY OF ADMITTED FACTS

October 15, 1980	Parties met on a trip to Nepal and commenced an intimate relationship. M was a partner in a small courier company, H. was an advertising executive with a large firm.
July 1982	Parties commenced cohabitation: M. moved into H.'s City Home
November 1982	Parties incorporated their own Joint Ad Business
February 1993	M. purchased her business partner's interest in the courier company for $7,500 plus assumption of $53,000 in debt
March 1983	Parties purchased Commercial Property for $160,000 - M. contributed $15,000; H. $30,000; H.'s mother $10,000 - mortgage of $110,000. M. pays $350 per month and with other tenants' rental payments, building carried itself
June 1984	Parties made mutual Wills
1985	Parties purchased Mercedes Turbo Stationwagon for $41,000 - M. contributed a trade-in of $7,500 - Joint Ad Business paid $16,530 - $16,000 balance in a car loan paid by M.
1985	Joint Ad Business paid for renovations to City Home ($25,000)
May 1986	Parties purchased land in country for $79,000 by H. taking a second mortgage on the City Home for $80,000 with M. as guarantor
May 1986	Parties incorporated Joint Clothing Business - funded by $15,000 Joint New Venture Loan, $40,000 in proceeds from a new mortgage on the Commercial Property. Joint Clothing Business also had a $25,000 line of credit
1987	H. started signing M.'s name to corporate cheques
1987	Parties sold Commercial Property and received net proceeds of $146,700. These funds were invested jointly and used for the construction of the Country Home
1987	H. injured her back, and was unable thereafter to do heavy lifting, labour or gardening
May 1988	Construction of the Country Home was completed - total cost was $350,000 - financed with $80,000 second mortgage on the City Home, $146,000 from the sale of the Commercial Property and $93,000 construction loan. Lines of credit and borrowings by Joint Clothing Business and Joint Ad Business were used to fund the difference and to pay for personal expenses during 1988 and 1989
October 1989	H. converted the Joint Clothing Business line of credit to a personal loan for $15,041. M. payed for this debt until separation.
1989 or 1990	Parties received $14,000 from lawsuit against real estate agent for Commercial Property - M. applied approx. $2,300 to retire car debt, balance went to joint expenses

September 1990	H. began contract work with public relations firm, billed by Joint Ad Business, allowing her to continue to draw all money out of company
November 1990	M. cashed $6,000 RSP and sold investments of gold and silver; her parents gave her $4,000 as a gift - all funds went towards joint expenses
	To facilitate the mortgage, M. signed letter H. prepared saying she was a tenant paying $1,200.00 per month
December 5, 1990	H. consolidated debts into a new mortgage of $160,000 on City Home
December 5, 1990	M. signed promissory note for $40,000 admitting that she owed that share of the new City Home mortgage
February 1991	M. borrowed $15,000 from her father to pay joint expenses
April 1991	Royal Bank mortgage of $27,500 registered on title to Belmont (taken in September of 1989) was discharged
Early 1992	M.'s mother became ill and was hospitalized. H. told M. to concentrate on her mother and that "everything else would be looked after."
May 1992	M.'s mother died
Summer 1992	M. without outside employment except for joint business, and performed labour and household chores at City and Country Homes during the summer
September 24, 1992	Parties separated. M. moved out of Belmont, taking few personal possessions
October 1, 1992	H. changed locks to both the City Home and the Country Home, shut down the Joint Ad Business and the Joint Clothing Business. M. had no access to the income or capital that the parties had built together, for more than five years.

Appendix 2:

STATEMENT OF PRIOR LEGAL PROCEEDINGS

Date of Institution of Proceeding	Nature of Proceeding and Instituted by Whom	Court	Name of Judicial Officer and Date of Disposition of Proceeding	Nature of Disposition
October 14/92	Notice of Application issued by M. for damages for oppression under the *OBCA*, a proprietary interest in the city home, partition and sale of the country property, monthly payments and other relief	OC(GD)		
October 16/92	M.'s without-notice Motion for non-harrassment and preservation orders	OC(GD)	October 16/92 Lissaman J.	Non-dissipation, non-depletion and non-harassment orders against H. and the Corporate Defendants; M. permitted to register a Certificate of Pending Litigation on title to the city home; balance of Motion adjourned to October 23/92 to be heard on notice to H.
October 21/92	H.'s Notice of Cross-Application, for repayment of personal loans, division of certain assets, repayment of all payments made by H on the country home since 1988, and other relief	OC(GD)		
October 23/92	Return of M.'s October 16/92 Motion	OC(GD)	October 23/92 McIntyre J.	On consent, non-dissipation, non-depletion and non-harassment orders become mutual
December 16/92	M.'s Motion to remove Beard, Winter as solicitors of record for H. because the firm and individual lawyer had acted for the parties on several occasions	OC(GD)	December 16/92 Master Peppiatt	Beard Winter is removed as Solicitors of Record for H. due to a conflict of interest; no order as to costs
December 22/92 January 4/93	H.'s Notice of Appeal of Master Peppiatt's Order; M.'s Cross-Appeal as to costs	OC(GD)	February 9/93 Ferrier J.	H.'s Appeal dismissed, M.'s Cross-Appeal dismissed and H. to pay M.'s costs of the Appeal fixed at $1,500.

Date of Institution of Proceeding	Nature of Proceeding and Instituted by Whom	Court	Name of Judicial Officer and Date of Disposition of Proceeding	Nature of Disposition
April 27/93	M.'s Amended Notice of Application to Claim spousal support under s. 29 *FLA*	OC(GD)		
April 28/93	M.'s Notice of Constitutional Question re s. 29 *FLA*	OC(GD)		
June 29-30/93	Examinations for Discovery of M. performed by H.'s counsel; all requested undertakings are given by M., including income tax returns and bank records			
July 14, 16/93	Examinations for Discovery of H.; H. refuses to provide all tax returns, all bank records, all records regarding her new business, all records regarding her income and assets			
August 20/93	M.'s Motion for trial of the issues and transfer of the file to Family Law Division	OC(GD)	August 20/93 Adams J.	Application converted to Action with Trial of the Issues and related relief; this file shall be transferred to the Family Law Division; the title of proceeding shall be changed to M. v. H.; costs of the Motion to be in the cause
September 20/93	M.'s Motion for interim relief, including interim oppression award under the *OBCA* and orders relating to undertakings and refusals	OC(GD)	September 30/93 Epstein J.	Epstein J. found a *prima facie* case of oppression in H.'s admissions, and ordered $10,648 be immediately released to M. by way of non-interest bearing loan from the joint business, such loan to be factored into the overall accounting between the parties; the balance of the Motion be adjourned to December 8/93; costs of the Motion to M. in any event of the cause
December 8/93	H.'s Motion to dismiss the Constitutional Question; alternatively for a determination of the Constitutional Question as a separate trial under Rule 21.01	OC(GD)	February 2/94 Epstein J.	Motion for Summary Judgment dismissed, Constitutional issue to be determined under Rule 21.01; costs to be dealt with in the Rule 21.01 Judgment

Date of Institution of Proceeding	Nature of Proceeding and Instituted by Whom	Court	Name of Judicial Officer and Date of Disposition of Proceeding	Nature of Disposition
	Addendum to February 2/94 Reasons		February 25/94 Epstein J.	All issues relating to productions, including H.'s undertakings and refusals to be dealt with after the Trial of the Constitutional Question; M.'s Motion for interim disbursements to retain accountant or audit to be paid by business is dismissed; M.'s request that H. continue making mortgage payments on Country is dismissed as unnecessary in view of the preservation order of Lissaman J.; M. to have access to country every other weekend or otherwise as the parties may agree; M. to have access to the books and records of the business; M.'s request that the business pay but request that M & M pay for an audit is denied
March 14/94	Epstein J. holds a one-day hearing with court reporter present after receiving a letter dated February 23/94 from H.'s counsel suggesting that Epstein J. should withdraw from the case because H. had lost faith in the justice system; Epstein J. declines to withdraw			
April 12/94	M.'s Motion for contempt of non-harassment orders after M. alleges that she found H. trying to take the car, with the keys in the lock	OC(GD)	April 12/94 Epstein J.	No order made
September 1/94	Attorney General for Ontario advises in writing that it will be intervening and will concede that that s. 29 of the *FLA* is unconstitutional and will support the remedy of reading in. Ontario suggests that the Notice of Constitutional Question be amended to include a challenge to the treatment of spousal support under the *Income Tax Act*			
September and October/94	M., H. and Ontario serve and file all evidence for Trial of Constitutional Question			
October 18/94	H.'s counsel cross-examines only one expert affiant, Rev. Brent Hawkes			

Date of Institution of Proceeding	Nature of Proceeding and Instituted by Whom	Court	Name of Judicial Officer and Date of Disposition of Proceeding	Nature of Disposition
March/95	Parties agree to adjourn Trial of Constitutional Question until after the release of the SCC's reasons in *Egan* and *Miron*, which are released on May 25/95			
August 16/95	Attorney General for Ontario advises in writing that it will now take the position that s. 29 *FLA* does not offend the *Charter*			
September 11, 12, 13/95	Rule 21.01 Constitutional Trial	OC(GD)	February 9/96 Epstein J.	Section 29 of the *FLA* is of no force or effect to the extent that it excludes same-sex couples from its definition of spouse; the words "a man and a woman" be severed from the definition of "spouse" found in Section 29 of the *FLA;* the words "two persons" be read into the definition of "spouse" in Section 29 of the *FLA*; M. is at liberty to bring a motion for interim support before Epstein J, on 7 days' notice; H. is required to deliver a Financial Statement under the Rules within 30 days of the date of this Judgment; parties have until May 29/96 to make further written submissions regarding costs
February 14/96	H.'s Notice of Appeal of Constitutional Judgment	OCA		
February 19/96	H.'s Motion to stay all of the Constitutional Judgment pending appeal	OCA	February 19/96 Moldaver J.A.	The declarations of the constitutional invalidity of s. 29 will remain outstanding and will not be stayed; the personal relief regarding Financial Statement and Support Motion is stayed pending Appeal; the Appeal is to be expedited; costs reserved to the panel hearing the Appeal
April 16/96	H.'s Motion to stay Epstein J. from determining Costs of the Constitutional Trial	OCA	April 20/96 Laskin J.A.	Motion dismissed, costs reserved to the panel hearing the Appeal

Date of Institution of Proceeding	Nature of Proceeding and Instituted by Whom	Court	Name of Judicial Officer and Date of Disposition of Proceeding	Nature of Disposition
June 28/96	Costs Judgment re Trial of the Constitutional Question	OC(GD)	June 28/96 Epstein J.	H. to pay M., on a party and party basis forthwith after assessment, her costs of H..'s Motion to dismiss and for the Rule 21.01 Trial; Ontario to pay M., on a party and party basis forthwith after assessment, her costs of the Constitutional Trial, including preparation for and argument of the Rule 21.01 Motion, the assembly of materials and research performed before the date of Ontario's intervention
July 10/96	Ontario's Notice of Appeal the Constitutional and Costs Judgments of Epstein J.	OCA		
July 11/96	H.'s Supplementary Notice of Appeal	OCA		
August 6, 7, 8/96	Appeal before Ontario Court of Appeal	OCA	December 18/96 Charron and Doherty JJ.A.; Finlayson J.A. dissenting	Barring legislative activity to ensure the constitutionality of Section 29 of the FLA within one year from the date of this Judgment, there will be: a declaration that the definition of "spouse" contained in Section 29 of the FLA is of no force or effect to the extent that it excludes same-sex couples, a declaration that the words "a man and a woman" be severed from the definition of "spouse" in Section 29 of the FLA, and an order reading in the words "two persons" instead of "a man and a woman" into the definition of "spouse contained in Section 29 of the FLA. Epstein J.'s Orders allowing M. to bring a Motion for interim support on 7 days' notice and requiring H. to deliver a Financial Statement within 30 days is also stayed for one year. Neither party shall have a personal exemption. H.'s and Ontario's Appeals regarding costs are dismissed. Each party and intervenors shall bear his or her own costs of this Appeal.

Date of Institution of Proceeding	Nature of Proceeding and Instituted by Whom	Court	Name of Judicial Officer and Date of Disposition of Proceeding	Nature of Disposition
December 10/96	M.'s Motion for partition and sale of country property, answers to undertakings and refusals	OC(GD)	December 10/96 Epstein J.	The spousal support issues are severed from the balance of the issues in the action; all other issues other than support be expedited; the parties are entitled to an early Pre-Trial and an expedited Trial date; the issues of partition and sale and ownership of and access to the portfolio are adjourned to the Trial Judge
January 27/97	Pre-Trial	OC(GD)	January 29/97 Walsh J.	Trial Management Conference scheduled for April 21/97 at 9:30 at which time Trial date to be set
February 24/97	M.'s Motion for specific productions, answers to undertakings and refusals, and for an appraisal of the city home	OC(GD)	February 24/97 Epstein J.	H. shall produce forthwith income tax returns, bank statements for 1982 to present in respect of all accounts, all documentation relating to the operation of her business since 1992, and will also answer many enumerated undertakings and refusals. H. shall co-operate with a qualified real estate appraiser selected by M. to have sufficient access to the property to prepare a formal valuation. No costs of this Motion.
April 21, 24/97	Trial Management Conference	OC(GD)	April 21/97 Justice O'Connell	Statements of all carrying costs of the two properties for which H. claims payment to be delivered by H. within 14 days; M. to value the business and critique and management with a report to be delivered within 20 days.
April 24/97	Ontario's Application for leave to appeal to SCC	SCC	April 24/97 L'Heureux-Dube, Sopinka and Iacobucci JJ.	The application for leave to appeal is granted on the condition that the AG undertakes to pay M.'s costs of the appeal in any event of the cause
May 26/97	Continuation of Trial Management Conference	OC(GD)	May 28/97 Justice O'Connell	Pre-Trial to resume July 16/97
July 16/97	Pre-Trial	OC(GD)	July 16/97 Justice O'Connell	Trial date of property issues set for the week of January 26/98
September 9/97	Continuation of Pre-Trial	OC(GD)	September 9/97 Justice O'Connell	No order made

Date of Institution of Proceeding	Nature of Proceeding and Instituted by Whom	Court	Name of Judicial Officer and Date of Disposition of Proceeding	Nature of Disposition
January 22/98	Trial Management Conference	OC(GD)	January 22/98 Justice O'Connell	Trial to go ahead in the week of January 26/98
January 26/98	Trial of Property issues before Wilson J.	OC(GD)	January 28/98 Wilson J.	Parties to attend mid-trial Settlement Conference with Speigel J.
January 28/98	Settlement Conference with Speigel J.	OC(GD)	January 29/98 Wilson J.	Judgment in accordance with Minutes of Settlement filed

Appendix 3:

HISTORICAL PERSPECTIVE

Over the course of human history, same-sex relationships have been socially accepted by various cultures. In antiquity, relationships between men were institutionalized for free male citizens. Ancient Rome accepted same-sex marriage. Christian churches of the Middle Ages blessed the relationships of people of the same sex. There were same-sex unions, including legally recognized marriages, in Aboriginal, African and Asian cultures. A punitive attitude toward same-sex relationships was only adopted by many of the Christian churches after the 13th century. This shift occurred at the same time as the aggression directed against Jews, "heretics" and women deemed to be witches.

