NOT ENTERED INTO LIGHTLY: Same-Sex Marriage Litigation in Canada

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In the beginning …

Just a little over 25 years ago, in May 1995, the Supreme Court of Canada unanimously recognized sexual orientation as an analogous ground of discrimination to those specifically enumerated in section 15 (the equality rights provisions) of the Canadian Charter of Rights and Freedoms and therefore entitled to Charter protection.

While successful on that important point, the appellants, James Egan and John Nesbit, were unable to convince a majority of the Court that the refusal to extend old age pension benefits to a same-sex partner, as were available to a financially dependent “spouse” of any person “of the opposite sex” who had contributed to the Canada Pension Plan, breached the Charter’s equality rights protections.

Reflecting changing social attitudes, Canada’s Old Age Security Act (OASA) had previously been amended to extend the benefit to common law “spouses” provided they were currently cohabiting, had co-habited for more than a year, and publicly represented themselves as husband and wife. The appellants met all these requirements but clearly were not persons of the opposite sex, and, on that basis, the majority concluded that Mr. Egan and Mr. Nesbit were not “spouses” within the meaning of the OASA. A spousal relationship could not be distinct from a marital relationship.

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1 The views expressed in this paper are those of the authors’ alone and are not to be taken as reflecting the views of position of the Government of Ontario or the Ministry of the Attorney General. The authors would like to thank Susan Ursel, Partner, Green Chercover LLP, who provided helpful insight and analysis from her perspective as counsel on many of these leading cases.

2 “Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.”


4 s. 1 The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society. Charter, supra.

5 Old Age Security Act, S.C. 1979, c. 4.
and marriage which, Justice LaForest explained, had a specific legal meaning and social purpose:

(…) Suffice it to say that marriage has from time immemorial been firmly grounded in our legal tradition, one that is itself a reflection of long-standing philosophical and religious traditions. However, its ultimate raison d’être transcends all of these and 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. It would be possible to legally define marriage to include homosexual couples, but this would not change the biological and social realities that underlie the traditional marriage.

The marital relationship has special needs with which Parliament and the legislatures and indeed custom and judge-made law have long been concerned. The legal institution of marriage exists both for the protection of the relationship and for defining the obligations that flow from entering into a legal marriage. Because of its importance, legal marriage may properly be viewed as fundamental to the stability and well-being of the family and, as such, as Gonthier J. argued in Miron v. Trudel, Parliament may quite properly give special support to the institution of marriage. It is spouses in legal marriage who constitute the bulk of the beneficiaries of spousal allowances.

However, many of the underlying concerns that justify Parliament's support and protection of legal marriage extend to heterosexual couples who are not legally married. Many of these couples live together indefinitely, bring forth children and care for them in response to familial instincts rooted in the human psyche. These couples have need for support just as legally married couples do in performing this critical task, which is of benefit to all society. Language has long captured the essence of this relationship by the expression "common law marriage". 6

In his concurring opinion, Justice Sopinka found that the exclusion of the appellants contravened section 15, but found the exclusion was rationally connected to the objective of alleviating poverty due to retirement of a supporting spouse, minimally impaired the appellants’ rights, proportional and therefore was saved as reasonable justified pursuant to section 1 of the Charter. He concluded it was all just a little too soon to head down that path.

6 Egan, supra at pp 536-537; paras 21-24
It may be suggested that the time has expired for the government to proceed to extend the benefits to same-sex couples and that it cannot justify a delay since 1975 to include same-sex couples. While there is some force in this suggestion, it is necessary to keep in mind that only in recent years have lower courts recognized sexual orientation as an analogous ground, and this Court will have done so for the first time in this case. (…) Given the fact that equating same-sex couples with heterosexual spouses, either married or common law, is still generally regarded as a novel concept, I am not prepared to say that by its inaction to date the government has disentitled itself to rely on s. 1 of the Charter.  

