

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

**B E T W E E N:**

**THE ATTORNEY GENERAL OF ONTARIO**

Appellant  
(Intervenor)

- and -

**M.**

Respondent  
(Applicant)

- and -

**H.**

(Respondent)

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**FACTUM OF THE APPELLANT**

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**PART I -- THE FACTS**

1. In this case, the Respondent M is seeking spousal support from H under Part III of Ontario's *Family Law Act* (hereinafter "*FLA*"). Since M is the same sex as H, she is not a "spouse" as defined by s. 29 of the *FLA*, and is consequently ineligible for support, absent a *Charter* remedy. M has challenged the opposite-sex definition of "spouse" under s. 15(1) of the *Charter*, and was successful at first instance and in the Ontario Court of Appeal. The Attorney General for Ontario appeals to this Honourable Court from the judgment below, and takes the position that the existing definition of "spouse" in the *FLA* is constitutional.

*Family Law Act*, R.S.O. 1990, c. F.3, Part III, s. 29.

**A. ADJUDICATIVE FACTS**

2. M and H are women. They met in 1980 and started living together in a home which H has owned since 1974. H continued to pay for the upkeep of the home but both parties paid their own personal expenses and agreed to share living expenses and household responsibilities equally. During the period they lived together, they acquired a business property in downtown Toronto and a country property. They incorporated an advertising business and acquired other companies. There is some dispute about the precise nature of the lesbian relationship between the two, but it is generally accepted that such a relationship did exist and that M and H can properly be described as a same-sex couple. H states that the parties ceased any physical relationship in 1987, and ceased to share the same bedroom in 1989. In September of 1992, M left the common home.

Reasons for Judgment of the Court of Appeal, *per* Finlayson J.A. at p. 2, Case on Appeal, vol. III, tab 39, p. 425.

**B. PROCEEDINGS BELOW**

10 3. By Notice of Application dated October 14, 1992, M sought an order for partition and sale of the house, a declaration that she is the beneficial owner of certain lands and premises owned by H and of the companies which she named as defendants, and an accounting of transactions carried out by the companies, as well as other relief. By Notice of Cross-Application dated October 21, 1992, H and the corporate defendants sought damages for slander of title, partition and sale of property, and repayment of loans, as well as other relief.

Reasons for Judgment of the Court of Appeal, *per* Finlayson J.A. at pp. 2-3, Case on Appeal, vol. III, tab 39, pp. 425-426.

20 4. In April 1993, M amended her claim to include an application under Part III of the *FLA* for spousal support from H, and for a declaration that the opposite-sex definition of "spouse" in s. 29 of the *FLA* is unconstitutional.

Reasons for Judgment of the Court of Appeal, *per* Finlayson J.A. at p. 3, Case on Appeal, vol. III, tab 39, p. 426.

30 5. H thereupon brought a motion under Rule 20 for summary judgment or, alternatively, for the determination of a question of law under Rule 21 or directions. The motion was heard on December 8, 1993 by the Honourable Madam Justice Epstein. Reasons for judgment of Epstein J. were released February 2, 1994, with an addendum dated February 24, 1994. The motion for summary judgment was dismissed, and the motion under Rule 21 was adjourned. She granted leave under Rule 21.01(2)(a) to both parties, if so advised, to adduce evidence on the return of the motion.

40 Reasons for Judgment of the Court of Appeal, *per* Finlayson J.A. at p. 4, Case on Appeal, vol. III, tab 39, p. 427.

6. The Attorney General intervened in the motion and initially took a position in support of M. The motion was to have come on for hearing in November, 1994, but was adjourned on consent until the release of the decision in *Egan v. Canada*, [1995] 2 S.C.R. 513, so that the Court would have the benefit of the reasons of this Honourable Court in that case. Subsequent to a change of government and the decision in *Egan*, but before the hearing of this matter in the Ontario Court (General Division), the Attorney General took the position that the opposite-sex definition of "spouse" in s. 29 of the *FLA* does not violate the *Charter*. The motion under Rule 21 was heard in September 1995.

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

Reasons for Judgment of the Court of Appeal, *per* Finlayson J.A. at pp. 4, 5, Case on Appeal, vol. III, tab 39, pp. 427, 428.

7. On February 9, 1996, Epstein J. released her judgment in respect of the constitutional issue. Epstein J. held that s. 29 of the *FLA* offends s. 15 of the *Charter* and is not saved by s. 1 of the *Charter*. She ordered the following by way of remedy:

- (1) a declaration that s. 29 is of no force or effect to the extent that it excludes same-sex couples from its definition of "spouse";
- (2) a declaration that the words "a man and a woman" be severed from the definition of "spouse"; and
- (3) that the words "two persons" be read into the definition of "spouse" in s. 29.

Reasons for Judgment of the Court of Appeal, *per* Finlayson J.A. at p. 5, Case on Appeal, vol. III, tab 39, p. 428.

Reasons for Judgment of Epstein J., at p. 46, Case on Appeal, vol. II, tab 37, p. 401.

8. Furthermore, Epstein J. ordered that the motion for interim support could be brought before her on seven days notice and that H was to deliver a financial statement within 30 days of the date of the judgment.

10                   Reasons for Judgment of the Court of Appeal, *per* Finlayson J.A. at pp. 5-6, Case on Appeal, vol. III, tab 39, pp. 428-9.

                      Reasons for Judgment of Epstein J., at p. 46, Case on Appeal, vol. II, tab 37, p. 401.

9. Both H and the Attorney General appealed. The Court of Appeal granted M's motion to expedite the appeal. On December 18, 1996, a majority of the Court of Appeal (Charron and Doherty, J.J.A.) dismissed H's and Ontario's appeal. Like Epstein J., the Court ordered that the definition of "spouse" in s. 29 of the *FLA* is of no force or effect to the extent it excludes same-sex couples, that the words "a man and a woman" be severed from the definition, and that the words "two persons" should be read into the definition of "spouse".

                      Reasons for Judgment of the Court of Appeal, *per* Charron J.A. at p. 49, Case on Appeal, vol. III, tab 39, p. 506.

30                   Order of the Court of Appeal, January 22, 1997, p. 3, Case on Appeal, vol. I, tab 8, p. 53.

10. However, the Court of Appeal suspended its declaratory order for one year to provide an opportunity for "legislative activity to ensure the constitutionality of s. 29." The majority of the Court implied that other Ontario statutes may be unconstitutional in the light of its decision, and further that Ontario should reconsider enacting Bill 167, the *Equality Rights Statute Law Amendment Act, 1994* (which had been defeated in a free vote in 1994) in order to save litigation costs. It also suspended for one year Epstein J.'s order respecting the delivery of financial statements and allowing M to bring a motion for support on seven days notice.

40                   Reasons for Judgment of the Court of Appeal, *per* Charron J.A. at pp. 46-49, Case on Appeal, vol. III, tab 39, pp. 504-506.

Order of the Court of Appeal, p. 3, Case on Appeal, vol. I, tab 8, p. 53.

Bill 167, *Equality Rights Statute Law Amendment Act, 1994*, 35th Leg., Ontario, 1994.

10 11. Finlayson J.A. dissented. He would have allowed Ontario's and H's appeals. He concluded that the definition of "spouse" did not infringe *Charter* s. 15(1), and, in the alternative, was justified pursuant to *Charter* s. 1 for the reasons given by this Honourable Court in *Egan v. Canada*.

Reasons for Judgment of the Court of Appeal, *per* Finlayson J.A. at pp. 1-34, Case on Appeal, vol. III, tab 39, pp. 424-457.

20 12. On April 24, 1997, the Supreme Court of Canada granted the Attorney General of Ontario leave to appeal.

Judgment of the Supreme Court of Canada granting leave to appeal dated April 24, 1997, revised May 28, 1997, Case on Appeal, vol. I, tab 10.

## 30 PART II -- POINTS IN ISSUE

13. On July 23, 1997, the Chief Justice of Canada stated the following constitutional questions:

1. Does the definition of "spouse" in s. 29 of the *Family Law Act*, R.S.O. 1990, c. F.3, infringe or deny s. 15(1) of the *Canadian Charter of Rights and Freedoms*?

40 2. If the answer to Question 1 is yes, is the infringement or denial demonstrably justified in a free and democratic society pursuant to s. 1 of the *Canadian Charter of Rights and Freedoms*?



Order of the Supreme Court of Canada stating the Constitutional granting leave to appeal dated April 24, 1997, revised May 28, 1997, Case on Appeal, vol. I, tab 11.

### PART III -- ARGUMENT

#### A. LEGISLATION

14. Part III of the *FLA* deals with support obligations. Sections 30-32 create an obligation on persons to support themselves and their dependants. A "dependant" can be either the spouse, child or parent of the person having the support obligation. Section 33 establishes a procedure whereby dependants can seek a support order, and sets out the criteria for determining whether support should be provided, and the amount.

*Family Law Act*, R.S.O. 1990, c. F.3, ss. 30-33.

15. The definition of "spouse" for the purposes of spousal support is set out in s. 29 of the *FLA*. Since the definition was last amended in 1986, "spouse" has been defined as a person who is married, or:

... 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.

*Family Law Act*, R.S.O. 1990, c. F.3, s. 29.

*Family Law Act*, S.O. 1986, c. 4, s. 29.

**B. LEGISLATIVE HISTORY**

16. The current definition of "spouse" in s. 29 of the *FLA* is the result of an incremental process of reform of family law.

10 See:

*Deserted Wives' and Children's Maintenance Act*, R.S.O. 1937 c.211; as amended by S.O. 1954, c.22; as amended by S.O. 1958, c.23; as amended by R.S.O. 1960, c.105; as amended by R.S.O. 1970, c.128; as amended by S.O. 1971, c.98; as amended by S.O. 1973, c.133; as rep. by S.O. 1978, c.2.

Ontario Law Reform Commission, *Report on Family Law*, (Ministry of the Attorney General: Toronto, 1969-75).

20 *Family Law Reform Act*, S.O. 1975, c. 41.

*Family Law Reform Act*, S.O. 1978, c. 2.

*Family Law Amendment Act*, 1986, S.O. 1986, c. 35, s. 1, 2.

Reasons for Judgment of the Court of Appeal, *per* Finlayson J.A. (dissenting) at pp. 7, 8, Case on Appeal, vol. III, tab 39, pp. 430, 431.

30 17. In the 1960's, the Ontario government commissioned a series of reports dealing with family law, including the law relating to property rights and support obligations. The reports concluded that, despite the evolving role of women in society, married women were often economically dependent on their husbands as a result of their taking primary responsibility for parenting and women's unequal earning power in the workplace, and suffered economically in the event of marriage breakdown.

Reasons for Judgment of the Court of Appeal, *per* Finlayson J.A. (dissenting) at pp. 7,8, Case on Appeal, vol. III, tab 39, pp. 430, 431.

40 Ontario Law Reform Commission, "*Vol. IV, Family Property Law*" in *Report on Family Law, supra*, pp. xi, 4-19, 49-55, 103-107.

Ontario Law Reform Commission, "*Vol. VI, Support Obligations*" in *Report on Family Law, supra*, pp. 2-22.

18. Legislative reform to address the effects of sexual inequality both in marriage and in the event of marriage breakdown began in 1975 with the abolition of a number of legal inequities for married women, and the establishment in the law of equal status for married spouses of either sex.

10 *Family Law Reform Act*, S.O. 1975, c. 41.

Reasons for Judgment of the Court of Appeal, *per* Finlayson J.A.  
(dissenting) at pp. 7, 8, Case on Appeal, vol. III, tab 39, pp. 430, 431.

19. In 1978, a major package of reforms to Ontario family law established the principle of the economic partnership of the marriage, and a deferred community property regime for married spouses. With respect to spousal support, the 1978 *Act* established a system of support based primarily on a woman's need, rather than fault. Prior to this reform, women's applications for support from their husbands were frequently dismissed on the basis of judgments as to their conduct, reflecting assumptions in the pre-1978 legislation about the appropriate role of women in marriage. Although men were rarely in a position of economic dependence on their wives, the 1978 reforms also extended the obligation of support to women as well as men, in keeping with the Act's governing principle of equality between the sexes.

30 *Family Law Reform Act*, S.O. 1978, c. 2.

