Court File No. 25838

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

BETWEEN:

THE ATTORNEY GENERAL OF ONTARIO

Appellant (Intervenor)

- and -

M.

Respondent (Respondent)

- and -

H.

Respondent (Appellant)

FACTUM
OF THE INTERVENOR, REAL WOMEN OF CANADA

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PART I - INTRODUCTION AND FACTS

1. This is one of the most important social cases which this Court has heard since the promulgation of the *Canadian Charter of Rights and Freedoms* (the "*Charter*") some 17 years ago, for the Court will have to decide whether it radically redefines one of the most important words in our legal and cultural lexicon - "spouse". If this appeal is dismissed, the Court will have signalled to legislatures, and the Canadian culture at large, that the word "spouse" no longer bears its established meaning as shaped by our history, philosophy and culture, but instead, by reason of a general constitutional imperative of equality, now embraces a relationship which hitherto has not been

brought within its ambit. This is not a case where the Court can take comfort that its decision will be one with a narrowly circumscribed legal effect. On the contrary, it will send strong waves throughout the legal and social culture of our country.

PART II - ISSUES

2. REAL Women of Canada will focus its submissions on the first constitutional question stated by the Chief Justice of Canada:

> "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*?"

REAL Women submits that the question should be answered, "No.".

PART III - ARGUMENT

1. Section 15: Distinctions and Denial of Benefits

3. Whichever approach it takes to equality analysis under s.15 of the *Charter*, a court must first find that the impugned statute creates a distinction which gives rise to a denial of one of the equality guarantees contained in s.15. Section 29 of the Ontario *Family Law Act* (the "*FLA*") obviously draws a distinction between the respondent and others. Yet, as observed by Justice LaForest:

> "This of course, does not carry one very far. Parliament is in the business of making such distinctions in developing programs and policies which is the task assigned to it in our democratic system."
>
> *Egan v. Canada, [1995] 2 S.C.R. 573, at p.531, para.10.*

4. REAL Women submits that M has not established that the distinction created by s.29 of the *FLA* has disadvantaged her, or denied her a benefit of the law. The present case differs significantly from the previous underinclusive challenges considered by this Court under section 15(1) of the *Charter* in that it does not involve the issue of

access to a government financial benefit. Instead, M, contends that a denial of equal benefit of the law has arisen because the Ontario legislature has enacted a legislative scheme which only addresses the economic consequences of the breakdown of relationships in the case of opposite-sex couples and has failed to create a legislative scheme which treats the economic consequences of the breakdown of same-sex relationships. M implicitly asserts that the Constitution of Canada requires a legislature to treat all manifestations of a broadly-defined social problem (the economic consequences of the breakdown of relationships), or not treat any aspect at all. For if the legislature treats only one aspect then, according to the equality analysis asserted by M, such legislation would be constitutionally infirm as violating section 15 of the *Charter*.

5. The *FLA* does not bar same-sex couples from access to the courts to resolve financial issues which arise on the breakdown of their relationships. As noted by M in paragraphs 7 and 8 of her Factum, she has resorted to and obtained relief through the courts for her financial claims, this action having been settled in the middle of its trial. In his dissenting judgment, Finlayson, J.A. rejected M's assertion that s.29 of the *FLA* created a disadvantage within the meaning of s.15:

> " In sum, while Part III of the *FLA* treats same-sex couples differently than heterosexual couples, I do not see that this difference constitutes disadvantage. Part III does not deny same-sex couples any material or dignitary benefits which it bestows upon heterosexual couples. Nor does it withhold or grant options, benefits or protections in a manner which suggests that same-sex couples are lesser forms of intimate unions. It simply refuses to accord same-sex cohabiting couples the marital status that it accords to opposite-sex cohabiting couples.
>
> *Appeal Reasons, Case, Vol.III*, pp. 442-443

6. In addition, as submitted by H in paragraph 23 of her Factum, the ability of parties to contract out of s.29 of the *FLA* calls into question whether the *FLA* creates any legal benefit which is not otherwise available through contract. REAL Women therefore submits that ample reasons exist to conclude that any distinction created by s.29 of the *FLA* does not give rise to the denial of equal benefit or protection of the law.