During the eighteenth, nineteenth and early twentieth century, lifelong romantic partnerships between North American women were common and enjoyed widespread social approval. However, after the early feminist movement, and the popular writings of sexologists, homosexuality was classified as a psychiatric illness. During World War II, Nazis murdered and experimented on gays and lesbians in concentration camps. When surviving Jews were released from the camps, many gay men and lesbians were transferred to jails to continue their sentences. Under 1950's McCarthyism, thousands of North American gays and lesbians were fired from the armed forces and civilian agencies because of their sexual orientation. With the influx of persons to urban centres after World War II and in response to their persecution, gays and lesbians began to form communities and advocate for equality.

What follows is a brief outline of the history of gay and lesbian equal rights. Although this is a list of dates and well-known events, it must be remembered that these political and legal decisions represent the hopes and struggles of thousands of individual human souls, whose dream of equality is still unrealized.

1948	Kinsey report is released: first major survey of sexual behaviour shows a continuum between heterosexuality and homosexuality.
1950s	Rise of the nuclear family. Women are encouraged to return to the home so that there is space in the workplace for men returning from the War. Society is marked by a strong gender polarity, and thousands of gays and lesbians are fired on the basis of their sexual orientation.
1950	Mattachine Society for gays and lesbians forms in Los Angeles, and over 100 discussion groups spring up in Southern California by 1953.
1955	The Daughters of Bilitis, the first formal lesbian organization, forms and begins publication of the *Ladder*.

1956 Dr. Evelyn Hooker releases her ground-breaking research, *The Adjustment of the Male Overt Homosexual*, demonstrating that gay men are as well adjusted as heterosexual men.

1957 The United Kingdom's *Wolfenden Report* concludes it is not the function of the law to intervene in the private lives of citizens, or to seek to enforce any particular pattern of behaviour. However, another ten years pass before the government decriminalizes same-sex behaviour.

1958 Shortly after their marriage, Mildred Jeter, a black woman, and Richard Loving, a white man, are arrested for violating Virginia's law against miscegenation and face up to five years in prison. A court upholds their conviction by relying on attitudes about "unnatural" relationships and religion, and the appellate court agrees, stating: "Almighty God created the races...and he placed them on separate continents. And but for the interference with his arrangement there would be no cause for such marriages. The fact that he separated the races shows that he did not intend for the races to mix." Their case, *Loving* v. *Virginia*, is appealed to the US Supreme Court, which in 1967 overturns the laws in 16 states containing such "same-race restrictions" on people's choice of a marriage partner.[1]

1964-65 Early Canadian gay organizations begin: Vancouver Association for Social Knowledge and Ottawa Council on Religion and the Homosexual.

1968 The Metropolitan Community Church is founded by lesbian and gay Christians in Los Angeles. The Metropolitan Community Church, like Black churches, serves to fill a gap for segregated parishioners.

1969 After years of police harassment at the Stonewall Tavern in Greenwich Village, New York, gays and lesbians respond to an attempted police raid with three days of riots. Thee "Stonewall Riots" mark the birth of the modern gay and lesbian liberation movement, and hundreds of equality-seeking organizations and publications are formed in its aftermath.

60s-70s Birth control is made widely available, weakening the notion that the only acceptable grounds for sex are procreative. Unmarried heterosexual couples live together openly. Civil rights, anti-war, student, and women's movements each challenge societal norms in different ways. These movements raise questions about authoritarianism, the construction of gender, and the ability of the government and the legal system to promote justice for all.

1969 The Trudeau government repeals the Canadian *Criminal Code* prohibition against anal intercourse between consenting adults in private.

1973 Homosexuality is removed from the American Psychiatric Association list of mental disorders.

1974 Richard North and Chris Vogel marry in the United Church and are then forced to appeal the Manitoba Registrar's refusal to register their marriage. The Manitoba County Court upholds the refusal on the basis that no marriage existed to be registered.[2] Similar claims are made and denied in Minnesota, Kentucky, Washington, Ohio, Colorado and Maryland in the years 1970-1975.

1974 Parliament passes the *Statute Law (Status of Women) Amendment Act*, an omnibus bill to include unmarried opposite-sex cohabitants in the definition of 'spouse' in federal legislation.

1974 A mother who forms a lesbian relationship after separating from her husband loses custody because of her sexual orientation in *Case* v. *Case*.[3] More than 20 custody cases about sexual orientation follow, with consistently poor results for lesbian and gay parents.

1975 Supreme Court of Canada denies Mrs. Murdoch any interest in a cattle farm held in her husband's name, notwithstanding that she worked along side her husband in the fields for years.[4] The decision sparks a public outcry which spurs family law reform in Canada and the Commonwealth.

1976 The *Family Law Reform Act* (Ontario) is introduced for first reading on October 11.

1976 Doug Wilson's discrimination in employment complaint is dismissed in *University of Saskatchewan* v. *Saskatchewan Human Rights Commission*, the first sexual orientation human rights case.[5] The Court states that the decriminalization of homosexual sex does not indicate the existence of a national policy protecting the human rights of gay men.

1976 Richard North and Chris Vogel file a complaint with the Manitoba Human Rights Commission alleging that a denial of employment benefits on the basis of both sex and marital status is discriminatory; their complaints are dismissed in *Vogel v. Government of Manitoba*.[6]

1977 Quebec is the first province to add sexual orientation to the list of prohibited grounds of discrimination in its human rights legislation.

1977 In *Life Together: A Report on Human Rights in Ontario*, the Ontario Human Rights Commission recommends adding sexual orientation to the list of prohibited grounds of discrimination in Ontario's human rights legislation.

1977 An attempt to add sexual orientation to the *Canadian Human Rights Act* fails.

1978 In the same week a provincial election is called, police raid Toronto bathhouses under the "common bawdy-house" provisions of the *Criminal Code*. Although most of the charges are later thrown out of court, patrons are subjected to well-publicized arrests and bathhouse owners suffer extensive property damage. The protests which follow lead to the beginning of Toronto's organized gay and lesbian community.

1978 Prime Minister Trudeau declares: "the state has no business in the bedrooms of the Nation."

1978 *Family Law Reform Act, 1978,* is proclaimed on March 31. The definition of "spouse" includes unmarried couples for support purposes.

1978 Harvey Milk, an openly gay Supervisor of San Francisco, is assassinated.

1980 The Supreme Court of Canada applies the constructive trust to recognize non-financial contributions by unmarried spouses for the first time in *Pettkus* v. *Becker*, awarding a constructive trust in recognition of the parties' joint effort and teamwork.[7]

1981 The Ontario Court of Appeal finds that "homosexuality is a neutral factor" with respect to custody and access in *Bezaire* v. *Bezaire*.[8] This becomes the standard in custody cases, although results continue to reflect that gays and lesbians are expected to be "discreet" about their sexual orientation.

1981 The *Charter* is introduced. Svend Robinson moves for the inclusion of sexual orientation in section 15, but another member scoffs at the amendment, saying that Parliament could not "include every barnacle and eavestrough in the Constitution of Canada."

1982 The *Charter* comes into force. Section 15 does not specifically include sexual orientation, but its open-ended language is said to include it during debate. Section 15 is subject to a three-year "moratorium" in order to give governments time to review their policies and legislation, receive submissions and begin the legislative "Charter compliance" process.

1983 In Minnesota, Sharon Kowalski survives a car accident with extensive physical and intellectual disabilities. Although Ms. Kowalski and Karen Thompson are a committed couple who have exchanged rings and bought a house together, Ms. Kowalski's father is appointed her guardian and he soon blocks Ms.Thompson from visiting her. Ms. Thompson pursues litigation until 1991 when she finally succeeds in obtaining guardianship.[9]

1984 Berkeley, California becomes the first US city to extend domestic partnership benefits to same-sex partners of city employees.

1985 Following the release of the Federal government's discussion paper on section 15, *Equality Issues in Federal Law: A Discussion Paper,* the Boyer Commission holds public hearings, creating a valuable record of the realities of lesbian and gay existence in Canada. The Commission hears evidence of violence against lesbians and gays; denials of access to public benefits; bias against lesbian and gay parents in custody litigation; entrapment, harassment, interrogation and expulsion of gays and lesbians from the armed forces; a lack of resources for lesbian and gay youth thrown out of their families of origin; denials of hospital visitation rights when one partner is unconscious; and exclusion from public clubs and restaurants. The resulting report urges the inclusion of sexual orientation in the *Canadian Human Rights Act*, noting that every annual report of the Canadian Human Rights Commission from 1979 to 1985 has recommended the amendment. However, in a responding paper, *Toward Equality*, the federal government passes responsibility for such protection to the courts.

1985 On June 4, the *Family Law Act* (Ontario) is introduced for first reading.

1986 On March 31, the *Family Law Act* (Ontario) is proclaimed.

1986 *Bowers* v. *Hardwick*: the U.S. Supreme Court finds that Georgia's sodomy law did not violate the right to privacy, at least with respect to "homosexual sodomy."[10]

1986 *Anderson* v. *Luoma:* first reported family law case involving a same-sex couple. A constructive trust award is granted and child support and spousal support are denied.[11]

1987 An amendment to the *Ontario Human Rights Code* prohibits discrimination in employment on the basis of sexual orientation.

1987 Denmark enacts domestic partnership legislation that gives same-sex couples the same rights and obligations as married couples, except for adoption rights. Over the next ten years, similar legislation is enacted in Norway, Sweden, Greenland, Iceland, Hungary and Holland.

1988 Section 146(1.1) of the *Income Tax Act* is introduced. Employer pension survivor benefits granted to unmarried opposite-sex couples. Several changes in the following years impose tax costs by recognizing unmarried relationships.

1988 Karen Andrews challenges provisions of OHIP after being denied family coverage for her partner and her partner's biological child. The Court concludes that OHIP's regulations do not offend section 15 since same-sex couples cannot have children and do not have the same legal obligations as heterosexual couples, and are therefore not similarly situated to opposite-sex couples.[12]

1989 In *Braschi v. Stahl Associates,* the New York Court of Appeals holds that New York statutory law allows a committed same-sex partner to inherit rights to a rent-controlled apartment upon the death of a "family member" living with the deceased, and the court finds that same-sex couples are "family."[13]

1991 The British Columbia Supreme Court grants Timothy Knodel provincial medical benefits for his HIV positive same-sex partner.[14]

1991 In *Alison D.* v. *Virginia M.*, the New York Court of Appeals declines to expand on *Braschi* and refuses to require visitation rights to a child for the same-sex partner of the biological mother.[15]

1992 Michelle Douglas sues the Armed Forces in the Federal Court of Appeal for discrimination under section 15, and although she settles, the Court comments that her success is supportable under the jurisprudence.[16]

1992 Graham Haig is successful in the Ontario Court of Appeal in having the *Canadian Human Rights Act* judicially amended to include same-sex couples in its protections, after having been denied promotions in the Canadian Armed Forces after coming out.[17] The federal government announces that it will not appeal.

1992 Michael Leshner convinces a Board of Inquiry to order the Ontario government to set up an off-side pension providing same-sex couples with spousal pension benefits and to fully fund that plan if the *Income Tax Act* is not amended within three years.[18] The argument proceeds as a *Charter* challenge to discrimination on the basis of marital status under the *Ontario Human Rights Code*, relying on *Haig.*

1993 Section 252(4) of the *Income Tax Act* (Canada) gives global spousal status to opposite-sex cohabitees. In that year, opposite-sex couples receive tax benefits of approximately $5 billion dollars, comprising the 67th largest government expenditure. It is estimated that same-sex couples lose between $16.2 million and $165 million by subsidizing a system which does not benefit them.[19]

1993 In *Layland and Beaulne* v. *Ontario,* a majority of the Ontario Divisional Court dismisses a challenge to the opposite-sex requirement of marriage at common law because each of Layland and Beaulne is free to marry a woman.[20]

1993 The Supreme Court of Canada decides *Mossop,* finding that the denial of bereavement leave does not infringe the *Ontario Human Rights Act,* because there is no discrimination on the basis of "family status."[21] The Court leaves the *Charter* issue open.

1993 In *Canada* v. *Ward*, the Supreme Court of Canada states that an individual fearing persecution because of sexual orientation would be considered a member of a "particular social group" worthy of special protection as a Convention refugee.[22]

1993 The Hawaii Circuit Court rules in *Baehr* v. *Miike* that denial of marriage licenses to same-sex couples is sex discrimination and remands the case to trial to allow for state justification.[23]

1993 In *McAleer* v. *Canada (Human Rights Commission)* telephonic messages designed to incite hatred against gay men and lesbians are found to be discriminatory.[24] This is the first tribunal decision under the *Canadian Human Rights Act* based solely on sexual orientation.

1993 M. and H. separate and M sues for partition and sale of a jointly owned country property, a constructive trust interest in the city home and various remedies under the *Business Corporations Act (Ontario)*.[25] Her initial application includes a claim for monthly support and is later amended to specifically challenge the opposite sex definition of "spouse" in section 29 of the *FLA* and to claim support under that section.

1994 In *Re Bell Canada and Canadian Telephone Employees' Association*, an arbitrator finds that the refusal to extend spousal benefits to same-sex partners violates prohibitions in both a collective agreement and the *Canadian Human Rights Act* following *Haig*.[26]

1994 The New Democratic Government introduces legislation aimed at remedying discrimination against gay men and lesbians, which is described as "constitutionally necessary," but is introduced on a "free vote." The Government relies on the support of Liberal leader, Lyn McLeod, who has previously pledged her support to ending discrimination against gay and lesbian relationships. Instead, McLeod reneges on her promise, and a watered-down Bill 167 goes down to defeat on second reading. Thousands protest, and individual gays and lesbians are forced to contemplate case-by-case *Charter* litigation. Over half a million people protest the Bill's failure during that year's Gay Pride March.

1994 City council's refusals to allow a Gay Pride parade in Hamilton is found to be discriminatory under human rights legislation. Similar conclusions are reached in Saskatchewan in 1995 and London, Ontario in 1997.

1994 Delwin Vriend's challenge to Alberta's human rights legislation is allowed and sexual orientation protection is read into the legislation. The decision is overturned on appeal and a decision is pending from the Supreme Court of Canada.[27]

1995 In *Canadian Broadcasting Corp.* v. *Canadian Media Guild (Local 213 of The Newspaper Guild)*, an arbitrator directs the CBC to provide a pension plan to employees in settled same-sex relationships that is similar to the pension plan provided to employees in opposite-sex spousal relationships.[28]

1995 Three same-sex couples in Ottawa are each granted joint custody during the relationship as a means of creating parental rights.