Ontario Law Reform Commission, "*Vol. IV, Family Property Law*" in *Report on Family Law, supra*, pp. xi, 4-19, 49-55, 103-107.

Ontario Law Reform Commission, "*Vol. VI, Support Obligations*" in *Report on Family Law, supra*, pp. 2-22.

Ontario, Legislative Assembly, *Debates*, (October 26, 1976)  
(Statement by the Attorney General, the Hon. R. McMurtry), pp.  
4102-4103

40 See also:

*Moge v. Moge*, [1992] 3 S.C.R. 813, at pp. 849-850.

20. The 1978 reforms also imposed, for the first time, spousal support obligations on unmarried or "common law" spouses, defined as opposite-sex couples who had cohabited continuously for a

period of not less than five years, or who had cohabited in a relationship of some permanence where there was a child born of whom they were the natural parents. Married and common-law couples who did not wish to have support obligations imposed upon them could contract out of spousal support through a domestic contract.

10

*Family Law Reform Act*, S.O. 1978, c. 2, s. 14.

20

21. The inclusion of a common-law definition of "spouse" in the *FLA* was controversial and the subject of considerable public and legislative debate. The reason given by the government for this reform was that women in common law relationships tended to become financially dependent on their male partners because of their child-rearing activities and unequal earning power, just as in married relationships. The then-Attorney General, the Hon. Roy McMurtry, explained that the objective of imposing support obligations in the common law context was to address the exploitation of women in common law relationships by some men, and to reduce demands on the welfare system resulting from men's abandonment of their common law spouses and the children of such unions.

30

Ontario, Legislative Assembly, *Debates*, (November 18, 1976)  
(Statement by the Hon. R. McMurtry), p. 4793.

Reasons for Judgment of the Court of Appeal, *per* Finlayson J.A.  
(dissenting) at p. 8, Case on Appeal, vol. III, tab 39, p. 431.

40

22. Further incremental change occurred in 1986. The Ontario legislature reduced from five to three years the period of cohabitation required for a person to qualify as a common law spouse for the purposes of the right to spousal support, and included adoptive parents in the definition. This broadened definition of "spouse" created an expanded category of common law partners entitled to spousal support under Part III of the *FLA*.

*Family Law Act*, S.O. 1986, c. 4, s. 29.

Reasons for Judgment of the Court of Appeal, *per* Finlayson J.A.  
(dissenting) at p. 9, Case on Appeal, vol. III, tab 39, p. 432.

23. In 1986, the Ontario legislature also amended many other provincial statutes in order to confer the same rights and responsibilities on common law spouses as applied in respect of married spouses. As a result, most other Ontario laws now also treat opposite-sex common law spouses in the same way as formally married couples. Many statutes incorporate the definition of "spouse" used for support purposes in s. 29 of the *FLA*. In other cases, they use the definition of "spouse" in the *Human Rights Code*, R.S.O. 1990, c. H-19, or a variant of that definition. Only a few Ontario statutes continue to provide rights, or impose obligations, on married spouses only (notably the *FLA* provisions dealing with equalization of property, and the provisions of the *Succession Law Reform Act* dealing with succession to property on intestacy).

*Equality Rights Statute Law Amendment Act*, S.O. 1986, c.64.

Appendix A - Compilation of Spousal Distinctions in Ontario Statutes.

*Family Law Act*, R.S.O 1990, c. F.3, s. 1, and Part I "Family Property".

*Succession Law Reform Act*, c. S.26, s. 1, and Part II "Intestate Succession".

24. In reforming the definition of "spouse" in provincial legislation, the Ontario legislature took account of the integrated nature of spousal rights and responsibilities and the consequent importance of employing a generally uniform definition of "spouse" throughout provincial law. Many statutory benefits for spouses are premised on the existence of a spousal support obligation, which accounts for the use in many laws of the definition of "spouse" in s. 29 of the *FLA*. The result of the 1978 and 1986 reforms is an extensive and integrated system of spousal rights and responsibilities in Ontario law, within which Part III of the *FLA* is a significant component.

Appendix A - Compilation of Spousal Distinctions in Ontario Statutes.

See, for example:

Ontario, Legislative Assembly, *Debates*, (February 13, 1990)  
(Statement by Mr. Abols) p. G1043.

10 25. *The Equality Rights Statute Law Amendment Act, 1986* also amended the Ontario *Human Rights Code* to prohibit discrimination on the basis of sexual orientation. No amendments were made at this time to the definitions of "spouse" or "marital status" in the Code, or in any other Ontario statute, including s. 29 of the *FLA*, to include same-sex couples. The then-Attorney General, the Hon. Mr. Scott, as well as the Minister responsible for the *Human Rights Code*, the Hon. Mr. Wrye, made it clear that this amendment to the *Human Rights Code* was intended to protect individual gays and lesbians against discrimination in accommodation, employment and services, but was not intended to broaden the definition of "spouse" or otherwise affect fundamental values in society. The definition of "spouse" and "marital status" in the *Human Rights Code* was not amended and continues to refer only to persons of the opposite sex.

20 *Equality Rights Statute Law Amendment Act, 1986*, s. 18.

*Human Rights Code*, R.S.O. 1990, c. H-19, ss. 1-10.

Ontario, Legislative Assembly, *Debates*, (November 25, 1986)  
(Statement by the Attorney General, the Hon. Ian Scott), pp. 3619,  
3622.

Ontario, Legislative Assembly, *Debates*, (December 2, 1986)  
(Statement by the Hon. Mr. Wrye), p. 3839.

30 26. In 1993, the Ontario Law Reform Commission concluded that further information was necessary concerning the attitudes and expectations of cohabiting same-sex couples before it could recommend expanding the definition of "spouse" in the *FLA* to include same-sex couples. The Commission recognized that there were competing views on the desirability of such a reform, and that the *FLA* spousal support provisions might be unsuited to same-sex relationships.

40 Ontario Law Reform Commission, *Report on the Rights and Responsibilities of Cohabitants under the Family Law Act*, (Ministry of the Attorney General: Toronto, 1993), pp. 3, 46-47.

See also:

Cossman and Ryder, "*Gay Lesbian and Unmarried Heterosexual Couples and the Family Law Act: Accommodating a Diversity of*

*Family Forms*", Research Paper prepared for the Ontario Law Reform Commission, Osgoode Hall Law School, June 1993, pp. 135-147.

27. Nonetheless, in 1994, the then-government of Ontario proposed a further significant step in the reform of family law and of the definition of "spouse" in provincial law generally. On May 19, 1994, the then-Attorney General, the Hon. Marion Boyd, introduced Bill 167, the *Equality Rights Statute Law Amendment Act, 1994*. This Bill would have amended most Ontario statutes, including s. 29 of the *FLA*, to include same-sex partners in the definition of "spouse", and thereby provide same-sex couples with the same legal rights and obligations as opposite-sex common law spouses. On June 9, 1994, after extensive public and legislative debate, Bill 167 was defeated on second reading in a free vote of the Ontario legislature.

Bill 167, *Equality Rights Statute Law Amendment Act, 1994*.

Reasons for Judgment of the Court of Appeal, *per* Finlayson J.A. (dissenting) at pp. 9, 10, Case on Appeal, vol. III, tab 39, pp. 432, 433.

## C. CHARTER S. 15(1)

### 1. Three Approaches to Equality

28. In *Benner v. The Secretary of State of Canada*, [1997] 1 S.C.R. 358, Justice Iacobucci reviewed the approaches to equality which this Honourable Court has employed in recent s. 15(1) cases. The first approach is that followed by McLachlin and Sopinka JJ. in *Miron v. Trudel*, [1995] 2 S.C.R. 418, which set out the following test for discrimination under s. 15(1):

The analysis under s. 15(1) involves two steps. First, the complainant must show a denial of "equal protection" or "equal benefit" of the law, as compared with some other person. Second, the claimant must show that the denial constitutes discrimination. At this second stage, in order for discrimination to be made out, the claimant must show that the denial rests on one of the grounds enumerated in s. 15(1) or an analogous ground and that the unequal treatment is based on the stereotypical

application of presumed group or personal characteristics. If the claimant meets the onus under this analysis, violation of s. 15(1) is established.

*Miron v. Trudel*, [1995] 2 S.C.R. 418, at p. 485.

*Benner v. The Secretary of State of Canada*, [1997] 1 S.C.R. 358, at pp. 389-393.

10 29. This is substantially similar to the test outlined by Cory J. (Iacobucci J. concurring) in *Egan v. Canada*, [1995] 2 S.C.R. 513 at p. 584:

20 The first step is to determine whether, due to a distinction created by the questioned law, a claimant's right to equality before the law, equality under the law, equal protection of the law or equal benefit of the law has been denied. During this first step, the inquiry should focus upon whether the challenged law has drawn a distinction between the claimant and others, based on personal characteristics.

30 Not every distinction created by legislation gives rise to discrimination. Therefore, the second step must be to determine whether the distinction created by the law results in discrimination. In order to make this determination, it is necessary to consider first, whether the equality right was denied on the basis of a personal characteristic which is either enumerated in s. 15(1) or which is analogous to those enumerated, and second, whether that distinction has the effect on that claimant of imposing a burden, obligation or disadvantage not imposed on others or of withholding or limiting access to benefits or advantages which are available to others.

*Egan v. Canada, supra*, at p. 584.

40 30. The second approach to s. 15 focuses on the "relevance" of a distinction to the purpose of the legislation. Finding discrimination, therefore, requires an analysis of the "nature of the personal characteristic and its relevancy to the functional values underlying the law" (*Miron, supra*, per Gonthier J., at p. 436). It is not enough that the denial of equality be based on an enumerated or analogous ground since the same ground may be discriminatory in some cases but not in others depending on the context (see e.g. *R. v. Turpin*, [1989] 1 S.C.R. 1296, at pp. 1331-32). The grounds



of distinction must also be irrelevant to the values underlying the legislation, as Gonthier J. concluded in *Miron*, at p. 442, or s. 15(1) will not be violated:

10 To the extent, then, that a law in any given case mirrors or reflects a distinction drawn on such a basis that is relevant to its functional values which are not themselves discriminatory, the distinction drawn by the law will not be discriminatory.

*Miron v. Trudel, supra*, at pp. 436, 442.

*R. v. Turpin*, [1989] 1 S.C.R. 1296, at pp. 1331-32

20 31. This second approach was adopted in *Miron* and *Egan* by the Chief Justice and La Forest, Gonthier and Major JJ..

*Miron v. Trudel, supra*, at p. 429.

*Egan v. Canada, supra*, at p. 526.

30 32. Yet a third approach to s. 15 is found in the reasons of L'Heureux-Dubé J. in *Miron*. According to this third methodology, once a distinction has been shown to result in the denial of one of the four rights of equality on the basis of membership in an identifiable group, the distinction must then be shown to be discriminatory. This will require determining that it is "capable of either promoting or perpetuating the view that the individual adversely affected by this distinction is less capable, or less worthy of recognition or value as a human being or as a member of Canadian society, equally deserving of concern, respect, and consideration". Making this determination will require consideration of both the *group* adversely affected by the distinction and the nature of the *interest* adversely affected by it. The interaction of the group's social vulnerability, in light of the social and  
40 historical context, and the constitutional and societal significance of the interest will determine whether the impact of the distinction constitutes discrimination.

*Miron v. Trudel, supra*, at pp. 465-477.

*Egan v. Canada, supra*, at pp. 540-558.

33. A *Charter* s. 15(1) challenge to the opposite-sex definition of "spouse" has been addressed once before by this Honourable Court, in *Egan v. Canada, supra*. The *Egan* case involved a challenge to the definition of "spouse" in the *Old Age Security Act*, R.S.C., 1985, c. O-9 ("hereinafter *OAS Act*"), for the purposes of the spousal allowance under that Act. This Honourable Court decided unanimously that sexual orientation is an analogous ground of discrimination under the *Charter*, and, by a 5-4 majority that the opposite-sex definition of "spouse" in that Act constituted a prima facie breach of s. 15(1).

## 2. Application to the Present Case

34. If this Honourable Court adopts the second approach to s. 15, which focuses on the relevance of the distinction, then, for the reasons given by the Chief Justice and La Forest, Gonthier and Major JJ. in *Egan* and set out at paras. 48-75, *infra*, the definition of spouse in s. 29 of the *FLA* will not infringe *Charter* s. 15(1). The Appellant submits that the definition of "spouse" is relevant to the distinction adopted by the legislature "to describe a fundamental social unit to which some measure of support is given".