2. Section 15: Discrimination

7. REAL Women submits that the inquiry into whether the distinction created by s.29 of the *FLA* results in discrimination should be framed as follows:

1. Does the *FLA* exclude from the ambit of s.29 groups which it was *designed* to include, thereby resulting in discrimination because it relies on distinctions which are not relevant to its purpose or design?

2. Does the *FLA* exclude from the ambit of s.29 groups which *should have been included,* and whose exclusion is discriminatory because it rests on a stereotypical application of presumed group or personal characteristics?

M asserts that the definition of "spouse" in s.29 of the *FLA* results in discrimination under both approaches. REAL Women submits that no discrimination arises under either approach.

(a) Does the *FLA* exclude from the ambit of s.29 groups which it was designed to include?

(i) Identification of the Legislative Purpose or Design

8. Although members of this Court in *Egan,* and the majority of the Ontario Court of Appeal in the decision below, expressed the view that the purpose, or functional values, of legislation should not be taken into account in s.15(1) analysis, the majority of this Court in *Battleford & District Co-operative Ltd. v. Gibbs* recognized that the proper identification of the purpose of legislation is crucial to engaging in the comparative analysis of groups which underlies any assessment of discrimination:

> "In my view, *Brooks, supra,* provides a useful guide in determining the appropriate group to compare to mentally disabled employees in the case at bar. The first step is to determine, in all the circumstances of the case, the purpose of the disability plan. Comparing the benefits allocated to employees pursuant to different purposes is not helpful in determining discrimination - it is understandable that insurance benefits designed for

> disparate purposes will differ. If, however, benefits are allocated pursuant to the same purpose, yet benefits differs as the result of characteristics that are not relevant to this purpose, discrimination may well exist."
>
> *Battleford & District Co-operative Ltd. v. Gibbs, [1996] 3 S.C.R. 566 per Sopinka, J. at p.588, para. 33*

9. REAL Women submits that to ignore the purpose, or context, of a statute when considering whether its distinction results in discrimination risks discarding a "purposive" approach to *Charter* analysis for a sterile, mechanistic application of a legal formula. When this Court is asked to redefine a fundamental word in our cultural lexicon, it must start any analysis with a clear understanding of the purpose of the legislation in which the word is used. In so doing a court must concern itself with what the purpose of the legislation **is**, not what it **ought to be**. In other words, the court's task is to ascertain the purpose of the legislation *as expressed by the legislature.*

10. One of the most troubling aspects of this case was the willingness of the courts below to depart from the purpose of the *FLA* as expressed by the Ontario legislature. In articulating the purpose of the *FLA* the majority of the Ontario Court of Appeal ignored the clear language of the statute's preamble, and instead turned for guidance to statements made long after its enactment by the Ontario Law Reform Commission in its "Report on the Rights and Responsibilities of Cohabitants Under the Family Law Act" (the "Report"). The authors of the Report described the purpose of the *FLA* as "...to provide for the equitable resolution of economic disputes that arise when intimate relationships between individuals who have been financially interdependent break down..."

Appeal Reasons, Case, Vol.III, pp.475 and 480

11. The Ontario Law Reform Commission's formulation of the *FLA*'s purpose clashes with, and far exceeds, the specific purpose expressed in the FLA's preamble which reads:

> "Whereas it is desirable to encourage and strengthen the role of the family; and whereas for that purpose it is necessary to recognize the equal position of spouses as individuals within marriage and to recognize marriage as a form of partnership; and whereas in support of such recognition it is necessary to provide in law for the orderly and equitable settlement of the affairs of the spouses upon the breakdown of the partnership, and to provide for other mutual obligations and family relationships, including the equitable sharing by parents of responsibility for their children;"

The *FLA*'s preamble unambiguously indicates that the Legislature intended to enact a scheme for "spouses", with that term to be understood in its usual cultural meaning as the marital relationship between a man and a woman. One cannot find any suggestion in the preamble that the Legislature sought to apply the legislative scheme to a larger generic group consisting of "intimate relationships between individuals who have been financially dependant."