Start with spouse and finish with marriage

Despite Justice Sopinka’s concern about the pace of change in the law, less than five years later in M. v. H. the Supreme Court, with a single dissent, found the provisions of Ontario’s Family Law Act excluding same sex couples from the definition of spouse for the purposes of awards of spousal support upon marriage breakdown, was a breach of section 15 of the Charter and could not be saved as reasonably justified under section 1.

And, just over a decade after the majority in Egan found marriage and a “spousal” relationship to be an exclusively heterosexual construct, the Courts in British Columbia, Quebec, Ontario the Yukon and New Brunswick had all concluded that the common law bar to same sex marriage was contrary to the equality rights provisions of the Charter and not saved under section 1. The Attorney General of Canada chose not to appeal those decisions and successfully opposed or moved to quash appeals launched by other responding parties. The consequence of those provincial and territorial Court decisions, was to usher in the “legalization” of same-sex marriage in Canada.

In Halpern the Ontario Court of Appeal expressly rejected the Egan majority’s view of marriage, finding:

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7 Egan, supra at para 111
9 Hendricks c. Quebec (Procurer general) 2002 CanLII 23808 (CQ CS); Barbeau v. Canada (Attorney General) 2003 BCCA 251 (CanLII) (BC CA); Halpern v. Canada (Attorney General) 2003 CanLII 26403 (ON CA); Dunbar & Edge v. Yukon (Government) and Canada 2004 YKSC 204 (CanLII) (YK SC); Harrison v. AG (Canada) 2005 NBQB 232 (CanLII)
Importantly, no one, including the AGC, is suggesting that procreation and childrearing are the only purposes of marriage, or the only reasons why couples choose to marry. Intimacy, companionship, societal recognition, economic benefits, the blending of two families, to name a few, are other reasons that couples choose to marry. As recognized in M. v. H. at 50, same-sex couples are capable of forming “long, lasting, loving and intimate relationships.” Denying same-sex couples the right to marry perpetuates the contrary view, namely, that same-sex couples are not capable of forming loving and lasting relationships, and thus same-sex relationships are not worthy of the same respect and recognition as opposite-sex relationships.  

Finally on July 16, 2003 the Governor in Council referred the Federal government’s proposed Act recognizing marriages for civil purposes as “the lawful union of two persons to the exclusion of all others” to the Supreme Court. The Court was asked to provide its opinion whether the proposed legislation was within the constitutional authority of the federal government and consistent with the Charter and whether freedom of religion guaranteed by the Charter would protect a religious official from being compelled to perform a marriage between two persons which is contrary to his or her religious beliefs.

Without detouring into the somewhat abstruse world of Canadian federalism it is sufficient for the purposes of this paper to report that the Supreme Court found the proposed legislation within the jurisdiction of Parliament, consistent with the Charter and that the freedom of religion protections in the Charter would prevent a civil marriage officiant from being compelled to perform a marriage contrary to his or her religious beliefs.  

The Civil Marriage Act  received royal assent on July 20, 2005. The Act in its entirety reads:

An Act respecting certain aspects of legal capacity for marriage for civil purposes

Preamble

11 Halpern, OCA supra at para 94
13 Civil Marriage Act, SC 2005 , c.33
WHEREAS the Parliament of Canada is committed to upholding the Constitution of Canada, and section 15 of the *Canadian Charter of Rights and Freedoms* guarantees that every individual is equal before and under the law and has the right to equal protection and equal benefit of the law without discrimination;

WHEREAS the courts in a majority of the provinces and in one territory have recognized that the right to equality without discrimination requires that couples of the same sex and couples of the opposite sex have equal access to marriage for civil purposes;

WHEREAS the Supreme Court of Canada has recognized that many Canadian couples of the same sex have married in reliance on those court decisions;

WHEREAS only equal access to marriage for civil purposes would respect the right of couples of the same sex to equality without discrimination, and civil union, as an institution other than marriage, would not offer them that equal access and would violate their human dignity, in breach of the *Canadian Charter of Rights and Freedoms*;

WHEREAS the Supreme Court of Canada has determined that the Parliament of Canada has legislative jurisdiction over marriage but does not have the jurisdiction to establish an institution other than marriage for couples of the same sex;