*Egan v. Canada, supra, (per La Forest J.)* at pp. 535-540.

35. If this Honourable Court adopts the first or third approach to s. 15, then the definition of "spouse" in s. 29 of the *FLA* does infringe s. 15(1) of the *Charter*. The *FLA* provides a statutory benefit to spouses by imposing legal support obligations on spouses and by permitting one spouse to obtain an award of support. This statutory right is a benefit within the meaning of s. 15(1). Since individuals in same-sex relationships do not have a statutory right to seek such support, the definition of "spouse" in s. 29 denies a benefit to individuals based on their sexual orientation.

*Egan v. Canada, supra, per Cory J.* at pp. 583-604, *per L'Heureux-Dubé J.* at pp. 540-568.

10 36. The impugned legislation does not, however, "confer a significant benefit by providing state recognition of the legitimacy of a particular status" (Cory J., para. 161). The *FLA* is not intended to provide a state imprimatur on heterosexual relationships, whether married or "common law". Rather, it recognizes the special needs of such relationships which result from their opposite-sex composition. That same-sex relationships are not characterized by the systemic gender inequalities often associated with opposite-sex relationships has nothing to do with their "legitimacy".

20 37. While this Honourable Court has not developed a majority approach to s. 15(1), a majority has held that the opposite-sex definition of "spouse" at issue in *Egan* infringes *Charter* s. 15(1). The definition of "spouse" at issue in *Egan* was virtually identical to the definition of "spouse" in the present appeal. The Appellant's position is that *Egan* is indistinguishable from the present appeal, and that the reasons of both the majority and dissenting s. 15(1) judges in *Egan* would be equally applicable to the present appeal.

## D. CHARTER S. 1

### 1. Decision below conflicts with *Egan*

30 38. Although a 5-4 majority of this Honourable Court held that the opposite-sex definition of "spouse" at issue in *Egan* infringed the *Charter* s. 15(1), a different 5-4 majority held that the discrimination was justified pursuant to s. 1 of the *Charter*. The decision of the Court of Appeal in this appeal is in direct conflict with the s. 1 result in *Egan*.

*Egan v. Canada, supra*, at pp. 539-540 (*per* La Forest J.) and pp. 572-577 (*per* Sopinka J.).

40 39. All five s. 1 majority judges in *Egan* applied *McKinney v. University of Guelph* in deciding that the opposite-sex definition of "spouse" in the *Old Age Security Act* was justified under *Charter* s. 1. In *McKinney*, this Court held that the Ontario legislature should be permitted to act

10 incrementally in dealing with the issue of mandatory retirement. This incremental reform rationale was adopted and applied by La Forest and Sopinka JJ., in separate reasons, in the context of the opposite-sex definition of "spouse" at issue in *Egan*. As a result, a clear 5-4 majority of this Court has held that the continuing use of an opposite-sex definition of "spouse" can be justified on the basis of the reasoning in *McKinney*.

*Egan v. Canada, supra*, at pp. 539-540 (*per* La Forest J.) and pp. 572-577 (*per* Sopinka J.).

*McKinney v. University of Guelph*, [1990] 3 S.C.R. 229, at pp. 316-318.

20 40. In addition, a plurality of four of the five majority judges in *Egan* held that the definition of "spouse" may be restricted to opposite-sex couples because this is the social unit in society with capacity to procreate and which generally raises children. Since the legislative purpose was to address the particular needs of opposite-sex couples resulting from their special societal role, it was justifiable under s. 1 for Parliament to withhold these benefits from all other social units including same-sex partners.

30 *Egan v. Canada, supra*, at pp. 532-539 (*per* La Forest J.).

40 41. The reasons of the majority of the Court of Appeal in the case at bar provide little or no explanation for the different outcome in the support context at issue here, as compared with the old age security context at issue in *Egan*. The majority of the Court below makes no express reference to the majority s. 1 reasons of La Forest and Sopinka JJ. in *Egan*. The reasons below provide no basis for distinguishing *Egan* or for failing to apply the incremental reform justification based on *McKinney*, despite the fact that this rationale was accepted by all five majority judges in *Egan*. The majority also does not explain why the s. 1 analysis of La Forest J. in *Egan*, based on the special societal role and needs of opposite-sex couples, was not applied to the case at bar.

Reasons for Judgment of the Court of Appeal, *per* Charron J.A. at pp. 14-16, Case on Appeal, vol. III, tab 39, p. 471-473.

10 42. The appellant submits that the majority of the Court below erred by failing to follow *Egan*, and also in refusing to accept that the majority s. 1 reasons applied by both La Forest and Sopinka JJ. in *Egan* are equally applicable to s. 29 of the *Family Law Act*. Just as the opposite-sex definition of "spouse" for the purposes of the spousal allowance under the *OAS Act* is justifiable on the basis that it is a step in an incremental process of social reform, so too the opposite-sex definition of "spouse" for the purposes of support under the *Family Law Act* -- itself the result of recent incremental legislative reform -- is also justifiable based on the same *McKinney* rationale.

20 43. Similarly, just as the definition of "spouse" in the *OAS Act* is justifiable under s. 1 because it addresses the special needs of opposite-sex partners, as held by 4 of the 5 majority judges in *Egan*, so to the definition of "spouse" for the purposes of support under the *Family Law Act*, which also addresses the special needs of opposite-sex partners including the economic dependence of women resulting from their primary role in parenting and unequal earning power, is also justifiable on the basis of the plurality reasoning.

30 44. It is submitted that the *Egan* case cannot be meaningfully distinguished from the case at bar. The fact that there would be little or no additional cost to government entailed in expanding the definition of "spouse" in the *Family Law Act*, as compared with the *OAS Act*, is not a meaningful basis of distinction. The passage in *McKinney* relied on by La Forest J. in *Egan* states that legislatures should be entitled to consider social considerations, as well as budgetary and economic factors, in determining the pace of reform. Similarly, it is submitted that Sopinka J. did not place heavy reliance on the relatively small increased cost of expanding the *OAS Act's* spousal allowance to gay and lesbian partners. Rather, his reasons were based primarily on the broader proposition that government "does not have to be pro-active" in recognizing same-sex couples as equivalent to heterosexual spouses. It is therefore submitted that the relatively small increase in program expenditure at issue in *Egan* was not the determining factor in the majority's decision.

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*Egan v. Canada, supra*, at pp. 539-540 (*per* La Forest J.) and pp. 572-577 (*per* Sopinka J.).

*McKinney v. University of Guelph, supra*, at pp. 316-318.

See also:

10            *Rosenberg v. Canada (Attorney General)* (1995), 25 O.R. (3d) 612, at p. 622 (Gen. Div.) *per* Charron J.:

... It is not as if costs was a major factor in *Egan* which contributed in any significant way in the decision of the court. The evidence of cost in *Egan* was not afforded much weight by any of the justices who dealt with the issue.

20            45.        Similarly, any attempt to distinguish the present case on the basis that the *FLA* governs "private relationships", as compared with the government program at issue in *Egan*, must be rejected. *Egan* cannot be confined to statutes conferring government benefits because the majority applied the incremental reform justification set out in *McKinney*, and *McKinney* itself was a case dealing with legislation governing private relationships. Even the dissent in *Egan* accepted that greater (not lesser) judicial deference should be given to legislation which governs private relationships (Iacobucci J. gave the example of provincial human rights codes) as compared with government programs. Since the opposite-sex definition of "spouse" was held in *Egan* to be justifiable in legislation conferring government benefits, it follows that the same definition is justifiable in legislation governing private spousal relationships.

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*Egan v. Canada, supra*, at p. 617 (*per* Iacobucci J.).

40            46.        It is submitted that Justice La Forest's s. 1 reasons in *Egan*, wherein he defines marriage as inherently heterosexual and refers to a plethora of laws designed to support "the social unit which has the capacity to procreate children and generally cares for their upbringing", clearly apply in the context of family law and cannot be confined to the facts of the *Egan* case. Similarly, Justice Sopinka's reasons, to the effect that governments are not required to be proactive in recognizing new

10 social relationships, and that equating same-sex couples with opposite-sex spouses remains a novel concept, cannot be confined to the federal *OAS Act*. These are general statements of a majority of this Honourable Court which apply generally to the opposite-sex definition of "spouse" in legislation -- including the definition used in s. 29 of the *FLA* -- and are simply not susceptible to being narrowed to the facts of the *Egan* case.

47. Since there is no meaningful basis for distinguishing the present appeal, it follows that the decision of the Court below on s. 1 was in error. It is submitted that this Honourable Court should apply the s. 1 analysis in *Egan* and allow this appeal on the basis of precedent.

20 See: *Rosenberg, supra*.

## 2. Court below erred in its s. 1 analysis

48. If this Honourable Court does not accept that this appeal should be allowed on the basis of *stare decisis*, then the Appellant's alternative submission is that s. 29 of the *FLA* is justifiable under s. 1 on the basis of an application of the s. 1 test from first principles.

### 30 i) government objective

49. The correct identification of the government objective underlying Part III of the *FLA* is of crucial importance in this appeal. The Appellant submits that the legislative purpose of spousal support in the *FLA* is to remedy the systemic sexual inequality associated with opposite-sex relationships, including the economic dependence of women on men resulting from women taking on primary responsibility for parenting and from gender-based inequality in earning power.

40 50. Instead, the Court of Appeal below accepted as the purpose an objective identified in an Ontario Law Reform Commission Report released in 1993, which dealt with the rights of cohabiting gays and lesbians under the *Family Law Act*. The LRC Report stated that the objective of spousal

support was "to provide for the equitable resolution of economic disputes that arise when intimate relationships between individuals who have been financially interdependent break down".

Reasons for Judgment of the Court of Appeal, *per* Charron J.A. at p. 18, Case on Appeal, vol. III, tab 39, p. 475.

10 Ontario Law Reform Commission, *Report on the Rights and Responsibilities of Cohabitants under the Family Law Act*, (Ministry of the Attorney General: Toronto, 1993), pp. 43-44.

51. The Appellant submits that the objective identified by the Law Reform Commission and accepted by the Court of Appeal conflicts both with the legislative history of the *FLA* and with the clear terms of the *FLA* itself. In order to determine the true purpose of the spousal support provisions and the definition of "spouse" in the *FLA*, it is necessary to consider both the history of Ontario's family law legislation and the statutory language used in the *FLA*, including Part III and s. 29 thereof, all in the context of the special needs of opposite-sex relationships.

52. The state has long intervened to impose support obligations in opposite-sex spousal relationships and in parent-child relationships. Rather than leave such relationships to be governed by the voluntary assumption of support and normal rules of property and equity, the state imposes an exceptional regime of statutory rights and responsibilities on such relationships. The state has selected the opposite-sex spousal relationship and the parent-child relationship, to the exclusion of all other kinds of relationships in society, for special treatment.

See: *Egan v. Canada*, *supra*, at p. 535 (*per* La Forest J.).

53. With respect to the spousal relationship, the concern addressed in Part III of the *FLA* is the one-way economic dependence of one spouse on the other. Almost invariably, dependent spouses are women. Although there has been a decline in the proportion of families composed of a male breadwinner and a female homemaker, women in opposite-sex relationships still tend to take on primary responsibility for the care and raising of children. As a result also of the greater earning



capacity of men, women are much more likely to become economically dependent on their male spouses than the opposite, and are much more likely to suffer economically as a result of marital breakdown.

10 *Symes v. Canada*, [1993] 4 S.C.R. 695 at pp. 762-63:

Based upon this information - indeed based upon judicial notice - I have no doubt that women disproportionately incur the social costs of childcare.

*Moge v. Moge* [1992] 3 S.C.R. 813, at 849-850.

20 Statistics Canada, *Dimensions of Job-Family Tension* (Ottawa: Ministry of Supply and Services, 1994) at 76.

Statistics Canada, *Family Income After Separation* (Ottawa: Ministry of Supply and Services, 1997) at 7.

L. Weitzman, "The economics of divorce: social and economic consequences of property, alimony and child support awards", (1981) 28 *U.C.L.A. Law Review*, 1181 at 1251-1252.

