C23867

COURT OF APPEAL FOR ONTARIO

FINLAYSON, DOHERTY and CHARRON JJ.A.

B E T W E E N :	)	
	)	
	)	
M	)	**Mary Eberts and Marg Manktelow**
	)	**for the appellant**
Applicant	)	
(Respondent in Appeal)	)	
	)	**Martha A. McCarthy**
	)	**for the respondent**
- and -	)	
	)	
	)	**Robert E. Charney and Peter Landmann**
H	)	**for the Attorney General of Ontario**
	)	
Respondent	)	
(Appellant)	)	**Douglas Elliott**
	)	**for the Foundation for Equal Families**
	)	
	)	
	)	**Heard: August 6, 7 and 8, 1996**
	)	
	)	

FINLAYSON J.A. (Dissenting):

This appeal raises directly the issue of whether same-sex couples are denied equal protection and equal benefit of the law pursuant to s.15(1) of the *Canadian Charter of Rights and Freedoms* ("*Charter*") by reason of their exclusion from the definition of "spouse"

under Part III of the *Family Law Act*, R.S.O. 1990, c.F.3 (hereinafter sometimes "*FLA*").

History of the Proceedings

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 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.

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 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.

On April 27, 1993, M amended her application to include a claim for support pursuant to the *FLA*. On April 28, 1993, she served a Notice of Constitutional Question concerning the definition of "spouse" contained in Part III, section 29 of the *FLA*. On August 20, 1993, the Honourable Mr. Justice Adams ordered that the application and cross-application be transferred to the Family Law section of the General Division, and that there be a trial of all the issues in the application and cross-application, with M as plaintiff and H and the corporate defendants as defendants. The order was made without prejudice to the right of H to move for a determination of the constitutional issues before trial. The pleadings and affidavits in the application and cross-application were to be treated as the pleadings in the new action, and the cross-examinations already held in the application were to form part of the examinations for discovery in the new action. Adams J. also ordered on consent that the style of cause of the new action should be "M v. H", having regard to both parties' wishes to minimize or avoid publishing identifying characteristics of them, including, without limitation, age, occupation, and the location of real properties owned by either party.

H 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.

On September 1, 1994, the Attorney General of Ontario ("A.G.") intervened in response to the Notice of Constitutional Question and conceded that s.29 of the *FLA* was unconstitutional. On November 1, 1994, it filed a factum in support of this position. On August 16, 1995, after a change of government, the A.G. advised that it would now be arguing that s.29 was constitutional in that the admitted infringement of s.15(1) of the *Charter* could be saved under s.1. The A.G. removed its first factum from the court file without seeking leave to do so, and filed a new factum in support of its changed position. The A.G. filed no evidence in support of its new s.1 argument. It neglected to withdraw the affidavit of Professor Margrit Eichler, which it had filed earlier in support of its former position that family law should generally treat same-sex couples in the same manner as opposite-sex couples. This orphaned deposition was referred to briefly before us by M and the Foundation for Equal Families, but was not relied upon by Epstein J.

The motion under Rule 21.01 was to have come on for hearing on November 7 to 9, 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 the Supreme Court of Canada in that case. The motion was heard on September 11, 12, and 13, 1995.

On February 9, 1996, Epstein J. released her judgment in respect of the constitutional issue (reported at 27 O.R. (3d) 593). 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 section 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.

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 of the judgment.

H appeals the judgment on the constitutional issue. She is joined in the appeal by the intervenor Attorney General. On June 26, 1996, Associate Chief Justice Morden granted leave to the Foundation of Equal Families to intervene as a friend of the court.

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

(a) Relevant Provisions

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 in family relationships, including the equitable sharing by parents of responsibility for their children;

1. --(1) In this Act,

"cohabit" means to live together in a conjugal relationship, whether within or outside marriage; ("cohabiter")

"spouse" means 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. ("conjoint")

29. In this Part,

"dependant" means a person to whom another has an obligation to provide support under this Part; ("personne à charge")

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

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

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

> **30.** Every spouse has an obligation to provide support for himself or herself and for the other spouse, in accordance with need, to the extent that he or she is capable of doing so.
>
> **33.** -- (1) A court may, on application, order a person to provide support for his or her dependants and determine the amount of support.
>
> (2) An application for an order for the support of a dependant may be made by the dependant or the dependant's parent.

(b) Legislative Background

The present *Family Law Act* is the culmination of a succession of the most significant legislative initiatives undertaken by the Ontario Legislature in recent years. The introduction of the *Family Law Reform Act, 1975,* S.O. 1975, c.41 ("*FLRA, 1975*") followed years of study and debate starting in 1964 when the Ontario Law Reform Commission undertook a major study of family law. The *FLRA, 1975* caused controversy by recognizing the modern concept of marriage as a form of equal partnership, and by establishing, for the first time in this jurisdiction, a deferred community property regimen for husbands and wives.

In 1976, a comprehensive package of amendments to matrimonial property, family and support law was introduced in the legislature. It included, by the predecessor to s.29 of the *FLA,* the extension of the concept of marriage beyond those couples who had

voluntarily entered into the state of matrimony to men and women who simply lived together in a conjugal relationship. This significant extension was a particular source of contention because it imposed a regimen upon heterosexual couples that some at least had tried to avoid. Accordingly, as an offset to this amendment, the legislature provided for the recognition of domestic contracts whereby the parties to a marriage, including a common law marriage, could make their own arrangements with respect to property of the marriage and mutual support obligations. The *Family Law Reform Act, 1978*, 1978 S.O. c.2 ("*FLRA, 1978*") established, by what is now Part IV, s.53 of the present *Family Law Act*, a catalogue of domestic contracts. The catalogue includes cohabitation agreements between a man and a woman who are cohabiting or intend to cohabit and are not married to each other whereby they establish their respective rights and obligations during cohabitation, or on ceasing to cohabit or on death, including:

> (a) ownership in or division of property;
>
> (b) support obligations;
>
> (c) the right to direct the education and moral training of their children, but not the right to custody of or access to their children; and
>
> (d) any other matter in the settlement of their affairs.
>
> (2) If the parties to a cohabitation agreement marry each other, the agreement shall be deemed to be a marriage contract.

The *FLRA, 1978* was amended again in 1986 to change the definition of "spouse" in s.29 to shorten the period of cohabitation from five years to three.

There is nothing in the legislative record to indicate that same-sex couples were contemplated in this family law legislation until 1994. On May 19, 1994, the then Attorney General introduced Bill 167, *The Equality Rights Statute Law Amendment Act, 1994*. This Bill would have amended a number of statutes, including the present *Family Law Act*, to provide same-sex couples with the same rights and obligations as opposite-sex common law spouses. After extensive debate, Bill 167 was defeated on a free vote of the legislators on June 9, 1994.

Issues on Appeal

This court is now asked to do specifically what the legislature refused to do. The consequences of the judicial activism invited of us are best measured against the number of statutes that would have been amended by Bill 167. In the eyes of the Bill's drafters, those are the ones which would be affected by full legislative recognition of same-sex couples. I emphasize this because, in my view, we would be avoiding our responsibilities as a court by not recognizing that our acceptance of an expanded definition of "spouse" in the statute which governs the relationship between spouses, will effectively conclude the debate on the recognition of same-sex couples in this province.

There are three issues properly before us: 1) whether s. 29 of the *FLA* infringes s. 15(1) of the *Charter*; 2) if so, whether the infringement can be justified under s. 1 of the

Charter; and 3) if the infringement cannot be justified, what the appropriate remedy should be having regard to s. 24 of the *Charter* and s. 52 of the *Constitution Act, 1982*.

As I advised counsel during argument, I consider the applicability of s. 15(1) to the impugned legislation to be a very live issue. Unfortunately, the court was given little aid on this important aspect of the appeal. In my opinion, this case demonstrates the problems that arise when counsel make concessions on constitutional issues where it is not at all clear that the matter conceded has been resolved by authority. Even before *Egan* was decided by the Supreme Court of Canada, M, H, and the A.G. were prepared to concede that s. 29 of the *FLA* was a violation of s. 15(1) of the *Charter* as being discriminatory of M on the basis of her sexual orientation.

Both the appellant H and the intervenor the A.G. are content to argue this appeal on the assumption that s.29 of the *FLA* does constitute discrimination against lesbian couples on the basis of sexual orientation, and differ from M only on the application of s.1 of the *Charter* and the appropriate remedy. As to H, a private litigant who has asserted her sexual orientation, this position is entirely understandable. The same cannot be said of the A.G. who has intervened in this private dispute in the public interest. For reasons that I find puzzling, there is no representation before us on behalf of a significant segment of the public who has difficulty recognizing, much less accepting, that legislation explicitly enacted to

encourage and strengthen the role of the family discriminates against couples who are not married even within the extended definition of marriage in s. 29 of the *FLA*.

When I questioned counsel for the A.G. as to the irresolute role of the A.G. in these proceedings, he attempted to justify it on the basis that the decision of the Supreme Court in *Egan* had put the matter to rest. He submitted that we were bound to follow *Egan* and uphold the constitutionality of Part III of the *FLA* because of the doctrine of *stare decisis*. This does not explain why the Attorney General under the previous government had taken the position that she did, but in any event it is not helpful. If nothing else emerged from the argument before us, it at least satisfied me that *Egan* is not dispositive of this appeal. I do not want my remarks to be taken as critical of the quality of advocacy from counsel for the A.G. He is an experienced and able counsel who put the limited position of the A.G. forward with vigour and skill. My complaint concerns his brief. We were entitled to more assistance.

Analysis

(a) Section 15(1)

Fortunately, the motions judge in this case did not proceed exclusively on the basis of the concessions before her, but embarked on an independent s.15(1) inquiry. However, it is my opinion that the motions judge's analysis cannot withstand scrutiny.

Section 15(1) of the *Charter* provides that every person is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination. The motions judge applied a three-stage test in her s. 15(1) analysis: (i) Does the legislation draw a distinction; (ii) Does the distinction result in disadvantage; and (iii) Is the distinction based upon an enumerated or analogous ground?

(i) The Nature of the Distinction

The first step of the analysis involves determining the nature of the distinction being made by the impugned legislation. As the motions judge noted, "s. 29 of the *FLA* has drawn a distinction between opposite-sex partners and same-sex partners in a relationship of some permanence" (at p. 603). I agree with her that the distinction in s. 29 is not between individual claimants for support who are gay or lesbian, and individual claimants for support who are heterosexual. The distinction is between same-sex couples and heterosexual couples.

This is not, in my view, a trivial observation. As is evident from the history of the legislation, the object of this Act is the family, not just components of the family. The references in the *FLA* are to spouses as partners and to the marriage as a unit. Part III of the *FLA* contemplates two spouses, not one. It is the fact that neither M nor H fall within the definition of "spouse" in s.29 of the *FLA* which denies M the opportunity to apply to the

court for support. M cannot be a spouse by herself, and her right to apply for support from H is of no use unless the same law imposes upon H the obligation to provide that support. Therefore, because the distinction in s. 29 of the *FLA* is between heterosexual couples and homosexual couples, the legislation must be scrutinized for any discriminatory impact or effect on homosexuals *as couples*, and not as individual members of a couple.