WHEREAS everyone has the freedom of conscience and religion under section 2 of the *Canadian Charter of Rights and Freedoms*;

WHEREAS nothing in this Act affects the guarantee of freedom of conscience and religion and, in particular, the freedom of members of religious groups to hold and declare their religious beliefs and the freedom of officials of religious groups to refuse to perform marriages that are not in accordance with their religious beliefs;

WHEREAS it is not against the public interest to hold and publicly express diverse views on marriage;

WHEREAS, in light of those considerations, the Parliament of Canada’s commitment to uphold the right to equality without discrimination precludes the use of section 33 of the *Canadian Charter of Rights and Freedoms* to deny the right of couples of the same sex to equal access to marriage for civil purposes;
WHEREAS marriage is a fundamental institution in Canadian society and the Parliament of Canada has a responsibility to support that institution because it strengthens commitment in relationships and represents the foundation of family life for many Canadians;

AND WHEREAS, in order to reflect values of tolerance, respect and equality consistent with the Canadian Charter of Rights and Freedoms, access to marriage for civil purposes should be extended by legislation to couples of the same sex;

NOW, THEREFORE, Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:

Short title
1. This Act may be cited as the Civil Marriage Act.

Marriage - certain aspects of capacity
2. Marriage, for civil purposes, is the lawful union of two persons to the exclusion of all others.

Religious officials
3. It is recognized that officials of religious groups are free to refuse to perform marriages that are not in accordance with their religious beliefs.

Freedom of conscience and religion and expression of beliefs
3.1 For greater certainty, no person or organization shall be deprived of any benefit, or be subject to any obligation or sanction, under any law of the Parliament of Canada solely by reason of their exercise, in respect of marriage between persons of the same sex, of the freedom of conscience and religion guaranteed under the Canadian Charter of Rights and Freedoms or the expression of their beliefs in respect of marriage as the union of a man and woman to the exclusion of all others based on that guaranteed freedom.

Marriage not void or voidable
4. For greater certainty, a marriage is not void or voidable by reason only that the spouses are of the same sex.

Getting Here from There

The quick review above might lead one to conclude the road to recognition of same-sex marriage in Canada was both speedy and direct. While there is no disputing the speed in which the legal landscape changed, there were a number of detours and regroupings en route.
The speed may well be attributable to a rather special moment in Canadian legal history with the repatriation of our constitution and proclamation of the Charter in 1982 and the coming into force of the Charter’s equality rights provisions in 1985.

The collective turning of legal and political minds toward issues of rights and freedoms inspired by the gripping national debate over the creation of the Charter led to other initiatives as well. Significantly, in 1986 the Ontario Human Rights Code, which protects against discrimination in housing, employment, services, contracts and vocational association, was amended to include sexual orientation as a ground of discrimination.  

The work was thus engaged on a number of fronts: in the Courts as challenges to access to statutory benefits, questions of family law or express demands for marriage licenses, before Human Rights Tribunals alleging discrimination in employment or services, and in labour arbitrations again seeking extension of collectively bargained benefits such as bereavement leave to same sex spouses. In this last respect it is important to note the very significant role trade unions, and in particular the Canadian Union of Public Employees and the Canadian Labour Congress, took in advocating for same sex benefits and recognition of same sex relationships in employment and generally. 

The strategy undertaken evolved over time. As Susan Ursel, a leading LGBT advocate intensely involved in the early litigation, explains:

At this time in the late 1980’s and early 1990’s, debate inside the community began increasingly to focus on the viability of a challenge to the traditional definition or category of “marriage”, in the absence of clear human rights protection and the absence of a clear statement (at least in the late 1980’s and early 1990’s) that “sexual orientation” was an analogous ground under the Charter of Rights and Freedoms, section 15. An alternate strategy, focusing on extending the concept of protection on

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14 Human Rights Code, R.S.O. 1990, c. H.19, as amended
the basis of sexual orientation from merely individual protection to encompassing recognition and protection of relationships became a dominant theme in both formal and informal discussions around strategy. The idea that the common law definition of spouse, based as it was primarily on cohabitation, could afford a vehicle for sidestepping the politically contentious issue of a direct challenge to marriage law, and could afford a logically coherent, precedent based method for recognizing our relationships began to gain currency.\textsuperscript{16}