30 J. McLindon, "Separate but unequal: the economic disaster of divorce for women and children", (1987) 21(3) *Family Law Quarterly* 351 at 391-395.

B. McLachlin, "Spousal support: is it fair to apply new-style rules to old-style marriages?", (1990) 9 *Canadian Journal of Family Law* 131 at 138-139.

54. The government's primary concern in reforming the provisions relating to spousal support in 1978 was to address the economic situation of women who had been married to or cohabiting with men. The legislature accepted the conclusion of the Law Reform Commission in 1974-75 that  
40 women in spousal relationships tended to become financially dependent on their male partners because of the traditional roles of husband and wife. In enacting Part III of the *FLRA*, the government recognized and addressed the need of such women for spousal support.

Ontario Law Reform Commission, "*Vol. IV, Family Property Law*" in *Report on Family Law, supra*, pp. xi, 4-19, 49-55, 103-107.

Ontario Law Reform Commission, "*Vol. VI, Support Obligations*" in *Report on Family Law, supra*, pp. 2-22.

Ontario, Legislative Assembly, *Debates*, (November 18, 1976) (Statement by the Hon. R. McMurtry), at p. 4793.

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55. The province's extension of the support provisions of the *FLRA* to common-law partners in 1978 reflected the government's concern that women in common-law relationships were frequently subject to exploitation by their male partners and ended up dependent on public benefits upon a breakdown of the common-law relationship, including particularly where the relationship had produced children. Since the legislative objectives of preventing the exploitation of women by men, and of addressing the economic needs of women, applied to both common-law and married relationships, the support provisions in the *FLRA* were made applicable to both. As stated by the then-Attorney General:

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... there are many people living together in such relationships who are being exploited by their partner. They have been induced to enter into the relationship and to stay home and raise the children arising from the union, or children of another union, and have thus been put in a position of total dependency on the person as a result of being out of the labour market for a lengthy period of time. Many of these people are later abandoned and, under the present law, they have nowhere to turn but to the welfare authorities for support.

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This is not a small problem. For example, in September of this year, the government of Ontario has paid out family benefits to over 13,000 unmarried mothers and their 26,000 dependent children, totalling over \$3.5 million for that month alone.

[emphasis added]

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Ontario, Legislative Assembly, *Debates*, (November 18, 1976) (Statement by the Hon. R. McMurtry), at p. 4793.

56. The latest Canadian statistics continue to document that women and children experience significant losses in their standard of living upon separation. A March 1997 Statistics Canada report

entitled *Family Income after Separation* indicates that one year following separation, women suffer a median loss in adjusted family income of 23%, while men's adjusted income rises by approximately 10%. These results parallel U.S. studies which have shown even more striking discrepancies between the post-separation economic status of women and men.

10                     Statistics Canada, *Family Income After Separation*, *supra*.

L. Weitzman, "The economics of divorce: social and economic consequences of property, alimony and child support awards", *supra*.

J. McLindon, "Separate but unequal: the economic disaster of divorce for women and children", *supra*.

20                     57.       The social science data confirms that women's economic vulnerability upon separation is a result of their taking on primary responsibility for family related labour in the home and their unequal earning capacity in the workplace. Surveys continue to demonstrate that women bear a disproportionate burden of family and child-care responsibilities, despite the fact that many women are now employed. In particular, women are more likely than men to cease working, to engage in part-time work, to take on irregular work schedules or to work at home as the result of family and child-care responsibilities. The economic and career cost of these sacrifices continue to be significant.

30                     The significant wage gap women face in the workplace further intensifies the pressure upon them to sacrifice so as to enable a male spouse to maximize his earning potential, while reducing their own earning capacity upon reentry into the workforce.

                          Statistics Canada, *Dimensions of Job-Family Tension*, *supra*.

40                     B. McLachlin, "Spousal support: is it fair to apply new-style rules to old-style marriages?", *supra*.

58.       The continuing economic disadvantage faced by women in marriage was recently reaffirmed by this Honourable Court in *Moge v. Moge*, a case dealing with the federal *Divorce Act*.

What the Act requires is a fair and equitable distribution of resources to alleviate the economic consequences of marriage or marriage breakdown for both spouses, regardless of gender. The reality, however, is that in many, if not most, marriages, the wife still remains the economically disadvantaged partner.

10 *Moge v. Moge, supra*, at pp. 849-850.

20 59. While there may be a few cases in which male spouses become economically dependent on their female partners, or where one-way economic dependence arises in relationships other than heterosexual spousal relationships, it is submitted that the mischief at which the *FLA* is directed is the effects of gender-based inequality in opposite-sex relationships. The state intervenes through Part III of the *FLA* to ensure that spouses in opposite-sex relationships provide necessary economic support to dependent spouses and children. Unlike the majority of the Court below, Finlayson J.A., in dissent, recognized that Part III of the *FLA* imposes this support obligation during the existence of the spousal relationship, as well as in the event of a breakdown of the spousal relationship.

Ontario, Legislative Assembly, *Debates*, (November 18, 1976)  
(Statement by the Hon. R. McMurtry), at p. 4793.

30 *Family Law Report, 1969-75, supra*.

Reasons for Judgment of the Court of Appeal, *per* Finlayson J.A.  
(dissenting) at p. 28, Case on Appeal, vol. III, tab 39, p. 451.

40 60. It is submitted that the use of a gender-neutral definition of "spouse" in s. 29 does not change the fact that the legislature's central objective was to address the effects of women's economic dependence on men. Prior to the reforms of the 1970's, Ontario family law treated women less favourably than men in a number of respects, while support was only available to women -- i.e. from men. In order to address the former problem, the 1978 reforms instituted an across-the-board policy of sexual equality in Ontario family law. This should not obscure the fact that in virtually all cases it is still the women in opposite-sex spousal relationships who are economically disadvantaged, and that the purpose of Part III of the *FLA* is to address this problem. Indeed, this Honourable Court has

confirmed in a number of contexts that the objective of legislation may be to address problems faced by women notwithstanding the use of a gender-neutral definition of "spouse".

Ontario, Legislative Assembly, *Debates*, (November 18, 1976)  
(Statement by the Hon. R. McMurtry), p. 4793.

10 Ontario Law Reform Commission, "*Vol. IV, Family Property Law*" in  
*Report on Family Law, supra*, pp. xi, 4-19, 49, 51-55, 103-107.

*Moge v. Moge, supra*, at pp. 849-850.

*Egan v. Canada, supra*, at p. 575, para. 106 (*per* Sopinka J.).

*Miron v. Trudel, supra*, at pp. 470, 472-473, 475, 477 (*per*  
L'Heureux-Dubé J.).

*Symes v. Canada, supra*, at pp. 762-763.

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61. The other underlying reason why the state has chosen to intervene in opposite-sex relationships and to describe them in the law as spousal is because these are the relationships with capacity to produce children. It should be noted that Part III of the *FLA* imposes an obligation to support children as well as spouses and parents, and that a person can become a "spouse" under s. 29 precisely because the person is the parent of a child. The preamble to the *FLA* also refers specifically to ensuring the "equitable sharing by parents of responsibility for their children" as a purpose of the *Act*. It is submitted that the concern for children reflected in Part III, including s. 29 itself, as well as in the preamble, informs the government objective underlying the spousal support obligation, and should not be dismissed as analytically separate from the definition of "spouse" for the purposes of support, as did the majority of the court below (Finlayson J.A. dissenting on this point).

40 Reasons for Judgment of the Court of Appeal, *per* Charron J.A. at pp.  
20-22, Case on Appeal, vol. III, tab 39, pp. 477-479, *per* Finlayson  
J.A. (dissenting) at pp. 25-26, Case on Appeal, vol. III, tab 39, pp.  
448-49.

10 62. Society's children are its next generation of citizens, and the conditions in which they are raised have a profound and enduring impact on society. The state's intervention in opposite-sex spousal relationships, to the exclusion of other kinds of relationships in society, reflects its underlying concern with children, with the conditions in which children are raised, as well as with the parents who raise them, including particularly the welfare of mothers who still generally take on a disproportionate share of child-raising tasks and frequently become economically dependent on men as a result.

*Egan v. Canada, supra*, at pp. 535-539 (*per* La Forest J.).

Reasons for Judgment of the Court of Appeal, *per* Finlayson J.A. (dissenting) at pp. 25-26, Case on Appeal, vol. III, tab 39, pp. 448-49.

20 63. In light of both the history and the specific language used by the legislature in Part III of the *FLA*, it is submitted that the legislative objective of the *FLA* identified by the Court below must be rejected. First, the *FLA* was not intended to create legal obligations in respect of "intimate relationships", or to otherwise provide state support for relationships which involve sexual activity -- be it opposite-sex or same-sex. It is not the role of the state to support or endorse relationships involving a sexual aspect as being of greater value than other relationships, and it is submitted that  
30 the judiciary should not impose this as the basis for line-drawing in defining "spouse", as the Court of Appeal below has done.

*Egan v. Canada, supra*, at pp. 538-539 (*per* La Forest J.).

40 64. Second, it was not the legislature's intention that legal rights and obligations arise in all "economically interdependent" living arrangements -- on this logic, the *FLA* could be judicially extended to a wide variety of interdependent relationships including siblings, friends and others. Interdependence, in the sense of pooling incomes and assets, is not the concern of the *FLA*; rather, it is the one-way economic dependence which has characterized and still continues to characterize many opposite-sex relationships, and frequently results in women's economic need. The fact that a

relationship may be either intimate or economically interdependent, or both, simply does not invoke the fundamental concerns underlying the *FLA*.

10 65. Finally, the *FLA* is not intended to endorse the legitimacy of common-law relationships or to make moral judgments about the many kinds of relationships it does not govern. The objective of spousal support in the *FLA* is to address a concern of critical importance in society, namely the systemic gender inequality associated with opposite-sex spousal relationships.

**ii) rational connection and minimal infringement**

20 66. It is submitted that the opposite-sex definition of "spouse" is rationally connected to the objective of spousal support in Part III of the *FLA*. It imposes support obligations on those relationships which are characterized by gender-based inequality.

30 67. The sexual inequality often associated with heterosexual relationships and which results both from parenting and gender-based inequality in earning power is absent from most gay and lesbian relationships. It is submitted that the definition of "spouse" in the *FLA* reasonably excludes not only gay and lesbian relationships, but also siblings, friends, roommates, and many other types relationship, all of which are much less likely to involve parenting or the kind of resulting one-way economic dependence which is the province's concern. Same-sex couples do not differ from other excluded relationships in terms of the reasons the legislature has imposed support obligations on heterosexual couples.

*Egan v. Canada, supra*, at p. 538 (*per* La Forest J.).

40 68. The fact that some opposite-sex partners may not have children does not undermine the rationality or tailoring of the definition of "spouse" employed in the *FLA*. As held by La Forest J. in *Egan*:

10 I am not troubled by the fact that not all of these heterosexual couples in fact have children. . . I do not think that the courts should attempt to require meticulous line drawing that would ensure that only couples that had children were included. This would impose on Parliament the burden of devising administrative procedures to ensure conformity that could be both unnecessarily intrusive and difficult to administer, thereby depriving Parliament of that "reasonable room to manoeuvre" which this Court has frequently recognized as necessary."

*Egan v. Canada, supra*, at p. 538 (*per* La Forest J.).

Reasons for Judgment of the Court of Appeal, *per* Finlayson J.A. (dissenting) at p. 25, Case on Appeal, vol. III, tab 39, p. 448.

20 69. Similarly, the fact that same-sex partners occasionally adopt or bring up children "is exceptional and in no way affects the general picture." Other kinds of social units excluded from the definition of "spouse" also occasionally raise children, and such exceptions do not require treatment of such units as spousal.

*Egan v. Canada, supra*, at p. 538 (*per* La Forest J.).

Reasons for Judgment of the Court of Appeal, *per* Finlayson J.A. (dissenting) at p. 25, Case on Appeal, vol. III, tab 39, p. 448.

30 70. There are other important distinctions between opposite-sex and same-sex partners relevant to the support purposes of the *Act*. Most notably, gay and lesbian partners have, by definition, no gender-based inequality in earning power. Existing research also clearly indicates that same-sex relationships, although they parallel opposite-sex relationships in certain respects, are not characterized by the same economic and other inequalities which affect opposite-sex relationships. Studies have consistently found that same-sex relationships tend to be more egalitarian overall, and  
40 that they are not typically characterized by economic dependence. On the contrary, partners tend to be financially self-sufficient, and egalitarian in financial decision-making. Nor do same-sex partners assume stereotypical gender roles, and household labour is rarely divided along traditional gender-identified lines.