1995 Applying section 15, a trial court reads sexual orientation into Newfoundland's human rights legislation in *Newfoundland (Human Rights Commission)* v. *Newfoundland*.[29]

1995 Four Ontario co-mothers adopt the children born to their same-sex partners by alternative fertilization. The opposite sex requirement for joint adoption applications is found to offend section 15 in *Re K*.[30]

1995 Jim Egan and Jack Nesbit demonstrate discrimination under section 15, but a majority of Justices find a reasonable limit under section 1 with respect to the *Old Age Security Act*.[31] *Miron v. Trudel* is released the same day, and allows a challenge to a definition of spouse based on marriage.[32]

On the same day *Egan* is released, Revenue Canada states that it will de-register any employer health services plans if they include benefits for same-sex couples.

1996 Charron J. of the Ontario Court General Division (as she then was) cannot distinguish herself from *Egan* and feels bound to follow *Egan* in *Rosenberg*, a case about private, earned pensions and their treatment under the *Income Tax Act*.[33]

1996 *M.* v. *H.* trial decision: Epstein J. gives same-sex couples spousal support rights and obligations. The declaration of invalidity is not stayed pending appeal.[34]

1996 The Canadian Human Rights Commission states that the failure to include sexual orientation in the human rights legislation "undermines Canada's much vaunted claim to be a leader in human rigths, [and] it is a failure in moral logic and a near-public repudiation of the rights of many law-abiding and tax-paying Canadians."

1996 Stanley Moore and Dale Akerstrom successfully challenge the Department of Foreign Affairs and Trade's refusal to recognize them as spouses for the purpose of employment benefits.[35] In its decision, the Canadian Human Rights Tribunal orders

the federal government to prepare an inventory of all provisions of the *Income Tax Act* "which would treat any employment related benefits paid to same-sex common law couples differently for taxation purposes from the way they would be treated if paid to an opposite-sex common-law couple," and to eliminate all forms of discrimination so listed.

The federal government announces a month later that it will not appeal the Tribunal's decision regarding the extension of employment benefits to same-sex couples, but will appeal the balance, stating that it goes beyond the complaints filed.

On September 14, 1996, Revenue Canada issues a private ruling that a health services plan providing coverage for same-sex couples is capable of satisfying the definition of a "private health services plan," thus reversing an earlier decision to de-register employer health services plans including benefits for same-sex couples.

1996 The House of Commons narrowly passes Bill C-33, an amendment to the *Canadian Human Rights Act* to include sexual orientation as a prohibited ground of discrimination, with preamble about family values.

1996 The U.S. Supreme Court strikes down a 1992 amendment to Colorado's constitution that prohibited giving civil rights protections to lesbians and gay men.

1996 Eight U.S. states pass laws that deny recognition of same-sex marriage. Bill Clinton, who had been elected president with strong lesbian and gay support based on his promise of equality, signs the *Defence of Marriage Act* in response to the Hawaii marriage decision. The *Defence of Marriage Act* deems all spousal references in federal legislation to exclude same-sex couples.

1996 Air Canada refuses to allow an employee, Neils Laessoe, to register his same-sex partner as his common law spouse for the purpose of obtaining employment benefits.[36] The Canadian Human Rights Tribunal finds in favour of Air Canada, stating that Air Canada should not be put to a higher standard than is required of the federal government in the extension of pension and retirement benefits to same sex couples. The Tribunal indicates,however, that if a *Charter* challenge had been made to the *Income Tax Act* and to the *Pension Benefit Standards Act*, the result might have been different.

1996 William Dwyer and Mary-Woo Sims are successful in obtaining damages for employment benefits denied them by the Municipality of Metropolitan Toronto, and all municipalities across Ontario are ordered to give such employment benefits. All municipalities are ordered to provide survivor pension benefits in the event that the *Income Tax Act* is amended accordingly.[37]

1996 On December 3, the Hawaii Circuit Court releases its decision in *Baehr* v. *Miike,* finding that the prohibition of same-sex marriage violates the equal protection clause of the U.S. Constitution.[38]

1996 On December 18, the Ontario Court of Appeal releases its decision in *M* v. *H* in which Charron J.A. (Doherty J.A. concurring) upholds the trial court's decision that same-sex couples should have spousal support rights and obligations, but suspends the declaration for one year.

1997 Kelly Kane challenges the definition of "spouse" under the *Insurance Act* and successfully obtains death benefits in the Ontario Court (General Division) after her partner is killed in a bicycle accident.[39]

1998 *Vriend* and *M.* v. *H.* pending before the Supreme Court of Canada. These cases present an opportunity for the court to give content to the finding that sexual orientation is an analogous ground.

General Sources

B. D. Adam, *The Rise of a Gay and Lesbian Movement* (New York: Simon and Schuster, 1995).

C. Blatchford, "Shame on N.D.P." *Toronto Sun* (10 June 1994) 51.

Canada, *Canadian Human Rights Commission, Annual Report 1995* (Ottawa: Minister of Supply and Services Canada, 1996).

W.N. Eskridge, Jr., *The Case for Same-Sex Marriage: From Sexual Liberty to Civilized Commitment* (New York: The Free Press, 1996) 15-50.

L. Faderman, *Odd Girls and Twilight Lovers: A History of Lesbian Life in Twentieth-Century America* (New York: Penguin Books, 1991).

P. Gombu and P. Mascoll, "Latex Gloves `Matter of Choice`" *Toronto Star* (11 June 1994) A3.

D.F. Greenberg, *The Construction of Homosexuality* (Chicago: The University of Chicago Press, 1983) 466-481.

G. Herek, "The Tyranny of 10%" (Aug.1, 1989) *The Advocate* 46-48.

"Holy Matrimony!" (June 1996) *Out* 100-102.

House of Commons, *Equality for All: Report of the Parliamentary Committee on Equality Rights* (Ottawa: Queen's Printer for Canada, 1985) (Chair: J. Patrick Boyer).

House of Commons, *Toward Equality: The Response to the Report of the Parliamentary Committee on Equality Rights* (Ottawa: Communications and Public Affairs, Department of Justice, 1986) .

E.L. Kennedy and M. D. Davis, *Boots of Leather, Slippers of Gold: The History of a Lesbian Community* (New York: Routledge, 1993).

K. Lahey, *Are We 'Persons' Yet, Law and Sexuality in Canada* (Toronto: University of Toronto Press, 1998) (forthcoming) at chapters 4 and 5.

K. Lahey, "The Political Economies of `Sex` and Canadian Income Tax Policy" (Address to the Canadian Bar Association (Ontario), 1998) [unpublished].

M. Leopold and W. King, "Compulsory Heterosexuality, Lesbians, and the Law: The Case for Constitutional Protection" (1985) 1 CJWL 163.

E. Marcus, *Making History: The Struggle for Gay and Lesbian Equal Rights* 1945 - 1990 (Toronto: Harper Perennial, 1993).

M. Mittelstaedt and J. Rusk, "Ontario Bill on Gay Rights Defeated" *Globe and Mail* (10 June 1994) A1.

J. Rusk, "Bill's Defeat Galbanizes Activists: Community Plans to Continue Fight in Court" *Globe and Mail* (11 June 1994) A4.

B. Ryder, "Becoming Spouses: The Rights of Lesbian and Gay Couples" (Toronto: Osgoode Hall Law School, October 1993).

M. Scott, "Defeat Won't Silence Gays and Lesbians" *Toronto Star* (14 June 1994) A17.

J. Wilkes, "Lesbian moms vow court fight" *Toronto Star* (10 June 1994) A11.

Selected materials may be found in the Brandeis Brief.

Endnotes

1. *Loving v. Virginia*, 385 U.S. 986; 87 S. Ct. 595;17 L. Ed. 2d 448 (1966).
2. *Re North and Matheson* (1974), 52 D.L.R. (3d) 280 (Man. Co. Ct.).
3. *Case v. Case* (1974), 18 R.F.L. 132 (Sask. Q.B.).
4. *Murdoch v. Murdoch* (1976), 26 R.F.L. 1 (T.D.).
5. *University of Saskatchewan v. Saskatchewan Human Rights Commission*, [1976] 3 W.W.R. 385 (Sask. Q.B.).
6. *Vogel v. Government of Manitoba* (1983), 4 C.H.R.R. D/1654 (Bd. of Adj.).
7. *Pettkus v. Becker*, [1980] 2 S.C.R. 834.
8. *Bezaire v. Bezaire* (1980), 20 R.F.L. (2d) 358 (Ont. C.A.).
9. *In Re Kowalski*, 478 N.W. 2d 790 (Minnesota Court of Appeal 1991); Karen Thompson and Julie Andrzekewski, *Why Can't Sharon Kowalski Come Home?* (San Francisco: Spinsters, 1988); L. Benkov, *Reinventing the Family* (New York: Crown Publishers, Inc. 1994) at 212-214.
10. *Bowers v. Hardwick*, 478 U.S. 186 (1986).
11. *Anderson v. Luoma* (1986), 50 R.F.L. (2d) 127 (B.C.S.C.).
12. *Andrews v. Ontario (Minister of Health)* (1988), 49 D.L.R. (4th) 584 (Ont. H.C.J.).
13. *Braschi v. Stahl Associates*, 74 N.Y. 2D 201 (Court of Appeal).
14. *Knodel v. British Columbia (Medical Services Commission)*, [1991] 6 W.W.R. 728 (B.C.S.C.).
15. *Alison D. v. Virginia M.*, 572 N.E. 2d 27 (New York Court of Appeals).
16. *Douglas v. Canada (M.N.R.)*, [1993] F.C.J. No. 464 (F.C.(T.D.)) [QL].
17. *Haig and Birch v. Canada* (1992), 9O.R. (3d) 495 (Ont. C.A.).
18. *Leshner v. Ontario* (No. 2) (1992), 12 C.H.R.D/184 (Ont. Bd. of Inq.(H.R.C.)).

19. Lahey, B.A., "The Political Economies of `Sex` and Canadian Income Tax Policy" (Address to the Canadian Bar Association (Ontario), 1998) [unpublished].

20. *Layland v. Ontario (Minister of Consumer and Commercial Relations)* (1993), 104 D.L.R. (4th) 214 (Ont. Gen. Div.).

21. *Mossop v. Canada,* [1993] 1 S.C.R. 554.

22. *Canada v. Ward,* [1993] 2 S.C.R. 689.

23. *Baehr v. Lewin,* 852 P. 2d 44 (Hawaii, 1993); *Baehr v. Miike,* 80 Haw. 341, 910 P 2d. 112 (1996).

24. *McAleer v. Canada (Human Rights Commission)*, (1996) 132 D.L.R. (4th) 672 (Fd. Ct. T.D.).

25. *M. v. H.* (1993), 50 R.F.L. (3d) 92 (Ont. Ct. Gen. Div.).

26. *Re Bell Canada and Canadian Telephone Employee's Association* (1994), 43 L.A.C. (4th) 172.

27. *Vriend v. Alberta* [1994] 6 W.W.R. 414 (Alta. Q.B.); (1996), 132 D.L.R. (4th) 595 (C.A.) (Appeal to Supreme Court of Canada heard on November 4, 1997).

28. *Canadian Broadcasting Corp. v. Canadian Media Guild (Local 213 of the Newspaper Guild)* (1995), 52 L.A.C. (4th) 350 (Can.).

29. *Newfoundland (Human Rights Commission) v. Newfoundland* (1995), 127 D.L.R. (4th) 694 (Nfld. T.D.).

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

31. *Egan v. Canada* [1995] 2 S.C.R. 513.

32. *Miron v. Trudel,* [1995] 2 S.C.R. 418.

33. *Rosenberg v. Canada* (Attorney General) (1995), 25 O.R. (3d) 612 (Ont. Gen. Div.).

34. *M v. H* (1996), 31 O.R. (3d) 417 (C.A.).

35. *Moore and Akerstrom v. The Queen* [1996] C.H.R.D. No. 8 (Can. Human Rts. Trib.).

36. *Laessoe v. Air Canada,* T.D. No. 10/96 (September 13, 1996) (Can. Hum. Rts. Trib.).

37. *Dwyer v. Toronto (Metropolitan)*, [1996] O.H.R.B.I.D. No. 4 (Ont. Bd. Of Inq. (HRC)) [QL]*Dwyer v. Toronto (Metropolitan)*, [1996] O.H.R.B.I.D. No. 33 (Ont. Bd. Of Inq. (HRC)) [QL].

38. *Baehr v. Lewin,* 852 P. 2d 44 (Hawaii, 1993); *Baehr v. Miike,* 80 Haw. 341, 910 P 2d. 112 (1996).

39. *Kane v. Ontario (Attorney-General)*, [1997] O.J. No. 3979 (Ont. Gen. Div.).

Appendix 4:

SOCIAL CONTEXT OF GAY AND LESBIAN LIFE

M.N. Cameli, *Extending Family Benefits to Gay Men and Lesbian Women*, (1992) 68 *Chicago-Kent L.R.* 447.

M.C. Dunlap, "The Lesbian and Gay Marriage Debate: A Microcosm of Our Hopes and Troubles in the Nineties" (1991) 1 *Law & Sexuality* 63.

W.N. Eskridge, Jr., *The Case for Same-Sex Marriage* (New York: The Free Press, 1996) at 1 - 13; 51 - 86; 87 - 122; 123 - 182; 183 -193; 219 - 261; 263 - 267.

J.C. Gonsiorek and J. D. Weinrich "The Definition and Scope of Sexual Orientation" in *Homosexuality: Research Implications For Public Policy,* J.C. Gonsiorek and J.D. Weinrich, eds. (Newbury Park: Sage Publications, 1991)1-12.

O.F. Greenberg, *The Construction of Homosexuality* (Chicago: University of Chicago Press, 1988) 466-481.

G. Herek, "The Tyranny of 10%" (Aug.1, 1989) *The Advocate* 46-48.

G.M. Herek, "Myths About Sexual Orientation: A Lawyer's Guide To Social Science Research" (1991) 1 *Law & Sexuality* 133-172.

G.M. Herek, "Stigma, Prejudice, and Violence Against Lesbians and Gay Men" in *Homosexuality: Research Implications For Public Policy,* J.C. Gonsiorek and J.D. Weinrich, eds. (Newbury Park: Sage Publications, 1991) 60-80.

Nan D. Hunter, "Marriage, Law, and Gender: A Feminist Inquiry" (1991) 1-9 *Law and Sexuality* 7.

J.A.W. Kirsch and J.D. Weinrich "Homosexuality, Nature, and Biology: Is Homosexuality Natural? Does it Matter?" in *Homosexuality: Research Implications For Public Policy*, J.C. Gonsiorek and J.D. Weinrich, eds. (Newbury Park: Sage Publications, 1991)13-31.

Kathleen A. Lahey, *Are We 'Persons' Yet, Law and Sexuality in Canada* (Toronto: University of Toronto Press, 1998) (forthcoming) at chapters 4 and 5.

M. Leopold and W. King "Compulsory Heterosexuality, Lesbians, and the Law: The Case for Constitutional Protection" (1985) 1 C.J.W.L. 163.

