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# Sexual Orientation and the Charter: The Achievement of Formal Legal Equality (1985-2005) and Its Limits

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Canada is one of the leading countries in the world in the strength of its legal protection against sexual orientation discrimination and in the progress it has made toward securing equal rights and opportunities for its lesbian, gay, and bisexual ("LGB") minority. The author details the achievement of formal legal equality through the courts', particularly the Supreme Court of Canada's, Charter decisions since section 15 (the equality provision) of the Charter first became effective. He focuses on the topics of criminal law, employment, unmarried same-sex couples, LGB parenting, and civil marriage for same-sex couples. By canvassing the landmark cases in these areas, he examines the Charter dialogue between the courts and legislatures and the political results of these equality decisions.

The author hypothesizes that future Charter litigation will concern the limits of formal legal equality. This is so because once a group that has historically faced pervasive direct discrimination achieves formal legal equality (based on claims of "sameness"), attention immediately shifts to indirect discrimination (based on claims of "difference"). As in the case of *Little Sisters*, where the Supreme Court was unwilling to make exceptions to the definition of obscenity for the LGB minority, sexuality is one area that is likely to remain a focus of the struggle for substantive equality.

The article concludes with the reminder that once formal legal equality has been achieved, and proves inadequate, there is a tendency among equality-seeking groups to dismiss it. While the author recognizes that formal legal equality on its own is not enough, he stresses that it has tremendous material and symbolic value. He hopes that Canada's leadership in this area of human rights law will inspire the many countries where formal legal equality for LGB individuals and same-sex couples remains a distant dream.

À cause de ses fortes garanties juridiques contre la discrimination fondée sur l'orientation sexuelle, et à cause de ses avancées vers la reconnaissance de l'égalité des droits et des chances pour sa minorité lesbienne, gaie et bisexuelle (LGB), le Canada fait figure de chef de file dans le monde. L'auteur retrace l'histoire de l'atteinte de l'égalité formelle par le biais des tribunaux, et s'attarde plus précisément sur les décisions de la Cour suprême sur la *Charte des droits et libertés de la personne* depuis l'entrée en vigueur de son article 15. Il se concentre sur le droit criminel, l'emploi, les couples de même sexe non mariés, l'homoparentalité et les mariages civils des couples de même sexe. Dans son examen des arrêts marquants dans ces domaines, il examine le dialogue entre les tribunaux et le législateur, de même que l'impact politique des décisions prétoriales portant sur la notion d'égalité.

L'auteur conjecture que la prochaine vague de litiges portant sur la Charte portera sur les limites de l'égalité juridique formelle. En effet, un groupe qui a historiquement subi une discrimination directe considérable et qui finit par obtenir l'égalité formelle (sur la base d'appels à la «similarité») tend alors à s'en prendre à la discrimination indirecte dont il se dit être l'objet (sur la base d'appels à la «différence»). L'affaire *Little Sisters*, dans laquelle la Cour suprême n'a pas voulu créer, pour la minorité LGB, d'exception à la définition de l'obscénité, montre que la sexualité sera probablement un lieu d'activité important dans la lutte pour la reconnaissance de l'égalité substantielle.

L'article se termine par un rappel. Si, une fois atteinte, l'égalité formelle se révèle inadéquate, les groupes militant pour l'égalité auront tendance à la laisser tomber. Bien que l'auteur reconnaisse que l'égalité formelle ne suffise pas en soi, il en souligne l'énorme valeur matérielle et symbolique. Il espère que l'exemple du Canada dans ce domaine des droits de la personne inspirera les nombreux pays où l'égalité formelle des personnes LGB et les conjoints de même sexe n'est qu'un rêve éloigné.

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## Introduction

Canada is one of the leading countries in the world in the strength of its legal protection against sexual orientation discrimination<sup>1</sup> and in the progress it has made toward securing equal rights and opportunities for its lesbian, gay, and bisexual (“LGB”) minority.<sup>2</sup> The *Canadian Charter of Rights and Freedoms*,<sup>3</sup> and the Supreme Court of Canada’s Charter decisions, have played an important role in expanding this legal protection since the equality rights provision of the Charter, section 15, came into force on 17 April 1985.

Although not limited to such situations, section 15(1) has proven most powerful when it is wielded against legislation or other rules that blatantly deny formal legal equality (i.e., involve direct—usually express—discrimination). On 16 April 1985, the age of consent to same-sex sexual activity<sup>4</sup> was twenty-one (versus fourteen for most male-female sexual activity),<sup>5</sup> sexual orientation discrimination in employment and other areas was legal in twelve out of the then thirteen jurisdictions, and unmarried same-sex couples were not recognized by any legislation or case law, especially legislation on joint adoption of children. By invoking section 15 of the Charter, LGB litigants have been able to challenge some of the hundreds of distinctions in legislation that existed in 1985 and persuade judges that they are discriminatory and unjustifiable. Judicial decisions have, in turn, encouraged governments and legislatures to repeal many of these distinctions voluntarily without further litigation.

In this article, I will consider the progress that has been made since 1985, especially in the case law of the Supreme Court, and the areas of Canadian law in which this progress has occurred. In doing so, I will assess the likelihood of the

<sup>1</sup> See generally Donald G. Casswell, *Lesbians, Gay Men and Canadian Law* (Toronto: Emond Montgomery Publications, 1996) [Casswell, *Lesbians, Gay Men*]; Kathleen A. Lahey, *Are We “persons” Yet?: Law and Sexuality in Canada* (Toronto: University of Toronto Press, 1999); Bruce MacDougall, *Queer Judgments: Homosexuality, Expression and the Courts in Canada* (Toronto: University of Toronto Press, 2000).

<sup>2</sup> Time and space did not permit me to incorporate transgendered issues into this article. I have done so for England and Wales in Robert Wintemute, “Sexual Orientation and Gender Identity” in Colin Harvey, ed., *Human Rights in the Community* (Oxford: Hart Publishing) [forthcoming in 2005].

<sup>3</sup> Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

<sup>4</sup> See *Criminal Code*, S.C. 1953-54, c. 51, s. 149 (prohibiting “gross indecency” between any two persons, not just two men). Theoretically, this prohibition was sexual-orientation neutral in that it covered any male-female sexual acts considered “grossly indecent”. See *R. v. Davis* (1969), [1970] 3 C.C.C. 260, 69 W.W.R. 638 (Alta. C.A.) (acts of adult male-female fellatio, cunnilingus, and anal intercourse in the presence of, and photographed by, a 16-year-old girl on LSD were “indecent”). The vast majority of prosecutions, however, concerned male-male sexual activity, and the stigmatizing effect of the prohibition fell exclusively on same-sex sexual activity. See Casswell, *Lesbians, Gay Men*, *supra* note 1 at 108-14.

<sup>5</sup> See Marilyn Pilon, “Canada’s Legal Age of Consent to Sexual Activity” (12 April 2001), online: Library of Parliament: Parliamentary Research Branch <<http://www.parl.gc.ca/information/library/PRBpubs/prb993-e.htm>>.