J. Lynch & M. Reilly, "Role relationships: lesbian perspectives", (1985) 12(2) *Journal of Homosexuality* 53 at pp. 53-54, 66.

B. Sang, "Lesbian relationships: a struggle towards equality", *Women-identified Women*, T. Darty & S. Potter, eds. (Palo Alto: Mayfield, 1984) 51 at pp. 52-54, 57-58.

10 N. Eldridge & L. Gilbert, "Correlates of relationship satisfaction in lesbian couples", (1990) 14 *Psychology of Women Quarterly* 43 at pp. 58-59.

M. Cardell, S. Finn & J. Maracek, "Sex-role identity, sex-role behaviour, and satisfaction in heterosexual, lesbian, and gay male couples", (1981) 5(3) *Psychology of Women Quarterly* 488 at pp. 492-493.

20 M. Schneider, "The relationships of cohabiting lesbian and heterosexual couples: a comparison", (1986) *Psychology of Women Quarterly* 234 at p. 237.

L. Peplau, "Lesbian and gay relationships", *Homosexuality: Research implications for public policy*, J. Gonsoiorek & J. Weinrich, eds. (Newbury Park: Sage, 1991) 177 at pp. 183-184.

P. Blumstein & P. Schwartz, *American couples: money, work, sex* (New York: William Morrow, 1983) at pp. 127-131, 148-151.

71. As the *Ontario Law Reform Commission Report, 1993*, states:

30 While the Coalition for Gay and Lesbian Rights in Ontario argues that same-sex couples should receive the same legal recognition and incur the same obligations as heterosexual couples, others argue that same-sex relationships are fundamentally different from heterosexual relationships. For example, in these relationships, partners may not perform traditional gender roles and they may not accept sexual monogamy and emotional exclusivity as ideals. Some commentators argue that inclusion of same-sex couples ignores real differences between couples.

40 Others argue that the assimilation of same-sex relationships to the dominant heterosexual model will reinforce a family form that has played a central role in the oppression of women. An example of this argument is the view that including same-sex spouses under the support obligation, as currently expressed in the Act, might encourage sex-sex spouses to enter relationships of dependency.

(footnotes omitted)

Ontario Law Reform Commission *Report on the Rights and Responsibilities of Cohabitants under the Family Law Reform Act, 1993*, at pp. 46-47.

*Egan v. Canada, supra*, at pp. 538-539 (per La Forest J.).

Affidavit of Eichler sworn September 20, 1994, pp. 10, 11, Case on Appeal, vol. II, tab 31, pp. 276, 277.

Cossman and Ryder, *Gay Lesbian and Unmarried Heterosexual Couples and the Family Law Act, supra*, at pp. 142, 143.

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72. It can be acknowledged that one-way economic dependence may occasionally occur in gay and lesbian relationships, and that gay and lesbian relationships may well be economically interdependent in the sense of pooling incomes and assets. However, this was not the aspect of the problem which the legislature viewed as the most serious or pressing or to which it addressed itself in the reforms of 1978 and 1986. To date, the legislature's reforms have been addressed to the one-way economic dependence of women arising from the particular nature of relationships with men, while additional steps to address the situation of individuals upon the breakdown of other kinds of relationships -- including gay and lesbian relationships -- have not been taken. Following *Egan* and *McKinney*, the legislature was entitled to focus on the aspect of the problem it viewed as most pressing, and to leave it to future legislatures to address economic dependence in other contexts.

*Egan v. Canada, supra*, at pp. 539-540, 572-574.

*McKinney v. University of Guelph, supra*, at pp. 316-318.

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73. The social science evidence dealing with same-sex couples remains incomplete. The Ontario Law Reform Commission stated in 1993 that it could not recommend extending spousal status to gay and lesbian partners without further information concerning the attitudes and expectations of cohabiting same-sex couples, and that the spousal support provisions in the *FLA* might well be unsuited to same-sex relationships. Other alternatives included the establishment of registered "domestic partnership" arrangements. In such circumstances, this Honourable Court should not substitute its own view for the legislature's regarding the competing social science evidence.

Ontario Law Reform Commission, *Report on the Rights and Responsibilities of Cohabitants under the Family Law Act, supra*, pp. 3, 46-47.

Cossman and Ryder, *Gay Lesbian and Unmarried Heterosexual Couples and the Family Law Act, supra*, at pp. 135-139.

*Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927 at pp. 989-990.

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74. It should also be noted that it is far from clear that most gay and lesbian partners actually wish to be treated as "spouses" under the law. There is a division of opinion within the gay and lesbian community regarding the desirability of being assimilated into the heterosexual model for relationships, and on whether the statutory regime under the *FLA* is suitable for same-sex partners. In such circumstances, the Court should not interfere in the legislature's mediation between these competing groups.

Ontario Law Reform Commission, *Report on the Rights and Responsibilities of Cohabitants under the Family Law Act, supra*, pp. 3, 46-47.

Cossman and Ryder, *Gay Lesbian and Unmarried Heterosexual Couples and the Family Law Act, supra*, at pp. 135-139.

*Irwin Toy Ltd. v. Quebec (Attorney General)*, *supra*.

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75. Although Ontario has declined to intervene and impose the statutory regime under the *FLA* on non-spousal and non-parental relationships, same-sex partners and other non-spouses are not without remedies where economic dependence does occur in such relationships. Where the law of property is insufficient, equitable remedies are available to non-spouses under the common law. A resulting trust or a remedy for unjust enrichment (which are specifically claimed by the Respondent in this case) are routes of redress available to same-sex partners and other non-spouses to seek compensation for their contribution to the partnership and acquisition of assets. In addition, opposite sex partners are free to voluntarily assume support obligations by agreement between the partners.

The availability of such alternative remedies is a relevant factor in the s. 1 analysis and one which minimizes the infringement of the rights of the Respondent.

*Pettkus v. Becker*, [1980] 2 S.C.R. 834, at 848-850.

*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.

76. For these reasons it is submitted that the definition of "spouse" in the *FLA* is not so overinclusive or underinclusive as to be irrational, and that it is also sufficiently tailored to the objectives of Part III to meet the minimal impairment test under s. 1 of the *Charter*.

**iii) balancing**

77. It is submitted that the policy concerns underlying the *Family Law Act* are of critical importance to society, and that the importance of allowing the legislature to proceed step-by-step in carrying out fundamental family policy reforms, outweighs any discrimination which may be caused by leaving out persons or relationships to which the government's central objectives are much less likely to apply.

*Egan v. Canada*, *supra*, at pp. 535-540 (*per* La Forest J.) and pp. 572-577 (*per* Sopinka J.).

Reasons for Judgment of the Court of Appeal, *per* Finlayson J.A. (dissenting) at p. 27, Case on Appeal, vol. III, tab 39, pp. 450.

78. It should be noted that Part III of the *FLA*, including s. 29 thereof, is a relatively recent step in an incremental process of reform of spousal support. The *FLRA* first provided equal status to spouses of both sexes in 1975, extended the right to claim support to common-law opposite-sex spouses in 1978, and further broadened the definition of "spouse" by reducing the requisite period of cohabitation from five to three years in 1986. The general meaning of "spouse" in provincial law

was only broadened from the original married definition to include common-law opposite-sex partners in 1986.

*Egan v. Canada, supra*, at p. 576 (*per* Sopinka J.).

*McKinney, supra*, at pp. 316-318.

See: "Legislative history", paras. 16-27 *supra*.

79. The state's definition of married and cohabiting opposite-sex relationships as "spousal", its imposition of spousal obligations, and the conferral of spousal benefits, is repeated throughout the law. In Ontario, ninety statutes define "spouse", and there are also numerous regulations as well as municipal by-laws which define "spouse" and confer spousal obligations and benefits. Virtually without exception, "spouse" is defined as opposite-sex. One reason is that spousal obligations and benefits are rooted in the state's fundamental concern for the needs of children and the reproducing family unit. As a result, other kinds of relationships have not attracted the same level of state attention or intervention.

Appendix A - Compilation of Spousal Distinctions in Ontario Statutes.

*Egan v. Canada, supra*, at pp. 535-539 (*per* La Forest J.), at p. 576 (*per* Sopinka J.).

Reasons for Judgment of the Court of Appeal, *per* Finlayson J.A. (dissenting) at pp. 25-26, Case on Appeal, vol. III, tab 39, pp. 448-49.

80. Furthermore, every province in Canada has family law legislation which entitles spouses to apply for support, and every province, with the recent exception of British Columbia, restricts the right to apply for support to opposite-sex spouses, as does the federal Parliament in the *Divorce Act*.

Alberta: *Domestic Relations Act*, R.S.A. 1980 chap. D-37, s. 15; *Maintenance Order Act*, R.S.A. 1980 chap. M-1, s. 3.

Saskatchewan: *Family Maintenance Act*, S.S. 1990-91 chap. F-6.1, s. 2.

Manitoba:	<i>Family Maintenance Act</i> , R.S.M. 1987 chap. F.20, s.1 and s. 4(3).
Quebec:	<i>Code civil du Quebec</i> , L.Q., 1991, chap. 64, art. 365, 585
10 New Brunswick:	<i>Family Services Act</i> , S.N.B. 1980 chap. F-2.2, ss. 111, 112(3).
Nova Scotia:	<i>Family Maintenance Act</i> , R.S.N.S. 1989 c. 160, s.2.
P.E.I.:	<i>Family Law Act</i> , S.P.E.I. 1995, chap. 12, ss.1(g), 29(1)(b).
Newfoundland:	<i>Family Law Act</i> , R.S. Nfld. 1990 chap. F-2, ss. 2(1)(e), 35(c).
20 Canada:	<i>Divorce Act</i> , R.S.C. 1985, (2nd Supp.), c. 3, ss. 2, 15.

81. Indeed, some provinces continue to restrict spousal support to married spouses, and provide no right of support to common law partners. It is only because the Ontario legislature has progressed toward the ideal of equality by imposing support obligations on male and female spouses equally, as well as on opposite-sex common law partners, that places Ontario in the position of having to justify why support obligations have not been extended even further, to include same-sex partners.

*Code civil du Quebec*, L.Q., 1991, chap. 64, art. 365, 585;

*Domestic Relations Act*, S.A. chap. D-37, s. 15;

*Maintenance Order Act*, S.A. chap. M-1, s. 3.

But see:

*Taylor v. Rossu* (1996), 191 A.R. 252 (Q.B.).

40 82. In 1994, the Ontario legislature defeated Bill 167 in a free vote, and in so doing declined to adopt a general definition of "spouse" in provincial legislation which included same-sex partners. Indeed, no other jurisdiction in North America has done so. Such a change would have major social implications. As held by Sopinka J. in *Egan*, equating same-sex partners with opposite-sex spouses

remains a novel concept and the legislature is not required to be proactive in recognizing new social relationships. Just as the federal government would have to "assess the impact of extending the benefits contained in some 50 federal statutes," so too a change to the definition of "spouse" in Ontario would affect no less than 90 provincial statutes.

10

*Egan v. Canada, supra*, at pp. 572, 576 (*per Sopinka J.*), at 539-540 (*per La Forest J.*).

Appendix A - Compilation of Spousal Distinctions in Ontario Statutes.

20

83. Once the current definition of "spouse" is departed from, a number of variations are possible, such as friends, siblings, adult children and parents, and other relatives. Indeed, at first instance in this case, Epstein J. acknowledged that her decision "may open up the opportunity for different types of unions, even some perhaps involving more than two members." If the current definition of "spouse" is struck down, it is not clear on what rational basis the legislature can delimit "spouse" when it faces the next inevitable challenge to Part III of the *FLA* based on another ground of distinction such as family status or some other analogous ground of discrimination.

30

*Egan v. Canada, supra*, at pp. 535 (*per La Forest J.*).

Judgment of Epstein, J., at p. 42, Case on Appeal, vol. II, tab 37, p. 397.

*Edwards Books and Art Ltd. v. The Queen*, [1986] 2 S.C.R. 713 (*per Dickson, C.J.C.*) at 772, 781-782.