(ii) Does the Distinction Result in Disadvantage?

Unfortunately, while the motions judge labelled the distinction properly at the first step of her s. 15(1) analysis, she failed to carry it through to the second step. When considering whether the impugned distinction results in disadvantage, she wrote: "By excluding same-sex couples from the definition of 'spouse' in s. 29 of the *FLA*, the legislation denies a dependent same-sex spouse the benefit and protection of the law that is accorded to a dependent heterosexual spouse" (at p. 603).

The motions judge would have us accept that we can assess the discriminatory impact of s. 29 according only to its effect on the claimant M without considering the position of H. However, this is not a case of simply asking whether M is deprived of benefits available to married persons, but is equally concerned with whether her partner H is obliged to provide those benefits. I think that any analysis of s.15(1) of the *Charter* that restricts itself to whether M has been deprived of equal protection and equal benefit of the law is

fraught with problems. M submits that the *FLA* discriminates against her as a lesbian, but the remedy proposed is that H, her lesbian partner, be assigned the primary responsibility to provide for M, and that the machinery of government be used to assist M in enforcing that responsibility. This machinery, set out in Part III of the *FLA*, is far more comprehensive than any known to the civil law in other areas. It would entitle not only M to apply for a support order, but her parents as well. Should M receive public benefits from certain named public bodies, those bodies would also be entitled to bring the application. The effect on H of remedying the alleged discrimination against M cannot, as was submitted, be relegated to the heading of "remedy". We must deal at the outset with how imposing a burden on H furthers H's equality rights.

Accordingly, it is my opinion that the motions judge, having found that the legislation distinguished between same-sex and opposite-sex couples, made a serious error in finding that the impact of that legislative distinction could be considered with respect to M only. We must look at M and H collectively to see if, as a couple, they are being denied equal protection and equal benefit of the law by virtue of their exclusion from the definition of "spouse" in Part III of the *FLA*.

The only Supreme Court of Canada decision to consider the reach of s. 15(1) with respect to same-sex couples is *Egan, supra*. The issue was the constitutionality of the

Old Age Security Act, R.S.C. 1985, c. O-9. The Act provided for a spousal allowance to be paid to the spouse of a pensioner when that spouse is between 60 and 65 years of age and the couple's combined income falls below a fixed level. Section 2 of that Act defined the "spouse" of a pensioner as including "a person of the opposite sex who is living with that person, having lived with that person for at least one year, if the two persons have publicly represented themselves as husband and wife." The claimants Egan and Nesbit, who had lived together in an openly gay relationship for 38 years, submitted that they were denied the equal benefit and protection of the law on the basis of their sexual orientation, contrary to s. 15(1) of the *Charter*, and that this denial could not be justified under s. 1.

On the issue of s. 15(1), Cory J. for the majority found the exclusion of same-sex couples constituted discrimination in three senses: first, it denied same-sex couples the equal benefit of the law by denying them a monetary benefit being granted to heterosexual couples. Second, it denied same-sex couples the equal benefit of the law by denying them the right to make a fundamental personal choice as to whether they wished to seek public recognition as a couple. Third, the exclusion denied same-sex couples the equal benefit and protection of the law by denying these relationships the same degree of dignity it conferred on heterosexual couples by virtue of monetary support. In my opinion, Part III of the *FLA* does not suffer from any of these constitutional defects.

Part III of the *FLA* does not confer any economic gain on the couple, but merely provides for the possible redistribution of money within the couple. Unlike the government fund at issue in *Egan*, it cannot be said that Part III of the *FLA* directly, or even indirectly, grants an economic benefit to heterosexual couples which it denies to same-sex couples.

In *Egan*, the government submitted that the claimants were not denied a benefit so as to attract s. 15(1), because they could receive more government income support payments by claiming separately as individuals than they could as a spousal couple. Cory J. dismissed this argument, holding, *inter alia*, that, "[a] law may well confer a benefit by providing individuals with the opportunity to make a significant choice" (at p. 593). He found that cohabiting homosexual couples were being denied the right of heterosexual couples to choose whether they wished to be publicly recognized as a common-law couple.

The motions judge in the case under appeal applied *Egan* and held that M and H collectively were denied this benefit. In my opinion, her finding at p. 603 that "the legislation denies same-sex couples the opportunity to make a choice as to whether they wish to be publicly recognized as a common law couple" is in error. In *Egan*, the two partners together made a conscious choice to apply for the pensioner's spousal allowance. In the instant case, the choice has been made by M alone. H vigorously objects to being deemed

M's spouse for the purposes of Part III of the *FLA*. This legislation removes the opportunity of couples to make such a choice, even from those who had deliberately opted to avoid the obligations of marriage by simply living together. The *Family Law Act* differs from the *Old Age Security Act* in that the decision to publicly represent a relationship as spousal in nature may be made unilaterally by one partner, without regard to the other partner's wishes and intentions. By bringing an application for support against H, M simply cannot be said to be exercising the right *of the couple* to seek public recognition of their relationship.

A third benefit of the law at issue in *Egan* was identified by Cory J. at p. 594, where he found that the *Old Age Security Act* "... confers a significant benefit by providing state recognition of the legitimacy of a particular status." As Cory J. explained:

> A very real benefit which is derived from the payment of the spousal allowance is the recognition by the state of the societal benefits which flow from supporting a couple who, for at least a year, have established a stable relationship which involves cohabitation, commitment, intimacy and economic interdependence.

In that particular case, the state's refusal to include the claimants within the term "spouse" not only denied them the monetary benefit of the pensioner's spousal allowance, but also sent a message that the state deemed the claimants' relationship less worthy of support and respect than heterosexual relationships. In my opinion, no such conclusion can be said to flow from the exclusion of same-sex couples in the legislation before us.

The *Family Law Act* does not privilege certain family forms over others. In regulating the legal relationships between married and common law heterosexual spouses, Part III of the *FLA* does not indicate that the state prefers such relationships over other living arrangements. The legislation does not offer monetary support to heterosexual relationships, so as to suggest official approval. On the contrary, it attempts to internalize the social costs of marriage and ensure that the burden of caring for dependants is borne within the family unit, rather than by the state. Indeed, segments of the homosexual community have indicated that inclusion of same-sex couples within Part III of the *FLA* would be inappropriate. The Ontario Law Reform Commission's *Report on the Rights and Responsibilities of Cohabitants Under the Family Law Act*, 1993, declined to recommend in favour of ascribing spousal status to same-sex couples for the purpose of the *Family Law Act*'s spousal support provisions, on the basis that this support model might be unsuited to same-sex relationships. Accordingly, I cannot see how, in not imposing these substantial economic rights and obligations on homosexuals, Part III of the *Family Law Act* implies that homosexual relationships are not as socially desirable as heterosexual relationships.

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. I am not persuaded that the formal attribute of marital status, unaccompanied by any material advantage, is by itself a "benefit" of the law.

(iii) Does the Distinction Result in Discrimination?

If I am wrong, and homosexual couples do in fact suffer some sort of symbolic or even tangible disadvantage by virtue of their exclusion from the legal definition of marriage in Part III of the *Family Law Act*, does it necessarily follow that this disadvantage constitutes discrimination? The essence of discrimination is the violation of human dignity flowing from burdensome distinctions made on the basis of stereotypical presumptions about historically disadvantaged groups, rather than on the basis of individual capacity: *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143 *per* McIntyre J. at p. 173; *R. v. Turpin* [1989], 1 S.C.R. 1296 *per* Wilson J. at pp. 1331-1335; *Miron v. Trudel*, [1995] 2 S.C.R. 418 *per* McLachlin J. at p. 499.

In my opinion, the question at the heart of this appeal is whether s. 15(1) of the *Charter* demands that same-sex couples be included in legal definitions of marriage in family law legislation. While it is now clear that both sexual orientation and marital status are analogous grounds to those enumerated under s. 15(1), the jurisprudence concerning the

ambit of this protection is largely undeveloped. The Supreme Court of Canada first considered the intersection of marital status and s. 15(1) of the *Charter* generally in the case of *Miron v. Trudel*, [1995] 2 S.C.R. 418. Miron and Valliere lived together as an unmarried heterosexual couple. They had children together and functioned as an economic unit. Miron was injured in the course of an automobile accident caused by an uninsured driver, and could no longer work as a result. He made a claim for accident benefits under Valliere's insurance policy, which extended accident benefits to the "spouse" of the policy-holder. As prescribed by the *Insurance Act*, R.S.O. 1980, c. 218, "spouse" was defined as someone legally married to the policy-holder. Miron and Valliere claimed that these legislative provisions discriminated against them on the basis of marital status.

The majority decision was written by McLachlin J., who found that restricting the definition of "spouse" in this context to legally-married persons only constituted a violation of s. 15(1). She held that the claimants were being denied a benefit available to others solely on the basis that unmarried cohabitants were considered less meritorious than married cohabitants. She held further that this distinction on the basis of marital status constituted impermissible discrimination, writing at p. 501 that, "marriage, however sacred, may be inappropriately used to bar individuals not belonging to the married group from the protection or benefit if laws to which the status of legal marriage has little real relevance."

The issue of same-sex couples and marriage has not received much judicial consideration from the Supreme Court of Canada. In *Egan, supra,* Cory J. expressly stated that his majority opinion was not meant to alter the societal concept of marriage. He wrote at p.583:

> One submission must be dealt with at the outset. The respondent contends that by this action the appellants are requesting the Court "to change fundamentally the essential meaning of the societal concept of marriage". I cannot accept that submission. It appears to me to be inaccurate and misleading. This case cannot be taken as constituting a challenge to either the traditional common law or statutory concepts of marriage. Rather, the sole issue presented is whether the state can define a "common law spouse" in a manner which explicitly excludes homosexual couples. Eligibility for payment of the spousal allowance under the *Old Age Security Act* is not in any way contingent upon being married. Rather, the spousal allowance is specifically made available to common law couples. The only aspect of the Act which is being challenged is the definition of common law spouse. Thus any contention that this appeal will affect the societal concept of marriage can be set aside.

The minority judgment on s. 15(1) in *Egan* disagreed. La Forest J., writing for himself and three other judges, found that the legislation in issue was meant to support married couples who were aged and elderly for the advancement of public policy central to society. The statutory concept of marriage, wrote La Forest J., has evolved in recognition of changing social realities to encompass both legally married and common-law couples. It did not constitute discrimination to exclude same-sex couples within the definition of

marriage, because such units are not capable of procreating children. At p. 536 he wrote:

> ... [marriage's] ultimate *raison d'être* ... is firmly anchored in the biological and social realities that heterosexual couples have the unique ability to procreate, that most children are the product of these relationships, and that they are generally cared for and nurtured by those who live in that relationship. In this sense, marriage is by nature heterosexual.