\textbf{Wins and Losses}

\textit{1988 Andrews v. Ontario (Health)}\textsuperscript{17}

In 1988 a lesbian couple with children brought an application to the Ontario Superior Court alleging that the \textit{Health Insurance Act} discriminated against same-sex couples and their families in the manner in which it provided Ontario Health Insurance Plan benefits. While the applicant’s employer was prepared to extend coverage to the applicants’ children it refused to provide coverage for the dependent “spouse”. The applicants framed the issue in much the same way as was done in \textit{Egan}: the definition of “spouse” should extend to same-sex couples living in domestic partnerships, and that the denial of this benefit constituted an infringement of their \textit{Charter} rights.

The Superior Court dismissed the application on the basis that the definition of spouse had been defined consistently in Ontario statutes by reference to a partner of the opposite sex. That being so the evidence as to the nature of the relationship between the applicants, and its similarities to married and common law spousal relationships was irrelevant. The Court concluded that the differential treatment between same and opposite-sex couples was not discriminatory, as same-sex couples were being treated similarly to all unmarried people in the province. The Court determined the \textit{Charter} claim was without merit and in any event would be saved based on section 1.

\textsuperscript{16} \textit{Ursel}, supra at p.8
\textsuperscript{17} \textit{Andrews v. Ontario (Health)} 64 O.R. (2d) 258; [1988] O.J. No. 213
1991 *Knodel v. British Columbia (Medical Services Commission)*¹⁸

In this decision the applicant was denied extended health benefits for his same-sex spouse on the basis of an opposite sex definition of spouse in the relevant legislation. He challenged this with the support of his trade union. The BC Superior Court declined to follow the Ontario Court in *Andrews* on the basis that the "similarly situated" test applied by it was no longer good law given the SCC's more recent decision in *Andrews v. Law Society of British Columbia*.¹⁹ The BC Superior Court went on to conclude that the opposite sex definition contravened the equality provisions of the *Charter*. The Attorney General conceded that the breach was not saved by section 1.

1992 *Leshner v. Ontario Ministry of the Attorney General (No. 2)*²⁰

Using the recently amended provisions of the *Human Rights Code*, the complainant claimed his employer, the government of Ontario, discriminated against him by denying his spouse coverage under the pension benefits plan. The complainant also argued that the *Human Rights Code* provisions which restricted the definitions of “spouse” and “marital status” to persons of the opposite sex infringed s.15 of the *Charter*. The respondent conceded there was *prima facie* discrimination on the basis of sexual orientation but that provisions of the *Human Rights Code* provided a permissible exception to that discrimination and, further, it could not provide equivalent pension benefits because it was constrained entirely by the requirements of the federal *Income Tax Act*. Thus any discrimination was outside its power to rectify.

The Board of Inquiry, predecessor to the present Human Rights Tribunal of Ontario, upheld the complaint. In doing so it had to grapple with the fact that, while the *Code* protected sexual orientation, it retained an opposite sex definition of spouse and marital status. The Board of Inquiry found this was a “paradox” inconsistent with the

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¹⁸ *Knodel v. BC (MSC)* 1991 CanLII 3980 (BC SCt)
values of the *Code* and the inclusion of sexual orientation as a prohibited ground of discrimination.

Clearly Mr. Leshner is being discriminated against in that his same-sex conjugal relationship is not being given equivalent status to an opposite-sex conjugal relationship for employment benefit plan purposes. In this sense the underlying factor is discrimination because of sexual orientation. However, is discrimination condoned by s. 25(2) of the *Code*. In effect s.25(2) allows discrimination in employment benefits on the basis of whether or not the employee has a status derived from having a partner in a heterosexual conjugal relationship arising from a legal or so-called common law marriage.