*McKinney v. University of Guelph, supra*, at 316-318.

*Village of Belle Terre v. Boraas*, 94 S. Ct. 1536 at 1540 (1974) (United States Supreme Court):

40

It is said, however, that if two unmarried people can constitute a "family", there is no reason why three or four may not. But every line drawn by a legislature leaves some out that might well have been included. That exercise of discretion, however, is a legislative, not judicial function.

10 84. Finally, it is submitted on policy grounds that this Honourable Court should avoid making a decision on the validity of the opposite-sex definition of "spouse" which is inconsistent with its recent decision on the very same issue in *Egan*. Ontario has an intricate system of integrated spousal rights and responsibilities. If this Court rules that the definition of "spouse" can be restricted to opposite-sex partners in some acts, but must include same-sex partners in others, the parallelism in the law between spousal benefits and obligations will be destroyed, resulting in inconsistent and unfair treatment of gay and lesbian partners particularly.

20 85. There is a need for judicial consistency on the same-sex spouse issue. The Appellant and other governments in Canada currently face a plethora of litigation challenging the opposite-sex definition of "spouse" in dozens of statutes, regulations and by-laws. If the definition of "spouse" is struck down in the present context, despite having been upheld in *Egan*, then the result will be continuing litigation, act by act, to determine whether each challenge is more like *Egan*, or more like *M. v. H.*, all at considerable expense to *Charter* plaintiffs and to governments across Canada.

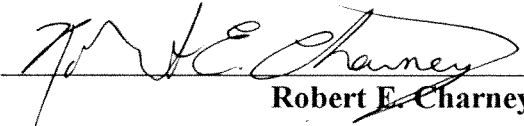
Appendix B: List of Challenges to the Opposite-sex Definition of "Spouse".

30 **PART IV -- ORDER REQUESTED**

86. Since the majority s. 15(1) and s. 1 reasons in *Egan* are fully applicable to the case at bar, it is submitted that the answers to the constitutional questions are "yes" and "yes" respectively, and that this appeal should accordingly be allowed.



ALL OF WHICH IS RESPECTFULLY SUBMITTED

  
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*"Peter C. Landman" per R.E.C.*  
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September 18, 1997

**NOTICE TO THE RESPONDENT:**

Pursuant to subsection 44(1) of the *Rules of the Supreme Court of Canada*, this appeal will be inscribed by the Registrar for hearing after the respondent's factum has been filed or on the expiration of the time period set out in paragraph 38(3)(b) of the said Rules, as the case may be.

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**APPENDIX A**

**Spousal Distinctions in Ontario Statutes**



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(A) DEFINITIONS OF SPOUSE USED IN ONTARIO STATUTES

1. Human Rights Code

- "spouse" means the person to whom a person of the opposite sex is married or with whom the person is living in a conjugal relationship outside marriage

2. Modified Human Rights Code

- "spouse" means a person of the opposite sex,
  - (a) to whom the person is married, or
  - (b) with whom the person is living in a conjugal relationship outside marriage, if the two persons,
    - (i) have cohabited for at least a year,
    - (ii) are together the parents of a child, or
    - (iii) have together entered into a cohabitation agreement under section 53 of the Family Law Act.

3. Section 29 of Family Law Act

- "spouse" means a married spouse as defined in subsection 1(1) of the Family Law Act, and in addition includes either of a man and a woman who are not married to each other and have cohabited,
  - (a) continuously for 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

(B) GENERAL PROVISIONS

## 1. PROHIBITION ON MARITAL STATUS DISCRIMINATION

Human Rights Code

- Code prohibits discrimination on the basis of marital status in relation to the provision of goods, services, accommodation, employment subject to specific exemptions
- Code's provisions have primacy over all other Ontario statutes

Definition of "spouse": Spouse includes couples of the opposite sex cohabiting in a conjugal relationship outside marriage

Definition of "marital status": Marital status includes the status of living with a person of the opposite sex in a conjugal relationship outside marriage

## 2. RIGHTS TO PRIVACY

Freedom of Information and Privacy ActMunicipal Freedom of Information and Privacy Act

- Both Acts prohibit disclosure of "personal information", which is defined to include information about "marital status"

## 3. ABOLITION OF ILLEGITIMACY

Children's Law Reform Act

- Abolishes all legal distinctions between children based on whether they were born "outside wedlock"
- Establishes new rules based on biological parentage
- Includes presumptions about biological parentage based on cohabitation between the child's mother and a male person before the child was born.

No definition of spouse, but all cohabiting spouses would be caught by the presumption of parentage in section 8.

#### 4. RIGHTS TO ADOPT CHILDREN

##### Child and Family Services Act

- The spouse of a child's parent is not subject to same restrictions regarding the placement of a child for adoption
- The written consent of the spouse of a parent is required for an adoption order

Definition of "spouse": Human Rights Code

#### 5. RIGHTS TO SHARE A FAMILY NAME

##### Change of Name Act

- Cohabiting couples may apply together under this Act for a change of name, despite "spouse" being defined in the Act as married spouses only

Definition of "spouse": Human Rights Code

#### 6. RIGHTS TO MAKE SUBSTITUTE DECISIONS ON BEHALF OF A SPOUSE

- All of the following statutes provide spouses with rights to make decisions on behalf of their spouses should their spouses become incapable:

Consent to Treatment Act, 1992: decisions regarding medical treatment

Homes for the Aged and Rest Homes Act: decisions regarding personal care

Human Tissue Gift Act: decisions regarding use of body after death

Mental Health Act: decisions regarding consent to treatment

Nursing Homes Act: decisions regarding personal care

Substitute Decisions Act, 1992: decisions regarding management of property and personal care

Workers' Compensation Act: decisions regarding payment of benefits and rights to take action against a party other than the employer

Definition of spouse (all statutes): Modified Human Rights Code

##### Absentees Act

- Court may grant the spouse of an "absentee" the right to manage the absentee's property

Definition of spouse: Human Rights Code

## 7. RIGHTS ON DEATH OF A SPOUSE

### Coroners Act

- Spouses have rights to examine coroner's records, request an inquest, object to extraction of pituitary gland with respect to deceased spouse

Definition of spouse: Modified Human Rights Code

### Estates Act

- Court may grant administration of estate to a spouse where a person dies Intestate

Definition of spouse: Human Rights Code

Note: See Part F (p. 20) for rules regarding inheritance of property

(C) RIGHTS TO FINANCIAL SUPPORT AND FINANCIAL BENEFITS

1. SUPPORT OBLIGATIONS BETWEEN SPOUSES

Family Law Act

- Spouses have obligations to financially support one another and can apply for an order for financial support on family breakdown
- Spouses also have rights to enter into domestic contracts re. their mutual obligations of financial support and can sue for pecuniary loss if a spouse is injured or killed

Definition of spouse: 3 years cohabitation or "relationship of some permanence" if together the parents of a child

Succession Law Reform Act

- A spouse may claim financial support from an estate if his or her deceased spouse did not make adequate provision for his or her support

Definition of spouse: as in s. 29 of the FLA

Related Provisions:

Execution Act

- Debts for maintenance payments to spouse or former spouse prevail over exemptions from execution (in most cases)

Definition of spouse: Human Rights Code. (But note: provision would only apply to spouses eligible for "maintenance" payments.)

Family Support Plan Act

- Enforcement of support orders is governed by the Family Support Plan Act, which provides, inter alia, for automatic wage deduction where a former spouse has permitted support payments to fail into default. The Family Support Plan Act applies to all support orders made under the Family Law Act.

No definition of spouse in the FSPA, but Act applies to all spouses who are entitled to support under the Family Law Act

Insurance Act

- Insurance money is exempt from seizure where the spouse of an insured person is designated as having an interest

No definition

Mental Health Act

- Where the Public Trustee is the committee of a patient's estate, he or she may make support payments to the patient's spouse

Definition of spouse: Modified Human Rights Code

Mental Hospitals Act

- A spouse is liable for the maintenance of his or her spouse in a mental hospital governed by the act. (Probably archaic: see Health Insurance Act below re. provision of insured health services.)

No definition

Municipal Health Services Act

- A spouse is liable for any tax payable by his or her spouse where a personal tax is levied on municipal residents for health services. (Probably archaic: see Health Insurance Act below re. provision of insured health services.)

No definition

Retail Sales Tax Act

- Where a person acquires property from a spouse or former spouse on marriage breakdown and the acquisition satisfies the person's rights under the Family Law Act, no tax is payable

Definition of spouse: as in s. 29 of the Family Law Act.

Workers' Compensation Act

- Spouse entitled to have workers' compensation payments garnished for support or maintenance

Definition of spouse: Modified Human Rights Code

## 2. RIGHTS TO EMPLOYMENT BENEFITS

### a. Pension Benefits

#### Pension Benefits Act

- Spouses of pension plan members are entitled to joint and survivor pensions
- Pension Benefits Act governs in the event of a conflict with any other Act.

Definition of spouse: as in s. 29 of FLA: support definition

Other Provisions Permitting Employers to Provide Pension Benefits to their Employees and their Employees' Spouses:

#### Courts of Justice Act

#### Municipal Act

#### Municipality of Metropolitan Toronto Act

#### Ontario Municipal Employees Retirement System Act

#### Public Libraries Act

#### Public Service Pension Act

#### Teachers' Pension Act

- All pensions provided under these statutes must be joint and survivor pensions as per the Pension Benefits Act

Definition of spouse for this purpose (all statutes): as in s. 29 of FLA: support definition



b. Other Employment Benefits

Employment Standards Act

- General prohibition on marital status discrimination in relation to employment benefits, except as permitted by the Regulations
- ESA governs in the event of a conflict with any other Act

**Statutes Permitting Employers to Provide Benefits (other than pension benefits) to their Employees and their Employees' Spouses:**

Education Act

- Boards may provide annual retirement allowances to widows or widowers of employees and provide for group life insurance for employees and their spouses

No definition of Spouse

Legislative Assembly Act

- Spouses have the right to a set number of paid trips between the member's residence and the seat of government

Definition of spouse: Human Rights Code

Legislative Assembly Retirement Allowance Act

- Retirement allowance may be granted to spouse of deceased member

Definition of Spouse: Modified Human Rights Code

Municipal Act

- Municipal Councils may pass by-laws permitting retirement allowances and "gratuities" to be granted to surviving spouses of employees and to provide for accident and hospitalization insurance

Definition of Spouse: Modified Human Rights Code

Partnerships Act

- Spouses may receive benefits by way of annuity from the partnership business without being deemed to be partners

Definition of spouse: Human Rights Code

Perpetuities Act

- Rule against perpetuities does not apply to trusts or funds established to benefit employees' surviving spouses

Definition of Spouse: Modified Human Rights Code

Police Services Act

- Municipal council or Lieutenant Governor in Council may grant aid to surviving spouses of police officers who die in the line of duty. (Probably archaic: provision of spousal survivor pensions governed by OMERS.)

No definition of spouse

Regional Municipality of Ottawa-Carleton Act

- Annual retirement allowances may be provided to surviving spouses of employees

Definition of spouse: Modified Human Rights Code

Workers' Compensation Act

- Spouses entitled to compensation if worker dies from job-related injury

Definition of spouse: Modified Human Rights Code

## 3. INSURANCE BENEFITS

Insurance Act

- Spouses may be covered under a single contract for "family insurance"
- A spouse has an insurable interest in the life and well-being of his or her "spouse"
- A spouse of a deceased insured is deemed to be insured under the owner's policy
- A spouse is included as an insured person in some cases involving injury or death and is entitled to claim statutory accident benefits

Definition of spouse: For most purposes no definition is given, however definitions are given (i) for the purposes of automobile insurance, where definition is as in s.29 of Family Law Act (with the exception of no-fault benefits, which have their own modified definition provided by Regulation), and (ii) in the case of "family insurance" which by statute applies to married couples

#### 4. GOVERNMENT BENEFITS

##### a. Needs-Tested Benefits

###### Family Benefits Act

###### General Welfare Assistance Act

- Family benefits are available to all parents who are not living with a spouse and some persons over the age of 65 who are not living with a spouse
- Entitlement to social assistance under both programs is based on "family income": all of the income and assets of a "spouse" must be pooled with the applicant's in assessing an individual's need for assistance

Definition of spouse (contained in Regulations): as in s. 29 of the FLA: support definition

###### Income Tax Act (Ontario)

- Entitlement to sales tax credits, property tax credits, and Ontario home ownership savings plan tax credits are determined on the basis of "family income": all of the income of a "spouse" must be included with the tax filer's

Definition of spouse is governed by tax collection agreement with the federal government: common law couples are considered "spouses" after one year of cohabitation under federal tax rules.