Supreme Court requiring nationwide equal access to civil marriage in 2005, which would represent the remarkable achievement of formal legal equality for LGB individuals and same-sex couples after only twenty years of Charter protection. I will close by examining issues of substantive legal equality that will remain to be addressed in the future.<sup>6</sup>

### I. Recognizing Sexual Orientation as an “Analogous Ground” Under Section 15(1)

The words “sexual orientation” do not appear in section 15(1) of the Charter, alongside “race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.” On 29 January 1981, a parliamentary committee had rejected (with twenty-two votes against and two for) an amendment proposed by then MP Svend Robinson<sup>7</sup> that would have added sexual orientation.<sup>8</sup> Then Minister of Justice, Jean Chrétien said: “We have explained that there are other grounds of discrimination that will be defined by the courts. We wanted to have an enumeration of grounds and we do not think it should be a list that can go on forever.”<sup>9</sup> Thus, in January 1981, less than twelve years after the decriminalization of adult same-sex sexual activity,<sup>10</sup> and at a time when sexual orientation appeared in the anti-discrimination legislation of only one province (Quebec)<sup>11</sup> and in no national-level constitution or legislation anywhere in the world, discrimination against LGB persons was not yet considered sufficiently serious to warrant express inclusion in section 15(1) as an “enumerated ground”. In view of the subsequent developments to be discussed below, there can be no doubt that if section 15(1) were to be drafted for the first time today, sexual orientation would be included, as it has been in section 9(3) of the *South African Constitution* (1996)<sup>12</sup> and article 21(1) of the *Charter of Fundamental Rights of the European Union* (2000).<sup>13</sup>

The decision not to mention sexual orientation in section 15(1) in 1982 was clearly not intended to prevent subsequent judicial determinations that it is implicitly

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<sup>6</sup> See also John Fisher, “Outlaws or Inlaws?: Successes and Challenges in the Struggle for LGBT Equality” (2004) 49 *McGill L.J.* 1183.

<sup>7</sup> Mr. Robinson was closeted in 1981 but courageously came out as Canada’s first openly gay MP in 1988.

<sup>8</sup> See *Minutes of Proceedings and Evidence of the Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada*, 1st Sess., 32d Parl., Issue No. 48 at 48:20-21, 48:31-34.

<sup>9</sup> *Ibid.* at 48:33.

<sup>10</sup> *Criminal Law Amendment Act, 1968-69*, S.C. 1968-69, c. 38, s. 7.

<sup>11</sup> *Charter of Human Rights and Freedoms*, R.S.Q. c. C-12, s. 10 (“*orientation sexuelle*” added by S.Q. 1977, c. 6, s. 1).

<sup>12</sup> *Constitution of the Republic of South Africa 1996*, No. 108 of 1996, s. 9(3).

<sup>13</sup> EC, *Charter of Fundamental Rights of the European Union*, [2000] O.J.C. 364/1, art. 21(1). Art. 21(1) is art. II-21(1) of the 18 July 2003 Draft Treaty establishing a Constitution for Europe (Part II, Title III), online: <[http://europa.eu.int/futurum/constitution/index\\_en.htm](http://europa.eu.int/futurum/constitution/index_en.htm)>.

included. Indeed, as early as 1986, the federal Department of Justice stated that it was “of the view that the courts will find that sexual orientation is encompassed by the guarantees in section 15.”<sup>14</sup> Lower courts could not easily address this question until after the Supreme Court decided, in *Andrews v. Law Society of British Columbia*,<sup>15</sup> to limit the scope of review under section 15(1) by defining “discrimination” as: (i) a distinction (or a neutral rule with a similar effect); (ii) that is based on a ground “enumerated” in section 15(1) or “analogous” to the enumerated grounds (like “citizenship”, the ground in *Andrews*); and (iii) which is “discriminatory” in some substantive rather than purely formal sense.<sup>16</sup>

Was sexual orientation an “analogous ground” (i.e., similar to race, religion, and sex)? Most lower courts found that it was, but often did not give any reasons for their conclusion because the respondent government had conceded the point.<sup>17</sup> When the question finally reached the Supreme Court in *Egan v. Canada*,<sup>18</sup> all nine judges held that sexual orientation is such a ground. However, they gave two different sets of reasons for this conclusion. Justices Cory and Iacobucci, writing for a group of five judges, found that “homosexuals, whether as individuals or couples, form an identifiable minority who have suffered and continue to suffer serious social, political and economic disadvantage.”<sup>19</sup> They did not refer to the cause of an individual’s sexual orientation and instead focused on the social, political, economic, and legal status of LGB individuals as a group. Justice La Forest, writing for the other four judges, observed that: “whether or not sexual orientation is based on biological or

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<sup>14</sup> Canada, Department of Justice, *Toward Equality: The Response to the Report of the Parliamentary Committee on Equality Rights* (Ottawa: Communications and Public Affairs, Department of Justice Canada, 1986) at 13 [*Toward Equality*].

<sup>15</sup> [1989] 1 S.C.R. 143, 56 D.L.R. (4th) 1 [*Andrews*].

<sup>16</sup> I have criticized the use of this third requirement: Robert Wintemute, “Discrimination Against Same-Sex Couples: Sections 15(1) and 1 of the *Charter: Egan v. Canada*” (1995) 74 Can. Bar Rev. 682 at 691-700 [Wintemute, “Discrimination Against Same-Sex Couples”]. In *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497, 170 D.L.R. (4th) 1 [*Law*], the Supreme Court unanimously adopted an extremely complex version of this third requirement focusing on whether the distinction based on an enumerated or analogous ground also constitutes a “violation of essential human dignity”. The Court has yet to use this third requirement to screen out a distinction based on sexual orientation, thereby excusing a government from having to justify use of the distinction under section 1, but has done so for distinctions based on age (*Law, ibid.*; *Gosselin v. Québec (A.G.)*, [2002] 4 S.C.R. 429, 221 D.L.R. (4th) 257; *Canadian Foundation for Children, Youth and the Law v. Canada (A.G.)*, [2004] 1 S.C.R. 76, 234 D.L.R. (4th) 257), marital status (*Nova Scotia (A.G.) v. Walsh*, [2002] 4 S.C.R. 325, 221 D.L.R. (4th) 1 [*Walsh*]), mental disability (*Winko v. British Columbia (Forensic Psychiatric Institute)*, [1999] 2 S.C.R. 625, 175 D.L.R. (4th) 173), and physical disability (*Granovsky v. Canada (Minister of Employment and Immigration)*, [2000] 1 S.C.R. 703, 186 D.L.R. (4th) 1).

<sup>17</sup> See Robert Wintemute, *Sexual Orientation and Human Rights: The United States Constitution, the European Convention, and the Canadian Charter* (Oxford: Oxford University Press, 1997) at 163-68.

<sup>18</sup> [1995] 2 S.C.R. 513, 124 D.L.R. (4th) 609 [*Egan*].