He concluded that because the distinction in question was based on capacity rather than stereotype, it did not constitute discrimination under s. 15(1).

In my view, then, the majority judgments in both *Miron v. Trudel* and *Egan* are distinguishable from the case under appeal for the following reasons:

(a) they are not concerned with the relationship of the spouses *inter se*;

(b) they are concerned with whether the legislation in question has excluded one or both of the "spouses" from receiving a direct monetary benefit created by the legislation under attack;

(c) the party providing the benefit is either the government or an industry which relies upon government legislation and is obliged by law to conduct its business with the public without discrimination;

(d) they consider legislation that has nothing to do with the regulation of marriage or those who comprise the partners to the marriage or the children of that marriage; and

(e) they expressly or impliedly make clear that they do not intend to alter the

societal concept of marriage.

By contrast, in this case we are confronted with a lesbian woman who seeks to include herself and her unwilling ex-partner in family law legislation. To suggest that this appeal is limited to the definition of "spouse", without much relevance to the societal concept of marriage, is a gravely misleading over-simplification. With great deference to those who think otherwise, I am satisfied that in this appeal we are confronted with just the analysis that Cory J. sought to avoid in *Egan.* The *Family Law Act* does deal with the institution of marriage as it has evolved over the years. The preamble to the *Family Law Act* defines the roles of the spouses within marriage and assigns responsibilities to the partners to that marriage. The secular revolution has wrested the institution of marriage from the control of the clergy such that the societal concept of marriage now encompasses those couples who have voluntarily entered into a conjugal state without benefit of religious or civil ceremony. The definitions of "spouse" simply describe the reality of the modern day marriage: those who are formally husband and wife by reason of the sacrament of marriage and those who cohabit as husband and wife.

Since neither *Egan v. Canada* nor *Miron v. Trudel* is dispositive of this issue, I think it is fair to treat this case as a matter of first impression. Having regard to what has been said on the subject of marriage and same-sex couples by the Supreme Court of Canada,

I feel very comfortable in adopting the four-judge dissent on s. 15(1) in *Egan*. For the reasons stated by La Forest J., I am of the opinion that there is no breach of s. 15(1) of the *Charter*. The legislature has opted to regulate heterosexual unions in recognition that this is not only the traditional, but also the basic, social structure for the procreation of children. I reject the suggestion that same-sex couples can create a family unit that parallels the heterosexual family where there have been children of the union. The fact that children can become available to same-sex couples through adoption, surrogate motherhood, artificial insemination and other means is a red herring for the purposes of constitutional analysis. The same sources of parenthood are available to single persons. I have no hesitation in accepting that same-sex relationships can be as lasting, caring and fulfilling as heterosexual unions, but it strains the credibility of the proponents of recognition of these unions to say that they have the same capacities as the families of traditional and common-law marriages.

The legislation under attack is properly concerned about the health and prosperity of family units, including those outside the formal institution of marriage. Procreation is a direct consequence of heterosexual unions and is not always intentional. The state, however, has a direct interest in the children of these unions. The demographics of our society are determined by immigration and the procreation of children. These must be of central concern to our government if it is to discharge its obligation to maintain a vibrant social structure within a prosperous economic environment. As part of this concern,

the legislature has recognized the historical fact of the interrelationship between child rearing and the dependency of the female spouse, and has accordingly provided for mutual support obligations between spouses. In all these circumstances, the fact that the legislators have not yet chosen to recognize same-sex relationships as meriting equal attention is neither surprising nor unconstitutional.

Having found no infringement of s. 15(1), I need not decide the remaining two constitutional issues. However, I cannot leave this matter without commenting on what I believe to be errors in the motions judge's reasoning on s. 1, her decision as to the appropriate remedy and the nature of the evidence put before her.

(b) Section 1

Had I found a violation of s. 15, I would have upheld the validity of the *FLA* under s. 1 of the *Charter*, relying as did La Forest J. in *Egan, supra*, at pp.539-40, on my reasons set out above relating to discrimination. I would also have been mindful of the fact that the majority of the court in *Egan* found the impugned legislation in that case to be saved under s. 1 by virtue of the reasoning in *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229 at pp. 316-18. The section 1 majority, formed by the judgments of Sopinka J. and La Forest J., found that *McKinney* stood for the proposition that, in enacting social policy, governments should be permitted to act incrementally. I believe

that such an analysis is equally applicable to the case under appeal. Forcing the provincial government to regulate all family forms at the same time, rather than on a gradual basis, might seriously impede worthy legislative initiatives. I believe the motions judge erred in not showing deference to the legislature in this case.

In my view, this was not the only error made in the court below. As the focal point of her s. 1 analysis, the motions judge found the legislative goal of Part III of the *FLA* to be as follows:

> The key [to spousal support] is *dependency* that exists upon the *breakdown* of the relationship and that is causally connected to the relationship itself. ...
>
> Legislation providing for spousal support is intended to protect those who have become economically dependant upon a relationship marked by marriage or intimate cohabitation, and who require assistance in becoming self-sufficient upon the breakdown of that relationship (at pp. 609-610).

This characterizes the goal far too narrowly. Section 30 of the *FLA* is very clear that the obligation to provide support rests on both spouses and is a continuing one. It is not contingent on the breakdown of the relationship. Further, entitlement to support is not conditional on proof that the applicant's need is causally connected to the relationship.

In my opinion, the motions judge's limited characterization of the legislative

goal merely echoed the errors in her s. 15(1) reasons. Quite simply, in confining her *Charter* analysis to a finding that the state denied M a benefit, the motions judge did not appreciate the nature or extent of the burden that she was proposing to place on H. Perhaps if she had taken a broader view of the legislation at issue, the motions judge might have been more reluctant to impose a statutory regimen of personal responsibility upon two private citizens with respect to their personal living arrangements.

(c) Remedy

The motions judge found that M suffered discrimination by reason of her sexual orientation, thereby depriving her of the benefit available to a heterosexual spouse to apply for support under Part III of the *FLA*. To remedy this, the motions judge amended the definition of spouse in s. 29 of the *FLA* to exclude any reference to "a man and woman" and added the words "two persons" so that the definition would read:

> "spouse" means a spouse as defined in subsection 1(1), and in addition includes two persons who are not married to each other and have cohabited.

The motions judge did not make any declaration with respect to the definition of "cohabit". The term “cohabit” is a term defined under s. 1(1) of the *Family Law Act* as meaning “to live together in a conjugal relationship, whether within or outside the marriage”. The Oxford Dictionary of Current English defines “conjugal” as “of

marriage or the relationship of husband and wife". Black's Law Dictionary defines the term as "of or belonging to marriage or the married state; suitable or appropriate to the married state or to married persons; matrimonial; connubial". In *Routley v. Dimitrieff* (1982), 36 O.R. (2d) 302, Master Donkin commented at p. 304 as follows:

> In my view, living "together in a conjugal relationship" requires something like a marriage, including living in the same place, eating together as circumstances allow, being seen in public as a couple, and representing each other to be members of one family group, or at least some of these features.

The motions judge simply did not address how a same-sex couple could comprise a conjugal couple in the sense of holding themselves out as husband and wife, or as married.

An even more important oversight is the motions judge's lack of consideration for the consequences attendant to her remedy. For example, partners to any cohabitation agreement as provided for in Part IV must be "a man and a woman". This means that homosexuals who are unhappy with the prospect of being drafted into this new regime do not have the option of making their own mutual support arrangements. Thus a significant burden is cast upon persons such as H without the opportunity to "opt out" available to their heterosexual counterparts. If the remedy was meant to alleviate discrimination on the basis of sexual orientation, then clearly it was riddled with

inconsistency.

I have never heard of a problem solving process which does not invite the problem solver to revisit her analysis when she arrives at an answer which appears incongruous. I think that if the motions judge had done so in the case on appeal she would have realized that she had been presented with the wrong problem, and that the question of discrimination could not be assessed with reference to M alone. The obvious flaws in the motions judge's remedy should have alerted her to the flaws in her s. 15(1) analysis.

(d) Expert Evidence

As a final note, I feel compelled to comment on some of the material that was submitted to the motions judge as evidence, particularly by M. Her expert evidence was of two types. First, she submitted several affidavits from various representatives of the homosexual community, describing same-sex relationships and suggesting how those family forms would be best accommodated by legislation. In my opinion, this material is not expert evidence in the true sense of the term, and I accordingly reject the suggestion that we are bound by any conclusions of the motions judge based upon it. This information does not meet the basic test of what constitutes expert opinion evidence as set out by the Supreme Court of Canada in *R. v. Mohan* (1994), 89 C.C.C. (3d) 402. In that

case, Sopinka J. held for the Court at p. 411 that expert opinion may be admitted where such evidence is relevant, is necessary to assist the trier of fact, does not run afoul of any exclusionary rule, and is given by a properly qualified expert.

I doubt that much of this information is relevant to the task at hand. We are charged with assessing the constitutionality of legislation, not with evaluating alternative policy choices. However, even assuming that this affidavit evidence can meet the threshold test of relevance, I do not see how it is necessary to assist the trier of fact. Much of the material consists of various argumentative opinions that the *FLA*'s exclusion of same-sex couples constitutes discrimination. "Discrimination" as used in s. 15(1) of the *Charter* is a legal term, not a technical word whose meaning is outside the purview of judges. Judges should be taken to know, or at least to be capable of discerning, the meaning of the term "discrimination" as it appears in the *Charter*, without the assistance of expert testimony. Further, I do not believe that this evidence is sufficiently reliable to be instructive. Unlike most social science evidence adduced in *Charter* motions, this evidence does not consist of objective, replicable studies or statistical data. Rather, it is replete with personal accounts prepared for the specific purpose of supporting M's position in these proceedings. Moreover, I do not think that many of these people are qualified experts. They may have knowledge of their own experiences within the lesbian and gay community, but this does not render them constitutional scholars.

The second type of evidence submitted by M concerned the legislative intention to be ascribed to the Province of Ontario's efforts at family law reform. Among this evidence was an affidavit from Dr. Graham White, a former Assistant Clerk at the Office of the Clerk of the Legislative Assembly of Ontario. He purported to give expert testimony on the reasons for the Ontario Legislature's defeat of Bill 167, and the likelihood of the provincial government, assuming various parties to be in power, passing in future a similar bill. Again, I do not see how the reception of this evidence is justified. The wonder of democracy is that individual members of the legislature, when freed from party discipline, can vote for or against a bill for reasons that do not have to be articulated, much less understood. I cannot see how Dr. White possesses superior insight into this process, why his comments should be regarded as in any way a reliable indicator of past or future legislative intentions, or even why his observations would be at all relevant to the constitutional issue before us.

Expert evidence can, in appropriate cases, be indispensable to the fair resolution of a legal matter. However, we must not lose sight of the fact that measuring legislation against the *Charter* is a judicial task which cannot be delegated. In discharging their constitutional duty, courts must guard against being derailed by the personal opinions of politically-motivated individuals, disguised as expert testimony.