M. Nava and R. Dawidoff, *Created Equal: Why Gay Rights Matter to America,* (New York: St. Martin's Press, 1994) at ix- xvi; 1 - 28; 29 - 57; 67 - 74; 75 - 112; 135 - 158; 159 - 167; 168 - 176.

J. Nichols, *The Gay Agenda: Talking Back to the Fundamentalists,* (New York: Prometheus Books, 1996) 17-33.

C. O'Brien and L. Weir, "Lesbians and Gay Men Inside and Outside Families" in *Canadian Families Diversity, Conflict and Change,* N. Mandell and A. Duffy, eds. (Toronto: Harcourt Brace & Company, Canada) 111-139.

Suzanne Pharr, *Homophobia A Weapon of Sexism* (Little Rock: Chardon Press, 1988) 1-52.

B. Ryder, "Becoming Spouses The Rights Of Lesbian And Gay Couples" (1993) Law Society of Upper Canada *Special Lectures*, Family Law: Roles, Fairness and Equality 1.

B. Ryder, *Equality Rights and Sexual Orientation: Confronting Heterosexual Family Privilege* (1990) 9 C.L.E.L.J. 39.

P. Rusk, "Same-Sex Spousal Benefits and the Evolving Conception of Family" (1993) 52 U.T.F.L.R. 170.

R.J. Testa B.N. Kinder and G. Ironson "Heterosexual Bias in the Perception of Loving Relationships of Gay Males and Lesbian" (1987) 23:2 *Journal of Sex Research* 163-172.

M.P. Treauthart, "Adopting a More Realistic Definition of 'Family'" Gonzaga University School of Law (1990) 26:1 *Gonzaga Law Review* 91.

These materials may be found in the Brandeis Brief.

Appendix 5:

PSYCHOLOGICAL AND SOCIOLOGICAL RESEARCH ON INTERDEPENDENCE IN GAY AND LESBIAN RELATIONSHIPS

R.M. Berger "Men Together: Understanding The Gay Couple" (1990) 19:3 *Journal of Homosexuality* 31-48.

P. Blumstein and P. Schwartz, *American Couples: Money, Work, Sex* (New York: William Morrow and Company, Inc., 1983) 11-24; 51-111.

M.A. Caldwell and L.A. Peplau, "The Balance Of Power In Lesbian Relationships" (1984) 10 7/8 *Sex Roles* 587-599.

Natalie Eldridge and Lucia Gilbert, "Correlates of Relationship Satisfaction in Lesbian Couples" in *Psychology of Women Quarterly* 14 (1990) 43-62.

W.N. Eskridge, Jr. *The Case for Same-Sex Marriage: From Sexual Liberty to Civilized Commitment* (New York: The Free Press, 1996) 1-13.

G.M. Herek, "Myths About Sexual Orientation: A Lawyer's Guide To Social Science Research" (1991) 1 *Law & Sexuality* 133 at 161-165.

M. Mendola, *The Mendola Report: A New Look At Gay Couples* (New York: Crown Publishers, Inc., 1980) Prologue; 246-265.

C. O'Brien and L. Weir, "Lesbians and Gay Men Inside and Outside Families" in N. Mandell and A. Duffy, *Canadian Families Diversity, Conflict and Change* (Toronto: Harcourt Brace & Company, Canada) 111 at 122-127.

Letitia Anne Peplau, "Lesbian and Gay Relationships" in J.C. Gonsiorek and J.D. Weinrich, *Homosexuality: Research Implications For Public Policy* (Newbury Park: Sage Publications, 1991)177-196.

M.E. Reilly and J.M. Lynch, "Power-Sharing In Lesbian Partnerships" (1990) 19:3 *Journal of Homosexuality* 1-28.

S. Slater, *The Lesbian Family Life Cycle* (New York: The Free Press, 1995) 37-77.

R.J. Testa, B.N. Kinder and G. Ironson "Heterosexual Bias in the Perception of Loving Relationships of Gay Males and Lesbian" (1987) 23:2 *Journal of Sex Research* 163-172.

These materials may be found in the Brandeis Brief.

Appendix 6:

CHILDREN OF GAY AND LESBIAN PARENTS

K. Arnup, " 'We Are Family': Lesbian Mothers In Canada" (1991) 20:3/4 *RFR/DRF* 101-107.

D. A. Baptiste, Jr., "The Gay and Lesbian Stepparent Family" in *Gay and Lesbian Parents,* F.W. Bozett, ed. (Westport: Praeger Publishers, 1987) 112-137.

L. Benkov, *Reinventing The Family: The Emerging Story Of Lesbian And Gay Parents* (New York: Crown Publishers, Inc., 1994) 212-253; Notes at 273-275.

F.W. Bozett, "Children of Gay Fathers" in *Gay and Lesbian Parents,* F.W. Bozett, ed. (Westport: Praeger Publishers, 1987) 39-58.

F.W. Bozett, "Gay Fathers: A Review Of The Literature" (1989) 18:1/2 *Journal of Homosexuality* 137-162.

E.M. DiLapi, "Lesbian Mothers And The Motherhood Hierarchy" (1989) 18:1/2 *Journal of Homosexuality* 101-121.

Editors of *The Harvard Law Review* "Family Law Issues Involving Children" in *Lesbians And Child Custody: A Casebook,* D.J. Maggiore, ed., (New York: Garland Publishing, Inc., 1992) 157.

P. L. Ettelbrick, "Who Is A Parent?: The Need To Develop A Lesbian Conscious Family Law" (1993) 10 *NYLS Journal Of Human Rights* 513.

G. D. Green and F. Bozett, "Lesbian Mothers and Gay Fathers" in *Homosexuality: Research Implications For Public Policy,* J.C. Gonsiorek and J.D. Weinrich, eds. (Newbury Park: Sage Publications, 1991) at 197-214.

G. Herek "Myths about Sexual Orientation: A Lawyer's Guide to Social Science Research" (1991) 1 *Law & Sexuality* 133 at 152-161.

G.M. Herek, "Stigma, Prejudice, and Violence Against Lesbians and Gay Men" in J.C. Gonsiorek and J.D. Weinrich, *Homosexuality: Research Implications For Public Policy* (Newbury Park: Sage Publications, 1991) 60 at 70-72.

M.G de Lamadrid, ed., "Lesbians Choosing Motherhood: Legal Implications of Co-Parenting" in *Lesbians And Child Custody: A Casebook,* D.J. Maggiore, ed., (New York: Garland Publishing, Inc., 1992) 195.

M. Leopold and W. King "Compulsory Heterosexuality, Lesbians, and the Law: The Case for Constitutional Protection" (1985) 1 C.J.W.L. 163.

F. Nelson, *Lesbian Motherhood: An Exploration of Canadian Lesbian Families* (Toronto: University of Toronto Press Incorporated, 1996) 3-42; 102-138.

C. O'Brien and L. Weir, "Lesbians and Gay Men Inside and Outside Families" in N. Mandell and A. Duffy, *Canadian Families Diversity, Conflict and Change* (Toronto: Harcourt Brace & Company, Canada) 127-130.

C.J. Patterson, "Children Of Lesbian And Gay Parents" (1992) 63 *Child Development* 1025-1042.

S. B. Pennington, "Children of Lesbian Mothers" in *Gay and Lesbian Parents,* F.W. Bozett, ed. (Westport: Praeger Publishers, 1987) 58-85.

S. Pollack, "Lesbian Mothers: A Lesbian-Feminist Perspective on Research" in *Lesbians And Child Custody: A Casebook*, D.J. Maggiore, ed., (New York: Garland Publishing, Inc., 1992) 219.

N.D. Polikoff, "Lesbian Mothers, Lesbian Families: Legal Obstacles, Legal Challenges in *Lesbians And Child Custody: A Casebook*, D.J. Maggiore, ed., (New York: Garland Publishing, Inc., 1992) 229.

W. Ricketts and R. Achtenberg, "The Adoptive and Foster Gay and Lesbian Parent" in *Gay and Lesbian Parents,* F.W. Bozett, ed. (Westport: Praeger Publishers, 1987) 39-85.

R. R. Rivera, "Legal Issues in Gay and Lesbian Parenting" in *Gay and Lesbian Parents,* F.W. Bozett, ed. (Westport: Praeger Publishers, 1987) 199-227.

S. Slater, *The Lesbian Family Life Cycle* (New York: The Free Press, 1995) 89-118.

These materials may be found in the Brandeis Brief.

Appendix 7:

CHANGES IN FAMILIES

David R. Lutwin, Gary N. Siperstein, "Househusband Fathers" in *Dimensions of Fatherhood,* Shirley M.H. Hanson and Frederick W. Bozett, eds. (Beverly Hills/London: Sage Publications, 1985) 269-306.

Ellen M. Gee, "Contemporary Diversities" in *Canadian Families Diversity, Conflict and Change,* N. Mandell and A. Duffy, eds. (Toronto: Harcourt Brace & Company, Canada) 79-109.

Vanier Institute of the Family, *Today's Families at the Heart of the Matter* (Ottawa: Vanier Institute of the Family, 1994).

R.A. Lewis, "Men's Changing Roles in Marriage and the Family" in *Men's Changing Roles in the Family,* R.A. Lewis and M.B. Sussman, eds. (New York/London: The Haworth Press, 1986) 1-10.

J. Pleck, M. Lamb, and J. Levine, "Epilog: Facilitating Future Change in Men's Family Roles" in *Men's Changing Roles in the Family,* R.A. Lewis and M.B. Sussman, eds. (New York/London: The Haworth Press, 1986) 11-16.

These materials may be found in the Brandeis Brief.

Appendix 8:

SUPPORT PROVISIONS: The *Family Law Act* and *Divorce Act* Compared

***Family Law Act* — R.S.O. 1990, c. F.3**

PART III
SUPPORT OBLIGATIONS

29. Definitions. — In this Part,
"dependent" — "dependent" means a person to whom another has an obligation to provide support under this Part;

"spouse" — "spouse" means a spouse as defined in subsection 1(1), and in addition includes either of a man and woman who are not married to each other and have cohabited,

(a) continuously for a period of not less than three years, or

(b) in a relationship of some permanence, if they are the natural or adoptive parents of a child.

30. Obligation of spouses for support.— Every spouse 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 doing so.

33.(1) Order for support.— A court may, on application, order a person to provide support for his or her dependants and determine the amount of support.

(8) Purposes of order for support of spouse.— An order for the support of a spouse should,

(a) recognize the spouse's contribution to the relationship and the economic consequences of the relationship for the spouse;
(b) share the economic burden of child support equally;
(c) make fair provision to assist the spouse to become able to contribute to his or her own support; and
(d) relieve financial hardship, if this has not been done by orders under Parts I (Family Property) and II (Matrimonial Home).

(9) Determination of amount.— In determining the amount and duration, if any, of support in relation to need, the court shall consider all the circumstances of the parties, including,

(a) the dependant's and respondent's current assets and means;
(b) the assets and means that the dependent and respondent are likely to have in the future;
(c) the dependent's capacity to contribute to his or her own support;
(d) the respondent's capacity to provide support;
(e) the dependant's and the respondent's age and physical and mental health;

***Divorce Act* — R.S.C. 1985, (2nd Supp.), c.3**

COROLLARY RELIEF

15.(1) Definition of "spouse". In this section and section 16, "spouse" has the meaning assigned by subsection 2(1) and includes a former spouse.

15.(2) Order for support. A court of competent jurisdiction may, on application by either or both spouses, make an order requiring one spouse to secure or pay, or to secure and pay, such lump sum or periodic sums, or such lump sum and periodic sums, as the court thinks reasonable for the support of

(a) the other spouse;
(b) any or all children of the marriage; or
(c) the other spouse and any or all children of the marriage.

(3) Interim order for support.— Where an application is made under subjection (2), the court may, on application by either or both spouses, make an interim order requiring one spouse to secure or pay, or to secure and pay, such lump sum or periodic sums, or such lump sum and period sums, as the court thinks reasonable for the support of

(a) the other spouse;
(b) any or all children of the marriage; or
(c) the other spouse and any or all children of the marriage,

pending determination of the application under subsection (2).

(4) Terms and conditions.— The court may make an order under this section for a definite or indefinite period or until the happening of a specified event and may impose such other terms, conditions or restrictions in connection therewith as it thinks fit and just.

(f) the dependant's needs, in determining which the court shall have regard to the accustomed standard of living while the parties resided together;

(g) the measures available for the dependant to become able to provide for his or her own support and the length of time and cost involved to enable the dependant to take those measures;

(h) any legal obligation of the respondent or dependent to provide support for another person;

(i) the desirability of the dependant or respondent remaining at home to care for a child;

(j) a contribution by the dependant to the realization of the respondent's career potential;

(k) if the dependent is a child,

(i) the child's aptitude for and reasonable prospects of obtaining an education, and

(ii) the child's need for a stable environment;

(l) if the dependent is a spouse,

(i) the length of time the dependant and respondent cohabitated,

(ii) the effect on the spouse's earning capacity of the responsibilities assumed during cohabitation,

(iii) whether the spouse has undertaken the care of a child who is of the age of eighteen years or over and unable by reason of illness, disability or other cause to withdraw from the charge of his or her parents,

(iv) whether the spouse has undertaken to assist in the continuation of a program of education for a child of eighteen years of age or over who is unable for that reason to withdraw from the charge of his or her parents,

(v) any housekeeping, child care or other domestic service performed by the spouse for the family, as if the spouse were devoting the time spent in performing that service in remunerative employment and were contributing the earnings to the family's support,

(vi) the effect on the spouse's earnings and career development of the responsibility of caring for a child; and

(m) any other legal right of the dependant to support, other than out of public money.

(10) Conduct.— The obligation to provide support for a spouse exists without regard to the conduct of either spouse, but the court may in determining the amount of support have regard to a course of conduct that is so unconscionable as to constitute an obvious and gross repudiation of the relationship.

37.(1) Application for variation.— A dependent or respondent named in an order made confirmed under this Part, the

(5) Factors.— In making an order under this section, the court shall take into consideration the condition, means, needs and other circumstances of each spouse and of any child of the marriage for whom support is sought, including

(a) the length of time the spouses cohabitated;

(b) the functions performed by the spouse during the cohabitation; and

(c) any order, agreement or arrangement relating to support of the spouse or child.

(6) Spousal misconduct.— In making an order under this section, the court shall not take into consideration any misconduct of spouse in relation to the marriage.

(7) Objectives of order for support of spouse.— An order made under this section that provides for the support of a spouse should,

(a) recognize any economic advantages or disadvantages to the spouses arising from the marriage or its breakdown;

(b) apportion between the spouses any financial consequences arising from the care of any child of the marriage over and above the obligation apportioned between the spouses pursuant to subsection (8);

(c) relieve any economic hardship of the spouses arising from the breakdown of the marriage; and

(d) in so far as practicable, promote the economic self-sufficiency of each spouse within a reasonable amount of time.

respondent's personal representative, or an agency referred to in subsection 33(3), may apply to the court for variation of the order,

(2) Powers of court.— If the court is satisfied that there has been a material change in the dependant's or respondent's circumstances or that evidence not available on the previous hearing have become available, the court may discharge, vary or suspend a term of the order, prospectively or retroactively, relieve the respondent from the payment of part or all of the arrears or any interest due on them and make any other order under section 34 that the court considers appropriate in the circumstances referred to in section 33.