12. The legislative extension of the definition of "spouse" in Part III of the *FLA* to common-law couples did not detract from the original marital context of the legislation nor fundamentally alter the purpose of the statute as set out in its preamble. As stated by La Forest, J. in Egan:

> " But many of the underlying concerns that justify Parliament's support and protection of legal marriage extend to heterosexual couples who are not legally married. Many of these couples live together indefinitely, bring forth children and care for them in response to familial instincts rooted in the human psyche. These couples have need for support just as legally married couples do in performing this critical task, which is of benefit to all society. Language has long captured the essence of this relationship by the expression "common law marriage".

Egan, per La Forest, J. at pp. 536-7, para.23

13. REAL Women submits that the majority of the Court of Appeal erred in several ways in concluding that the purpose of Part III of the *FLA* is aimed at providing "for the equitable resolution of economic disputes that arise when intimate relationships between individuals who have been financially interdependent breakdown":

(i) the Court of Appeal engaged in rewriting, rather than interpreting the legislation;

> "The Marriage Act is clear and to give it such a different meaning would not be to undertake interpretation but to assume the role of lawmaker which is for Parliament. That is particularly so in an area where the law reflects social values and policy.": per Gault, J. in *Quilter v. Attorney-General of New Zealand* (unreported decision of the New Zealand Court of Appeal, December 17, 1997)

(ii) it impermissibly "shifted" the purpose of the legislation from dealing with the original purpose of addressing problems of spouses to a "shifted" purpose of dealing with any intimate relationship involving financial dependence;

R. v. Big M Drug Mart, [1985] 1 S.C.R. 295 at pp.334-336

(iii) it justified turning its back on the legislation's express purpose by asserting that a consideration of the purpose of the *FLA* in terms of the preamble "...would inevitably lead to circular reasoning and would not provide a vehicle for the meaningful assessment of M's claim to unequal treatment." For a court to refashion a legislative purpose at odds with the very language of the statute, and then strike the legislation down for failing to fulfil this new-found objective, is no better than setting up a straw man for the inevitable knockdown punch, and strays dangerously close to engaging in "result-driven" reasoning.

Appeal Reasons, Case, Vol. III, Tab 39, pp.474-475

(ii) The Relationship of the Distinction to the Design

14. REAL Women submits that the Attorney General accurately stated the purpose of the *FLA* and its support provisions in paragraph 49 of his Factum, correctly set out the social problem addressed by the legislation in paragraphs 52 through 62 of his Factum, and properly analysed the relationship of the statutory distinction to the legislative purpose in paragraphs 48 to 75 of his Factum. Once the purpose of the *FLA* is interpreted in accordance with language of the statute, then, as the Attorney General points out in paragraph 35 of his Factum, the definition of spouse in s.29 of the *FLA* does not infringe s.15(1) of the *Charter*. To paraphrase Justice Sopinka in the *Battleford* case: "it is understandable that ... benefits designed for disparate purposes will differ." The purpose of legislating in respect of spouses, and their resulting families, was articulated by Justice La Forest in *Egan*:

> "It is the social unit that uniquely has the capacity to procreate children and generally cares for their upbringing, and as such warrants support by Parliament to meet its needs. This is the only unit is society that expends resources to care for children on a routine and sustained basis. As counsel for the intervenor, The Interfaith Coalition on Marriage and the Family, put it, whether the mother or the father leaves the paid work force or whether both parents are paying after-tax dollars for daycare, this is the unit in society that fundamentally anchors other social relationships and other aspects of society.
>
> ...
>
> None of the couples excluded from the benefits under the Act are capable of meeting the fundamental social objectives thereby sought to be promoted by Parliament. These couples undoubtedly provide mutual support for one another, and that, no doubt, is of some benefit to society. They may, it is true, occasionally adopt or bring up children, but this is exceptional and in no way affects the general picture. I fail to see how homosexuals differ from other excluded couples in terms of the fundamental social reasons for which Parliament has sought to favour heterosexuals who live as married couples."
>
> *Egan, supra, at pp.537-8*

15. Recent Statistics Canada data emphasize the continued role of the family as the fundamental social unit and the central role played by husband and wife families in the raising of children. In 1995, 54% of the Canadian population aged 15 and over were married (12,511,000) and 9% were living in a common law relationship (2,080,000) out of a total population of 23,264,000 aged 15 and over. As of 1991, families of "now married couples" represented 77% of all families with never-married sons and daughters at home, while families of common law couples represented 10%. Single parent families comprised only 13% of the total number of families. Further in 1991 65% of families had children living at home, while 35% did not. Of those families without children living at home "empty-nesters" comprised 59.4%, while childless couples comprised 40.5%, or only 14% of the total number of families.