Disposition

I would allow the appeal and set aside the judgment below with respect to the Rule 21.01 motion. I would substitute a declaration that s. 29 of the *Family Law Act* does not offend the *Charter*.

H is entitled to her costs as against M with respect to both the appeal and the Rule 21.01 motion. I would not interfere with the motions judge's disposition with respect to costs of the Rule 20 motion.

In the special circumstances of this case, I would not interfere with the order of Epstein J. that the Attorney General pay M's costs of the motion below. While the A.G. has been nominally successful in this court to the extent that I have found the impugned legislation to be constitutional, I did not do so on the basis of the A.G.'s submissions. Accordingly, I would dismiss this aspect of the A.G.'s appeal.

CHARRON J.A.:

I. INTRODUCTION

This appeal raises the issue of whether the definition of "spouse" in s. 29, Part III, of the *Family Law Act*, R.S.O. 1990, c. F.3 ("FLA"), which excludes same-sex couples from its purview, violates s.15(1) of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982,* being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11. My colleague has set forth the history of the proceedings as well as the applicable constitutional and statutory provisions. I will therefore refer to such material only as is necessary to an understanding of these reasons.

As stated by my colleague, there are three issues on this appeal:

1) whether s. 29 of the FLA infringes s. 15(1) of the *Charter*;

2) if so, whether the infringement can be justified under s. 1 of the *Charter*; and

3) if the infringement cannot be justified, what the appropriate remedy should be having regard to s. 24 of the *Charter* and s. 52 of the *Constitution Act, 1982*.

II. DOES S. 29 OF THE FLA INFRINGE S. 15(1) OF THE *CHARTER*?

All parties and interveners on this appeal concede that s. 29 constitutes a *prima facie* violation of M's s. 15(1) equality rights and agree that the debate is situated under s. 1

of the *Charter*. In my view, this concession is properly made having regard to both the record before the court and the relevant jurisprudence. Consequently, in my view, the issue requires but a brief analysis.

Any analysis of s. 15(1) requires a consideration of the recent trilogy of decisions released by the Supreme Court of Canada in May 1995: *Miron v. Trudel*, [1995] 2 S.C.R. 418; *Egan v. Canada*, [1995] 2 S.C.R. 513; and *Thibaudeau v. Canada*, [1995] 2 S.C.R. 627. While the Supreme Court is clearly divided as to the appropriate analytical approach to s.15(1), a majority of the Court appear to favour a two-step analysis, essentially leaving any consideration of the issue of "relevance" of the discriminatory distinction to the functional values of the legislation to the analysis under s. 1: see *Egan*, per L'Heureux-Dubé at pp. 546-8 and *Miron*, per McLachlin (Sopinka, Cory and Iacobucci concurring) at pp. 485-492. In my view, notions of relevance are indeed more appropriately dealt with under the s. 1 analysis and I agree, more particularly, with McLachlin J.'s comments in *Miron* in this regard.

The analysis under s.15(1) therefore involves two steps:

1. The claimant must show that his or her right to equality before the law, equality under the law, equal protection of the law or equal benefit of the law has been denied due to a distinction created by the impugned provision. The distinction may be evident

on the face of the legislation itself or it may be identifiable only with regard to the disproportionate impact of the legislation on the claimant as compared to another person.

2. The claimant must show that the distinction constitutes discrimination. Not all distinctions constitute discrimination. At this second stage, in order for discrimination to be made out, the claimant must show that the distinction falls within an enumerated or analogous ground and she must also show that the legislation violates the purpose of this section. I find McLachlin J.'s analysis with respect to this second step most useful where she states the following in *Miron*, at p. 492:

> 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.

If the claimant meets the onus imposed upon her under this part of the analysis, a violation of s. 15(1) is established and the onus then shifts to the party seeking to uphold the impugned provision to justify the discrimination as "demonstrably justified in a free and democratic society" under s. 1 of the *Charter*.

1. Does the impugned legislation draw a distinction?

The motions judge concluded that "[c]learly, section 29 of the FLA has drawn a distinction between opposite-sex partners and same-sex partners in a relationship of some permanence". Section 29 of the FLA sets out definitions applicable to Part III of the Act, which deals with support obligations, and defines "spouse" as follows:

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

Section 1(1) defines "cohabit" as meaning "to live together in a conjugal relationship, whether within or outside marriage".

M, in asserting her claim to unequal treatment, draws a comparison between herself, as an *unmarried* person in an intimate same-sex relationship of some duration and other *unmarried* persons in intimate heterosexual relationships of some duration. She does not allege a breach of her s. 15(1) rights because the legislation does not confer upon her the same rights as upon a *married* person in a heterosexual relationship.

The line of comparison is always very important in the assessment of an equality claim. M's choice of comparison may well be dictated by strategy, but in my view, it is also dictated by existing legislative policy, relevancy and logic. Firstly, same-sex couples do not have the present legal means to marry or to otherwise formalize their union. Hence, given the present state of the law, no useful comparison can be made between M and a member of a married couple. Secondly, if the selected group for comparison includes married couples, we run the risk of getting lost in a maze of irrelevant considerations pertaining to the distinction between married couples and unmarried couples. Any line of comparison which may be drawn between same-sex couples and married couples is essentially outside the purview of this debate. Finally, the comparison to *unmarried* heterosexual couples is the logical choice because it is precisely the inclusion of *unmarried* heterosexual couples in the legislative scheme as it pertained to spousal support obligations without at the same time including same-sex couples which opened the door to M's claim of inequality.

M argues that this distinction denies her the right to make an application under s. 33 of the FLA for an order for support against her partner H, a right that is available to unmarried persons in heterosexual relationships who otherwise meet the requirements of the statute. M argues that if she could demonstrate that she had cohabited with a *man* within the meaning of s. 29 and s. 1(1), fulfilling the requirements as to duration, or parenthood with

a degree of permanence, and conjugality, she could bring an application for an order for support against her partner. But, since she is of the same sex as her partner, she cannot bring her application even if she can demonstrate that the relationship between herself and her partner meets these same statutory requirements.

In this respect, M argues that same-sex couples can meet the requirement set out in s. 1(1) of the FLA that there be a *conjugal* relationship. She points to existing jurisprudence which sets out principles for the determination of conjugality in a relationship and she argues that these factors are not inconsistent with same-sex relationships: see for example *Molodowich v. Penttinen* (1980), 17 R.F.L. (2d) 376 (Ont. Dist. Ct.); *Re Stoikiewicz and Filas* (1978), 21 O.R. (2d) 717 (Unif. Fam. Ct.); *Bellis v. Innes* (1980), 21 R.F.L. (2d) 40 (B.C. Co. Ct.); *Re Harris and Godkewitsch* (1983), 41 O.R. (2d) 779 (Prov. Ct.); *Tanouye v. Tanouye,* [1994] 2 W.W.R. 735 (Sask. Q.B.). As a result, M contends that she is denied equal protection of the law or equal benefit of the law.

In my view, M is correct in her contention that same-sex couples are capable of meeting all statutory prerequisites set out in s. 29 and s. 1(1) but for the requirement that they be "a man and woman". Same-sex couples are certainly capable of living together continuously for a period of not less than three years. Also, on the present state of the law, same-sex couples may well be able to adopt children (see *Re K* (1995), 23 O.R. (3d) 679

(Prov. Ct.)) and live together in a relationship of some permanence. Finally, it is at least arguable that same-sex couples could meet the requirements of conjugality as set out in s. 1(1). In this respect, I find the list of questions set out by Kurisko D.C.J. in *Molodowich v. Penttinen, supra* instructive. After reviewing the relevant authorities on the meaning of conjugality, Kurisko D.C.J. purported to consolidate the statements found in the jurisprudence with the guidance of a series of questions listed under seven descriptive components as follows:

> *1. Shelter:*
> (a) Did the parties live under the same roof?
> (b) What were the sleeping arrangements?
> (c) Did anyone else occupy or share the available accommodation?
>
> *2. Sexual and Personal Behaviour:*
> (a) Did the parties have sexual relations? If not, why not?
> (b) Did they maintain an attitude of fidelity to each other?
> (c) What were their feelings toward each other?
> (d) Did they communicate on a personal level?
> (e) Did they eat their meals together?
> (f) What, if anything, did they do to assist each other with problems or during illness?
> (g) Did they buy gifts for each other on special occasions?
>
> *3. Services:*
> What was the conduct and habit of the parties in relation to:
> (a) preparation of meals;
> (b) washing and mending clothes;
> (c) shopping;
> (d) household maintenance; and
> (e) any other domestic services?
>
> *4. Social:*

(a) Did they participate together or separately in neighbourhood and community activities?

(b) What was the relationship and conduct of each of them toward members of their respective families and how did such families behave toward the parties?

5. Societal:

What was the attitude and conduct of the community toward each of them and as a couple?

6. Support (economic):

(a) What were the financial arrangements between the parties regarding the provision of or contribution toward the necessaries of life (food, clothing, shelter, recreation, etc.)?

(b) What were the arrangements concerning the acquisition and ownership of property?

(c) Was there any special financial arrangement between them which both agreed would be determinant of their overall relationship?

7. Children:

What was the attitude and conduct of the parties concerning children?

The existing case law on this point has developed in the context of heterosexual relationships only. Even so, the existing jurisprudence makes it clear that couples do not have to fit a singular traditional model in order to demonstrate that their relationship is conjugal within the meaning of the law. The extent to which these different elements of a conjugal heterosexual relationship will be taken into account will vary with the circumstances of each case. In the same way, some factors may take on a greater or lesser significance than others in the case of same-sex couples. For example, some same-sex cohabitees may not have openly and publicly presented themselves as a couple for fear of

reprisal or prejudice, a concern which may not be present to the same degree, if at all, in the case of unmarried heterosexual cohabitees.

While the above-noted list should not be taken as being exhaustive or in any way determinative of the issue, it summarizes well the various elements considered in the jurisprudence and a reference to this list is therefore of assistance in the consideration of M's position. I agree with M's contention that there is nothing in the evidence before us which would indicate that any of the elements listed is necessarily inconsistent with same-sex relationships. Of course, not all same-sex couples form conjugal relationships. But then, the same can be said of heterosexual couples.

In my view, M has met the onus with respect to this first step of the s.15(1) analysis. The impugned provision does draw a distinction as contended and does so on its face.

2. Does the distinction constitute discrimination?

It is quite clear that the distinction drawn by the legislation between M, as a person in a same-sex relationship, and a person in a heterosexual relationship, is based on sexual orientation. In *Egan*, all justices were unanimous in finding that sexual orientation

is an analogous ground under s. 15(1). As stated above, this usually suffices to establish discrimination and it is only in exceptional cases that the denial of equality on an analogous ground will not violate the purpose of s. 15(1). In this case, I am of the view that the denial of equality does violate the purpose of s. 15(1) since the limitation imposed upon M is based on a "stereotypical application of presumed group characteristics" and not on "merit, capacity or circumstance".