<sup>19</sup> *Ibid.* at para. 175.

physiological factors, which may be a matter of some controversy, it is a deeply personal characteristic that is either unchangeable or changeable only at unacceptable personal costs ... ”<sup>20</sup> For these judges, the fact that it is impossible or difficult for individuals to change their sexual orientation (in the sense of internal feelings or attractions) was an important factor.<sup>21</sup>

## II. Applying Section 15(1) to Specific Forms of Sexual Orientation Discrimination

The determination in 1995 that sexual orientation is an analogous ground meant that, in *Egan* and subsequent cases, governments would be required to show under section 1 that all distinctions based on sexual orientation (satisfying the third requirement that they be “discriminatory”) are “reasonable limits prescribed by law [which] can be demonstrably justified in a free and democratic society.” The courts would decide on a case-by-case basis whether particular discriminatory distinctions based on sexual orientation could be justified. If not, they would violate the Charter.

In this Part, I will examine the case law of Canadian courts (mainly the Supreme Court) on specific forms of sexual orientation discrimination. Instead of discussing decisions in chronological order, I will follow Kees Waaldijk’s “standard sequences” in “legislative recognition of homosexuality”: “(1) decriminalisation, followed or sometimes accompanied by the setting of an equal age of consent, after which (2) anti-discrimination legislation can be introduced, before the process is finished with (3) legislation recognising same-sex partnership and parenting.”<sup>22</sup> Although the “standard sequences” describe the order in which legislatures in most countries address these issues, not the order in which litigants have presented these issues to the Supreme Court, the “standard sequences” are still useful because they correlate strongly with the difficulty of each issue for a court applying the Charter. Thus, direct discrimination in the criminal law is generally easier than direct discrimination against LGB individuals in employment and other areas, which is in turn easier than direct discrimination against same-sex couples and parents.

### A. Equality in the Criminal Law

The first issue of sexual orientation discrimination raised under a national constitutional bill of rights, or an international human rights treaty, is often that of a “blanket ban”: a law criminalizing all private, consensual sexual activity between men or women of any age (or specific important forms of such activity). This has been true

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<sup>20</sup> *Ibid.* at para. 5.

<sup>21</sup> See Wintemute, “Discrimination Against Same-Sex Couples”, *supra* note 16 at 687-88.

<sup>22</sup> “Small Change: How the Road to Same-Sex Marriage Got Paved in the Netherlands” in Robert Wintemute, ed. & Mads Andenæs, honorary co-ed., *Legal Recognition of Same-Sex Partnerships: A Study of National, European and International Law* (Oxford: Hart Publishing, 2001) 437 at 439-40.

of the European Court of Human Rights,<sup>23</sup> the Constitutional Court of South Africa,<sup>24</sup> and the Supreme Court of the United States.<sup>25</sup> However, because Canada repealed its blanket ban on same-sex sexual activity in 1969, the question of a constitutional “right of privacy” protecting such activity never reached the Supreme Court. Instead, given that such activity was lawful, the Court in *Egan* was able to consider sexual orientation discrimination immediately as an issue of “equality” under section 15(1) of the Charter, rather than initially as one of “liberty” or “privacy” under section 7.

The unequal age of consent of twenty-one for same-sex sexual activity, established in 1969, could have been challenged under the Charter. In 1987, however, an equal age of consent of fourteen was adopted for all sexual activity (other than anal intercourse, for which it was set at eighteen if the parties are not husband and wife).<sup>26</sup> Together, the 1969 decriminalization and the 1987 partial equalization of the age of consent eliminated the most obvious forms of sexual orientation discrimination from the Criminal Code, and section 15(1) of the Charter (if not also section 7) would prevent their reintroduction. There remain, however, rules in the Criminal Code that are neutral both as drafted and as applied but have the potential to cause indirect (adverse effects) discrimination based on sexual orientation. The role of the Charter in prohibiting indirect discrimination, thereby providing more substantive rather than purely formal legal equality to LGB individuals, will be considered in Part III.

### **B. Equal Access to Employment**

Just as the most serious examples of sexual orientation discrimination in criminal law were removed by federal legislation, the Charter has not been the main source of protection against such discrimination in employment (i.e., access to, promotion within, and retention of jobs by LGB individuals, as opposed to equal access to employment benefits for their same-sex partners). This is because: (i) section 32 of the Charter limits its application to the public sector; and (ii) even within the public sector, victims of discrimination would prefer to make a complaint to a federal or provincial human rights (anti-discrimination) commission under the applicable human rights code or act (i.e., anti-discrimination legislation). If the relevant commission considers the complaint worth pursuing, it will cover the complainant’s legal fees through to the Supreme Court if necessary. Complainants challenging the discrimination under the Charter will generally have to fund their own legal costs.

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<sup>23</sup> *Dudgeon v. U.K.* (1981), 4 E.H.R.R. 25.

<sup>24</sup> *National Coalition for Gay and Lesbian Equality v. Minister of Justice*, [1998] 1 B.C.L.R. 5 (S. Afr. Const. Ct.).

<sup>25</sup> *Bowers v. Hardwick*, 478 U.S. 186, 92 L. Ed. 2d 140 (1986), overruled in *Lawrence v. Texas*, 539 U.S. 558, 156 L. Ed. 2d 508 (2003). The US Supreme Court became “stuck” on the criminalization issue in 1986 and (unlike the Supreme Court of Canada, the European Court of Human Rights, and the Constitutional Court of South Africa) was not able to move on to other issues for 17 years (apart from *Romer v. Evans*, 517 U.S. 620, 134 L. Ed. 2d 855 (1996)).

<sup>26</sup> *Criminal Code*, R.S.C. 1985, c. C-46, s. 159, as am. by S.C. 1987, c. 24, ss. 1-4.

Instead of the Charter, the main source of protection against sexual orientation discrimination in employment has been amendments adding sexual orientation to the prohibitions of discrimination in federal, provincial, and territorial anti-discrimination legislation. Until about 1994, these amendments were probably made voluntarily by the legislatures of eight of Canada's then thirteen jurisdictions, rather than because of pressure from appellate court decisions interpreting the Charter. Indeed, this "legislative consensus" was a significant factor supporting the conclusion of Justices Cory and Iacobucci in *Egan*, in 1995, that sexual orientation is an analogous ground under the Charter.<sup>27</sup> Nonetheless, in 1992, litigation under the Charter began to play a role in filling the gaps in protection offered by legislation. The two most glaring gaps were at the federal level: (i) the armed forces had a policy of dismissing all LGB personnel; and (ii) the *Canadian Human Rights Act* ("CHRA"), which prohibits discrimination in access to jobs in the federal government and federally regulated private sector industries (e.g., banks and airlines), did not include sexual orientation.