> *Statistics Canada Catalogue No. 93-312, Table 3: "Census Families and Private Households by Number of Never-Married Sons and Daughters at Home, Showing Family Structure, for Canada, Provinces and Territories, 1986 and 1991"*
>
> *Statistics Canada, Women in Canada: A Statistical Report (3rd edition) Catalogue 89-503E, at p.27, Table 2.10 and 2.11*
>
> *Statistics Canada, Report on the Demographic Situation in Canada 1996: Current Demographic Analysis, p.129*

16. For these reasons, REAL Women submits that the definition of "spouse" in s.29 of the *FLA* is not discriminatory; the definition relies on distinctions which are proper to, and in accordance with, the purpose of the *FLA*.

(b) Does the *FLA* exclude from the ambit of s.29 groups which should have been included because their exclusion rests, or is based upon, a stereotypical application of presumed group or personal characteristics?

(i) General Considerations regarding Discrimination

17. The word "spouse" has a long-established meaning in our cultural lexicon. The *Concise Oxford Dictionary* defines "spouse" as "husband or wife"; *Black's Law Dictionary* defines the word as meaning "one's wife or husband". Both definitions accord with

our common cultural understanding and use of the word. The Ontario Court of Appeal radically changed the meaning of the word "spouse".

18. REAL Women submits that any approach to *Charter* analysis which appears to mandate a fundamental shift in our cultural landscape and lexicon should be scrutinized with great care for it may be the result of a formalistic analysis which has ignored the context in which the language is used. Chief Justice Dickson cautioned that a generous interpretation of the *Charter* must nonetheless take into account the larger Canadian social context:

> " The interpretation should be, as the judgment in Southam emphasises, a generous rather than a legalistic one, aimed at fulfilling the purpose of the guarantee in securing for individuals the full benefit of the *Charter*'s protection. At the same time it is important not to over-shoot the actual purpose of the right or freedom in question, but to recall that the *Charter* was not enacted in a vacuum, and must therefore, as this Court's decision in *Law Society of Upper Canada v. Skapinker*, [1984] 1 S.C.R. 357, illustrates, be placed in its proper linguistic, philosophic and historical context."
>
> *R. v. Big M. Drug Mart Ltd.*, [1985] 1 S.C.R. 295, per Dickson, J. at p.344g-i.

19. When the guarantee of equality is examined in light of our "linguistic, philosophic and historical context", REAL Women submits that a court should hesitate before concluding that the general language of the guarantee of equality mandates a radical change to the long-held meaning of the word "spouse". In the recent case of *Quilter v. Attorney-General of New Zealand*, the New Zealand Court of Appeal was required to determine whether the New Zealand *Bill of Rights'* guarantee of freedom from discrimination rendered invalid that country's *Marriage Act* which limited marriage to a man and a woman. The majority of the court concluded that the general guarantee of equality in the *Bill of Rights* did not work such a profound change to the long-established meaning of marriage:

> "I am further in agreement that the provisions of the Marriage Act are to be given no different interpretation in light ofs.19 New Zealand Bill of Rights Act. 1990. The Marriage Act is clear and to give it such different meaning would not be to undertake interpretation but to assume the role of lawmaker which is for

Parliament. That is particularly so in an area where the law reflects social values and policy.", per *Gault, J, at p.4.*