My colleague expresses the view that we cannot assess the discriminatory impact of the impugned legislative provision with regard only to its effect on the claimant M without considering the position of H. I would agree with this statement in the sense that a consideration of the rights of others, which in this case would include the rights of H, is certainly relevant to the constitutional debate before us, particularly as they pertain to s. 1 concerns. However, I respectfully disagree with my colleague when he states that M's claim cannot be determined separately and that we must look at M and H collectively to ascertain if, as a couple, their s.15(1) rights are breached by virtue of their exclusion from the definition of "spouse" in Part III of the FLA.

In my view, it is not incumbent upon M to show that H's rights are also violated in order to successfully assert her own rights under s. 15(1) of the *Charter*. While a claim is often couched in terms of the discriminatory impact on a group of persons having similar

characteristics, the very language of s. 15(1) makes it clear that the right belongs to the individual. M has the right to stand alone in claiming a violation of her rights without in effect being joined in her position by H. Her claim must be assessed accordingly by the court.

While I do not share some of the other concerns raised by my colleague in his s.15(1) analysis with respect to the different capacities of same-sex unions as compared to "families of traditional and common-law marriages", these issues, in my view, can be more appropriately dealt with in the context of a s. 1 analysis and I will make reference to some of these matters later in these reasons.

In the result, I agree with the motions judge's conclusion that the definition of spouse in s. 29 of the FLA violates s. 15(1) of the *Charter*. I find the conclusion reached by Cory J. in *Egan* particularly noteworthy on this point (at p. 604):

> In the present appeal, looking at the Act from the perspective of the appellants, it can be seen that the legislation denies homosexual couples equal benefit of the law. The Act does this not on the basis of merit or need, but solely on the basis of sexual orientation. The definition of "spouse" as someone of the opposite sex reinforces the stereotype that homosexuals cannot and do not form lasting, caring, mutually supportive relationships with economic interdependence in the same manner as heterosexual couples. The appellants' relationship vividly demonstrates the error of that approach. The discriminatory impact can hardly be deemed to be trivial when the legislation reinforces prejudicial attitudes based on

> such faulty stereotypes. The effect of the impugned provision is clearly contrary to s. 15's aim of protecting human dignity, and therefore the distinction amounts to discrimination on the basis of sexual orientation.

Excepting any reference to the nature of the particular relationship between the parties (a matter I do not find necessary or advisable to comment upon in the circumstances of this case), I am of the view that Cory J.'s words are equally applicable to this case.

III. IS THE INFRINGEMENT JUSTIFIED UNDER S. 1 OF THE *CHARTER*?

The legislation will be upheld notwithstanding the infringement of M's rights under s. 15(1) if the proponent of the legislation can demonstrate, on a balance of probabilities, that the violation is reasonable and demonstrably justifiable in a free and democratic society. The onus in this case is on H; she is joined by the Attorney General of Ontario (Attorney General) as intervener.

Section 1 recognizes the inevitable tension between the unimpeded exercise of individual rights and the pursuit of broader societal purposes. The section permits, in narrow circumstances, legislation which limits individual rights in order to promote other important societal interests. In those circumstances, the legislation is saved because the limit on the individual right furthers the broader societal interest. The gain for the community is said to be worth the loss suffered by the individual. Clearly, a limit on an individual's

constitutional rights which does not further an important public purpose can never be justified under s.1 as there is no public gain to counterbalance the individual's loss.

The test to be applied under s.1 is well known. Two conditions must be met:

1. the objective of the legislation must be pressing and substantial; and
2. there must be a proportionality between the gain achieved by the public interest served by the legislation and the harm done to the interest of the person or group whose right is infringed. This condition is met when three criteria are satisfied:

   a) the legislative provision must be rationally connected to the objective of the legislation;

   b) the impugned provision must minimally impair the *Charter* guarantee; and

   c) there must be a proportionality between the effect of the measure and its objective so that the attainment of the legislative objective is not outweighed by the deleterious effects of the violation.

It is also important to remember that s. 1 of the *Charter* requires that any s. 15(1) violation be *demonstrably* justified in order to be saved and the onus is clearly upon the proponents of the legislation to do so. The Attorney General, as intervener, takes the position that the decision of the Supreme Court of Canada in *Egan* is determinative of the issue in this case. The appellant supports this argument.

In *Egan*, the Supreme Court of Canada, by majority decision, upheld the validity of those provisions contained in the *Old Age Security Act*, R.S.C., 1985, c.O-9 which serve to restrict certain allowances provided for in its scheme of retirement income to spouses in a heterosexual union. The appellants Egan and Nesbitt were a homosexual couple. In 1986, some 38 years after the relationship began, Egan, having reached age 65, became eligible to receive old age security and a guaranteed income supplement, pursuant to the *Old Age Security Act*. The same Act provides for a spousal allowance to paid to the spouse of a pensioner when that spouse is between the ages of 60 and 65 years and the couple's combined income falls below a fixed level. Upon reaching age 60, Nesbitt applied for the spousal allowance describing Egan as his spouse. His application was rejected solely on the basis that the relationship between Nesbitt and Egan was homosexual and therefore did not conform to the definition of spouse set out in s.2 of the Act. Section 2 of that Act reads as follows:

> "spouse", in relation to any person, includes a person of the opposite sex who is living with that person, having lived with that person for at least one year, if the two persons have publicly represented themselves as husband and wife;

Counsel for the Attorney General argues that the issues on this appeal are sufficiently similar so as to bind this court in arriving at the same result.

Since the constitutional issue raised in *Egan* also concerned the rights of gay men and lesbians, many similar concerns were addressed in that case and much the same

evidence was considered as before the court on this appeal. Hence the decision in *Egan* is of some precedential value in the disposition of the constitutional issue raised in this appeal. However, the matter cannot be resolved by a simple application of the doctrine of *stare decisis* as contended. The Legislature's objectives in this case, as discussed below, are distinct from Parliament's intent as expressed in the *Old Age Security Act.* A separate analysis under s. 1 must therefore be undertaken in order to dispose of the issues at hand.

The parties and interveners on this appeal have filed material for consideration by the court on the s.1 analysis. A review of this evidence can be more suitably made in reference to the issue of proportionality. I will therefore consider the first condition of the s.1 test before I summarize the evidence.

1. The Objective of the Impugned Provision

In order to determine the objective of the impugned provision in this case, I believe one must first consider the FLA as a whole and then focus on the spousal support provisions in Part III of the FLA with particular emphasis on the impugned definition itself.

a) The FLA as a whole

The purpose of the FLA can be considered in terms of broad policy considerations. The preamble of the FLA itself provides one such statement of policy:

> 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 in family relationships, including the equitable sharing by parents of responsibility for their children.

This statement can provide a general sense of direction for the determination of an operative statement of purpose. However, the proper adjudication of any s. 15 claim also requires a consideration of the practical effect of the statute. Such an approach is necessary because of the nature of claims made pursuant to s. 15(1): a claim of inequality will almost invariably be rooted in practical considerations arising out of the application of the impugned legislative disposition.

For the purpose of this constitutional debate, I find that the following excerpt from the *Report on The Rights and Responsibilities of Cohabitants Under the Family Law Act* (Report) published by the Ontario Law Reform Commission (OLRC) in 1993 provides the most concise and useful statement of the objective of the FLA :

> The purpose of the *Family Law Act* is to provide for the equitable resolution of economic disputes that arise when

> intimate relationships between individuals who have been financially interdependent break down (Parts I-IV). As well, it ensures that family members have a means to seek redress when an immediate relative is injured or killed through the negligence of a third party (Part V).

I have considered whether the statement of objective should be couched in terms which exclude same-sex couples, a position implicitly advanced by counsel for the Attorney General on this appeal. For example, should the purpose be defined in terms of providing "for the equitable resolution of economic disputes that arise when intimate relationships between individuals *of the opposite sex* ... break down"? I have concluded that it should not be so defined because a consideration of the purpose in such terms would inevitably lead to circular reasoning and would not provide a vehicle for the meaningful assessment of M's claim to unequal treatment.

This point is aptly made by McLachlin J. in *Miron* where she refutes Gonthier J.'s approach in his s. 15(1) analysis with respect to the functional values of the legislation at pp. 488-9:

> In approaching the concept of relevance within s. 15(1), great care must be taken in characterizing the functional values of the legislation. My colleague Gonthier J. concedes that the distinction here at issue - the denial on the basis of marital status - might, for some purposes, be viewed as an analogous ground. He asserts, however, that it is not used in a discriminatory manner in this case because "the functional value of the benefits is not to provide support for <u>all</u> family units living in a state of financial interdependence, but rather, the Legislature's intention

> was to assist those couples who are married" (para.72). He concludes that distinguishing on the basis of marital status is relevant to this purpose and hence that the law is not discriminatory. On examination, the reasoning may be seen as circular. Having defined the functional values underlying the legislation in terms of the alleged discriminatory ground, it follows of necessity that the basis of the distinction is relevant to the legislative aim. This illustrates the aridity of relying on the formal test of logical relevance as proof of non-discrimination under s.15(1).

McLachlin J. makes the same criticism of La Forest J.'s reasoning in *Egan* where he characterizes the functional value of the legislation as meeting the need to support married couples who are elderly.

While McLachlin J. was directing her criticism at her colleagues' approach to notions of relevance in their respective analyses under s. 15(1), it is these same notions of relevance that are discussed here under s.1, and, as stated above, are more appropriately addressed at this stage of the analysis. I find the same criticism would apply in this case if one were to define the purpose of the legislation in terms of the exclusion of same-sex couples.

Having looked at the general purpose behind the FLA, it then becomes important to narrow the focus to the spousal support obligations contained in Part III of the Act and then further to the impugned provision itself.

b) Support obligations under Part III of the Act

The support obligations under the FLA are contained in ss. 29 to 50 and pertain both to spousal support and to child support. Before focussing on the spousal support obligations, some brief observations should be made with respect to the child support provisions and their relevancy to the issue at hand.

The legislative provisions for child support undoubtedly constitute an important feature of Part III of the FLA. It is also clear that child-rearing obligations, including the obligation to provide financial support for a child, are relevant factors to be considered on any application for spousal support whenever children are involved. Must we therefore conclude that procreation which, as stated by my colleague Mr. Justice Finlayson, "is a direct consequence of heterosexual unions" forms such an intrinsic part of the whole notion of spousal support so as to justify the exclusion of same-sex unions from consideration in the legislative scheme? I do not think so for several reasons.

Firstly, the mutual spousal support obligations are in no way dependent on the couple having children.