(3) Limitation on applications for variation.— No application for variation shall be made within six months after the making of the order for support or the disposition of another application for variation in respect of the same order, except by leave of the court.

17.(1) Order for variation, recision or suspension.— A court of competent jurisdiction may make an order varying, rescinding or suspending, prospectively or retroactively,

(a) a support order or any provision thereof on application by either or both former spouses; or

(b) a custody order or any provision thereof on application by either or both former spouses or by any other person.

(2) Application by other person. — A person, other than a former spouse, may not make an application under paragraph 1(b) without leave of the court.

(3) Terms and conditions. —The court may include in a variation order any provision that under this Act could have been included in the order in respect of which the variation order is sought.

(4) Factors for support order. — Before the court makes a variation order in respect of a support order, the court shall satisfy itself that there has been a change in the condition, means, needs or other circumstances of either former spouse or of any child of the marriage for whom support is or was sought occurring since the making of the support order or the last variation order made in respect of that order, as the case may be, and, in making the variation order, the court shall take into consideration that change.

(7) Objectives of variation order varying order for support of former spouse.— A variation order varying a support order that provides for the support of a former spouse should

(a) recognize any economic advantages or disadvantages to the former spouses arising from the marriage or its breakdown;

(b) apportion between the former spouses any financial consequences arising from the care of any child of the marriage over and above the obligation apportioned between the spouses pursuant to subsection (8);

(c) relieve any economic hardship of the former spouses arising from the breakdown of the marriage; and

(d) in so far as practicable, promote the economic self-sufficiency of each spouse within a reasonable period of time.

Appendix 9:

SUMMARY OF CASES, ARTICLES AND ADDRESSES ON LEGISLATIVE DEFERENCE

CASES

(i) General:

Andrews v. *Law Society of British Columbia*, [1989] 1 S.C.R. 143 at 152.

R.. v. *Edward Books & Arts Ltd.*, [1986] 2 S.C.R. 713 at 795.

New Brunswick Broadcasting Co. v. *Nova Scotia (Speaker of the House of Assembly)*, [1993] 1 S.C.R. 319 at 389.

Reference Re B.C. Motor Vehicle Act, [1985] 2 S.C.R. 486 at 497.

Rodriguez v. *B.C. (A.G.)*, [1993] 3 S.C.R. 519 at 564.

Tétreault-Gadoury v. *Canada (E.I.C.)*, [1991] 2 S.C.R. 22 at 44

Trial Decision at 617.

(ii) Deference as Minimal Impairment Issue:

Archibald v. *Canada*, [1997] F.C.J. No. 394 (T.D.).

Canadian Broadcasting Corporation v. *New Brunswick (A.G.)*, [1996] 3 S.C.R. 481

Eldridge v. *British Columbia*, [1997] S.C.J. No. 86 at para. 85-86.

Harvey v. *New Brunswick (A.G.)*, [1996] 2 S.C.R. 876.

Miron v. *Trudel*, [1995] 2 S.C.R. 418 at 478, 480.

Rocket v. *Royal College of Dental Surgeons*, [1990] 2 S.C.R. 232 at 248-251.

Ross v. *New Brunswick School District No. 15*, [1996] 1 S.C.R. 825.

(iii) Deference should advance *Charter* values:

Dickason v. *University of Alberta*, [1992] 2 S.C.R. 1103 at 1123.

Eldridge v. *British Columbia,* [1997] S.C.J. No. 86 at para. 85.

Irwin Toy Ltd. v. Quebec (A.G.), [1989] 1 S.C.R. 927 at 993-994.

McKinney v. *University of Guelph*, [1990] 3 S.C.R. 229 at 304-305, 309, 314-315.

RJR-MacDonald Inc. v. *Canada (Attorney General)*, [1995] 3 S.C.R. 199 at 329.

ADDRESSES

The Honourable Mr. Justice Michel Bastarache, "Experience, Morality, and the Liberty Interest in the Charter" Address to The Lawyers Club (5 January 1998, Toronto) at 12 [unpublished].

The Honourable Mr. Justice Antonio Lamer, "Address to the Empire Club of Canada," (April, 1995) [unpublished].

The Honourable Mr. Justice John Sopinka, "Judicial Independence"Address to the Ukrainian-Canadian Conference on Judicial Independence and Authority (2 October 1997, Kiev, Ukraine) at 2-3 [unpublished].

The Honourable Madam Justice Bertha Wilson, "The Charter of Rights and Freedoms" (1985) 50 Sask. L. Rev. 169 at 172.

SECONDARY MATERIALS: Books, Articles

The Honourable Madam Justice Rosalie Abella, "Public Policy and the Judicial Role" in M. McKenna, ed., *The Canadian and American Constitutions in Comparative Perspective* (Calgary: University of Calgary Press, 1993) 167 at 177.

W. Black and L. Smith, "The Equality Rights", in G.A. Beaudoin and E. Mendes, eds., *The Canadian Charter of Rights and Freedoms*, 3d ed. (Toronto: Carswell, 1996) at 14-40.

The Honourable Mr. Chief Justice Brian Dickson (Retired), "The Canadian Charter of Rights and Freedoms: Context and Evolution" in G.A. Beaudoin & E. Mendes, eds., *The Canadian Charter of Rights and Freedoms*, 3rd ed. (Toronto: Carswell, 1996) at 1-15.

R. Dworkin, *A Matter of Principle* (Cambridge: Harvard University Press, 1985) at 27-28, 34.

R. Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* (Cambridge: Harvard University Press, 1996) at 15-17, 24-26, 38.

D. Elliott, "*Sexual Orientation and the Charter: Canada at the Crossroads*", (Paper presented at the CBAO National Conference, Ottawa, 26 August 1997) [unpublished].

J.H. Ely, *Democracy and Distrust: A Theory of Judicial Review* (Cambridge: Harvard University Press, 1980) at 74-75

P. W. Hogg and A. A. Bushell, "The *Charter* Dialogue Between Courts and Legislatures" (1997) 35 O.H.L.J. 75 at 105

P. W. Hogg, *Constitutional Law of Canada*, 3d ed. (Supp.) (Scarborough: Thomson Canada, 1992) at 52-23 to 52-24;

M.J. Horwitz, "Foreword: the Constitution of Change: Legal Fundamentality Without Fundamentalism" (1993) 107 *Harvard Law Review* 30 at 63-64.

M. Jackman, "Protecting Rights and Promoting Democracy: Judicial Review Under Section 1 of the *Charter*" (1997) 34:4 Osgoode Hall L.J. 661 at 663.

Julie Jai, "Policy, Politics and Law: Changing Relationships in Light of the Charter" (1997) 9 N.J.C.L. 1 at 9, 16.

W.R. Lederman, "The Power of the Judges and the New Canadian Charter of Rights and Freedoms" (1982) 16 U.B.C.L. Rev. Charter Ed. 3.

S. Lightstone, "Seismic Shocks or Healthy Tension?" (Aug-Sept 1997) *CBAO Magazine National* 12 at 13-14.

The Honourable Mr. Justice B. L. Strayer, "Life Under the Canadian Charter: Adjusting the Balance between Legislatures and Courts" (1988) *Public Law* 347 at 349.

Dr. J.D. Whyte, "*Charter* Rights Without Remedies: Non-Discrimination Rights for Lesbian and Gays: A Case of Judicial Abandonment?" (Paper presented at the Canadian Bar Association - Ontario, Institute of Continuing Legal Education, Lesbian and Gay Issues and Rights Programme, Toronto, 31 January 1997) at 9 [unpublished].

Appendix 10:

INTERNATIONAL SUMMARY of STATUTES AND JUDICIAL DECISIONS CONFERRING EQUALITY OF STATUS ON LESBIANS AND GAY MEN

1. SUPPORT AND PROPERTY RIGHTS

I. By Statutory Provision

(a) British Columbia

Through an extended definition of "spouse", same-sex couples are included in British Columbia's provincial family law regime and have all the rights and responsibilities related to support, child custody and access.[1] Support orders are enforced under the *Family Maintenance Enforcement Act*.[2] Same and opposite-sex cohabitees are also able to enter into agreements and be bound by the Act's property division provisions.

Family Relations Act, R.S.B.C. 1996, c. 128, as am. by *Family Relations Amendment Act*, 1997 (proclaimed February 4, 1998).

Family Maintenance Enforcement Act, R.S.B.C. 1996, c.127 as am. by *Family Maintenance Enforcement Amendment Act*, 1997, (Proclaimed February 4, 1998).

(b) Australia

The Australian Capital Territory in its *Domestic Relationships Act 1994*, through its definition of "domestic relationship" gives same-sex partners property and spousal support support.[3]

Domestic Relationships Act 1994, Australian Capital Territory.

II. By Judicial Decision

Forrest* v. *Price (1992), 48 E.T.R. 72 (B.C. S.C.)

The plaintiff, a gay man who had been in a 13 year same-sex relationship marked by the classic division of roles characteristic of many heterosexual marriages, was awarded a constructive trust interest in the parties' various properties. See also, *Brunet* v. *Davis*, [1992] O.J. No. 1586 (Gen. Div.)(QL).

2. CUSTODY, ACCESS AND CHILD SUPPORT

I. By Statutory Provision

(a) British Columbia

The province of British Columbia has given gay and lesbian couples the same right to custody and access and imposed the same obligation to pay child support, as heterosexual couples, by redefining "parent" and adding a definition for "step-parent" in the *Family Relations Act*.[4]

> *Family Relations Act*, R.S.B.C. 1996, c. 128, as am. by *Family Relations Amendment Act*, 1997 (Proclaimed February 4, 1998).

(b) Iceland

Iceland's Registered Partnership law gives registered partners the right to obtain joint custody of each other's biological children. Both partners become the child's guardian and should the biological parent die, the other partner (the child's step-parent) automatically becomes the child's sole guardian.

II. By Judicial Decision

Canada

(a) ***Buist* v. *Greaves***, [1997] O.J. No. 2646 (Gen. Div.) (QL).

The non-biological co-mother's application for sole-custody of a child was refused solely on an examination of the best interests of the child. Sexual orientation was not relevant to the decision. The Applicant was given generous access and ordered to pay child support.

United States

(b) ***Holtzman* v. *Knott***, 520 N.W. 2d 91 (Wis. S.C., 1994), cert den 116 S.Ct. 475 (U.S. S.C., 1995).

A non-biological co-mother was permitted to seek access to her son. The court ruled that a "parent-like relationship" would be recognized when the following elements were present: that the biological or adoptive parent consented to and fostered the formation of a parent-like relationship with the child; that the applicant and child lived together in the same household; that the applicant assumed significant obligations of parenthood without expectation of financial compensation; and, that the relationship was of sufficient duration to become a "bonded, dependent relationship, parental in nature." See also the decision of Superior Court Judge Phillip Cummis (Essex County Court, New Jersey), in the matter of *V.C.* v. *M.B.* (November 1997), where a co-parent who raised twins with her lesbian partner was given interim access pending a custody trial; and, *J.A.L.* v. *E.P.H.* (1996), Lambda Update 3:6 (Penn. Super.

Ct.), where the court wrote that, "[T]he inescapable conclusion to be drawn... is that... the child was to be a member of their nontraditional family, the child of both of them, and not merely the offspring of E.P.H. as a single parent."

Australia

(c) *W.* v. *G.*, (New South Wales, 1996) (unreported).

Trial court ordered lump sum child support of $150,000 for two children, conceived in a lesbian relationship by artificial insemination, on the basis of an implied promise to support.

III. By Recommendation of a Legislative Committee

(a) Netherlands

"The law should offer better protection to children who are raised and cared for by two people of the same sex. Legal consequences should be introduced within and outside the boundaries of family law in an effort to "enhance" joint custody and co-guardianship. Adoption should become a possibility, albeit under stringent conditions."

Recommendation from the "Kortmann Committee Report to the State Secretary for Justice", Netherlands, November 12, 1997.

3. RIGHT TO ADOPT

I. By Statutory Provision

(a) British Columbia

British Columbia's adoption legislation was amended in November 1996 to permit same-sex couples to adopt.[5]

Adoption Act, R.S.B.C. 1996, c. 5.

II. By Judicial Decision

Canada

(b) *Re. K.* (1995), 23 O.R. (3d) 679 (Prov. Div.)

Ontario Provincial Division applied s.15(1) of the *Charter* to read same-sex couples into the definition of "spouse" in the step-parent provisions of provincial adoption law, with the result that the co-mothers of children conceived by artificial insemination were permitted to adopt their children without affecting the parental status of the birth mothers. See also: *Re. C.E.G. (No. 1)*, [1995] O.J. No. 4072 (Gen. Div.) (QL), *per* Aston J.

(c) ***Re. L. and S.***, File No.195/89 (Ont. Prov. Div.) *per* Pedlar J.

The applicant, a lesbian, was granted interim sole custody of two children. One child had been legally adopted by the applicant, the other was conceived by artificial insemination by her partner during their relationship. The decision was based on the definition of "parent" and "child" in the *Children's Law Reform Act*, which defines parent as any person who has acted with a settled intention to serve as parent.

(d) ***Benson* v. *Korn***, [1995] C.H.R.R. D/319 (August 4, 1995) (B.C. Council of Human Rights), *per* Patch.

A doctor's refusal to provide artificial insemination to a lesbian couple constituted discrimination on the basis of sexual orientation under British Columbia human rights legislation.

United States

(e) ***In the Matter of the Adoption of a Child by Jon Holden and Michael Galluccio,*** Superior Court of New Jersey, Chancery Division, Bergen County (Family Part), Honourable Sybil R. Moses (October 22, 1997) (unreported).

Gay and lesbian couples are permitted to adopt children jointly and will be measured by the same adoption standards as married couples. No couple will be barred from adopting because of their sexual orientation. (Decision also applies to unmarried heterosexual couples). See also: *Adoption of Tammy*, Lexis 528, Supreme Judicial Court of Massachusetts (4 May 1993).

United Kingdom

(f) ***In re W (A Minor) (Adoption: Homosexual Adopter),*** [1997] 3 W.L.R. 768.

In *re W*, a biological mother argued against a freeing order on the basis of public policy -- that Parliament had not intended people in same-sex relationships to apply to adopt a child. The Court disagreed, holding that the *Adoption Act 1976* permits adoption applications by single applicants, whether living alone at the time, or cohabiting in a heterosexual or homosexual relationship or even an "asexual" relationship with another person who it is proposed should fulfil a quasi-parental role towards the child. The Court stated that to conclude otherwise would be "illogical, arbitrary and inappropriately discriminatory" and contrary to its primary duty to protect and promote the child's welfare. See also *T., Petitioner*, 1997 S.L.T. 724 (Ct. Sess., Scot.); *Re AMT (Known as AC)*, [1997] S.L.T. 724 (Ct. Sess., Scot.).