The first gap was filled as the result of a section 15(1) challenge brought by Michelle Douglas, a lesbian woman who had been dismissed from the armed forces. On 27 October 1992, the day the trial of her case was to begin, the armed forces agreed to settle and asked MacKay J. of the Federal Court to sign a judgment granting declarations that Douglas's section 15(1) rights had been violated and that "the Defendant's poli[cies] ... regarding the service of homosexuals in the Canadian Armed Forces are contrary to the *Charter*."<sup>28</sup> He did so, and later that day, the Chief of Defence Staff issued a statement that "Canadians, regardless of their sexual orientation, will now be able to serve their country ... without restriction."<sup>29</sup>

The filling of the second gap was hastened by a section 15(1) challenge brought by Joshua Birch, a gay man who had been dismissed by the armed forces. In *Haig v. Canada*, his lawyer, Philip MacAdam, made the very creative argument that the omission of sexual orientation from the CHRA (which would otherwise have permitted Birch to challenge his dismissal) was a violation of section 15(1) as indirect sexual orientation discrimination (i.e., it was neutral, in also denying heterosexual individuals any protection, but had a disproportionate effect on LGB individuals, who were much more likely to need such protection).<sup>30</sup> The Ontario Court of Appeal agreed and ordered that "the [CHRA] ... be interpreted, applied and administered as though it contained 'sexual orientation' as a prohibited ground of discrimination."<sup>31</sup> The federal government did not appeal the decision, making its effect on the CHRA

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<sup>27</sup> *Supra* note 18 at para. 175.

<sup>28</sup> *Douglas v. R.* (1992), [1993] 1 F.C. 264 at para. 15, 98 D.L.R. (4th) 129.

<sup>29</sup> Thomas Claridge & Geoffrey York, "Forces Agree to End Anti-Gay Policies; Ottawa Pays Former Officer \$100,000 to Settle Rights Suit" *The Globe and Mail* (28 October 1992) A1.

<sup>30</sup> The first commentators to propose this argument were probably Arnold Bruner, "Sexual Orientation and Equality Rights" in Anne Bayefsky & Mary Eberts, eds., *Equality Rights and the Canadian Charter of Rights and Freedoms* (Toronto: Carswell, 1985) 457 at 467-68; James E. Jefferson, "Gay Rights and the *Charter*" (1985) 43:1 U.T. Fac. L. Rev. 70 at 76-77.

<sup>31</sup> (1992), 9 O.R. (3d) 495 at 508, 94 D.L.R. (4th) 1 [*Haig*].

outside Ontario uncertain, but finally rendered the question moot when Parliament added sexual orientation to the *CHRA* in 1996, ten years after the federal government had first promised to do so.<sup>32</sup>

After the 1996 federal amendment, four jurisdictions had still not added sexual orientation to their anti-discrimination legislation: Alberta, Newfoundland, Prince Edward Island, and the Northwest Territories. Because *Haig* had not been appealed to the Supreme Court, the question remained: does section 15(1) of the Charter oblige all Canadian legislatures to include sexual orientation in their anti-discrimination legislation, or is a decision to do so voluntary on their part? The Supreme Court answered the question in *Vriend v. Alberta*,<sup>33</sup> in which gay chemistry teacher Delwin Vriend was unable to challenge his dismissal by a private religious college in Edmonton (now known as King's University College) because of the Alberta government's stubborn refusal to add sexual orientation to its anti-discrimination legislation. All eight judges held that Alberta's *omission* (failure to provide legal protection against public and private sector sexual orientation discrimination) violated section 15(1), and seven judges agreed that sexual orientation should be "read in" to Alberta's legislation.

Justices Cory and Iacobucci held that the Alberta legislation drew a distinction "between homosexuals and heterosexuals" in that "the exclusion of the ground of sexual orientation ... clearly has a disproportionate impact on [gays and lesbians] as opposed to heterosexuals"<sup>34</sup> (i.e., there was indirect discrimination). This distinction was based on the analogous ground of sexual orientation and, whether or not it had a discriminatory intent, its effects were discriminatory. The exclusion "sends a strong and sinister message," suggesting that "discrimination on the ground of sexual orientation is not as serious or as deserving of condemnation as other forms of discrimination," which may be "tantamount to condoning or even encouraging discrimination against lesbians and gay men."<sup>35</sup>

Under section 1, Justices Cory and Iacobucci rejected all of the Alberta government's justifications for the discriminatory distinction, including the argument that the Court should defer to the Alberta legislature in making a social policy decision that required it to mediate between competing interests: religious freedom and homosexuality. They held that any conflicts with religious freedom can be dealt with on a case-by-case basis under the Alberta legislation's exception provisions.<sup>36</sup> Because the case concerned the omission in the legislation, not the employer's action, the fact that the employer was a "private fundamentalist Christian college" was not an issue before the Court. Reading in was the appropriate remedy because it is

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<sup>32</sup> *Toward Equality*, *supra* note 14 at 13.

<sup>33</sup> [1998] 1 S.C.R. 493, 156 D.L.R. (4th) 385 [*Vriend*].

<sup>34</sup> *Ibid.* at para. 82.

<sup>35</sup> *Ibid.* at para. 100.

<sup>36</sup> *Ibid.* at paras. 123-25.

reasonable to assume that, if the legislature had been faced with the choice of having no anti-discrimination legislation or having legislation that offered protection on the ground of sexual orientation, the latter option would have been chosen, especially in view of the size of the excluded group.<sup>37</sup>

Whether or not section 15(1) would permit it, repeal of Alberta's anti-discrimination legislation after *Vriend* was not politically feasible. And the Alberta government decided not to override the Supreme Court's decision by invoking section 33 of the Charter to re-enact the legislation without sexual orientation. As of 7 September 2004, however, the Alberta government was still refusing to amend its legislation by "writing in" sexual orientation and making the Supreme Court's remedy no longer necessary.<sup>38</sup> In anticipation of the *Vriend* decision, or following it, every province or territory that had not yet done so (other than Alberta) complied with the case by enacting an express amendment: Newfoundland (1997), Prince Edward Island (1998), and the Northwest Territories (2002), as well as Nunavut (2003). These express amendments, combined with the application of *Vriend* to Alberta, mean that Canada now has "coast-to-coast" protection against sexual orientation discrimination in employment (and other areas such as education, housing, and the provision of goods and services).<sup>39</sup>

*Vriend* was perhaps the first decision of its kind in the world, effectively holding that the Alberta legislature had not only a "negative obligation" to refrain from discriminating in its own laws, but also a "positive obligation" to act by providing legal protection against sexual orientation discrimination, especially in the private sector. The Supreme Court of Canada went well beyond the US Supreme Court, which held in *Romer v. Evans*<sup>40</sup> that a state constitutional amendment could not prohibit a state or local legislature from voluntarily adding sexual orientation to its anti-discrimination legislation. The US Supreme Court did not find any federal constitutional obligation requiring the state or local legislature to do so, and it is not

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<sup>37</sup> *Ibid.* at para. 161.

<sup>38</sup> See online: Alberta Human Rights and Citizenship Commission <<http://www.albertahumanrights.ab.ca/legislation>>.