Secondly, the child-support provisions of the FLA do not in any way exclude members of same-sex unions from their application. The definition of "child" under the

FLA is not limited to the ordinary meaning of natural or adopted child but "includes a person whom a parent has demonstrated a settled intention to treat as a child of his or her family". The corollary definition of parent under the FLA also includes "a person who has demonstrated a settled intention to treat a child as a child of his or her family". The evidence before the court is uncontroverted that many lesbians and gay men who form same-sex relationships also raise children. And, in any case where a child is involved, the child-support provisions would be of equal relevance to an application for spousal support by a member of the same-sex couple as it would be in the case of a member of an opposite-sex couple.

Finally, I find there is much merit in the following observation made by L'Heureux-Dubé J. in *Egan* at p. 569:

> I would also reject any argument that homosexual relationships have a distinct biological reality - namely that homosexuality is non-procreative - as dangerously reminiscent of the type of biologically based arguments that this Court has now firmly rejected. Compare *Bliss v. Attorney General of Canada*, [1979] 1 S.C.R. 183, at p. 190, with *Brooks v. Canada Safeway Ltd.*, , [1989] 1 S.C.R. 1219, at p. 1243-44.

Hence, I am of the view that the constitutional question raised in this case in the context of spousal support obligations can, and should, be considered as an issue distinct from the child-support obligations contained in Part III of the Act.

The main provisions pertaining to spousal support may be summarized as follows. Firstly, the Act provides that "[e]very spouse has an obligation to provide support for himself or herself and for the other spouse, in accordance with need, to the extent that he or she is capable of doing so" (s. 30). Hence, the obligation to provide support for oneself and for one's spouse does not only arise upon breakup but is a continuing obligation throughout the course of the relationship. Not surprisingly, however, applications for support are almost invariably brought following a breakup as opposed to during the course of the relationship and, therefore, from a practical standpoint, the purpose of the legislation must be considered in that context.

Secondly, in recognition of the interdependent nature of intimate relationships, the obligation to pay and the corollary right to obtain support is defined in terms of the respective capacity and need of each spouse. The purpose of an order for the support of a spouse is expressly set out in s. 33(8) of the FLA:

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

Finally, the FLA sets out a number of factors which are to be taken into account in determining an appropriate quantum of support and it gives the court wide ranging powers to enforce any order for support. The FLA also provides for the making of an order restraining harassment by a spouse.

As can be seen from this brief overview, Part III of the FLA on Support Obligations is clearly part of a legislative scheme aimed at providing "for the equitable resolution of economic disputes that arise when intimate relationships between individuals who have been financially interdependent break down", as set out above.

Some additional provisions contained in Part III reveal a second underlying purpose which goes beyond the equitable resolution of private disputes.

Where a dependant spouse or child is receiving or has received assistance from the public purse or has applied for such assistance, the agency responsible for providing such public assistance may make an application for an order for support for the dependant whether the dependant joins in the application or not (s. 33(3)). Also, the terms of a private agreement entered into by the parties may be set aside where the dependant spouse is one who qualifies for an allowance for support out of public money (s. 33(4)(b)).

It is clear from the latter provisions that, in addition to setting up a scheme for the equitable resolution of disputes as stated earlier, the Legislature intended, where applicable, to alleviate the burden on the public purse by shifting the obligation to provide support for needy persons to those parents and spouses who have the capacity to provide support to these individuals.

c) Definition of spouse

Finally, we must consider the impugned provision itself. The extended definition of spouse set out in s. 29 was introduced as an amendment to the FLA in 1978. It is important to consider, as did the motions judge, the intent of the Legislature when it introduced this revised spousal support scheme which included common law cohabitees for the first time since it is within the context of this amendment that the line of comparison is drawn in this case.

Why did the Legislature extend the application of the spousal support provisions beyond marriage? I am unable to identify any additional purposes distinct from those already raised. In my view, the Legislature must simply be taken to have recognized that, in so far as spousal support obligations were concerned, it was neither fair nor effective to choose marriage as the exclusive marker for the identification of intimate relationships giving rise to economic interdependence which might require, upon breakdown, some access

to the equitable dispute-resolution scheme created by the legislation. Nor was it fair or effective to use marriage as an exclusive marker for the identification of persons who, upon breakdown of a relationship, should bear the burden of providing support for the other party to that relationship based upon their capacity to pay. The underlying objectives of the legislation, as they were prior to the amendment, would be better achieved if the legislative net were cast wider so as to include other people with similar needs.

No one contends in this case that the objective of the Legislature is not pressing and substantial. The crux of the debate in this case lies in the proportionality test.

2. Proportionality of the measure

As stated earlier, there must be a proportionality between the gain achieved by the public interest served by the legislation and the harm done to the interest of the person or group whose right is infringed. The inquiry in this case inevitably leads to a comparison between same-sex and opposite-sex cohabitees. While it is perfectly legitimate and indeed necessary to make comparisons between the two groups since, after all, equality is all about comparisons, it is important to keep the basis of discrimination firmly in mind when going through this analysis. The requirement cannot be that same-sex relationships be "just like" heterosexual relationships in all respects to qualify for equal legal recognition because this

would amount to a requirement that the claimant lose the identity for which protection is claimed in order to achieve equality. This is the antithesis of equality. For example, this is precisely where the analysis would lead us if procreation were viewed as the operative distinction between the two groups since same-sex relationships, by their very nature, cannot be procreative. And, it is this very characteristic - sexual orientation - which forms the basis of the discrimination.

It would be useful at this point to review and assess the evidence before the court.

a) Evidence presented by the Attorney General

At an earlier stage of these proceedings, the Attorney General conceded that s. 29 of the FLA was unconstitutional. In support of this position, the Attorney General filed expert evidence which strongly supports the position that same-sex couples should generally be treated in the same manner as are opposite-sex common law couples in the context of family law.

The Attorney General filed an affidavit from Professor Margrit Eichler, a recognized expert in the sociology of families, together with numerous exhibits. Professor

Eichler, whose expertise is mainly focussed on policy issues, reviews in her affidavit the changing family structures in Canada as well as the changing family policies, as expressed in Canadian legislation. She expresses the opinion that there is no basis for excluding same-sex couples while including opposite-sex couples as family in legislative policies. She states that it is widely recognized among researchers and policy makers that a monolithic definition of the family is no longer adequate to reflect the complex reality of today. Rather, she presents an analytical framework which is more capable of accommodating the existing diversity of family types. In her analysis, she considers several dimensions of familial interaction, including the procreative, socialization, sexual, residential, economic, emotional and personal services dimensions. She concludes as follows at para. 33 of her affidavit:

> Overall, the differences among opposite sex couples and among same sex couples are greater than the differences between these two groups. Both groups exhibit all of the dimensions I have discussed as being indicative of a family structure. The fact that there may be a different distribution of the various dimensions when comparing opposite sex couples as a group and same sex couples as a group is of little relevance. What is significant is that both groups demonstrate the full range of dimensions. Both groups should therefore be categorized the same way for social policy programs.

Professor Eichler acknowledges that there are a number of experts on the subject of lesbian and gay relationships who take a different view. She notes in particular the research paper prepared for the OLRC written by Cossman and Ryder and quotes the following excerpt:

> Not all gay men and lesbians however agree that their relationship should be recognized as spousal and included within existing family law. Many gays and lesbians resist the assimilation of their relationships to the model of traditional heterosexual spouses, and argue that gays and lesbians should not seek to be included within the social and legal structure of the traditional heterosexual family.
>
> Some have argued that same-sex relationships do not fit the model of the traditional heterosexual family, that gay and lesbian relationships are different from heterosexual relationships. It is argued that these relationships, for example, are not based on traditional gender roles and that they may or may not be based on sexual monogamy or emotional exclusivity [...].

Professor Eichler expresses the view that this position, which has been referred to in argument as the "anti-assimilationist" view, is premised "on a relatively monolithic approach to heterosexual families". In her view, it underestimates the degree of variation among opposite-sex couples. In my view, the evidence before the court clearly supports Professor Eichler's opinion on this point. Any voicing of objection to the ascription of spousal status to same-sex couples within the context of family law contained in the material before the court appears to be founded on a rejection of the "traditional" and stereotypical attribution of roles within a relationship according to gender. It is not surprising that many gay men and lesbians would reject any assimilation to such a model since it would in effect require that they abandon the very identity they seek to protect, their sexual orientation towards a person of the same gender.

More importantly, the FLA does not require by any of its terms that such a "traditional" model (i.e. breadwinner/domestic worker) be embraced before spousal status will be conferred upon a heterosexual couple. It may well be that a need for spousal support will arise more frequently in the case of couples who have chosen to conduct their affairs in such a fashion but the application of the FLA is by no means confined to this "monolithic" approach. In fact, the FLA promotes equality in the relationship. Hence the inclusion of same-sex couples would not have the effect of assimilating them to what is perceived by some as a patriarchal model which oppresses women.

Later in the course of the proceedings below, the Attorney General changed its position and chose to intervene on behalf of H as proponent of the legislation. However, no further evidence was filed in support of this ultimate position. Counsel for the Attorney General on this appeal simply relies on the *Egan* case and the doctrine of *stare decisis* as discussed earlier.

b) Evidence presented by the appellant H

The bulk of the evidence presented by the appellant H pertains to the particular relationship between herself and M. The motions judge succinctly summarized this evidence in her reasons. This court took the position at the hearing that, in order to dispose of this

appeal, it was unnecessary to consider any of the facts beyond the uncontested circumstances that M and H are of the same sex and were involved in an intimate relationship of sorts over a period of several years.

H, in support of her argument under s.1, filed her own affidavit in which she ascribes to the "anti-assimilationist" view. In support of this view, she asserts that her relationship with M was not based on any heterosexual model as it "did not involve sex-typing either of us into a traditional 'marital' role or any model which would typecast either of us as male/female; man/woman; or breadwinner/domestic worker." H's evidence on this point further supports Professor Eichler's opinion that the "anti-assimilationist" position is premised "on a relatively monolithic approach to heterosexual families" as discussed earlier.

H also relies on some observations and recommendations contained in the OLRC Report. In its Report, the OLRC addressed the question "to whom should the rights and obligations set out in the Ontario Family Law Act apply?" In particular, H points to the fact that the ascription of spousal status to same-sex cohabitees is not recommended in the Report. Rather, the OLRC recommended that the Legislature acquire further information concerning attitudes and expectations within the gay and lesbian community before ascribing spousal status to same-sex couples under the FLA. H points to this recommendation as evidence in support of her contention that the Legislature was justified in excluding same-sex

spouses in its expanded definition of spouse under Part III of the FLA. Counsel for H argues that the OLRC has, by this recommendation, in effect identified the ascription of spousal status as the least desirable method of achieving equality for gay and lesbian couples.

Apart from H's personal opinion on the issue as set out in her affidavits, the OLRC Report essentially constitutes the only evidence relied upon by the proponents of the legislation. In my view, the recommendation of the OLRC with respect to the ascription of spousal status upon same-sex couples, when considered in its proper context, is not supportive of H's argument.