4. RECOGNITION OF DOMESTIC CONTRACTS

I. By Statutory Provision

(a) British Columbia

Same-sex couples may enter into validly enforceable agreements and be bound by provincial family property division provisions. The relevant provisions, recently added to the *Family Relations Act,* are reproduced in the endnotes.[6]

Family Relations Act, R.S.B.C. 1996, c. 128, as am. by *Family Relations Amendment Act*, 1997 (Proclaimed February 4, 1998).

(b) Australia

Part IV of the *Domestic Relationships Act 1994*, recognizes the validity of domestic agreements entered into by same-sex partners.[7]

Domestic Relationships Act 1994, Australian Capital Territory

II. By Judicial Decision

(a) ***Sleeth* v. *Wasserlein*** (1991), 36 R.F.L. (3d) 278 (B.C. S.C.).

The British Columbia Supreme Court considered and gave complete effect to a settlement agreement reached between parties who had lived together in a same-sex relationship. In doing so, the court relied squarely upon conventional contract doctrine. See also, *Chrispen* v. *Tophan* (1986), 3 R.F.L. (3d) 149 (Sask. Q.B.), where the court rejected the general principle that contracts between cohabitees offended public policy.

5. CALCULATION OF INCOME FOR THE PURPOSES OF SOCIAL ASSISTANCE

I. By Statutory Provision

(a) British Columbia

British Columbia has changed its provincial social assistance rules to recognize same-sex couples in the calculation of household income for the purposes of determining entitlement to welfare assistance.

6. DEPENDANT RELIEF

I. By Statutory Provision

(a) Australia

The *Family Provision Act 1969*, was enacted to ensure that the family of a deceased person receives adequate provision out of the deceased's estate. A surviving same- sex domestic partner is recognized and protected by the Act.[8]

Family Provision Act 1969.

(b) Czech Republic

In the Czech Republic, existing laws give surviving members of gay couples many of the rights of married survivors; for example, the surviving partner can inherit the deceased partner's property provided they have lived together for at least three years. (As cited in J.D. Wilets, "International Human Rights Law and Sexual Orientation" (1994) 18 Hastings Int'l Comp. L. Rev. 1 at 96.)

(c) Argentina

Argentinean gay and lesbian couples who live together for five years can claim a widow or widower's pension when their partner dies.

II. By Judicial Amendment

(a) *Kane* v. *Attorney General (Ontario)*, O.J. No. 3979 (Gen. Div.)(QL).

The definition of "spouse" which limited entitlement to death benefits under the *Insurance Act* to married couples or opposite-sex cohabitees, was unconstitutional insofar as it excluded same-sex couples. The definition was judicially amended to conform with section 15 of the *Charter* as follows:

> "spouse" means **either of two persons who**... are not married to each other and have cohabited continuously for a period of not less than three years... [Emphasis in original].

7. VICTIM'S COMPENSATION AND DOMESTIC VIOLENCE

I. By Statutory Provision

(a) Australia, New Zealand

In Australia and New Zealand, lesbians and gay men are covered under domestic violence statutes and are entitled to seek compensation as victims of domestic violence.[9]

Victims Compensation Act 1996, New South Wales
Domestic Violence Act 1995 (New Zealand)

II. By Judicial Amendment

United States

(a) ***Ireland* v. *Davis***, Lexis 131, Ky. App (12 December 1997).

Same-sex couples qualify as "couples" for the purposes of state domestic violence legislation. To qualify, the plaintiff, a gay man, had to be a "member of an unmarried couple" as defined in the statute.

(b) ***The State of Ohio* v. *Hadinger***, 573 N.E. 2d 1191 (Ohio App. 1991).

The Ohio Court of Appeal held that the legislature intended the state's domestic violence statute to apply to persons who are cohabiting, regardless of gender. The definition of spouse was found to be sufficiently broad to cover same- and opposite-sex spouses. ["Spouse" was defined as "a person who is living with or has lived with the offender in a common law marital relationship, who otherwise is cohabiting with the offender, or who otherwise has cohabited with the offender within one year prior to the date of the alleged commission of the act in question."]

8. IMMIGRATION SPONSORSHIP

I. By Statutory Provision

Several countries, including Great Britain, Australia, Denmark, the Netherlands, New Zealand. Norway and Sweden, permit citizens to sponsor same-sex partners pursuant to state family reunification laws and regulations.

(a) Australia

Australia has a visa and permit category for "Nonfamilial Relationships of Emotional Interdependency," which covers common law and same-sex couples and which may be used by same-sex couples to achieve residency. (Wilets, *supra* at 104-5.)

(b) Denmark

Danish citizens may sponsor their same-sex partners pursuant to the 1989 Danish Registered Partnership Law. (Wilets, *supra* at 105.)

(c) Netherlands

To qualify to sponsor a same-sex partner requires proof of an emotional relationship and adequate arrangements for the settlement of the applicant in the Netherlands. The Dutch sponsor must have sufficient means of income and assume financial responsibility for the foreign applicant. When parties have lived together for three years, the foreign partner can apply for an independent residence permit. (Wilets, *supra* at 105.)

(d) New Zealand

Partners of gay or lesbian citizens are able to apply for residency under the "family relationship category." The gay or lesbian couple must prove the relationship is "genuine, stable and of at least four years in duration." (Wilets, *supra* at 105.)

(e) United Kingdom

The Minister of Immigration for the United Kingdom recently announced that, effective October 13, 1997, a new concession to the Immigration Rules will be in place to permit British citizens to bring their same sex spouses to join them in Britain. The requirements for leave to enter as an "unmarried partner" are set out in the endnotes.[10]

> *"Concession Outside the Immigration Rules for Unmarried Partners of: Persons Present and Settled in the United Kingdom, or Being Admitted on the Same Occasion for Settlement, or Who Are in the United Kingdom in a Category Leading to Settlement, or Who Have been Granted Asylum"* pursuant to an announcement by the Honourable Mike O'Brien, Minister of Immigration, October 10, 1997 (effective October 13, 1997).

II. By Judicial Declaration

(a) *Canada (Attorney General)* v. *Ward*, [1993] 2 S.C.R. 689 at 739.

The Supreme Court of Canada declared that membership in a "particular social group" for the purposes of Convention refugees includes "groups defined by an innate or unchangeable characteristic" such as sexual orientation. See also *Pizarro* v. *Canada (Minister of Employment and Immigration)*, [1994] F.C.J. No. 320 (F.C. T.D.) (QL), where the applicant claimed persecution on the basis of his sexual orientation. The Court applied *Ward* and held that the applicant's sexual orientation could constitute membership in a particular social group.

III. By Recommendation of a Parliamentary Committee

The Report of the Immigration Legislative Review was submitted to the federal Minister of Citizenship and Immigration in December 1997. The panel recommended that same-sex couples should have the same rights as married couples to permit the immigration of foreign partners of Canadian citizens.

Robert Trempe, Chair, Immigration Legislation Review, "Not Just Numbers: A Canadian Framework for Future Immigration" 31 December 1997 (Ministry of Citizenship and Immigration).

9. SUCCESSION RIGHTS IN RENTAL HOUSING

I. By Judicial Amendment

(a) ***Braschi* v. *Stahl Associates Company***, 543 N.E.2d 49 (N.Y. 1989).

The term "family", as used in a non-eviction provision of state rent-control laws, which provide protection to the surviving spouse of a tenant or other members of a deceased tenant's "family" who had been living with the tenant, includes adult life-time partners whose relationship was long-term and was characterized by emotional and financial commitment and interdependence.

10. GUARDIANSHIP

I. By Judicial Amendment

(a) ***In re Kowalski***, 478 N.W.2d 790 (Minn. Ct. App., 1991).

The Court of Appeal held that a same-sex partner can be appointed guardian for an incapacitated partner.

11. EMPLOYMENT BENEFITS

I. By Judicial or Quasi-Judicial Ruling

(a) ***Leshner* v. *The Queen***, 92 C.L.L.C. 16, 329 (Ont. Bd. Inq.) (31 August 1992)

An Ontario Board of Inquiry ordered the Province of Ontario to provide spousal benefits for provincial employees in same-sex relationships, including extending survivor benefits to same-sex partners.

The *Leshner* decision had a significant impact on the broader public and private sector. For example, in October 1993, the Toronto Board of Education agreed to provide dental benefits to the partners of its gay and lesbian employees as part of a settlement filed with the Ontario Human Rights Commission by Ian Kirkland, a Toronto teacher. The Toronto Board's dental plan now defines "spouse" as a person who is married or who "although not legally married... cohabits with the employee in a conjugal relationship, including a person of the same sex as the employee." (Wilets, *supra* at 98). In December 1993, Sears Canada announced that

"in light of recent human rights and Supreme Court rulings, employees wishing to register same-sex partners under their benefit program may do so immediately." (Wilets, *supra* at 98). The Sears move follows similar actions by Levi Strauss & Co., Price Club Canada Inc., Air Canada, Bell Canada, Dow Chemicals, General Motors, Northern Telecom, London Life Insurance Company, The Toronto Sun and several other large Canadian corporations, municipalities, and public sector organizations.

(b) ***Re Canada (Treasury Board-Environment Canada) and Lorenzen*** (1993), 38 L.A.C. (4th) 29

An arbitrator granted same-sex benefits under a collective agreement which defined a common-law spouse as a person of the opposite-sex, but which also prohibited discrimination on the basis of sexual orientation. Same-sex couples were found to be covered within the definition of "spouse" in the government's collective agreement with its employees as the denial of bereavement leave and family-related leave violated both the collective agreement and the *Canadian Human Rights Act*. See also *Re Bell Canada and Canadian Telephone Employees' Association* (1994), 43 L.A.C. (4th) 142, *per* McDowell (arbitrator); *Canadian Broadcasting Corp.* v. *Canadian Media Guild (Local 213 of the Newspaper Guild)*, 1 February 1995, *per* Munroe (arbitrator) (unreported arbitration); *Re Treasury Board (Canadian Grain Commission) and Sarson* (1996), 42 C.L.A.S. 337; *Re Yarrow and Treasury Board (Agriculture and Agri-Food Canada)*, 43 C.L.A.S. 309 (Pub. Serv. Staff Rels. Bd.); *Re Metro Toronto Reference Library and C.U.P.E., Local 1582* (1995), 51 L.A.C. (4th) 69; *Re Board of Governors of University of Lethbridge* (1994), 48 L.A.C. (4th) 242; *Re Canada Post Corp. And P.S.A.C.* (1994), 35 C.L.A.S. 469

(c) ***Moore and Akerstrom*** **v.** ***The Queen***, [1996] C.H.R.D. No. 8 (Can. Human Rts. Trib., 13 June 1996) *per* Norton (Chair), Ellis and Sinclair (Members).

A federal Human Rights Board of Inquiry held that federal laws that have the effect of denying same-sex partners any of the spousal employment benefits given to the partners of heterosexual federal employees have to be extended to include them.

(d) ***Dwyer*** **v.** ***Toronto (Metropolitan)***, File No. BI-0056-93 (27 September 1996) (Ont. Bd. Inq.)

The Municipal employer was ordered to extend employee benefits to same-sex partners, including pension benefits when the *Income Tax Act* is amended.

12. PROVINCIAL MEDICAL BENEFITS

I. By Judicial Decision

(a) ***Knodel* v. *British Columbia (Medical Services Commission)*** [1991] 6 W.W.R. 728 (B.C. S.C.).

The Appellant, Knodel, was permitted to treat his same-sex partner as his "spouse" for the purposes of provincial medical benefits coverage. The Court found that the denial of spousal coverage under the provincial plan discriminated on the basis of sexual orientation.

13. FAMILY VISITS

I. By Judicial Declaration

(a) ***Veysey* v. *Correctional Service of Canada*** (1990), 109 N.R. (F.C.A.), aff'g on different grounds (1989), 29 F.T.R. 74 (F.C.T.D.)

Timothy Veysey, an inmate in a federal penitentiary, was permitted conjugal visits with his same-sex partner, initially through the application of s.15 and, in the Federal Court of Appeal, on principles of statutory interpretation.

II. By Administrative Practice

(a) Canada

In December 1997, the House of Commons Board of Internal Economy announced that same-sex partners of federal Members of Parliament will now be entitled to the same free airline travel formerly reserved for MP's husbands or wives.

14. VEHICLE REGISTRATION

I. By Judicial Declaration

(a) ***Coles and O'Neill* v. *Ministry of Transportation and Jacobson***, File No. 92/018/09 (October 1994) (Ont. Bd. Inq.).

Same-sex couples are accorded the same treatment as opposite-sex couples for the purposes of vehicle registration.

15. CHANGE OF NAME

I. By Judicial Declaration

(a) ***Bewley* v. *Ontario*,** [1997] O.H.R.B.I.D. No. 24 (File No. BI-0104096) (Ont. Bd. Inq.

Lesbian couple permitted to file a joint election to change their name pursuant to provisions of the *Change of Name Act* that gave the "election" option only to married spouses and opposite sex conjugal partners.

16. MARRIAGE AND REGISTERED DOMESTIC PARTNERSHIPS

I. By Statutory Provision

A number of countries have taken steps to end all unequal treatment on the basis of sexual orientation by permitting same-sex couples to register their partnership and thereby obtain access to virtually every right of matrimony. The first country to do so was Denmark, in 1989, followed by Norway (1993), Greenland (1994), Sweden (1995), Iceland (1996) and the Netherlands (1998). Legislation to end discrimination in marriage statutes are being examined in Finland and France.

(a) Denmark

In 1989, Denmark became the first country in the world to legalize same-sex marriages via the Law on Registered Partnerships, which grants gay and lesbian couples all the rights of ordinary matrimony except access to adoption, donor insemination technology and church weddings. (Wilets, *supra* at 96.)

(b) Netherlands

A registered partnership law, giving same-sex and opposite sex couples every right of matrimony except access to adoption and donor insemination took affect in the Netherlands on January 1, 1998. Registered gay or lesbian couples receive identical rights to heterosexual couples, including the same pension, social security and inheritance rights as married couples and enforces alimony payments if the couple split. Only adoption rights are excluded, however, in November 1997, a Dutch parliamentary committee gave its support to same-sex marriage, and child adoption, pension, inheritance and social security rights.

(c) Iceland

Iceland Partnership Law (Lo'g um stadfesta samvist) allows registered couples to have joint custody of the biological children of one partner.

(d) Hungary

In 1995, the Hungarian Constitutional Court ordered the legislature to give gay and lesbian couples the same economic rights (*e.g.* access to social benefits) enjoyed by heterosexual couples. In 1996, following the Constitutional Court's mandate, the Hungarian Government legalised common law marriage. All matrimonial rights are included, except access to adoption.

(e) Norway

The Norwegian Parliament passed a Partnership Law (on April 1, 1993) under which gay or lesbian couples who wish to register their relationship are granted the same benefits and obligations as married couples, with two exceptions: they do not have the right to adopt children; and, there is no duty under this law for the State Church to perform a church ceremony for the couple. The Registered Partnership statute took effect August 1, 1993 (Wilets, *supra* at 96.)