<sup>39</sup> Federal level: *Canadian Human Rights Act*, R.S.C. 1985, c. H-6, ss. 2, 3(1), as am. by S.C. 1996, c. 14; British Columbia: *Human Rights Code*, R.S.B.C. 1996, c. 210, ss. 7-11, 13-14, as am. by S.B.C. 1992, c. 43; Manitoba: *Human Rights Code*, C.C.S.M. c. H175, s. 9(2)(h); New Brunswick: *Human Rights Act*, R.S.N.B. 1973, c. H-11, ss. 3-7, as am. by S.N.B. 1992, c. 30; Newfoundland: *Human Rights Code*, R.S.N. 1990, c. H-14, ss. 6-9, 12, 14, as am. by S.N. 1997, c. 18; Northwest Territories: *Human Rights Act*, S.N.W.T. 2002, c. 18, s. 5(1) (which also includes "gender identity"); Nova Scotia: *Human Rights Act*, R.S.N.S. 1989, c. 214, s. 5(1)(n), as am. by S.N.S. 1991, c. 12; Ontario: *Human Rights Code*, R.S.O. 1990, c. H.19, ss. 1-3, 5-6 (S.O. 1986, c. 64, s. 18); Nunavut: *Human Rights Act*, S.N. 2003, c. 12, s. 7(1); Prince Edward Island: *Human Rights Act*, R.S.P.E.I. 1988, c. H-12, s. 1(1)(d), as am. by S.P.E.I. 1998, c. 92; Quebec: *Charte des droits et libertés de la personne*, R.S.Q. c. C-12, s. 10, as am. by S.Q. 1977, c. 6, s. 1; Saskatchewan: *Saskatchewan Human Rights Code*, S.S. 1979, c. S-24.1, ss. 9-19, 25, 47, as am. by S.S. 1993, c. 61; Yukon Territory: *Human Rights Act*, R.S.Y. 2002, c. 116, ss. 7, 37 (S.Y. 1987, c. 3).

<sup>40</sup> 517 U.S. 620 (1996).

clear that it would find such an obligation even for race discrimination.<sup>41</sup> *Vriend* could perhaps inspire the European Court of Human Rights, which has yet to consider a case where a Council of Europe member state has failed to prohibit a particular kind of discrimination in the private sector. For example, Council Directive 2000/78/EC<sup>42</sup> requires European Union member states to prohibit public and private sector sexual orientation discrimination only in employment and vocational training (which includes most post-secondary education), but not in primary or secondary education, housing, or the provision of goods and services.

### C. Equality for Unmarried Same-Sex Couples

Discrimination against unmarried same-sex couples, compared with married or unmarried opposite-sex couples, has given rise to the most litigation under the Charter since 1985.<sup>43</sup> This is perhaps because, as late as 1985, it was still assumed that there was nothing discriminatory about treating unmarried opposite-sex couples as “spouses” (as federal and provincial legislation began to do in the 1970s) and unmarried same-sex couples as “roommates”. Indeed, *Equality for All*, the October 1985 report of the federal Parliamentary Committee on Equality Rights, saw no contradiction in recommending:

that the [CHRA] be amended to add sexual orientation as a prohibited ground of discrimination ... [and] that a consistent definition of common law relationships [cohabiting or de facto couples] be incorporated in all federal laws and policies that recognize such relationships, and ... that the definition require *that the parties be of the opposite sex*, reside continuously with each other for at least one year, and represent themselves publicly as husband and wife.<sup>44</sup>

Once section 15(1) came into force, unmarried same-sex couples began to invoke it, as well as federal and provincial anti-discrimination legislation, in challenging their exclusion from employment, social security, and other benefits made available to unmarried opposite-sex couples. The first such case to reach the Supreme Court, *Canada (A.G.) v. Mossop*,<sup>45</sup> was brought by Brian Mossop, a federal government employee who had been denied bereavement leave when his male partner’s father died, but would have received it had his partner been a woman, whether or not they

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<sup>41</sup> See *Reitman v. Mulkey*, 387 U.S. 369 at 376-77, 18 L. Ed. 2d 830 (1967).

<sup>42</sup> EC, *Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation*, [2000] O.J.L. 303/16.

<sup>43</sup> The first two section 15(1) cases on sexual orientation discrimination concerned the rights and obligations of same-sex partners: *Anderson v. Luoma* (1986), 50 R.F.L. (2d) 127 (B.C.S.C.); *Andrews v. Ontario (Minister of Health)* (1988), 64 O.R. (2d) 258, 49 D.L.R. (4th) 584 (H.C.J.). See also Robert Wintemute, “Sexual Orientation Discrimination as Sex Discrimination: Same-Sex Couples and the Charter in *Mossop, Egan and Layland*” (1994) 39 McGill L.J. 429 at 431-32.

<sup>44</sup> Canada, Parliament, *Equality for All: Report of the Parliamentary Committee on Equality Rights* (Ottawa: Queen’s Printer, 1985), Recommendations 10, 17 [emphasis added].

<sup>45</sup> [1993] 1 S.C.R. 554, 100 D.L.R. (4th) 658.

were married. Instead of relying on section 15(1) to challenge either the denial of the benefit, or the omission of sexual orientation from the *CHRA* (as in *Haig*), Mr. Mossop complained to the Canadian Human Rights Commission that he had suffered discrimination based on “family status”, a ground covered by the *CHRA*. In a four to three decision, the Court held that, because Parliament had decided not to add sexual orientation to the *CHRA* in 1983 when it added family status, “homosexual couples cannot constitute a ‘family’ for the purposes of ... the *CHRA*.”<sup>46</sup> Justice La Forest added: “While some may refer to [Mr. Mossop’s] relationship as a ‘family’, I do not think it has yet reached that status in the ordinary use of language.”<sup>47</sup>

The next six years saw a rapid evolution in the Court’s thinking on sexual orientation discrimination generally, and on discrimination against unmarried same-sex couples in particular. In *Egan*, after finding unanimously that sexual orientation is an “analogous ground” under section 15(1), the Court had to apply this principle to the facts of the case: the denial of a “spouse’s allowance” (an extra social security benefit for low-income pensioners) to John Nesbit, the partner since 1948 of James Egan, when a hypothetical unmarried female partner of Mr. Egan would have qualified after one year of cohabitation. By five votes to four, the Court held that the challenged distinction was between same-sex “common law couples” and opposite-sex “common law couples” on the ground of sexual orientation (not between same-sex “non-spouses” and opposite-sex “spouses” on the ground of “spousal status”) and constituted discrimination in the definition of “spouse” contrary to section 15(1). The Court’s final decision, by five votes to four, was that the discrimination could be justified under section 1. Justice Sopinka who agreed with the dissenters that the legislation violated section 15(1), argued that “the legislation was addressing itself to *those in greatest need*,” and that “equating same-sex couples with heterosexual spouses, either married or common law, is still generally regarded as *a novel concept*.”<sup>48</sup>

It took only four years for the concept of equal treatment for unmarried same-sex couples to cease to be “novel”. In *M. v. H.*,<sup>49</sup> by eight votes to one, the Supreme Court held that an Ontario statute defining “spouse” as including unmarried opposite-sex but not same-sex couples, contained unjustifiable sexual orientation discrimination. M. and H. were two women who, during a ten-year relationship, had lived together, purchased property, and started an advertising business. When the relationship broke down, M. (the financially weaker party) sought financial support from H. and brought a constitutional challenge to the only legal obstacle she faced: the definition of “spouse” (for the purpose of support obligations) in section 29 of Ontario’s *Family Law Act* (“*FLA*”) was a legally married spouse or “either of a man and woman who

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<sup>46</sup> *Ibid.* at para. 40.