It is the nature of his “marital status” that is the operative factor in the discrimination of Mr. Leshner in the instant case, but for s. 25(2) of the *Code*, such discrimination would be prohibited by s. 5(1).21

The Board therefore went on to apply the *Charter*. It concluded, pre-*Egan*, that the *Code* was in breach of the *Charter*, not saved under s.1. This included a finding that words “of the opposite sex” were to be removed from the definition of “marital status” in the *Code* and that s. 25(2) was deemed inoperative to the extent that it restricted survivor benefits to opposite-sex conjugal relationships. Similar provisions within other Ontario employment and public pension legislation were held also held to be inoperative to the extent they mirrored definitions of the *Code* that contravened s. 15 of the *Charter*. Amendments to the Ontario *Income Tax Act* were also required, or, alternatively, the Government could create a separate registered pension plan for equivalent survivor benefits and eligibility to persons living in same-sex conjugal relationships. The respondent did not appeal the Board’s decision.

Reflecting on why *Leshner* succeeded when *Andrews* failed, Susan Ursel comments:

If I could hazard a guess, it was because of several factors: it was explicitly not a challenge to marriage, and it explicitly was a bid to extend the civil (as opposed to religiously based) concept of common law spousal status to gay men and lesbians. The case was also expressly based on

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21 *Leshner*, *supra*, at para 102-3
an argument of fairness-Leshner paid into the pension plan at the same rate as his colleagues who were in opposite sex relationships, and yet he and his partner could not draw out of that plan at the same rate or extent as his colleagues, no matter how long they lived together, because the opposite sex definition of spouse as it appeared in the various laws implicated in the transaction.

1993 *Layland v. Ontario (Consumer and Commercial Relations)*

Yet, a year later in Ontario, the Divisional Court dismissed a judicial review of a refusal to issue a marriage license on the basis that a valid marriage could only take place between a man and a woman. While the majority found, again pre-*Egan*, sexual orientation to be an analogous ground of discrimination under s. 15 of the *Charter*, their decision turned on the belief that one of the principal purposes of the institution of marriage, the majority found, is to encourage procreation, and that purpose cannot be achieved in a “homosexual union.”

1993 *Canada v. Mossop*

The Canadian Human Rights Tribunal found that denying the complainant bereavement leave to attend the funeral for the father of his same-sex spouse was discrimination on the basis of family status. The Federal Court of Appeal overturned the decision and the Commission then appealed to the Supreme Court. The majority found the Tribunal made an error of law when it interpreted “family status” to include same-sex families. It is important to note that sexual orientation was not a protected ground in the *Canadian Human Rights Act* at the time and the appellant did not raise the *Charter* on the appeal.

Susan Ursel’s reflections about the outcome in *Mossop* give insight into the strategies and choices being made in litigating these issues.

While I was not involved with the case, I like many others in the community followed it closely for the insight it provided to judicial perspectives at the time, and because, had it been successful, it would

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23 *Canada (Attorney General) v. Mossop* 1993 1 S.C.R. 554
have represented an important development in establishing our existence and our rights in the mainstream. Mossop was as clearly an expression of the aspirations of the community as any of the other pieces of litigation at the time. It represented another kind of legal strategy, carried out through litigation, in an effort to interject back into the jurisprudence a sense of the lived experience of gay men and lesbians, not as some version of common law spouses, but as family in a quintessential but uniquely gay sense. One could argue that it was Mossop’s and Popert’s determination and their counsel’s professionalism which ensured that this strand of thinking about our relationships remained part of the jurisprudential discussion.

How is it that within one year of each other, one decision could determine that the opposite sex definition of “spouse” was discriminatory, and another could say that same sex relationships did not fall within the rubric of “family status”. At the time, and in hindsight today, I believe that the strategy in the Mossop case, to push more into the category of “family” as it was then understood was simply “a bridge too far”. While it was possible to articulate a vision of same sex relationships between two adults which paralleled our common law heterosexual notions of relationship, it was simply too much and too fast for the court to compass the idea that these constructs might be families too. (…). 24

1995 Vogel v. Manitoba 25

In this decision the Manitoba Court of Appeal considered an appeal from a Human Rights adjudicator’s refusal to find the denial of employment benefits to same sex spouses was discriminatory. That decision had been upheld by the Superior Court. The case reached the Court of Appeal just after the release of Egan. The Court found that, based on Egan, the analysis applied by the adjudicator amounted to an error in law and on that basis the complaint was remitted back for rehearing.