"The reason in brief for the conclusion that s.19 would not be breached by the Marriage Act as interpreted is that, in terms of its meaning and purpose, s.19 would not have removed a central element of the accepted definition of marriage, the central element being that the partners to a marriage are of opposite sexes. Parliament would not have effected such a major change to a fundamental institution in our society and legal system with a great number of consequential changes (where the law depends on marital status) in such an indirect way. Rather, to make such a change, Parliament would be expected to act in a direct way be expressly changing the definition of marriage or by making particular incidents attaching to marriage more widely available." per *Keith, J., at p.51*

Quilter v. Attorney General of New Zealand, unreported decision of the New Zealand Court of Appeal, December 17, 1997, at pp. 4 and 51

(ii) The Legislative Distinction Is Not Based Upon Sexual-Orientation

20. Section 29 of the *FLA* does not create a legislative distinction based upon sexual orientation for the reasons pointed out by the Attorney General in paragraphs 64 and 83 of his Factum, and by H in paragraph 25 of her Factum - many relationships between persons are excluded from the ambit of s.29 of the *FLA*, not simply relationships between same-sex couples. The word "spouse" excludes a variety of groups and "sexual-orientation" does not explain the basis upon which other groups are excluded from the definition. If more than one group is excluded from a statutory definition, a court should seek to identify the characteristics shared by all the excluded groups in order to explain or identify the basis upon which they are excluded. Although courts have stated that the impact of legislation must be looked at from the perspective of the complainant, courts cannot ignore the fact that several groups may be excluded from the ambit of the legislation.

(iii) The Legislative Distinction Does Not Rely Upon The Stereotypical Application of Presumed Group Characteristics

The meaning of discrimination

21. The "enumerated and analogous grounds" analysis adopted by the Supreme Court of Canada in *Andrews* does not prevent a legislature from making distinctions based on personal characteristics, rather it prohibits the making of *arbitrary* or *unjust* distinctions based on personal characteristics. This difference is critical to a proper understanding of s.15(1) analysis, and the difference has been explained in several Supreme Court of Canada decisions. In *Miron*, McLachlin, J., speaking for the majority, described "just" discrimination as follows:

> " To establish discrimination, the claimant must bring the distinction within an enumerated or analogous ground. In most cases, this suffices to establish discrimination. However, exceptionally it may be concluded that the denial of equality on the enumerated or analogous ground does not violate the purpose of s.15(1) - to prevent the violation of human dignity and freedom through the imposition of limitations, disadvantages or burdens through the stereotypical application of *presumed* group characteristics, rather than on the basis of merit, **capacity** or circumstance. While irrelevance of the ground of distinction may indicate discrimination, the converse is not true. Proof of relevance does not negate the possibility of discrimination. We must look beyond relevance to ascertain whether the impact of the impugned legislation is to disadvantage the group or individual in a manner which perpetuates the injustice which s.15(1) is aimed at preventing." (emphasis added)

Justice McLachlin stressed that "unjust" discrimination rests upon distinctions made upon presumed, rather than actual, characteristics:

> " The enumerated and analogous grounds serve as ready indicators of discrimination because distinctions made on these grounds are typically stereotypical, being based on presumed rather than actual characteristics. Nevertheless, in some situations distinctions made on enumerated or analogous grounds may prove to be, upon examination, non-discriminatory." (emphasis added)

Miron v. Trudel, [1995] 2 S.C.R. 418, at p.487, and pp.492-3

22. Gonthier, J., speaking for the minority in *Miron*, also highlighted the difference between making distinctions based upon presumed rather than actual characteristics:

> " In determining what constitutes such a relevant basis for distinction, this Court in Andrews, adopted the so-called "enumerated and analogous grounds" approach to discrimination. Under this approach, the analysis under s.15 of the *Charter* encompasses a determination as to whether the prejudicial distinction is attributable to or on the basis of an enumerated or analogous ground. Such a ground is identified as one that is commonly used to make distinctions which have little or no rational connection with the subject matter, generally reflecting a stereotype". (emphasis added)
>
> *Miron, supra, at pp.438 and 441*
>
> *See also*: Gault, J. in *Quilter, supra*, at p.5: "It is necessary to distinguish between permissible differentiation and impermissible differentiation amounting to discrimination. This is a definitional question ... Discrimination generally is understood to involve differentiation by reference to a particular characteristic (classification) which characteristic does not justify the difference. Justification for differences frequently will be found in social policy resting on community values."