###### Ontario Guaranteed Annual Income Act

- Entitlement to benefits (for persons over the age of 65) are calculated on the basis of "family income": all of the income of a "spouse" must be included.

**Definition of spouse: any two persons of the opposite sex who have been cohabiting for three years where there is a bar to their marriage or for one year if they have publicly represented themselves as husband and wife. Provision is archaic: based on a provision of the federal Old Age Security Act, which has since been repealed. Benefit is delivered as a supplement to Old Age Security Act benefits and province relies on federal government to provide names of recipients.**

## b. Other Government Benefits

### Assessment Act

- Surviving spouse of owner of farming land entitled to more favourable tax assessment

No definition

### Compensation for Victims of Crime Act

- Criminal Injuries Compensation Board may make an order for compensation for the spouse of a person who has been killed during the commission of a crime

Definition of spouse: Human Rights Code

### Corporations Tax Act

- Spouses Included in definition of "family farm corporation" and "family fishing corporation": eligible for more favourable tax treatment

Definition of spouse governed by tax collection agreement with the federal government: federal tax rules recognize common law couples as spouses after one year cohabitation

### Health Insurance Act

- The spouse of an insured person is entitled to insured services

Definition of spouse: Modified Human Rights Code

### Land Transfer Tax Act

- Transferee of land may receive tax credit if spouse entitled to it
- Non-resident employer may have tax reduced if land bought for an employee and his or her spouse
- One spouse may make affidavit on behalf of both spouses

Definition of spouse: s. 29 of FLA

### Municipal Elderly Residents' Assistance Act

- Owners entitled to tax credit against their property taxes where the owner or his or her spouse is over the age of 65

Definition of Spouse: Modified Human Rights Code

### Retail Sales Tax Act

- No sales tax is payable if property is transferred to a spouse for no consideration

Definition of Spouse: as in s. 29 of the FLA

**(D) CONFLICT OF INTEREST**

The following statutes all address situations where spouses are assumed to have common interests (often financial interests) which require the placing of special restrictions and obligations on spouses, or exempt them from certain activities.

**Business Corporations Act**

- Spouses are included in definition of "associate"
- Prohibitions are placed on financial assistance which can be provided to associates
- Associates also excluded in determining whether takeover bid accepted by sufficient percentage of shares

Definition of Spouse: Human Rights Code

**Community Economic Development Act, 1993**

- Community investment share corporation is prohibited from issuing Class A shares if it would result in a person and his or her spouse holding shares over the prescribed limits

Definition of Spouse: as in s. 29 of FLA

**Cooperative Corporations Act**

- Spouses included in definition of "associate" and "related person"
- Insider information cannot be used by insiders or their associates
- Restrictions on when a related person can be appointed auditor or receiver

Definition of Spouse: Human Rights Code

**Corporations Act**

- Spouses included as "associates" for purposes of insider trading provisions: accountable to corporation for any benefits received as a result

Definition of Spouse: Human Rights Code

**Credit Unions and Caisse Populaires Act**

- Spouses are included in definition of "related persons": unable to be an auditor

Definition of Spouse: Human Rights Code

**Election Act**

- Spouse of a returning officer cannot be appointed election clerk without the approval of the Chief Election Officer

Definition of Spouse: Modified Human Rights Code

Evidence Act

- Spouses are competent, but not compellable, witnesses in proceedings involving their spouses

Definition of Spouse: Married spouses only

Note: All spouses are compellable witnesses in default proceedings under the Family Support Plan Act (s. 11(2)) and Reciprocal Enforcement of Support Orders Act (s. 16).

Independent Health Facilities Act

- Spouses deemed to be associates in operation of independent health facility

No definition

Juries Act

- Spouses of judges, lawyers, law enforcement officials are ineligible to serve on juries
- Spouses not to be included on the same jury panel with each other

Definition of Spouse: Human Rights Code

Labour Sponsored Venture Capital Corporations Act, 1992

- Spouses included in definition of "related group" and "related person"

Definition of Spouse: s. 29 of FLA

Loan and Trust Corporations Act

- Spouse included in definition of "restricted party" and "relative"
- Spouse of a director, officer or employee cannot be an outside director or an auditor
- Corporation cannot invest in real estate owned by director's spouse, buy from or lend to a spouse, enter into a transaction with a spouse (except under special circumstances)
- Corporation subject to investment limitations in the case of single investments to two or more related persons

Definition of Spouse: Human Rights Code

Members' Conflict of Interest Act

- Member must disclose assets, liabilities and financial interests of member and his or her spouse

Definition of Spouse: as in s. 29 of the FLA

**Municipal Conflict of Interest Act**

- Pecunary interest of a member's spouse deemed to be the pecunary interest of the member

Definition of Spouse: Human Rights Code

**Municipal Elections Act**

- Spouse of a candidate cannot be appointed an election official (poll clerk, deputy returning officer)
- Funds from spouses of registered candidates deemed to be "contributions"

Definition of Spouse: Modified Human Rights Code

**Nursing Homes Act**

- Spouse included in definition of "associate": financial statements must include information regarding payments made to the benefit of the licensee's spouse

Definition of Spouse: : Modified Human Rights Code

**Ontario Energy Board Act**

- Limits the number of shares which can be acquired by a person and his or her spouse

Definition of Spouse: Human Rights Code

**Ontario Youth Employment Act**

- Employee's spouses not entitled to employment under the program

Definition of Spouse: Human Rights Code

**Ottawa-Carleton French Language School Board**

- Spouse of member of Board of Commission cannot be a mediator

Definition of Spouse: Modified Human Rights Code

**Powers of Attorney Act**

- Powers of attorney cannot be executed before a witness who is the spouse of the attorney

Definition of Spouse: Human Rights Code

**Securities Act**

- Spouses Included in definition of "associates" and restrictions placed on spouses in a number of areas: e.g. use of confidential information, loans and takeover bids
- Registration and prospectus requirements waived when trade or distribution of securities is to a spouse

Definition of Spouse: Human Rights Code

**Small Business Development Corporations Act**

- Restrictions on investments by small business development corporations where spouses hold shares

Definition of Spouse: s. 29 of FLA



**(E) SPOUSAL CO-RESIDENCY****1. RIGHTS TO PARTICIPATE IN MUNICIPAL ELECTIONS****County of Simcoe Act**

- Spouses of owners and tenants are qualified to hold office as hydro commissioner

Definition of Spouse: Modified Human Rights Code

**Education Act**

- Spouses of school supporters, owners and tenants and school are entitled to vote

No definition of Spouse

**Municipal Act**

- Spouses of owners and tenants are qualified to be elected a trustee and to vote

Definition of Spouse: Modified Human Rights Code

**Municipal Elections Act**

- Spouses of school supporters, owners, tenants are eligible to vote in municipal elections

Definition of Spouse: Modified Human Rights Code

**2. HOUSING AND SHARED ACCOMMODATION****Charitable Institutions Act**

- Residents have rights to meet privately with their spouses and, if both spouses are residents, to share a common room

Definition of spouse: Modified Human Rights Code

**Election Act**

- Members of the armed forces and their spouses can vote by proxy

Definition of Spouse: Modified Human Rights Code

**Homes for the Aged and Rest Homes Act**

- Residents have rights to meet privately with their spouses and, if both spouses are residents, to share a common room

Definition of spouse: **Modified Human Rights Code**

**Landlord and Tenant Act**

- Landlord may terminate a lease if he or she requires possession for him or herself or for a spouse
- Restrictions on distraint with respect to goods on non-residential property do not apply where property is claimed by a spouse living on the premises

Definition of Spouse: **Modified Human Rights Code**

**Municipal Act**

- Where taxes are unpaid on residential property, the Treasurer may levy them by distress on goods and chattels if title is claimed by the spouse of the owner
- Councils may pass by-laws re. the prohibition of parking on private property without the consent of the owner/occupier or his or her spouse

Definition of Spouse: **Modified Human Rights Code**

**Non-Resident Agricultural Land Registration Act**

- Spouse of member of armed forces, ambassador etc. considered a non-resident person re. interest in agricultural land

Definition of Spouse: **Modified Human Rights Code**

**Municipality of Metropolitan Toronto Act**

- Surviving spouse may remain in leased premises after the death of the tenant or occupant

Definition of Spouse: **Human Rights Code**

**Nursing Homes Act**

- Residents have rights to meet privately with their spouses and, if both spouses are residents, to share a common room

Definition of Spouse: **Modified Human Rights Code**

**Rent Control Act, 1992**

- Act does not apply to living accommodation where occupant is required to share a bathroom or kitchen facility with the owner or the owner's spouse

Definition of Spouse: **Modified Human Rights Code**

Rental Housing Protection Act

- Conversion of rental property does not require approval of municipal council if conversion is for the purpose of occupation by the owner or his or her spouse

Definition of Spouse: Modified Human Rights Code

Toronto Island Residential Community Stewardship Act, 1993

- House or land can be transferred to a spouse, child or joint tenant: otherwise must be transferred to trust corporation

Definition of Spouse: s.29 of FLA

(F) LEGAL OWNERSHIP OF PROPERTY

1. SHARING OF FAMILY PROPERTY

Family Law Act

- Spouses have right to share family property on death or marriage breakdown, and rights re. possession of the matrimonial home

(Related statutory provisions (filing requirements etc.) with the same definition of spouse: Land Titles Act, Registry Act, Municipal Sales Tax Act)

Definition of Spouse: Married spouses only

2. INHERITANCE OF ESTATES

Succession Law Reform Act

- Spouses inherit property if spouse dies Intestate

Definition of Spouse: Married spouses only

Trustee Act

- Spouse who receives estate as a result of erroneous grant of probate or administration to personal representative must return it, or its value

Definition of Spouse: Married spouses only

(G) MISCELLANEOUSAgricultural Committees Act

- spouses of farmers part of eligible group for membership of agricultural committee

No definition

Consumer Reporting Act

- marital status and name and age of person's spouse included in definition of "credit information"

No definition

Conveyancing and Law of Property Act

- two persons granted, conveyed or devised land are presumed to take as tenants in common, even if spouses

No definition

Junior Farmer Establishment Act

- spouses of junior farmers qualify for both loan and loan guarantee

Definition of spouse: Human Rights Code

Marriage Act

- statutory scheme designed to regulate marriage

Applies by definition to married spouses only

McMichael Canadian Art Collection Act

- remains of spouses of Group of Seven can be interred in McMichael Collection Cemetery

Applies to spouses of Group of Seven only

Mortgages Act

- mortgagee can obtain possession (for purchaser) of house being rented and terminate lease of tenant if gets assurance from purchaser that house required for his or her use or that of spouse or other family

No definition

**Ontario Home Ownership Savings Plan Act**

- program to assist first-time home buyers to buy an "eligible home" takes into account whether spouse owns or has owned an eligible home

**Definition of spouse: married spouses only**

**Ontario Pensioners Property Tax Assistance Act**

- Individuals 65 or over may apply for limited annual grant to offset their "occupancy cost" (municipal tax, rent) or occupancy cost incurred by spouse

**Definition of spouse: married spouses only by implication**

(H)

## LIST OF STATUTORY PROVISIONS

(This list refers to public acts consolidated in the R.S.O. 1990 Ontario statutes and enacted 1991-1993. No reference is made to unconsolidated and unrepealed public acts or private acts. Though some Ontario Regulations are included, timing did not permit a systematic review of all references to "spouse" in the Regulations. It may be that the Regulations contain a definition of spouse where no definition is provided in the enabling statute.)