(f) Brazil

Brazil's same sex partnership bill grants gay and lesbian couples spousal rights in the areas of property, inheritance, health benefits, loans and immigration. Adoption rights are excluded.

(g) Municipal Ordinances

A number of American cities have passed domestic partnership ordinances, thereby permitting same-sex couples to have their relationships officially acknowledged through registration. See, for example: Berkeley, CA; City of Berkeley, Cal., Policy Establishing Domestic Partnership Registration (1984); West Hollywood, CA; West Hollywood, Cal., Mun. Code para. 4220-28 (1985); Los Angeles, CA; San Francisco, CA; San Francisco Cal., Admin. Code para. 62.1-62.8 (1991); Laguana Beach, CA; Washington D.C.; Takoma-Park, Maryland; Ann Arbour, Michigan; Minneapolis, Minnesota; Ithaca, New York; Seattle, Washington.

II. By Judicial Decision

(a) *Baehr* v. *Lewin*, 852 P.2d 44 (1993).

In *Baehr* v. *Lewin*, the Hawaii Supreme Court held that it was unconstitutional to deny marriage licenses to same-sex couples as it violated the couples' constitutional rights, including the right to equal protection of the law. The court held that the state, in refusing to issue marriage licenses had discriminated on the basis of sexual orientation.

In July 1996, the Hawaii legislature signed into law a benefits package giving same-sex couples the right to receive reciprocal benefits such as medical insurance, state

pensions, inheritance rights and the right to sue for wrongful death. The benefits apply to all registered cohabiting couples that cannot legally marry.

(b) Swaziland

In 1992, a Swaziland judge recognized the marriage of two lesbians who were married according to an indigenous practice. (As cited in Wilets, *supra* at 94.)

III. By Administrative Practice

(a) Canada

In 1997, the federal Public Service Staff Relations Board granted marriage leave to a gay man employed by the federal government, and in doing so "recognized that homosexuals have the right to establish families."

17. CONSTITUTIONAL PROTECTION AGAINST DISCRIMINATION ON THE BASIS OF SEXUAL ORIENTATION

I. By Express Constitutional Guarantee

The Constitutions of South Africa[11], Germany and Poland all expressly prohibit discrimination on the basis of "sexual orientation."

(a) South Africa

Constitution of the Republic of South Africa, 1996, as adopted by the Constitutional Assembly on 8 May 1996, and as amended on 11 October 1996.

(b) Germany

Art. 12 (Gesetz-und-Verordnungsblatt für das Land Brandenburg, 1992, No. 18) (Wilets, *supra* at 53.). [Wilets also notes that the German state of Thuringia adopted a new constitution prohibiting discrimination on the grounds of sexual orientation (pending public approval by a referendum in late 1994).]

(c) Poland

In Poland, a parliamentary sub-committee drafted an amendment to Article 4, Section 2 of the Polish "Bill of Rights" (Karta Praw I Wolnosc) which prohibits discrimination against Polish citizens based on sexual orientation.

II. By Judicial Declaration

Canada

(a) ***Egan* v. *Canada***, [1995] 2 S.C.R. 513.

Confirmed that "sexual orientation" is an analogous ground for the purposes of s.15(1) of the *Charter*.

United States

(b) ***Romer* v. *Evans***, 116 S.Ct. 1620 (U.S.S.C.)

The United States Supreme Court ruled that state constitutional provisions which invalidate any state or municipal action designed to protect to protect people from discrimination on the basis of sexuality violate the equal protection clause of the fourteenth amendment, because they deprived one class of persons of ordinary legal protections that most people have come to take for granted.

III. By Recommendation of a Legislative Committee

(a) Canada

Following enactment of the *Charter*, the Standing Committee on Justice and Legal Affairs was directed to examine all federal laws to ensure that they conformed with the equality provisions in s.15. In making its report, the Committee explicitly recommended that "sexual orientation" should be read into the enumerated grounds set out in s.15. However, the Committee went further and recommended that the *Canadian Human Rights Act* should also be amended to add "sexual orientation" as a prohibited ground of discrimination. Parliament finally passed Bill C-33 in 1996, eleven years after the release of the Committee's report and four years after the Ontario Court of Appeal judicially amended the Code in *Haig and Birch* v. *Canada* (1992), 9 O.R. (3d) 494 (C.A.).

J. Patrick Boyer (chair), *Equality for All: Report of the Parliamentary Committee on Equality Rights* (Ottawa: Minister of Supply and Services, October 1985)

18. HUMAN RIGHTS CODES AND NON-DISCRIMINATION PROVISIONS

I. By Statutory Provision, Declaration or Resolution

Many jurisdictions have added "sexual orientation" clauses to their human rights codes and declarations, thereby prohibiting discrimination on the basis of sexual orientation in such areas as publications, accommodation, services, the purchase of property, employment advertisements and, unions and associations.

United Nations

(a) The International Covenant on Civil and Political Rights

Article 26 of the International Covenant on Civil and Political Rights prohibits discrimination on the basis of "sex".[12] In *Toonen* v. *Australia,*[13] the United Nations Human Rights Committee ruled that the reference to "sex" in Article 26, as well as Article 2(1) is to be taken to include "sexual orientation."

> International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171, U.N. Doc. A/6316 (1966).

European Parliament

The European Parliament, is elected directly by the citizens of member-states of the European Community. Although it has no direct effect on those citizens, it provides clear objectives for specific actions by member-states and by the European Commission. The European Parliament's Resolution on equal rights for homosexuals and lesbians in the European Community[14] is an affirmative statement as to the necessity for equality of treatment for gays and lesbians.

> European Parliament Resolution on Equal Rights for Homosexuals and Lesbians in the European Community (A3-0028/94), adopted 8 February 1994

Canada

(b) Federal

The *Canadian Human Rights Act* includes "sexual orientation" as one of the prohibited grounds of discrimination.[15]

> *Canadian Human Rights Act*, R.S.C. 1985, c. H-6, as amended.

(c) Ontario

Ontario's *Human Rights Code*[16] includes sexual orientation as a prohibited ground of discrimination for the purposes of accomodation, contracts, employment and vocational associations.

> *Human Rights Code*, R.S.O. 1990, c. H.19 ss.2(1), 3, 5(1), 6.

See also: *Human Rights Code*, S.M. c.45, s.9(2)(h) (Manitoba); *Human Rights Act*, R.S.N.B.1973, c.H-11, as amended by S.N.B. 1992, c.30, ss.1-8 (New Brunswick); *Charte des droits et liberté de la personne*, R.S.Q., c. C-12, s.10 (Quebec); *Saskatchewan Human Rights Code*, S.S. 1977, c.S-24.1, ss.9-19, 25, 47(1), as amended by S.S. 1993, c.61, ss. 4-15, 18

(Saskatchewan); *Human Rights Act*, S.Y.T. 1987, c.3, ss.6, 34 (Yukon Territory); *Human Rights Act*, R.S.N.S., 1989, c. 214, as amended 1991, c. 12 (Nova Scotia); and, *Human Rights Code*, R.S. B.C. 1996, c. 210 (British Columbia).

(Source: Robert Wintemute, *Sexual Orientation and Human Rights,* Oxford: Oxford University Press (1995) at 267.

United States

Eleven States: California, Connecticut, Hawaii, Maine, Massachusetts, Minnesota, New Hampshire, New Jersey, Rhode Island, Vermont and Wisconsin, prohibit discrimination against lesbians and gay men in the workplace and in other contexts such as housing and public accommodation. The New Jersey *Act* is reproduced in the endnotes.[17]

See also Massachusetts *(Mass. Gen. Laws Ann.* ch. 151B, ss. 3,4 (added in 1989); District of Columbia (*D.C. Code Ann.*ss. 1-2501 to 1-2533 (originally added 1973); Minnesota (*Minn. Stat. Ann.* ss. 363.01(45), 363.03 (added in 1993); Vermont (*Vt. Stat. Ann.* tit. 1, s.143; tit. 21, s.495 (added in 1991); *Haw. Rev. Stat.* Ss. 378-1, 378-2 (added in 1991); *Cal. Labour Code*, s.1102.1 (added 1992); *Conn. Gen. Stat.* ss. 4a-60a, 45a-726a, 46a-81b to 46a-81r (added in 1991); *Wis. Stat. Ann.* Ss. 101.22, 111.31 to 111.36 (added in 1982).

(Source: Robert Wintemute, *Sexual Orientation and Human Rights,* Oxford: Oxford University Press (1995) at 267.)

International

(d) New Zealand

The New Zealand *Human Rights Act 1993*[18] is among the most far-reaching of all anti-discrimination statutes. The *Act* specifically prohibits discrimination on the basis of sexual orientation, HIV status or "marital or family status". "Marital status" has been defined to include "living in a relationship in the nature of marriage." "Family status" has been defined to include "being married to or being in a relationship in the nature of a marriage with a particular person." The anti-discrimination provisions apply to all sectors of New Zealand society, including the armed forces, police and religious bodies.

Human Rights Act 1993, No. 82.

See also: *Equal Opportunity Act,* 1984 as amended (Australia)[19]; Anti-Discrimination *Act 1977, No. 48*, as amended by *Anti-Discrimination (Amendment) Act 1982, No. 142*, and *Anti-Discrimination (Amendment) Act 1994, N. 28* (New South Wales); and *Discrimination Act 1991*, No. 81, Australian Capital Territory, s.7(1)(b).

Municipal

Increasingly, major cities have enacted Administrative bylaws that extend non-discrimination provisions to private sector employment. The relevant provisions of San Francisco's Administrative Code are set out in the endnotes.[20]

See also Baltimore, Boston, Chicago, Denver, Kansas City, Los Angeles, Minneapolis, New Orleans, New York, Philadelphia, Pittsburgh, Portland, Saint Louis, San Diego, San Francisco and Seattle

(Source: Robert Wintemute, *Sexual Orientation and Human Rights,* Oxford: Oxford University Press (1995) at 267.)

II. By Judicial Decision

Canada

"Sexual orientation" protection has been imported into both federal and provincial human rights codes in a series of decisions:

(a) ***Haig and Birch* v. *Canada*** (1992), 9 O.R. (3d) 494 (C.A.).

Judicial amendment of the *Canadian Human Rights Act*, to include sexual orientation as a prohibited ground of discrimination. The Applicant, Graham Haig, had been denied promotions in the Canadian Armed Forces after revealing his sexual orientation.

(b) ***Vogel* v. *Manitoba***, [1995] 6 W.W.R. 513 (Man. C.A.).

Manitoba included "sexual orientation" in its human rights legislation as a prohibited ground of discrimination in 1987. In 1995, the Manitoba Court of Appeal ruled that it is discriminatory for the government to deny equal workplace benefits to its lesbian and gay employees, and sent the case back to a human rights adjudicator for reconsideration. In November 1997, the adjudicator affirmed that equal benefits should be extended to gay and lesbian employees. The Manitoba government announced that it would accept the adjudicator's ruling.

(c) ***Newfoundland and Labrador Human Rights Commission* v. *Nolan and Barry*** [1995] N.J. No. 283 (23 August 1995), *per* Barry J.

Held that "sexual orientation" should be a prohibited ground of discrimination under the Newfoundland human rights code.

ENDNOTES

1. The *Family Relations Act* states:

1. "spouse" means a person who

...

(b) except under Parts 5 and 6, lived with another person in a marriage-like relationship for a period of at least 2 years if the application under this Act is made within one year after they ceased to live together and, for the purposes of this Act, the marriage-like relationship may be between persons of the same gender.

89 (1) A spouse is responsible and liable for the support and maintenance of the other spouse having regard to the following:

(a) the role of each spouse in the family;

(b) an express or implied agreement between the spouses that one has the responsibility to support and maintain the other;

(c) custodial obligations respecting a child;

(d) the ability and capacity of, and the reasonable efforts made by, either or both spouses to support themselves;

(e) economic circumstances.

Family Relations Act, R.S.B.C. 1996, c. 128, as am. by *Family Relations Amendment Act*, 1997 (proclaimed February 4, 1998).

2. By virtue of their inclusion in the provincial family law regime as it relates to spousal or child support, gay or lesbian support payees can now enforce their support orders under the provincial support enforcement statute. A "spouse" is defined, without regard to gender, as follows:

"spouse" means an individual who is married to or living in a marriage-like relationship with a debtor and this marriage or marriage-like relationship may be between persons of the same gender.

Family Maintenance Enforcement Act, R.S.B.C. 1996, c.127 as am. by *Family Maintenance Enforcement Amendment Act*, 1997, (Proclaimed February 4, 1998).

3. 3.(1) In this Act, unless the contrary intention appears -

"domestic relationship" means a personal relationship (other than a legal marriage) between 2 adults in which 1 provides personal or financial commitment and support of a domestic nature for the material benefit of the other, and includes a de facto marriage.

...

15.(1) On application by a party to a domestic relationship, a court may make an order adjusting the interests in the property of either or both of the parties that seems just and equitable to it having regard to:

(a) the nature and duration of the relationship;

(b) the financial or non-financial contributions made directly or indirectly by or on behalf of either or both of the parties to the acquisition, conservation or improvement of any of the property or financial resources of either or both of them;

(c) the contributions (including any in the capacity of home-maker or parent) made by either of the parties to the welfare of the other or any child of the parties;

(d) the matters referred to in subsection 19(2), as far as they are relevant; and

(e) such other matters, if any, as the court considers relevant.

...

19.(1) On an application by a party to a domestic relationship, a court may order the other party to the relationship to pay an amount, or periodic amounts, by way of maintenance to the applicant if it is satisfied that:

(a) the applicant is unable to support himself or herself adequately because of having the care and control of a child of the parties, or a child of the other party, who, on the day on which the application is made, has not attained the age of --

(i) 12 years; or

(ii) if the child has a physical or mental disability, 16 years; or

(b) the applicant is unable to support himself or herself adequately because the applicant's earning capacity has been adversely affected by the circumstances of the relationship and the court is satisfied that --

(i) an order for maintenance would increase the applicant's earning capacity by enabling the applicant to undertake a course or program of training or education; and

(ii) it is reasonable to make the order, having regard to all the circumstances of the case.

(2) In exercising a power under subsection (1), a court shall have regard to:

(a) the income, property and financial resources of each party;

(b) the physical and mental capacity of each party for appropriate gainful employment;

(c) the financial needs and obligations of each party;

(d) the responsibilities of either party to support any other person;

(e) the terms of any order made or proposal to be made under section 15 with respect to the property of either or both of the parties; and

(f) any payments made to the applicant, pursuant to an order of a court or otherwise, in respect of the maintenance of a child or children.

20.(1) ... the court may order the other party to the domestic relationship to pay to the applicant such periodic or other amounts as the court considers reasonable, until the application is determined.

Domestic Relationships Act 1994, Australian Capital Territory.

4. Pursuant to the *Family Relations Act*:

1. "parent" includes

...