1996 Dwyer v. Toronto (Metro) 26

This complaint was another spousal benefits challenge and the first to do so post Egan. The respondent employer had been granting uninsured benefits such as bereavement leave to same-sex couples, on a discretionary basis, and insured benefits

24 Ursel, supra p. 15-16
25 Vogel v. Manitoba, 1995 CanLII 6260 (M CA)
on an interim basis because the Ontario Municipal Act maintained an opposite-sex eligibility for those benefits.

The Board of Inquiry distinguished the facts from those in Egan on the basis that the benefits sought were employment benefits, rather than social benefits. The Board found the Municipal Act to be in violation of s.15 of the Charter and ordered that the offending provisions be “read down”. Susan Ursel, counsel to one of the complainants in this case, suggests that the result in Dwyer “confirmed the utility of a contractually grounded set of arguments for equality in building upon and extending the opportunity afforded by Egan.”

1998 Vriend v. Alberta

While not a decision specifically on marriage or spousal benefits, the Supreme Court’s decision in Vriend is important for its approach to Charter analysis of discrimination on the analogous ground of sexual orientation.

The Alberta Individual Rights Protection Act (IRPA) did not include sexual orientation as a protected ground of discrimination. Mr. Vriend was fired from his position as a laboratory co-ordinator at a private College because he refused to conform to the College’s policy on “homosexual practice.” His attempt to complain to the Alberta Human Rights Commission was rejected because IRPA did not include sexual orientation as a protected ground. He challenged the constitutionality of the legislation.

The Court agreed IRPA was underinclusive and that this underinclusiveness created a discriminatory distinction on gay men and lesbians. Writing for the majority, Justice Cory concluded:

It is clear that the IRPA, by reason of its underinclusiveness, does create a distinction. The distinction is simultaneously drawn along two different

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27 Ursel, supra p. 24
29 Individual Rights Protection Act, R.S.A. 1990, c.I-2, as amended
lines. The first is the distinction between homosexuals, on one hand, and other disadvantaged groups which are protected under the Act, on the other. Gays and lesbians do not even have formal equality with reference to other protected groups, since those other groups are explicitly included and they are not.

The second distinction, and, I think, the more fundamental one, is between homosexuals and heterosexuals. This distinction may be more difficult to see because there is, on the surface, a measure of formal equality: gay or lesbian individuals have the same access as heterosexual individuals to the protection of the *IRPA* in the sense that they could complain to the Commission about an incident of discrimination on the basis of any of the grounds currently included. However, the exclusion of the ground of sexual orientation, considered in the context of the social reality of discrimination against gays and lesbians, clearly has a disproportionate impact on them as opposed to heterosexuals. Therefore the *IRPA* in its underinclusive state denies substantive equality to the former group.

(…)

Finally, the respondents' contention that the distinction is not created by law, but rather exists independently of the *IRPA* in society, cannot be accepted. It is, of course, true that discrimination against gays and lesbians exists in society. The reality of this cruel and unfortunate discrimination was recognized in *Egan*. Indeed it provides the context in which the legislative distinction challenged in this case must be analyzed. The reality of society's discrimination against lesbians and gay men demonstrates that there is a distinction drawn in the *IRPA* which denies these groups equal protection of the law by excluding lesbians and gay men from its protection, the very protection they so urgently need because of the existence of discrimination against them in society. It is not necessary to find that the legislation creates the discrimination existing in society in order to determine that it creates a potentially discriminatory distinction.30

1998 *Rosenberg v. Canada (AG)*31

The confusion concerning access to spousal benefits and which types of benefits might be accessed by what kinds of spouses was finally resolved for residents of Ontario in this decision. The *Income Tax Act* denied registration of a private pension plan with Revenue Canada if the plan extended eligibility of survivor benefits to same-

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30 *Vriend, supra, per Cory, J. at paras 81, 82, 84*

sex spouses. Rosenberg, with the support of her Union, challenged the constitutionality of this exclusion. The Divisional Court dismissed the application, on the grounds that it was indistinguishable from Egan. Effectively, this prevented employers, who wished to extend pension benefits to same-sex couples, from registering the plan, thereby making the plan economically unfeasible. It also denied same-sex couples the tax benefits available through the private pension registration plan.