<sup>47</sup> *Ibid.* at para. 46.

<sup>48</sup> *Supra* note 18 at paras. 107-11 [emphasis in original]. See Wintemute, “Discrimination Against Same-Sex Couples”, *supra* note 16 at 700-704.

<sup>49</sup> [1999] 2 S.C.R. 3, 171 D.L.R. (4th) 577.

are not married to each other and have cohabited ... continuously for a period of not less than three years.”<sup>50</sup>

Under section 15(1), Justices Cory and Iacobucci began by observing that the appeal did not concern “whether same-sex couples can marry, or whether [they] must, for all purposes, be treated in the same manner as unmarried opposite-sex couples.”<sup>51</sup> They then found that:

[S]ame-sex couples will often form long, lasting, loving and intimate relationships. The choices they make in the context of those relationships may give rise to the financial dependence of one partner on the other. ... [Yet under s. 29, they] are denied access to [the *FLA*’s court-enforced system of support] entirely on the basis of their sexual orientation.<sup>52</sup>

This distinction was “discriminatory” because:

It implies that [same-sex couples] are judged to be incapable of forming intimate relationships of economic interdependence as compared to opposite-sex couples ... [S]uch exclusion perpetuates the disadvantages [they suffer] and contributes to the erasure of their existence ... Therefore ... the human dignity of individuals in same-sex relationships ... is violated by the impugned legislation.<sup>53</sup>

Under section 1, Justices Cory and Iacobucci found that the opposite-sex definition of “spouse” did not advance the Ontario government’s two asserted objectives: “improving the economic circumstances of heterosexual women” and “the protection of children”. Heterosexual men had the right to apply for support, and it did not matter that gay men and lesbian women might need to do so less frequently than heterosexual women “because their relationships are typically more egalitarian.”<sup>54</sup> With regard to children, the *FLA* was

Simultaneously underinclusive and overinclusive ... [O]pposite-sex couples are entitled to apply ... irrespective of whether or not they are parents and regardless of their reproductive capabilities or desires ... [And an] increasing percentage of children are being conceived and raised by lesbian and gay couples as a result of adoption, surrogacy and donor insemination.<sup>55</sup>

They distinguished *Egan*, where equality would probably have meant a slight increase in government social security expenditure, from *M. v. H.*, where equality would probably have resulted in a slight reduction.<sup>56</sup> Turning to the remedy, Justices Cory and Iacobucci declared section 29 to be of no force or effect, but suspended the declaration for six months, because it

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<sup>50</sup> R.S.O. 1990, c. F. 3.

<sup>51</sup> *M. v. H.*, *supra* note 49 at para. 55.

<sup>52</sup> *Ibid.* at paras. 58-62.

<sup>53</sup> *Ibid.* at paras. 73-74.

<sup>54</sup> *Ibid.* at paras. 109-12.

<sup>55</sup> *Ibid.* at paras. 113-14.

<sup>56</sup> *Ibid.* at para. 130.

may well affect numerous other statutes that rely upon a similar definition of the term “spouse”. The legislature may wish to address the validity of these statutes in light of the unconstitutionality of s. 29 of the FLA ... [I]f left up to the courts, these issues could only be resolved on a case-by-case basis at great cost to private litigants and the public purse ... [T]he legislature ought to be given some latitude in order to address these issues in a more comprehensive fashion.<sup>57</sup>

Technically, the decision in *M. v. H.* invalidated only one definition of “spouse” in one Ontario statute. The federal and most provincial governments, however, took up the Court’s invitation to conduct comprehensive reviews of all their legislative definitions of “spouse”, and thereby avoid the expensive judicial review alluded to by Justices Cory and Iacobucci. *M. v. H.* thus caused direct sexual orientation discrimination against unmarried same-sex couples (compared with unmarried opposite-sex couples) to collapse like a house of cards. Since 1999, the rights and obligations of unmarried same-sex and opposite-sex couples have been equalized in hundreds of federal, provincial, and territorial statutes (including federal immigration legislation).<sup>58</sup> The amended laws grant unmarried same-sex couples equal treatment as, for example, “spouses” (British Columbia), “de facto spouses” (Quebec), “common-law partners” (federal level), “same-sex partners” (Ontario), or “adult interdependent partners” (Alberta). Before *M. v. H.*, a few laws had been amended in British Columbia and the Yukon Territory, and a comprehensive reform in Quebec was in progress.

Indeed, the comprehensive reform at the federal level (Bill C-23, the *Modernization of Benefits and Obligations Act*) extended to unmarried same-sex partners the specific benefit that John Nesbit had been denied in *Egan*. Bill C-23 had its first reading in the House of Commons on 11 February 2000, shortly before James Egan died, aged 78, on 9 March 2000. The bill had its third and final reading in the

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<sup>57</sup> *Ibid.* at para. 147.

<sup>58</sup> Federal level: *Modernization of Benefits and Obligations Act*, S.C. 2000, c. 12; *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, s. 12(1); Alberta: *Adult Interdependent Relationships Act*, S.A. 2002, c. A-4.5; British Columbia: *Family Relations Amendment Act, 1997*, S.B.C. 1997, c. 20; *Definition of Spouse Amendment Act, 1999*, S.B.C. 1999, c. 29; *Definition of Spouse Amendment Act, 2000*, S.B.C. 2000, c. 24; Manitoba: *An Act to Comply with the Supreme Court of Canada Decision in M. v. H.*, S.M. 2001, c. 37 [*Act to Comply with M. v. H.*]; *Charter Compliance Act*, S.M. 2002, c. 24; *Common-Law Partners’ Property and Related Statutes Amendment Act*, S.M. 2002, c. 48; New Brunswick: *Family Services Act*, S.N.B. 1980, c. F-2.2, s. 112(3), as am. by S.N.B. 2000, c. 59; Newfoundland: *An Act to Amend the Family Law Act*, S.N. 2000, c. 29; *Same Sex Amendment Act*, S.N. 2001, c. 22; Northwest Territories: *Family Law Act*, S.N.W.T. 1997, c. 18, s. 1(1), as am. by S.N.W.T. 2002, c. 6; Nova Scotia: *Law Reform (2000) Act*, S.N.S. 2000, c. 29; Ontario: *Amendments Because of the Supreme Court of Canada Decision in M. v. H. Act*, S.O. 1999, c. 6; Prince Edward Island: *An Act to Amend the Family Law Act*, S.P.E.I. 2002, c. 7; Quebec: *An Act to amend various legislative provisions concerning de facto spouses*, S.Q. 1999, c. 14; Saskatchewan: *Miscellaneous Statutes (Domestic Relations) Amendment Acts, 2001*, S.S. 2001, cc. 50-51; Yukon Territory: *Dependants Relief Act*, R.S.Y. 2002, c. 56, s. 1; *Family Property and Support Act*, R.S.Y. 2002, c. 83, ss. 1, 30, 31; *Estate Administration Act*, R.S.Y. 2002, c. 77, ss. 1, 74.