It is important to note that the OLRC Report concluded that the FLA in its present form discriminates against same-sex couples and that such discrimination is very difficult to justify under s. 1. The Report addressed the issue in the context of legislative reform. Its main recommendation with respect to same-sex couples is that a system of registered domestic partnerships be established to confer on same-sex couples the same rights and obligations as are available to married persons throughout the FLA. The question then arose as to whether or not spousal status should be ascribed to same-sex couples *who have not exercised their right to become registered domestic partners.* While the OLRC saw "much merit in treating them in the same way -- so that economic inequalities and exploitation will be minimized in all familial relationships," (p. 3) it recommended that

further information be obtained concerning the attitudes and expectations of cohabiting same-sex couples on this issue.

The following excerpts from the introduction to the Report reflect the main thrust of its recommendations (at pp. 1-3):

> Our fundamental conclusion is that the ambit of the Act should be expanded to include two kinds of relationship that are today partly or wholly excluded: those between cohabiting heterosexual couples, and those between cohabiting couples of the same sex.
>
> The preamble to the *Family Law Act* sets out its central purpose: to "strengthen the role of the family", "to recognize the equal position of spouses" and to treat their relationship as a "partnership". Hence, the law should provide for the orderly and equitable settlement of the affairs of the spouses upon the breakdown of the partnership and provide for other mutual obligations in family relationships. These are fundamental values in our society, which the Commission wishes to endorse and reaffirm.
>
> In the preamble, and throughout much of the Act, "family" is equated with "marriage". The problem we wish to address in this report is whether this should be the case. The major current exception is the imposition of some rights and obligations on heterosexual couples who live together without having been married. Thus, the Act is focused on the traditional model of marriage and provides little room for other forms of relationship that embody the fundamental elements of intimacy, mutual economic interdependence, and living together in a "close personal relationship that is of primary importance in both persons' lives", which we see as the essence of the concept of "family".

We believe that Ontario family law should now recognize and accommodate the increasing diversity of family forms.

[...]

Family partnerships between gay and lesbian couples are diverse. They have had limited opportunity to evolve in a supportive social climate. While we do not assume that such relationships are necessarily identical to "marriage" (which itself encompasses much diversity in form and practice), we believe that many of these relationships are essentially familial. They embrace the same elements of permanence, intimacy, sharing, and interdependence that characterize heterosexual relationships, and which the *Family Law Act* is designed to support. To the extent that this is so, and to the extent that their exclusion violates anti-discrimination norms of our society, they too should come under the umbrella of the *Family Law Act*.

[...]

Familial relations necessarily embody both rights and obligations. Primary among these are the right to choose the nature of the relationship and the right to equal treatment under the law. We propose to achieve these goals by broadening the definition of "spouse" in the Act and by introducing the concept of "Registered Domestic Partner". Once registered as Domestic Partners, unmarried couples, whether heterosexual or same-sex, would fall under the rules of the *Family Law Act*.

Accompanying these rights are the obligations of spouses to each other, many of which arise in the event of breakdown of the partnership. Our objectives are to provide that when two persons have lived together in a relationship of some permanence, interdependence, and emotional importance to both of them, and that partnership comes to an end, the law should ensure a fair sharing of the assets that they acquired during the time they were together, a fair disposition of the family home and a fair consideration of support if one party is likely to suffer economic hardship as a result of participation in the relationship.

The intent is to prevent the economic exploitation of one by the other.

Those who have chosen to marry, or designate their relationship as a Registered Domestic Partnership if our proposals are adopted, voluntarily accept these rights and obligations (subject to any additional contract they may have entered with each other). The matter becomes more complex when they have not assumed expressly these responsibilities. Do the partners in a common-law, ascriptive, or *de facto*, relationship have the same obligations with respect to each other? In the case of heterosexual couples who have lived together in a relationship of interdependence for a considerable period, we have little hesitation in saying "yes". It is likely that one or both partners have assumed that the relationship will be permanent and that the assets they have acquired are likely to be intermingled. For these couples, it is as important as it is for married persons that the assets be shared fairly. Their economic interdependence may have created conditions requiring continued support.

We are more hesitant about making recommendations concerning same-sex couples in this context. On one hand, we believe that the expectations that same-sex partners bring to their relationship may be different from the assumptions made by heterosexual couples and that there may be less likelihood that same-sex couples will encounter the economic inequalities that have been common in traditional heterosexual relationships. These considerations argue for different treatment of the two groups. On the other hand, we see much merit in treating them in the same way -- so that economic inequalities and exploitation will be minimized in all familial relationships. However, we believe that better information than the Commission now has before it concerning the attitudes and expectations of cohabiting same-sex couples would be a necessary foundation for any decision to ascribe rights and responsibilities under the *Family Law Act* to such couples. In our view, further consultation with the gay and lesbian community should be undertaken before a decision is made on this issue.

c) Evidence presented by M

The evidence offered by M is summarized in her supplementary factum as follows:

(a) The Affidavit of Meredith Cartwright, sworn August 17, 1994, a lawyer currently enrolled at the Harvard Divinity School, and a lesbian involved in a monogamous relationship. Ms. Cartwright describes her relationship and outlines how it is functionally similar to the relationships of her heterosexual friends except that same-sex couples stand outside of the mainstream of society and its laws. She discussed the practical, and emotional effects of exclusion of same-sex couples from the FLA; homosexuals are precluded from claiming and taking on the rights and obligations of their heterosexual peers under the *Family Law Act*;

(b) The Affidavit of Reverend Brent Hawkes, sworn August 12, 1994, the Pastor of the Toronto parish of the Universal Fellowship of Metropolitan Community Churches. Reverend Hawkes deposes that same-sex couples form loving and cooperative relationships that create dependencies in the same manner that opposite-sex couples do. He states that according same-sex couples status as spouses under family law legislation would provide a framework for resolution of disputes on relationship breakdown;

(c) The Affidavit of Dr. Rosemary Barnes, sworn August 12, 1994, former Chief Psychologist of Women's College Hospital with fifteen years of experience with lesbian and gay clients. Dr. Barnes discusses the effects of discrimination on same-sex couples, sex cohabitation, and suggests that same-sex couples form deeper interdependency than opposite-sex couples. She concludes that providing full legal recognition to same-sex relationships would enhance the integration of homosexuals into mainstream society and improve the psychological well-being of individual lesbians and gay men;

(d) The Affidavit of Ellen Faulkner, sworn August 16, 1994, a doctoral candidate with a specialty in domestic violence in lesbian relationships, in which Ms. Faulkner describes violence and power imbalances in lesbian relationships. She feels that if homosexuals were recognized as spouses, they would feel safer, less isolated and would be less likely to suffer violence in their relationships;

(e) The Affidavit of Nicholas Bala, sworn August 18, 1994, Associate Dean and family law Professor at the Faculty of Law at Queen's University. Professor Bala discusses the functional view of the family and states that legal recognition of same-sex couples as spouses would have important practical and symbolic value for homosexual relationships;

(f) The Affidavit of Dr. Graham White, sworn August 10, 1994, former Director of the Ontario Legislature Internship Programme and Professor of Political Science at the University of Toronto which analyses the defeat of Bill 167 and addresses the possibility of law reform currently;

(g) The Affidavit of John LeBlanc, an articling student, sworn August 19, 1993, attaching the Attorney General of Ontario's written position in another action that section 29 is unconstitutional to the extent that it excludes same-sex spouses;

(h) The Affidavit of Michael Haddad, sworn August 26, 1994, a sole practitioner lawyer with a large proportion of lesbian and gay male clients. Mr. Haddad states that cohabitation between same-sex partners creates emotional and financial interdependencies that must be addressed when a breakdown of the relationship occurs. He discusses the effect of exclusion of same-sex couples from the FLA, the degree of planning required, and the difficulties created by the general silence of the law on same-sex couples;

(i) The Affidavit of Professor John Allen Lee, sworn September 7, 1994, a Doctor of Sociology and Professor at the University of Toronto. Dr. Lee was the first professor in Canada to openly declare that he is a homosexual to his students. He discusses many sociological issues relating to gay and lesbian life and the broader social context in which gays and lesbians live. He particularly discusses concepts of the traditional family and discrimination; and

(j) Four volumes of extrinsic evidence, consisting of legal, psychological and sociological articles canvassing the sociological aspects of gay and lesbian life,

> the more general views of North American society regarding same-sex relationships, and the law's ability to respond to society's changing needs.

The overall weight of this evidence is in accord with the opinion of Professor Eichler as set out above and favours recognition of spousal status for same-sex couples. The evidence is overwhelming that cohabitation between partners who have intimate relationships, regardless of sexual orientation, creates emotional and financial interdependencies. The evidence also shows that the same needs for dispute resolution exist upon break-up of these types of intimate relationships, regardless of sexual orientation. All the evidence attests to the pervasiveness of the discrimination faced by same-sex couples who claim spousal benefits and strive for recognition as a familial relationship. The evidence also presents a plea for reform.

The only significant differences of opinion presented in the evidence pertain to the manner in which such reform should be effected and, yet, despite these differences, one recurring theme clearly emerges from the evidence - there appears to be no doubt that comprehensive legislative action would be the most desirable route for rectifying inequalities. Indeed, that is essentially the position taken by the appellant H and the Attorney General. Both make a plea for judicial deference to the incremental approach taken by the Legislature in family law reform. The Attorney General argues that implementing something like a partnership registration scheme is a policy choice for the government and not a

constitutional issue for the court. Perhaps the Attorney General might have been in a better position to make this argument if the Legislature had indeed made some policy choices with a view of redressing the discrimination. But it did not. It chose inaction. It is not open to the court to simply avoid the issue on the ground that legislative reform could provide a superior remedy. Nor is it open to the court to defer the issue until further information becomes available. The court must deal with the issue as it presents itself and on the basis of the evidence presented by the parties. The matter must be decided within the constitutional framework which, it is important to remember, has itself been set up through the democratic process.

d) Application to this case

As stated earlier, the first criterion to be met is that the impugned legislative provision, the definition of spouse in Part III of the FLA, must be rationally connected to the objective of the legislation. The definition includes married couples and heterosexual cohabitees in a relationship of some permanence. It is beyond dispute that the inclusion of married persons is rationally connected to the legislative objective. I think one can safely conclude that it is also beyond controversy at this point in time that the inclusion of heterosexual cohabitees is equally rationally connected. The rationale for this extension is based on the similarities between married couples and common law cohabitees when

considered in the context of the legislative objectives. As noted by the motions judge, the Ministry of the Attorney General, in a position paper entitled *Family Law Reform* and prepared at the time the amendment was put forth, stated as follows:

> [w]hen a man and woman have been living together in a relationship of some permanence, their lives take on the same financial characteristics as a legally recognized marriage. Often the couple both contribute to household expenses. One may be just as dependent on the other for certain tasks as married persons are.
>
> [...]
>
> A common law spouse upon whom the other is financially dependent should bear some of the cost of restoring the dependent person to self-sufficiency, rather than forcing him or her to resort to welfare.