On appeal, the Attorney General accepted that there was discriminatory treatment in violation of s.15, but argued, based on Egan, that it was saved by s.1. The Court of Appeal did not agree finding the discriminatory provisions could not be deemed as a reasonable limit, as there was no pressing or substantial objective achieved from the exclusion of same-sex couples from the private pension registration system. The sexual orientation of the recipient of the survivor’s benefits had no meaningful connection to the objective of the legislation, namely, the protection from economic insecurity in old age. Specifically in response to Justice Sopinka’s incrementalist s. 1 argument Justice Abella concluded:

The government relies on its inherent right to address equality issues incrementally. But this approach has been rejected by Justice Iacobucci in Vriend, supra, at para. 122, where he stated:

(...)[G]roups that have historically been the target of discrimination cannot be expected to wait patiently for the protection of their human dignity and equal rights while governments move toward reform one step at a time. If the infringement of the rights and freedoms of these groups is permitted to persist while governments fail to pursue equality diligently, then the guarantees of the Charter will be reduced to little more than empty words.

At what point, after all, can a court conclude that an inequality is sufficiently mature to undergo the metamorphosis from a permissibly delayed expectation to a constitutionally ripe entitlement. Courts do not operate by poll. They are required to make a principled decision about whether a constitutional violation is demonstrably justifiable in a free and democratic society, not whether there might be a more propitious time to remedy it.
Governments necessarily prefer to rely on perceived majoritarian wishes; courts, particularly in the enforcement of minority rights, are necessarily frequently obliged to override them. Waiting for attitudes to change can be a glacial process, as the sixty years in the United States between *Plessy v. Ferguson*, 163 U.S. 537 (1896) and *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954) demonstrated. The intervening years between the denial and the fulfillment of the constitutional rights involved, permitted the gratuitous accumulation of a myriad of social injustices.  

1998 *Canada v. Moore*  

The Federal government, as the respondent employer, sought judicial review from the Federal Court of a decision of the Canadian Human Rights Tribunal finding opposite sex definitions of "spouse" that deny employment benefits to same-sex partners discriminatory under the *Canadian Human Rights Act*. As in *Dwyer, Egan* was distinguished on the basis that the benefits in question were employment rather than social benefits. The Tribunal ordered the respondent to remove the words "of the opposite sex" from the relevant employment documents rather than create a separate classification for same-sex couples. The Federal Court upheld the Tribunal’s decision and commented disapprovingly on the respondent’s proposed remedy finding:

> In my view, the scheme proposed by the employer establishes a regime of "separate but equal", one that distinguishes between relationships on the basis of the sexual orientation of the participants. Thus, this scheme remains discriminatory. Further, though the two classes receive the same benefits, in my view, such a distinction continues to differentiate adversely between persons, within the meaning of the Act.  

1999 *M. v. H*.  

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32 *Rosenberg, supra*, per Abella JA at para 37-39
33 *Canada (Attorney General) v. Moore* [1998] 4 FC 585
35 *Moore, supra*
36 *M. v. H, supra* fn 8
M and H lived together as spouses for a number of years. Their relationship ended and M. sought spousal support pursuant to s.29 of the *Family Law Act*, but was denied on the basis that eligibility for spousal support was restricted to married couples and cohabitating opposite-sex couples. The Ontario Court of Appeal had declared the provision void.