(b) a stepparent of a child if

(i) the stepparent contributed to the support and maintenance of the child for at least one year, and

(ii) the proceeding under this Act by or against the stepparent is commenced within one year after the date the stepparent last contributed to the support and maintenance of the child.

...

1. (2) For the purpose of paragraph (b) of the definition of parent in subsection (1), a person is the stepparent of a child if the person and a parent of the child

(a) are or were married, or

(b) lived together in a marriage-like relationship for a period of at least 2 years and, for the purposes of this Act, the marriage-like relationship may be between persons of the same gender.

Family Relations Act, R.S.B.C. 1996, c. 128, as am. by *Family Relations Amendment Act*, 1997 (Proclaimed February 4, 1998).

5. Section 5 of the *Adoption Act* states as follows:

Who may receive a child for adoption

5(1) A child may be placed for adoption with one adult or 2 adults jointly.

(2) Each prospective adoptive parent must be a resident of British Columbia.

Adoption Act, R.S.B.C. 1996, c. 5.

6. Property agreements

120.1 (1) If spouses who are not married to each other make an agreement, Parts 5 [Matrimonial Property] and 6 [Division of Pension Entitlement] apply to

(a) the agreement, and

(b) if covered by the agreement,

(i) an annuity,
(ii) a pension or an interest in a pension plan,
(iii) a home ownership savings plan, or
(iv) property not described in subparagraphs (i) to (iii).

...

(3) In applying Part 5 or 6 for the purpose of this section, a reference to "marriage" in Part 5 or 6 must be deemed to be a reference to a marriage-like relationship between the spouses who are not married to each other.

Family Relations Act, R.S.B.C. 1996, c. 128, as am. by *Family Relations Amendment Act*, 1997 (Proclaimed February 4, 1998).

7. The *Domestic Relationships Act 1994* states as follows: [note that "Part III" deals with property interests and support]:

3.(1) "domestic relationship agreement" means -

(a) an agreement between 2 persons that -

(i) is made in contemplation of their entering into a domestic relationship or during the existence of a domestic relationship between them; and

(ii) makes provision with respect to financial matters; or

(b) such an agreement that varies a domestic relationship agreement; regardless of when it is made, whether there are other parties or whether it makes provision with respect to non-financial matters.

...

32.(1) Except as otherwise provided by this Part, an agreement is subject to, and enforceable in accordance with the law of contract.

(2) Nothing in an agreement shall be taken to affect the power of a court to make an order with respect to --

(a) the right to custody or maintenance of, or access to; or

(b) any other matter relating to;

a child of the parties to the agreement.

33.(1) In proceedings under Part III, where a court is satisfied that--

(a) there is an agreement between the parties to a domestic relationship;

(b) the agreement is in writing;

(c) the agreement is signed by the party against whom it is sought to be enforced;

(d) before the agreement was so signed each party was furnished with a certificate by a solicitor to the effect that the solicitor had advised that party, independently of the other party, as to the following matters:

(i) the effect of the agreement on the rights of the parties under this Act;

(ii) if it was advantageous, financially or otherwise, for that party to enter into the agreement;

(iii) if it was prudent for that party to enter into the agreement;

(iv) if the agreement was fair and reasonable in the light of the circumstances that were reasonably foreseeable then; and

(e) the certificates referred to in paragraph (d) are endorsed on or accompany the agreement;

the court shall not (except as provided by sections 34 and 35) make an order under Part III that would be inconsistent with the terms of the agreement.

Domestic Relationships Act 1994, Australian Capital Territory

8. The *Family Provision Act 1969* recognizes same-sex relationships via the following provisions:

4. (1) In this Act, unless the contrary intention appears:

...

"domestic partner", in relation to a deceased person, means a person who lived with the deceased in a domestic relationship for 2 years continuously at any time during the life of the deceased;

"domestic relationship" means a personal relationship between 2 adults (other than a relationship between spouses) in which 1 provides personal or financial commitment and support of a domestic nature for the material benefit of the other;

"eligible partner", in relation to a deceased person, means a person other than the person's legal spouse who-

(a) whether or not of the same gender as the deceased - lived with the deceased at any time as a member of a couple on a genuine domestic basis; and

(b) either -

(i) had lived with the deceased in that manner for 2 or more years continuously; or

(ii) is the parent of a child of the deceased;

...

"spouse", in relation to a deceased person, means -

(a) a legal spouse of the deceased; or

(b) an eligible partner of the deceased.

Family Provision Act 1969.

9. (a) Australia

9. Who is a family victim

(1) A family victim of an act of violence is a person who is, at the time that act is committed, a member of the immediate family of a primary victim of that act who has died as a direct result of that act.

...

(3) A member of the immediate family of a primary victim is:

(a) the victim's spouse, or
(b) the victim's de facto spouse, or partner of the same sex, who has cohabited with the victim for at least 2 years, or...

Victims Compensation Act 1996, New South Wales

(b) New Zealand

"partner"

(a) Any other person to whom the person is or has been legally married;

(b) Any other person (whether of the same or opposite gender) with whom the person lives or has lived in a relationship in the nature of marriage (although those persons are not, or were not, or are not or were not able to be, legally married to each other);

(c) Any other person, in any case where those persons are the biological parents of the same person.

Domestic Violence Act 1995 (New Zealand).

10. The United Kingdom's Immigration Rules now permit sponsorship of same-sex partners, on the following basis:

(i) the applicant is the unmarried partner of a person present and settled in the United Kingdom or who is on the same occasion being admitted for settlement; and

(ii) any previous marriage (or similar relationship) by either partner has permanently broken down; and

(iii) the parties are legally unable to marry under United Kingdom law (other than by reason of consanguineous relationships or age); and

(iv) the parties have been living together in a relationship akin to marriage which has subsisted for four years or more; and

(v) there will be adequate accommodation for the parties and any dependants without recourse

to public funds in accommodation which they own or occupy exclusively; and

(vi) the parties will be able to maintain themselves and any dependants without recourse to public funds; and

(vii) the parties intend to live together permanently; and

(viii) the applicant holds a valid United Kingdom entry clearance for entry in this capacity.

"Concession Outside the Immigration Rules for Unmarried Partners of: Persons Present and Settled in the United Kingdom, or Being Admitted on the Same Occasion for Settlement, or Who Are in the United Kingdom in a Category Leading to Settlement, or Who Have been Granted Asylum" pursuant to an announcement by the Honourable Mike O'Brien, Minister of Immigration, October 10, 1997 (effective October 13, 1997).

11. The Constitution of South Africa provides as follows:

Equality

9.(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.

(2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.

(3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

(4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.

(5) Discrimination on one or more grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.

Constitution of the Republic of South Africa, 1996, as adopted by the Constitutional Assembly on 8 May 1996, and as amended on 11 October 1996.

12. Article 26 of the International Covenant on Civil and Political Rights states:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171, U.N. Doc. A/6316 (1966).

General Comment 18 sets out the United Nations Human Rights Committee's position on the function of Articles 2(1) and 26, as follows (the Committee is the international body charged with interpreting the International Covenant on Civil and Political Rights):

> Non-discrimination, together with equality before the law and equal protection of the law without any discrimination, constitute a basic and general principle relating to the protection of human rights. Thus, article 2, paragraph 1, of the International Covenant on Civil and Political Rights obligates each State party to respect and ensure to all persons within its territory and subject to its jurisdiction the rights recognized in the Covenant without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Article 26 not only entitles all persons to equality before the law as well as equal protection of the law but also prohibits any discrimination under the law and guarantees to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

13. *Toonen* v. *Australia,* U.N. GAOR, Hum. Rts. Comm., 15th Sess., Case No. 488/1992, where the Committee ruled that Tasmanian's law criminalizing same-gender sexual activity violated international norms of equal protection and privacy.

14. Resolution on Equal Rights for Homosexuals and Lesbians in the European Community

The European Parliament,

...

1. Affirms its conviction that all citizens must be treated equally, irrespective of their sexual orientation;

2. Considers that the European Community is under the obligation to apply the fundamental principle of equal treatment, irrespective of each individual's sexual orientation, in all legal provisions already adopted or which may be adopted in the future;

3. Believes, furthermore, that the EC Treaties must make stronger provision for the defence of human rights, and therefore calls on the Community institutions to make preparations, in the context of the institutional reform scheduled for 1996, for setting up a European institution able to ensure equal treatment, without reference to ... sexual orientation...

7. Calls for an end to the unequal treatment of persons with a homosexual orientation under the legal and administrative provisions of the social security system and where social benefits, adoption law, laws on inheritance and housing and criminal law and all related provisions are concerned;

...

To the Commission of the European Community

12. Calls on the Commission to present a draft Recommendation on equal rights for lesbians and homosexuals;

13. Considers that the basis of the Recommendation should be equal treatment for all Community citizens regardless of their sexual orientation and the ending of all forms of legal discrimination on the grounds of sexual orientation;...

14. Believes that the Recommendation should as a minimum seek to end:
- different and discriminatory ages of consent for homosexual and heterosexual acts;
- prosecution of homosexuality as a public nuisance or gross indecency;
- all forms of discrimination in labour and public service law and discrimination in criminal, civil, contract and commercial law;
- the electronic storage of data concerning the sexual orientation of an individual without her or his knowledge and consent, or the unauthorized disclosure or improper use of this data;
- the barring of lesbians and homosexual couples from marriage or from an equivalent legal framework, and should guarantee the full rights and benefits of marriage allowing the registration of partnerships;
- any restriction on the right of lesbians and homosexuals to be parents or to adopt or foster children
...

European Parliament Resolution on equal rights for homosexuals and lesbians in the European Community (A3-0028/94), adopted 8 February 1994

15. The purpose clause of the *Canadian Human Rights Act* states:

2. The purpose of this Act is to extend the laws in Canada to give effect, within the purview of matters coming within the legislative authority of Parliament, to the principle that all individuals should have an equal opportunity to make for themselves the lives that they are able and wish to have, consistent with their duties and obligations as members of society, without being hindered in or prevented from doing so by discriminatory practices based on ... sexual orientation ...

Canadian Human Rights Act, R.S.C. 1985, c. H-6, as amended.

16. The *Ontario Human Rights Code* states:

1. Every person has a right to equal to equal treatment with respect to services, goods and facilities without discrimination because of ... sexual orientation...

Human Rights Code, R.S.O. 1990, c. H.19 ss.2(1), 3, 5(1), 6.

17. <u>New Jersey</u>

AN ACT to protect all persons in their civil rights and to prevent and eliminate discrimination based on affectional or sexual orientation...

3. The Legislature finds and declares that practices of discrimination against any of its inhabitants, because of ... sex {affectional or sexual orientation} ... are a matter of concern to the government of the State, and that such discrimination threatens not only the rights and proper privileges of the inhabitants of the State but menaces the institutions and foundation of a free democratic State...

The Legislature further finds that because of discrimination, people suffer personal hardships, and the State suffers a grievous harm. The personal hardships include: economic loss; time loss; physical and emotional stress; and in some cases severe emotional trauma, illness, homelessness or other irreparable harm resulting from the strain of employment controversies; relocation, search

and moving difficulties; anxiety caused by lack of information, uncertainty, and resulting planning difficulty; career, education, family and social disruption; and adjustment problems, which particularly impact on those protected by this Act...

ff. "Affectional or sexual orientation" means male or female heterosexuality, homosexuality or bisexuality by inclination, practice, identity or expression, having a history thereof or being perceived, presumed or identified by others as having such an orientation ...

hh. "Homosexuality" means affectional, emotional or physical attraction or behaviour which is primarily directed towards persons of the same gender ...

*N.J. Rev. Stat.*ss. 10:5-5.hh-kk., 10:5-12 (added in 1991).

18. The New Zealand *Human Rights Act 1993* states:

21. Prohibited Grounds of Discimination -- (1) For the purposes of this Act, the prohibited grounds of discrimination are:

...

(m) Sexual orientation, which means a heterosexual, homosexual, lesbian, or bisexual orientation.

(Covers Employment, Access to Places Vehicles and Facilities, Discrimination in the Provision of Goods and Services; in the Provision of Land, Housing, and Other Accommodation; in Access to Educational Establishments)

Human Rights Act 1993, No. 82.

19. The *Equal Opportunity Act, 1984* states

29.(1) In this Part -

"discriminate" means -

...

(b) discriminate on the ground of sexuality;

...

(3) Subject to subsection (4), for the purposes of this Act, a person discriminates on the ground of sexuality -

(a) if he or she treats another person unfavourably because of the other's sexuality, or presumed sexuality;

(b) if he or she treats another person unfavourably because the other does not comply, or is not able to comply, with a particular requirement and -

(i) the nature of the requirement is such that a substantially higher proportion of persons of a different sexuality complies, or is able to comply, with the requirement than of those of the other's sexuality;

and

(ii) the requirement is not reasonable in the circumstances of the case;

or

(c) if he or she treats another person unfavourably on the basis of a characteristic that appertains generally to the persons of the other's sexuality, or presumed sexuality, or on the basis of a presumed characteristic that is generally imputed to persons of that sexuality.

Equal Opportunity Act, 1984 as amended.

20. San Francisco

Section 12B.1. ALL CONTRACTS AND PROPERTY CONTRACTS TO INCLUDE NONDISCRIMINATION PROVISIONS; DEFINITIONS.

(a) All contracting agencies of the City, or any department thereof, acting for or on behalf of the City and County, shall include in all contracts and property contracts hereinafter executed or amended in any manner or as to any portion thereof, a provision obligating the contractor not to discriminate on the basis of sexual orientation, gender identity, domestic partner status, marital status, disability or Acquired Immune Deficiency Syndrome or HIV status (AIDS/HIV status), against any employee or, any City employee working with, or applicant for employment with such contractor and shall require such contractor to include a similar provision in all subcontracts executed or amended thereunder.

(b) No contracting agency of the City, or any department thereof, acting for on behalf of the City and County, shall execute or amend any contract or property contract with any contractor that discriminates in the provision of *bereavement leave, family medical leave, health benefits, membership or membership discounts, moving expenses, pension and retirement benefits or travel benefits as well as any benefits other than bereavement leave, family medical leave, health benefits, membership or membership discounts, moving expenses, pension and retirement benefits or travel* benefits between employees with domestic partners and employees with spouses, and/or between the domestic partners and spouses of such employees, where the domestic partnership has been registered with a governmental entity pursuant to state or local law authorizing such registration, subject to the following conditions. In the event that the contractor's actual cost of providing a certain benefit for the domestic partner of an employee exceeds that of providing it for the spouse of an employee, or the contractor's actual cost of providing a certain benefit for the spouse of an employee exceeds that of providing it for the domestic partner of an employee, the contractor shall not be deemed to discriminate in the provision of benefits if the contractor conditions providing such benefit upon the employee agreeing to pay the excess costs. In addition, in the event a contractor is unable to provide a certain benefit, despite taking reasonable measures to do so, the contractor shall not be deemed to discriminate in the provision of benefits if the contractor provides the employee with a cash equivalent.

San Francisco Administrative Code, Chapter 12B: Non-discrimination in Contracts, approved July 18, 1997; effective August 18, 1997.