23. The statements by Justices McLachlin and Gonthier point to a constitutional prohibition on legislatures drawing distinctions on the basis of a *false understanding* of what a person can or cannot do. Legal equality under the constitution does not require legislatures to ignore actual differences between individuals (or, as put by McLachlin, J. differences made "on the basis of merit, capacity or circumstance.") The constitutional prohibition is directed towards legislative line drawing based upon presumed, or stereotypical, characteristics which, upon reasoned examination, turn out not to be actual characteristics.

The meaning of conjugality

24. The distinction created by the definition of "spouse" in s.29 of the *FLA* does not rest on presumed group characteristics. In the Ontario Court of Appeal M contended, and the Court of Appeal accepted, that same-sex couples are capable of meeting all the statutory prerequisites in s.29 and s.1(1) of the *FLA*, including the statutory requirement of living "together in a conjugal relationship", but for the requirement that they be a "man and woman". Implicit in M's contention is the assertion that the actual characteristics manifested by same-sex couples are the same as those possessed by opposite-sex couples for the purposes of the definition of spouse in s.29, and that s.29 is constitutionally infirm by presuming that such characteristics can only be manifested by a "man and a woman".

Appeal Reasons, Case, Vol.III, pp.464-467

25. REAL Women submits that this fundamental premise underpinning M's s.15 analysis, and the decision of the majority of the Court of Appeal, is incorrect. The extended definition of "spouse" contemplates that in order to fall within the definition of "spouse" persons must be capable of cohabiting, that is of living in a *conjugal* relationship. The definition of "spouse" in the *FLA* requires that the relationship between the persons must involve physical intimacy of a *particular kind* - that is, be a conjugal relationship.

26. Further, the clear structure of s.29 requires that the relationship between the persons must be "marriage-like". The starting point of the definition of "spouse" in s.29 lies in those persons who are spouses, "as defined in subsection 1(1)". That subsection defines spouses essentially in terms of marriage: "either of a man and woman who, (a) are married to each other, or (b) have together entered into a marriage that is voidable or void, in good faith on the part of the person asserting a right under this Act." The extended definition of "spouse" in section 29 builds upon this starting point by adding to the definition, "and in addition includes either of a man and woman who are not married to each other and have cohabited..." The requirement of

"cohabitation" imports both a particular kind of physical intimacy (conjugal) and a temporal element (not less than three years or in a relationship of some permanence). While any relationship may possess an element of duration, only a "marriage-like" relationship exhibits conjugality.

27. M describes her relationship with H. as "conjugal", and the majority of the Ontario Court of Appeal thought it "at least arguable" that the relationship was conjugal. REAL Women of Canada submits that the respondent has misused the word "conjugal", both in its commonly understood sense and in the specific sense used in s.1(1) of the FLA.

Appeal Reasons, Case, Vol.III, p.464

28. The *Compact Edition of the Oxford English Dictionary* defines "conjugal" as: "of or relating to marriage, matrimonial; of or pertaining to husband or wife in their relation to each other." *Black's Law Dictionary* (6th edition) defines conjugal as: "Of or belonging to marriage or the married-state; suitable or appropriate to the married state or to married persons; matrimonial, connubial." At its heart, the concept of "conjugal" rests upon a *particular kind of physical intimacy,* unique to a man and woman, which has the capacity to beget a child.

See also the survey of judicial definitions contained in McEachern v. Fry Estate, [1993] O.J. No. 1731 (Gen. Div.) at pp.12-14

In Corbett v. Corbett [1970] 2 All E.R. 33, Ormrod, J. stated at p.48: "On the other hand, sex is clearly an essential determinant of the relationship called marriage, because it is and always has been recognized as the union of man and woman. It is the institution on which the family is built, and in which the capacity for natural heterosexual intercourse is an essential element."

John Finnis, "Law, Morality and 'Sexual Orientation'", (1994), 69 Notre Dame Law Review 1049, at pp. 1065-1070

29. An examination of ss.1(1) and 29 reveals that this also is the sense in which the *FLA* uses the word "conjugal". These sections predicate a conjugal relationship of persons of the opposite-sex and assumes that such a relationship has the *capacity* to result in the person being a parent of a child.