Hence the inclusion of heterosexual common law cohabitees could only serve to further the desirable goals of the legislation.

One could conclude from the above analysis, that the legislative provision is rationally connected to the objective of the legislation. The next question would then become whether the legislation constitutes a minimal impairment of the rights of the excluded group. However, in my view, where the legislative provision, on its face, serves to exclude the person discriminated against, it should be incumbent upon the proponents of the legislation to demonstrate that the exclusion is also rationally connected to the legislative objectives in

order to meet the first criterion of the proportionality test. Whichever way one chooses to consider the issue in this case, it is my view that the proportionality test is not met.

The proponents of the legislation have fallen quite short of meeting the onus upon them. In fact, I have been unable to identify any evidence to support the proposition that the exclusion of same-sex couples would further the objectives of the legislation. Rather, the overwhelming weight of the evidence supports the converse proposition. The *inclusion* of same-sex cohabitees in a relationship of some permanence would only serve to further the desirable goals of the legislation. A greater number of persons with similar needs would have access to the dispute-resolution mechanism set up by the legislation and fewer persons would look to the public purse for their needs. As counsel for the intervener, the Foundation for Equal Families, has aptly put it: as the law presently stands, the government is paying a premium to maintain inequality.

The exclusion of M from access to Part III of the FLA does not in any way advance the goals of the legislation. What about H? If M is allowed to bring her application for spousal support, it may well result in the imposition of a burden upon H. In my view, the question is not how imposing a burden on H furthers H's equality rights but how excluding H would advance the desirable goals of the legislation. Excluding H, just as excluding M, does not in any way advance the objectives of the legislation. The potential burden imposed

on H is part of the legislative scheme just as intrinsically as is the potential benefit to M. The potential burden on H is a necessary component of the legislative scheme which has as its aim the rectification of inequities arising out of the breakup of the intimate relationship between H and M and to guard the public purse from any additional burden in providing for M. The very nature of the spousal support provisions is that they bestow both rights and obligations upon the parties in question. Simply because H may be called upon to live up to the obligations set out in these provisions as opposed to enjoying the rights provided therein in no way justifies her exclusion.

The exclusion of same-sex couples from the definition of spouse in Part III of the FLA has not been demonstrably justified by the proponents of the legislation. The exclusion is not rationally connected to the legislative objectives. Alternatively, the provision does not constitute a minimal impairment of *Charter* rights: much as McLachlin J. concluded in *Miron*, at p.506, "if the issue had been viewed as a matter of defining who should [have access to the legislative scheme] on a basis that is relevant to the goal or functional values underlying the legislation... alternatives substantially less invasive of *Charter* rights might have been found." In light of these findings, it is clear that their is no proportionality between the effect of the measure and its objective.

I therefore conclude in answer to the second issue on this appeal that the infringement is not justified under s.1 of the *Charter*.

IV. REMEDY

The remaining matter to be determined is what the appropriate remedy should be having regard to s. 24(1) of the *Charter* and s. 52(1) of the *Constitution Act, 1982*. These provisions read as follows:

> 24.(1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.
>
> 52.(1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

The governing principles on this question of constitutional remedy are set out in *Schachter v. Canada*, [1992] 2 S.C.R. 679.

The effect of s.52 of the *Constitution Act, 1982* is to require that the law be declared of no force or effect to the extent that it is inconsistent with M's s. 15(1) equality rights under the *Charter*. Therefore, the first step is to determine the extent of the inconsistency. For the sake of convenience, I reproduce again the definition of spouse contained in s. 29:

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

The definition of "spouse" contained in s. 1(1) refers to persons who are married or who have entered into a marriage that is voidable or void and is not in issue on this appeal. As stated earlier, the word "cohabit" found in s. 29 is defined in s. 1(1) as meaning to live together in a conjugal relationship, whether within or outside marriage.

The inconsistency between the impugned legislative provision and the *Charter* principles of equality is readily identifiable in this case. The offensive portion is the restriction of the definition of spouse to "a man and woman."

The court must determine how to deal with the inconsistency. The court may strike down the inconsistent portion of the law, it may resort to the techniques of reading down or reading in and it may temporarily suspend the effect of its remedial order. In addition, s. 24(1) may be resorted to in suitable cases to fashion an "appropriate and just" remedy for the individual whose rights have been infringed.

In choosing the appropriate constitutional remedy, the court should endeavour to respect both the role of the Legislature and the purpose of the *Charter*. In this case, the purpose of the legislation is pressing and substantial. The court should endeavour to give effect to it to the extent that is possible. In this case, the means used to achieve this objective, insofar as the legislative provision on its face limits its application to opposite-sex couples, are not rationally connected to it and hence inconsistent with s. 15(1) *Charter* rights. The portion of the legislation which fails the rational connection test must therefore be struck down. The simplest way to achieve this is to sever the words "a man and woman" from the definition of "spouse" in s. 29.

The legislative provision also fails because it has not been carefully tailored to be a minimal intrusion and because it has effects disproportionate to its purpose. In this case, it is very easy for the court to remedy this inconsistency. The obvious remedy is to read in the words "two persons" instead of the offensive portion. In the result, the legislative purpose as defined earlier is still fully achieved and, in addition, it extends the application of the legislation so as to respect *Charter* principles. The reading in of the words "two persons" does not detract from the objective of the legislation. In fact, it further enhances it.

In the result, I would uphold the decision of the motions judge and grant the same remedy, subject to the proviso that the remedy be temporarily suspended for one year. Much as Iacobucci J. found in *Egan* with respect to the extension he was prepared to grant in that case, the matter here is not only a legal issue but a concern of public policy. While the remedy in this case does not necessitate any disbursement of public funds, the acceptance of an expanded definition of "spouse" by this court for the purpose of s. 29 of the FLA may have some ramifications which go much farther than the confines of this litigation. The court cannot address any of these concerns since it is strictly limited to a consideration of the impugned provision in question. On the other hand, the Legislature may choose to do so.

For example, counsel for the appellant on this case argued that the remedy granted in this case would create some anomalies within the FLA itself. While same-sex couples would now be subject to the spousal support regime under Part III of the FLA, they could not opt out of the regime by means of a cohabitation agreement as provided for in s. 53 or a separation agreement as set out in s. 54 since both these sections are contained in Part IV of the Act, to which s. 29 has no applicability. Both ss. 53 and 54 extend to common law cohabitees but specifically refer to "a man and a woman" and therefore would not apply to same-sex couples. While it may still be open to same-sex couples to enter into agreements to regulate their affairs outside the purview of the FLA, it is beyond the purview of this

litigation to determine whether such alternative would be adequate to resolve the anomaly. The Legislature may wish to consider this.

While I do not think it appropriate or relevant to speculate as to the reasons behind the defeat of Bill 167, I find its contents instructive on the question of whether or not to suspend the remedial order of this court. In an explanatory note, the Bill expressly purported to provide "for the extension of rights and obligations to same-sex spouses in the same manner as Ontario statutes provide for the rights and obligations of opposite-sex spouses who are not married." In this context, provisions in the *Human Rights Code*, the *Interpretation Act* and in 55 other statutes were identified as requiring amendment "in order to provide for the equal treatment of persons in spousal relationships." In a compendium to the Bill, these statutes were described as covering "a broad range of matters including employment benefits, family support obligations, regulation of financial conflict of interest, rights to make substitute decisions for an incapable spouse, and rights to share a family name."

The extent to which any of the legislative provisions in question would likely withstand constitutional scrutiny in light of the unconstitutionality of s.29 of the FLA is obviously not a matter for consideration on this appeal and these reasons should not be interpreted as reflective on these issues. However, it is a matter which the Legislature may

wish to address. If left up to the courts, these issues can only be resolved when raised in a piece-meal fashion in the context of individual cases at great costs to private litigants and to the public purse.

The Legislature should be given some latitude in order to address this equality issue in a more comprehensive fashion or in order to devise its own approach if it so chooses. I am particularly mindful of the recurring plea for legislative reform as the most effective means of meeting the equality requirements of the *Charter* contained in the material before us.

Further, the remedy sought by M in this case does not simply serve to confer a benefit on some persons in a like situation but also serves to impose a potential burden on others. Hence the concerned members of the public should have some opportunity to arrange their own affairs as they see fit to the extent that they may be able to do so.

I would therefore grant the following relief. Barring legislative activity to ensure the constitutionality of s. 29 of the FLA within one year from this date, there will be an order as follows:

(a) a declaration that the definition of spouse contained in s. 29 of the FLA is of no force or effect to the extent that it excludes same-sex couples;

(b) a declaration that the words "a man and woman" be severed from the definition of "spouse" in s. 29 of the FLA; and

(c) an order reading in the words "two persons" instead of "a man and woman" into the definition of "spouse" contained in s. 29 of the FLA.

The motions judge's order allowing M to bring a motion for interim support on seven days' notice and ordering H to deliver a financial statement within 30 days is also stayed for one year.

In the event of a suspension of remedy, the respondent M seeks an individual remedy in the form of a constitutional exemption allowing her to pursue her application immediately. H also seeks an individual remedy exempting her from the application of any expanded definition of "spouse" on the ground that the effect of this law was not contemplated by the parties during the course of their relationship.

I would not grant the individual relief requested to either party. M and H should be subject to the same rules as other same-sex couples. In the event that the Legislature devises its own approach during the course of the suspension, M and H will be

subject to the same legislative scheme as other same-sex couples. In the event that the remedial order takes effect, M will be free to pursue her remedy under the expanded definition of "spouse" as set out above in the same manner as other persons in similar situations. H will be subject to the law in the same manner as others who may be affected by the order. H cannot claim the protection of an unconstitutional law.

V. COSTS

Both H and the Attorney General are appealing the respective orders as to costs made by the motions judge against them. The motions judge ordered that H pay M's costs of the motion for summary judgment and ordered that the Attorney General pay M's costs for the *Charter* motion, both on a party-and-party scale. No other order as to costs was made.

H argues that she should not have to pay M's costs for the motion for summary judgment, firstly, because the matter pertains to a constitutional issue of significant public interest in which typically each party bears its own costs and secondly, because the summary proceeding was brought in good faith in an attempt to resolve the issue in a cost-effective manner. H also contends that the motions judge erred in refusing to allow her costs as against the Attorney General with respect to the *Charter* motion because all the same policy

considerations apply to her as they do to M. The Attorney General argues that, as intervener, he should not have to pay any of the parties' costs, whether they are unsuccessful or not.

In the special circumstances of this case, I agree with my colleague and would not interfere with the motions judge's order that the Attorney General pay M's costs for the *Charter* motion. I would therefore dismiss the Attorney General's appeal in this respect. Also, I would not interfere with the motions judge's order with respect to costs as against H and therefore would dismiss H's appeal in this respect.

With respect to the costs of this appeal, I would make no order as to costs. In view of the fact that the appeal raises a constitutional issue of significant public importance, it is my view that each party and the interveners should bear their own costs.