Absentees Act, s. 2(2)

Agricultural Committees Act, s. 6

Assessment Act, s. 19(4)

Business Corporations Act, ss. 1(1), 20(1), 50, 188(1)-(2)

Change of Name Act, ss. 1, 3, 4, 5, 6, 13

Charitable Institutions Act, ss. 3.1(2), 13(3), 13(6)

Child and Family Services Act, ss. 136(1), 137(10), 141(8), 146(2), 146(4), 158(2)

Children's Law Reform Act, s. 78(3)

Community Economic Development Act, 1993, s. 1(1)

Compensation for Victims of Crime Act, ss. 1, 21(3)

Consent to Treatment Act, 1992, ss. 1, 17(1)

Consumer Reporting Act, s. 1

Conveyancing and Law of Property Act, s. 13(2)

Co-operative Corporations Act, ss. 1(1), 111(1), 111(3), 126(1)-(4)

Coroners Act, ss. 1, 18(2), 26(1), 29(2)

Corporations Act, ss. 72(1), 76, 188, 189

Corporations Tax Act, ss. 1(2), 61(5), 71(2)-(3)

County of Simcoe Act, 1993, ss. 11(7)-(8)

Courts of Justice Act, s. 53(1)(c)(iii)

Credit Unions and Caisse Populaires Act, ss. 1(1), 63

Education Act, ss. 1, 61(1)(b), 62(7), 89(7), 92(14), 177(1)(a)

Election Act, ss. 8(2), 17(1), 22(2)-(3)

Employment Standards Act, s. 33(2), O. Reg. 321

Estates Act, ss. 29(1), 36(2)

Evidence Act, s. 8

Execution Act, ss. 1, 5(2)-(3), 6, 7(2)

Family Benefits Act, s. 7, O. Reg. 366

Family Law Act, ss. 1(1), 29, 61 [definitional sections which apply to all other references to spouse in Act]

Family Support Plan Act, ss. 1(1), 11(12)

Freedom of Information and Privacy Act, s. 2(1)

General Welfare Assistance Act, O. Reg. 537

Health Insurance Act, ss. 1, 11(2), 14(2), 45(1), O. Reg. 552

Homes for the Aged and Rest Homes Act, ss. 1.1(2), 32

Human Rights Code, ss. 10(1), 24(1)

Human Tissue Gift Act, ss. 5(1)-(2)

Income Tax Act, ss. 1(1), 7(2.1), 7(3.1), 8(1)-(5), 8(7)-(8), 8(17)

Independent Health Facilities Act, s. 1(3)(e)

Insurance Act, ss. 171, 179(1), 196(2), 224, 239(4), 250(4)(c), 265(2), 268(5), 268(5.1), 290, 305(1), 317(2), 323, 436(1), O. Reg. 776/93

Junior Farmer Establishment Act, ss. 1, 15(4), 27(1)(d)(i)

Juries Act, ss. 3(1) para. 7, 18(3)

Labour Sponsored Venture Capital Corporations Act, 1992, ss. 1(1), 6(1), 14(1)

Land Titles Act, ss. 44(1) para. 5, 151(3)

Land Transfer Tax Act, ss. 1(1), 1(5)(e), 5(2)(g), 9(1)(e), 9(2), 18(8)

Landlord and Tenant Act, ss. 1(1), 31(2), 103, 105(7)-(8), 110(3)-(5)

Legislative Assembly Act, s. 67(3)



Legislative Assembly Retirement Allowance Act, ss. 1, 11(1)-(5), 16(1), 19(1)-(5)

Loan and Trust Corporations Act, ss. 1(1), 2(10), 89(3), 116(2), 140-142, 141(2), 142(1)-(2), 144, 146, 148, 159, 168(5)

Marriage Act, throughout

McMichael Canadian Art Collection Act, s. 7(2)(g)

Members Conflict of Interest Act, ss. 1, 12(2)-(3), 13(1)-(3)

Mental Health Act, s. 2(1) para. 3 [to be repealed by Consent and Capacity Statute Law Amendment Act, 1992]

Mental Hospitals Act, s. 19

Mortgages Act, ss. 53(3), 53(6)

Municipal Act, ss. 1(1), 37(2), 98(2), 98(3), 99, 207 para. 48, 210 para. 131, 333(1), 400(1), 400(2)

Municipal Conflict of Interest Act, ss. 1, 3

Municipal Elderly Residents' Assistance Act, ss. 1, 2(1)-(3)

Municipal Elections Act, ss. 1, 5(1), 5(5), 14(1), 21, 22(1), 23(1), 30(1), 73(4), 88(4), 89(3), 141(9), 151.(5.2), 173(2), 195(4.2)

Municipal Freedom of Information and Protection of Privacy Act, s. 2(1)

Municipal Health Services Act, s. 6(2)

Municipal Tax Sales Act, ss. 4(2), 5(3), 11(1)-(2)

Municipality of Metropolitan Toronto Act, ss. 24(3), 25(1), 234(8), 238(12), 238(13), 238(15)

Non-Resident Agricultural Land Interests Regulation Act, s. 1(1)

Nursing Homes Act, ss. 1(2)-(3), 2(2) para. 14, 28(3), 39(3), 39(6)

Ontario Energy Board Act, s. 26(2), 26(5)

Ontario Guaranteed Annual Income Act, ss. 1, 2(4), 6(2)-(7), 7(1)-(5), 13

Ontario Home Ownership Savings Plan Act, ss. 1, 2 paras. 6 and 9-10 and 18, 3(3), 5(4), 5(6), 7(1)-(4), 9(1)-(2)

Ontario Municipal Employees Retirement System Act, ss. 1, 5(1)

Ontario Pensioners Property Tax Assistance Act, ss. 1, 2(2), 3(2), 3(4), 4(1)-(2), 8(2)

Ontario Youth Employment Act, s. 4(1)-(2)

- Ottawa-Carleton French Language School Board Act, ss. 19, 20, 53(4)
- Partnerships Act, s. 3 para. 3(c)
- Pension Benefits Act, ss. 1, 29(1), 29(5), 44(1), 44(3)-(5), 47, 48(1)-(4), 48(6)-(7), 48(14), 51(2), 51(3), 51(5), 84(1)
- Perpetuities Act, s. 9(2)
- Police Services Act, ss. 16, 20
- Powers of Attorney Act, s. 7(2)
- Public Libraries Act, s. 22(2)
- Public Service Pension Act, Schedule 1, s. 1 (from S.O. 1989, c. 73), ss. 14(1), 14(2), 14(4), 14(6)
- Reciprocal Enforcement of Support Orders Act, s. 16(1)
- Regional Municipality of Ottawa-Carleton Act, s. 9(2)
- Registry Act, ss. 47, 78(8)
- Rent Control Act, 1992, s. 3(1)
- Rental Housing Protection Act, s. 4(2)
- Retail Sales Tax Act, ss. 4.2(4), 8(2)-(3)
- Securities Act, ss. 1(1), 35(1) para. 21(ii)(D), 72(1)(p)(ii)(D), 76(5), 91(1), 94(1), 111(1), 118(2), 134(4)
- Small Business Development Corporations Act, s. 1, 12(1)-(3), 24(1)
- Substitute Decisions Act, 1992, ss. 1, 10(2), 17(2), 24(2), 46(3), 57(2), 69(6)
- Succession Law Reform Act, ss. 1(1)-(2), 12(2)-(3), 13(1), 16(1), 17(2), 31, 44, 45(1)-(3), 46(1)-(2), 47(1), 47(3)-(7), 57, 62(1), 62(3)
- Teachers' Pension Act, Schedule 1, s. 1 (from S.O. 1989, c. 92)
- Toronto Islands Residential Community Stewardship Act, 1993, ss. 20(1), 21(2)-(3), 27(4)
- Trustee Act, s. 47(1)
- Workers' Compensation Act, ss. 1(1), 10(8), 10(17)-(18), 35(2)-(8), 35(10)-(11), 35(13), 35(16)-(17), 39(3)-(4), 44(2), 44(4)-(5), 48(3), 49, 63(2), 69, 74(1)

## APPENDIX B

### Challenges to the Opposite-sex Definition of “Spouse”

#### Pre-Egan Decisions

- *Veysey v. Canada (Commissioner of the Correctional Services)*, [1990] 1 F.C. 321 (T.D.)
- *Andrews v. Ontario (Minister of Health)* (1988), 64 O.R. (2d) 258 (H.C.J.)
- *Haig and Birch v. Canada* (1992), 9 O.R. (3d) 495 (C.A.)
- *Coles and O’Neill v. Ontario* (August 30, 1994), (Ontario Bd. of Inquiry) [unreported]
- *Leshner v. Ontario* (No.2) (1992), 16 C.H.R.R. D/184 (Ontario Bd. of Inquiry)
- *Canada (Attorney General) v. Mossop*, [1993] 1 S.C.R. 554
- *Knodel v. British Columbia (Medical Services Commission)*, [1991] 6 W.W.R. 728 (B.C.S.C.)
- *Douglas v. Canada*, [1993] 1 F.C. 264 (T.D.)
- *Anderson v. Luoma* (1984), 14 D.L.R. (4th) 749 (B.C.S.C.)
- *Layland v. Ontario (Minister of Consumer and Commercial Relations)* (1993), 14 O.R. (3d) 658 (C.A.)
- *K(Re)* (1995), 23 O.R. (3d) 679 (Prov. Div.)
- *Nielsen v. Canada (Human Rights Commission)*, [1992] 2 F.C. 561 (T.D.)
- *C.U.P.E. (Local 2424) v. Carleton University (Re)* (1988), 35 L.A.C. (3d) 96 (Board of Arbitration), aff’d June 4, 1990 (Ont. Div. Ct.) [unreported], leave to appeal refused, [1990] O.J. No. 1890 (C.A.) (QL)
- *Clinton v. Blue Cross*, [1994] O.J. No. 903 (Gen. Div.) (QL)
- *Parkwood Hospital and McCormick Home and London and District Service Worker’s Union* (1992), 24 L.A.C. (4th) 149 (P. Haefling)
- *R. v. Rehberg* (1993), 111 D.L.R. (4th) 336 (N.S.S.C.)

- *C.(L.) v. C.(C.)* (1992) 10 O.R. (3d) 254 (Gen. Div.)
- *Canada v. Owen* (1993), 110 D.L.R. (4th) 339 (F.C.T.D.)

### **Post-Egan Decisions**

- *Rosenberg v. Canada (Attorney General)* (1995), 25 O.R. (3d) 612 (Gen. Div.), on appeal
- *Sims v. Ontario (Attorney General); Dwyer v. Municipality of Metropolitan Toronto*, [1996] O.H.R.B.I.D. No. 33 (QL) (Ontario Board of Inquiry), on appeal
- *Vogel v. Manitoba* (1995), 126 D.L.R. (4th) 72 (Man. C.A.)
- *Obringer v. Kennedy Estate* (1996), 11 O.T.C. 378 (Gen. Div.)
- *Regnier v. O'Reilly*, [1997] B.C.J. No. 739 (S.C.) (QL)
- *C.E.G. (No. 1) (Re)*, [1995] O.J. No. 4072 (Gen. Div., Fam. Ct.) (QL)
- *C.E.G. (No. 2) (Re)*, [1995] O.J. No. 4073 (Gen. Div., Fam. Ct.) (QL)
- *Canada (Attorney General) v. Moore*, [1996] F.C.J. No. 1139 (T.D.) (QL)
- *Modopoulos v. Breen Estate* (1996), 12 E.T.R. (2d) 128 (Ont. Ct. (Gen. Div.))
- *Taylor v. Rossu* (1996), 140 D.L.R. (4th) 562 (Alta. Q.B.)
- *Metro Toronto Reference Library and C.U.P.E., Local 1582 (Re)* (1995), 51 L.A.C. (4th) 69 (Ontario Board of Arbitration)
- *Taylor v. Rossu* (1996), 191 A.R. 252 (Q.B.)
- *McCallum v. Toronto Transit Commission* (September 16, 1997) (Ontario Board of Inquiry) [unreported]

**Judgment Reserved (Ontario)**

- *Bewley v. Ontario* (heard April 29-30, 1997) (Ontario Board of Inquiry)

**Proceedings Commenced (Ontario)**

- *Kane v. Ontario (Attorney General) and Axa Insurance* (Ont. Gen. Div.), to be heard Sept. 23-25, 1997
- *Bishop v. Ontario (Attorney General)*, (Human Rights Commission)
- *Bryk v. Ontario (Attorney General)*, (Human Rights Commission)
- *Westwood v. Ontario (Attorney General)*, (Human Rights Commission)