30. This analysis reveals, it is submitted, that the courts below erred in viewing the line drawn by the Ontario Legislative as between persons "of the opposite-sex" and "of the same-sex". In fact, the line is drawn by the *FLA* in the definition of "spouse" rests upon the difference between those in a "conjugal relationship" and those who are not.

The Evidence of the Parties on their similarity to "spouses"

31. The evidence in the Case on Appeal indicates H did not regard her relationship with M as similar to an opposite-sex relationship. H, in her affidavit, deposed that "...our relationship was not equivalent to marriage nor was it intended to emulate marriage in any way."

Affidavit of H, para.3, Case, Vol. II, Tab 32, p.282

32. The evidence filed by M suggests that "identity" or "sameness" arguments are used as tactical tools to achieve changes to legislation, after which the "distinctiveness" of same-sex relationships will be highlighted. In one of her affidavits M., states:

> " This is not to say that I believe that we can only gain approval of same-sex relationships by arguing about our similarities to opposite-sex relationships. I ascribe to the theory espoused to by Professor Rusk, that it is through "sameness" arguments that we can gain equality. Once this begins to occur, as Professor Rusk states, "we will be able to argue more productively for equal treatment without ignoring, or perhaps concealing, the ways in which lesbian and gay relationships are unique."

Affidavit of M., para.16, Case, Vol.II, Tab 23, p.196.

In the Report to his affidavit, Professor John Lee writes:

> "Certainly the "sameness argument" has been successfully used, in a great variety of cases ranging from the rights of blacks to the rights of common law couples...But the whole point of protection of rights in a pluralistic society, should surely be the recognition of equality of rights in the face of diversity of social constituences (sic). Why should any otherwise law-abiding social constituuency (sic) (commonly called "minority") have to argue that rights should be extended to it because it is "the same" when the whole purpose of that distinctive constituency is to be, in some important respect, different..."

Affidavit of Professor John Lee, Exhibit "A", Case, Tab 29, p.250.

The misuse by the Court of Appeal of judicial definitions of "conjugality"

33. REAL Women submits that the Ontario Court of Appeal misconstrued and misapplied previous jurisprudence on the requirement of cohabitation in s.1(1) of the *FLA*. The majority referred to the list of questions posed by Kurisko D.C.J. in the 1980 decision of *Molodowich v. Penttinen* to determine whether a man and a woman were cohabiting within the extended definition of "spouse" in the *FLA*. The approach of Kurisko D.C.J. in *Molodowich* was premised on conjugality arising in a relationship between a man and a woman. The references in Judge Kurisko's list to sexual behaviour and children must be understood in the context in which they arose - a relationship between a man and a woman.

Appeal Reasons, Case, Vol.III, pp.464

34. M endeavours to convert a judicial guideline developed in the context of opposite-sex couples into a litmus test as to whether same-sex couples live in a "conjugal" relationship for the purposes of the *FLA*. M takes the position, in paragraph 50 of her Factum, that a couple need only satisfy some, but not all, of the attributes on Judge Kurisko's list in order to fall within a judicial definition of "conjugal". While the majority of the Court of Appeal recognized that the case law using Judge Kurisko's list "has developed in the context of heterosexual relationships only", it proceeded to conclude that the extent to which these different elements of a conjugal relationship

will be taken into account in other relationships will "vary with the circumstances of each case."

Appeal Reasons, Case, Vol.III, pp.466

35. REAL Women submits that this analysis misunderstands and misapplies the purpose of the list developed by Judge Kurisko, with the result that the Court of Appeal wrongly concluded that same-sex couples are capable of meeting all statutory prerequisites set out in s.29 and s.1(1) of the *FLA*. REAL Woman respectfully submits that same-sex relationships, by their nature, are not conjugal as that word is understood at law and in society, and therefore cannot meet the elements of the definition of spouse in the *FLA*.