The Supreme Court upheld the declaration, stating that same-sex couples were capable of being in the types of relationships for which support could be required, namely, conjugal relationships of some permanence. The *Act* provided an avenue to enforce support obligations for both men and women, with or without children. Excluding same-sex partners from the protection of the legislation had no rational connection to the objective of ensuring the protection of women and children, or reducing the burden on the public purse. While the Court dismissed the appeal, it did alter the remedy sought. Rather than reading in the words “two persons” into the offending provision, the Court preferred to sever the provision, allowing the government six months in which to amend the *Act*.

Our view on this principal issue may be summarized as follows: Section 15(1) of the *Charter* is infringed by the definition of “spouse” in s. 29 of the *FLA*. This definition, which only applies to Part III of the *FLA*, draws a distinction between individuals in conjugal, opposite-sex relationships of a specific degree of duration and individuals in conjugal, same-sex relationships of a specific degree of duration. We emphasize that the definition of "spouse" found in s. 1(1) of the *FLA*, and which applies to other parts of the *FLA*, includes only married persons and is not at issue in this appeal. Essentially, the definition of “spouse” in s. 29 of the *FLA* extends the obligation to provide spousal support, found in Part III of the *FLA*, beyond married persons to include individuals in conjugal opposite-sex relationships of some permanence. Same-sex relationships are capable of being both conjugal and lengthy, but individuals in such relationships are nonetheless denied access to the court-enforced system of support provided by the *FLA*. This differential treatment is on the basis of a personal characteristic, namely sexual orientation, that, in previous jurisprudence, has been found to be analogous to those characteristics specifically enumerated in s.15(1).

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The crux of the issue is that this differential treatment discriminates in a substantive sense by violating the human dignity of individuals in same-sex relationships. As Law v. Canada (Minister of Employment and Immigration), [1999] 1 S.C.R. 497, established, the inquiry into substantive discrimination is to be undertaken in a purposive and contextual manner. In the present appeal, several factors are important to consider. First, individuals in same-sex relationships face significant pre-existing disadvantage and vulnerability, which is exacerbated by the impugned legislation. Second, the legislation at issue fails to take into account the claimant’s actual situation. Third, there is no compelling argument that the ameliorative purpose of the legislation does anything to lessen the charge of discrimination in this case. Fourth, the nature of the interest affected is fundamental, namely the ability to meet basic financial needs following the breakdown of a relationship characterized by intimacy and economic dependence. The exclusion of same-sex partners from the benefits of the spousal support scheme implies that they are judged to be incapable of forming intimate relationships of economic interdependence, without regard to their actual circumstances. Taking these factors into account, it is clear that the human dignity of individuals in same-sex relationships is violated by the definition of “spouse” in s. 29 of the FLA.

This infringement is not justified under s.1 of the Charter because there is no rational connection between the objectives of the spousal support provisions and the means chosen to further this objective. The objectives were accurately identified by Charron J.A., in the court below, as providing for the equitable resolution of economic disputes when intimate relationships between financially interdependent individuals break down, and alleviating the burden on the public purse to provide for dependent spouses. Neither of these objectives is furthered by the exclusion of individuals in same-sex couples from the spousal support regime. If anything, these goals are undermined by this exclusion.38

Conclusion

In response to M v. H. in 2000 the Ontario Legislature introduced an omnibus bill extending most of the provincial rights and responsibilities of married or common law couples to lesbian and gay couples. However, it did so by creating a new category of "same-sex partner" in addition to the existing definition of "spouse" for married and cohabiting heterosexual couples. This was done for the express purpose of continuing to reserve the traditional category of spouse for heterosexual couples, whether married or unmarried.

38 M. v.H., supra at para 2-4
As noted earlier, that perspective and approach was later abandoned, when appeal Courts in several provincial and territorial jurisdictions determined the distinction between same-sex and opposite-sex spousal relationships was no longer sustainable. By recognizing and accepting that same-sex couples can and do come together in relationships for the purpose of companionship, intimacy, family and even raising children, the very features that had been said to describe traditional notions of marriage, it became a small (but legally imperative) step to recognize the right of gay men and lesbians to marry. While the legal route was through the extension of employment and social benefits, by reference to common law spousal rights, ultimately the destination was firmly routed in the respect of human dignity and diversity.