Senate on 14 June 2000, shortly before John Nesbit died, aged 72, on 23 June 2000. Although John Nesbit never received a “spouse’s allowance”, he and James Egan did live to witness the final days of the discriminatory law that had excluded them.

#### **D. Equality for Actual and Prospective LGB Parents**

Unlike the Constitutional Court of South Africa,<sup>59</sup> the Supreme Court of Canada has yet to hear a case involving a section 15(1) claim of sexual orientation discrimination against an LGB parent or parents, whether actual or prospective. The two areas most likely to give rise to such a case are access to joint or second-parent (versus individual)<sup>60</sup> adoption of children and access to assisted reproduction and birth registration. In the case of joint or second-parent adoption, trial courts in Ontario<sup>61</sup> and Nova Scotia<sup>62</sup> have held that section 15(1) does not permit the exclusion of unmarried same-sex partners when unmarried (or only married) opposite-sex partners are permitted to adopt. Charter litigation in Alberta led to an amendment expressly permitting “step-parent” adoption,<sup>63</sup> which was then interpreted as covering an unmarried same-sex partner.<sup>64</sup> These decisions were not appealed. Whether or not compliance with the Charter was the motivation, British Columbia, Manitoba, Newfoundland, the Northwest Territories, Ontario, Quebec, and Saskatchewan now also provide expressly or impliedly for joint or second-parent adoption (or both) by unmarried same-sex partners.<sup>65</sup>

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<sup>59</sup> *Suzanne Du Toit & Anna-Marie De Vos v. Minister for Welfare and Population Development* (2002) (Case no. CCT40/01), online: The Constitutional Court of South Africa <<http://www.concourt.gov.za>> (unmarried same-sex partners cannot be excluded from the right of married different-sex partners to adopt children jointly); *J. & B. v. Director General, Department of Home Affairs* (28 March 2003) (Case no. CCT46/02), online: The Constitutional Court of South Africa <<http://www.concourt.gov.za>> (unmarried lesbian partners cannot be excluded from the right of married opposite-sex partners to both be registered as the parents of a child born to the wife after donor insemination). Unlike in Canada, all decisions of lower courts striking down legislation as contrary to the South African Constitution must be confirmed by the Constitutional Court.

<sup>60</sup> Every province and territory permits unmarried individuals to adopt children and no legislation or case law anywhere in Canada excludes LGB individuals from this possibility. Compare *Fretté v. France* (26 February 2002) (Eur. Ct. H.R.), online: Council of Europe <<http://www.echr.coe.int/hudoc.htm>>; Daniel Borrillo & Thierry Pitois-Étienne, “Différence des sexes et adoption: la ‘psychanalyse administrative’ contre les droits subjectifs de l’individu” (2004) 49 McGill L.J. 1035.

<sup>61</sup> See *Re K. & B.*, 23 O.R. (3d) 679, 125 D.L.R. (4th) 653 (Prov. Div.).

<sup>62</sup> See *Re Nova Scotia (Birth Registration No. 1999-02-004200)* (2001), 194 N.S.R. (2d) 362, (*sub nom. Re M. (S.C.)*), 202 D.L.R. (4th) 172 (S.C.).

<sup>63</sup> *Child Welfare Act*, R.S.A. 2000, c. C-12, s. 72(3).

<sup>64</sup> See *Re A* (1999), 253 A.R. 74, 181 D.L.R. (4th) 300 (Q.B.).

<sup>65</sup> British Columbia: *Adoption Act*, R.S.B.C. 1996, c. 5, ss. 29(1) (“two adults jointly may apply ... to adopt a child”), 29(2) (“[o]ne adult may apply ... to jointly become a parent of a child with a birth parent of the child”); Manitoba: *Adoption Act*, C.C.S.M. c. A2, ss. 36, 73(1) (joint adoption by “common-law partners”), 88 (adoption by “a common-law partner of the parent of a child”), as am. by S.M. 2002, c. 24, s. 1; Newfoundland: *Adoption Act*, R.S.N. 1999, c. A-2.1, ss. 20(1) (“2 adults jointly

As regards assisted reproduction and birth registration,<sup>66</sup> two cases have been successfully argued under British Columbia's anti-discrimination legislation<sup>67</sup> (which prohibits sexual orientation discrimination in services "customarily available to the public"), but neither case went to the BC Court of Appeal. At the federal level, the *Assisted Human Reproduction Act* declares, as one of the act's principles, that "persons who seek to undergo assisted reproduction procedures must not be discriminated against, including on the basis of their sexual orientation or marital status."<sup>68</sup> On the basis of the lower court decisions, provincial adoption legislation, the *Assisted Human Reproduction Act*, and the South African case law, it seems likely that the Supreme Court would hold that section 15(1) requires equal access to adoption, assisted reproduction, and birth registration for LGB individuals and same-sex partners.

### **E. Equal Access to Civil Marriage for Same-Sex Couples**

The Supreme Court's decision in *M. v. H.* catalyzed a process of rapid equalization of the rights of unmarried same-sex and opposite-sex couples in federal, provincial, and territorial law. Although gaps remain (especially in New Brunswick,

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may apply ... to adopt a child"), 20(2) ("[o]ne adult may apply ... to jointly become a parent of a child with a parent of that child"), as amended by S.N. 2002, c. 13, s. 10; Northwest Territories: *Adoption Act*, S.N.W.T. 1998, c. 9, ss. 1(1) ("spouse" includes "a person ... living in a conjugal relationship outside marriage with another person"), 5(1)(b) (adoption by "spouses jointly"), 5(1)(c) (adoption by "a spouse, where the child is the child of his or her spouse"), as amended by S.N.W.T. 2002, c. 6, s. 1; Ontario: *Child and Family Services Act*, R.S.O. 1990, c. C.11, ss. 136(1) ("spouse" which includes an unmarried different-sex but not same-sex partner), 146(2) (adoption by "the spouse of the child's parent"), 146(4) (joint adoption by "spouses" or "by any other individuals that the court may allow, having regard to the best interests of the child"), as am. by S.O. 1999, c. 6, s. 6; Quebec: arts. 546 ("[a]ny person of full age may, ... jointly with another person, adopt a child"), 579 ("a person's adoption of a child of his or her [married, civil union or de facto] spouse") C.C.Q.; Saskatchewan: *Adoption Act*, S.S. 1998, c. A-5.1, ss. 16(2) (adoption by "married adults jointly" or "any other ... persons that the court may allow, having regard to the best interests of the child"), 23(1) (second-parent adoption by "spouse", defined in section 2 as including "a person with whom [a] person is cohabiting as spouses"), as amended by S.S. 2001, c. 51, s. 2. See also *A.A. v. New Brunswick Department of Family and Community Services* (28 July 2004), No. HR-004-03 (N.B. Labour & Employment Board, Board of Inquiry), online: Equal Marriage <[http://www.samesexmarriage.ca/docs/NBHR\\_adoption.pdf](http://www.samesexmarriage.ca/docs/NBHR_adoption.pdf)> (the NB Human Rights Act's prohibition of sexual orientation and marital status discrimination in public services requires that a mother's same-sex partner have access to second-parent adoption and birth registration).