36. The fact that the word "spouse" does not, and cannot, include same-sex relationships does not render the term discriminatory, for the word reflects actual and not presumed characteristics. As Justice Gonthier stated in *Miron*:

> " More specifically, an indispensable element of the contextual approach to section 15(1) involves an inquiry into whether a distinction rests upon or is the expression of some objective physical or biological reality, or fundamental value. This inquiry crucially informs the assessment of whether the prejudicial distinction has been drawn on a relevant basis, and therefore, whether or not that distinction is discriminatory."

Miron, supra, at pp.438 and 441

Schafer v. Canada, (1997), 35 O.R. (3d) 1 (C.A.) per Austin J.A. at p. 22b

37. It is also noteworthy that a very recent decision by the European Court of Justice held that a refusal by an employer to allow travel concessions to the person of the same sex with whom a worker has a stable relationship, where such concessions are allowed to a worker's spouse or to the person of the opposite sex with whom a worker has a stable relationship outside marriage, does not constitute discrimination prohibited by Article 119 of the European Community Treaty. In reaching this conclusion the court

stated: "It follows that, in the present state of the law within the Community, stable relationships between two persons of the same sex are not regarded as equivalent to marriages or stable relationships outside marriage between persons of opposite sex."

> *Grant v. South-West Trains Ltd. unreported decision of the European Court of Justice, February 17, 1998, at para.35*

38. The line drawn by the Ontario Legislature in its definition of spouse in s.29 of the *FLA* is not one based upon a false understanding, or stereotypical view, of a relationship between two persons. On the contrary, the Legislature has chosen to draw the line based on a set of characteristics which are well understood (i.e. the characteristics of a marriage relationship between a husband and wife) and which require persons to possess *actual* characteristics in order to fall within the definition. To paraphrase Justice McLachlin in *Miron*, a homosexual or lesbian couple are not excluded from the definition of spouse because of a false understanding of the characteristics and capacities of their relationship; they are excluded because their relationship does not, and by its nature cannot, possess the actual characteristics which mark the relationship between a husband or wife, or the "marriage-like" relationship between a man and woman living together in common law. In the words of Gonthier, J. in *Miron*, the distinction in this case "rests upon or is the expression of some objective physical or biological reality or fundamental value".

> *Miron, supra, per Gonthier, J. at p.438 and per McLachlin, J. at pp.492-3*

39. For these reasons REAL Women submits that the distinction made by the definition of "spouse" in section 29 of the *FLA* is not discriminatory.

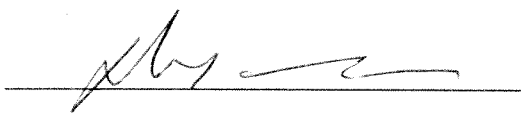
3. Remedy

40. In the alternative, in the event that this Court finds that the definition of "spouse" in s.29 of the *FLA* infringes s.15(1) of the *Charter* and is not saved under s.1, REAL Women submits that this Court should set aside paragraph 1 of the order of the Court of Appeal. "Reading in" is an appropriate remedy only where a court can conclude that it would conform to the legislative purpose. No such conclusion can be reached on the evidence before this Court. The defeat of Bill 167 in 1994 in the Ontario Legislature clearly signals that any reading in of "two persons" into the definition of "spouse" would be inconsistent with the intent of the legislature. At most this Court should declare s.29 of the *FLA* to be of no force and effect because of the exclusion of same-sex couples, suspend the declaration for a period of time and leave it to the Ontario Legislature to choose the means to remedy the legislation, including the possibility of using a means other than changing the definition of "spouse".

PART IV - ORDER REQUESTED

41. For these reasons REAL Women of Canada respectfully submits that the first constitutional question be answered "No", and that this appeal be allowed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED,



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SCHEDULE "A"

LIST OF AUTHORITIES

SCHEDULE "B"

STATUTES AND REGULATIONS

No. 25838

IN THE SUPREME COURT OF CANADA
(APPEAL FROM THE COURT OF
APPEAL FOR THE PROVINCE OF ONTARIO)

BETWEEN:

THE ATTORNEY GENERAL OF ONTARIO

Appellant
(Intervenor)

- and -

M.

Respondent
(Respondent)

- and -

H.

Respondent
(Appellant)

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