<sup>66</sup> Under Quebec's art. 538.3 C.C.Q., the female married or civil union spouse of a woman giving birth after donor insemination is automatically a legal parent and is not required to adopt the child (assuming that the donor is not a party to the women's parental project).

<sup>67</sup> See *Korn v. Potter* (1996), 134 D.L.R. (4th) 437, 22 B.C.L.R. (3d) 163 (S.C.) (refusal of doctor to inseminate lesbian woman); *Gill v. Ministry of Health* (24 August 2001), 2001 BCHRT 45, online: BC Human Rights Tribunal <<http://www.bchrt.bc.ca/popt/decisions>> (refusal of Vital Statistics Agency to accept lesbian mother's female partner as the second parent on a birth registration form).

<sup>68</sup> S.C. 2004, c. 2, s. 2(e).

the Northwest Territories, Nunavut, Prince Edward Island, and the Yukon),<sup>69</sup> *M. v. H.* will require that the legislature or lower courts fill them eventually. Despite this equalization process same-sex couples faced three remaining sources of inequality: (1) in some provinces and territories, the rights and obligations of married couples are greater than those of unmarried couples, and the Charter permits some of these distinctions,<sup>70</sup> even though they are based on the analogous ground of marital status;<sup>71</sup> (2) in some provinces and territories, unmarried same-sex couples can obtain rights and obligations only after a minimum period of cohabitation and, unlike unmarried opposite-sex couples, cannot obtain them immediately by registering their relationships;<sup>72</sup> and (3) even if rights and obligations identical to those of married opposite-sex couples can be obtained through an alternative registration system,<sup>73</sup> unmarried same-sex couples are excluded from the term “marriage” (i.e., the symbolic, emotional, and other intangible benefits of equal access to the same public institution and relationship registration system as unmarried opposite-sex couples).

The question of equal access to civil marriage was first raised by an unmarried same-sex couple in 1974 in *Re North & Matheson*,<sup>74</sup> perhaps the first reported Canadian decision on sexual orientation discrimination outside the criminal law. Given that same-sex sexual activity had been decriminalized only five years before, it is not surprising that the claim failed. A second challenge, this time under the Charter, was unsuccessful at trial in 1993 and then suspended after *Egan* made it clear that a majority of the Supreme Court was not yet ready to find a Charter violation.<sup>75</sup> A third wave of cases challenging access to marriage began with three Charter cases starting in 2000, a year after *M. v. H.*; trials were held in Vancouver, Toronto, and Montreal in 2001.<sup>76</sup>

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<sup>69</sup> These provinces and territories do not seem to have attempted (after *M. v. H.*, *supra* note 49) to amend all of their statutory definitions of “spouse” that include unmarried opposite-sex partners but exclude unmarried same-sex partners.

<sup>70</sup> See *Walsh*, *supra* note 16 (equal division of “matrimonial assets” after the breakdown of the relationship can be limited to married opposite-sex partners).

<sup>71</sup> See *Miron v. Trudel*, [1995] 2 S.C.R. 418, 23 O.R. (3d) 160.

<sup>72</sup> Manitoba and Nova Scotia now have registration systems for unmarried opposite-sex and same-sex partners that do not provide rights and obligations identical to those of married opposite-sex partners. See *Act to Comply with M. v. H.*, *supra* note 58. In Alberta, the similar status of “adult interdependent partner” may be acquired immediately by entering into an “adult interdependent partner agreement”. See *Adult Interdependent Relationships Act*, *supra* note 58, ss. 3(1), 7.

<sup>73</sup> This is possible in Quebec. See *An Act instituting civil unions and establishing new rules of filiation*, S.Q. 2002, c. 6 [*Act instituting civil unions*]. Parties to a civil union are known as “*conjoints en union civile*” or “*conjoints unis civilement*” or “civil union spouses”, not “*conjoints mariés*” or “*époux*” or “married spouses”.

<sup>74</sup> (1974), 52 D.L.R. (3d) 280, 20 R.F.L. 112 (Man. Co. Ct.).

<sup>75</sup> *Layland v. Ontario (Minister of Consumer and Commercial Relations)* (1993), 14 O.R. (3d) 658, 104 D.L.R. (4th) 214 (Div. Ct.). Greer J. wrote a strong dissent.

<sup>76</sup> See Donald G. Casswell, “Moving Toward Same-Sex Marriage” (2001) 80 Can. Bar Rev. 810; Bruce MacDougall, “The Celebration of Same-Sex Marriage” (2000-01) 32 Ottawa L. Rev. 235.

In the Vancouver case, *EGALE Canada Inc. v. Canada (A.G.)*, Pitfield J. of the Supreme Court of British Columbia held, on 2 October 2001, that the exclusion of same-sex couples from civil marriage is direct sexual orientation discrimination contrary to section 15(1), but that it can be justified under section 1, because “the one factor in respect of which there cannot be similarity is the biological reality that opposite-sex couples may, as between themselves, propagate the species and thereby perpetuate humankind. Same-sex couples cannot.”<sup>77</sup>

In the Toronto case, *Halpern v. Canada (A.G.)*,<sup>78</sup> three judges of the Ontario Superior Court of Justice (Divisional Court) held unanimously, on 12 July 2002, that the violation of section 15(1) cannot be justified under section 1. LaForme J. (with whom the other two judges agreed) rejected Pitfield J.’s view in *EGALE* that the purpose of marriage is (unassisted) procreation:

[I]t was only recently—when same-sex-couples began to advance claims for equal recognition of their conjugal relationships—that some courts began to infer that procreation was an essential component to marriage. ...

[I]t is well-established in annulment cases that a marriage is valid and not voidable despite the fact that one spouse refuses to have sexual intercourse, or is infertile, or insists on using contraceptives when having sexual intercourse. ...

[In] cases where the husband is unable to consummate the marriage due to impotence resulting from advanced age ... Canadian courts have consistently ruled that the marriage is understood to be for the purpose of “companionship” and is therefore valid, and not voidable. ...

[I]t could reasonably be argued ... that [the objective of procreation] appears to be a mere pretext used to rationalize discrimination against lesbians and gays.<sup>79</sup>

He then considered the question of proportionality between the end (promoting unassisted procreation) and the means (excluding same-sex couples from civil marriage):

There is simply no evidentiary basis to support the proposition that granting same-sex couples the freedom to marry would either diminish the number of children conceived by heterosexual couples, or reduce the quality of care with which heterosexual couples raise their children.

Same-sex couples experience, and raise children as a result of a variety of reproductive and parenting arrangements, none of which is unique to same-sex partners. ...

... I find that, the restriction against same-sex marriage fails the rational connection test because it is both: overinclusive in that it allows non-

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<sup>77</sup> [2001] 11 W.W.R. 685 at para. 205, 95 B.C.L.R. (3d) 122 [*EGALE* (S.C.)].

<sup>78</sup> (2002), 60 O.R. (3d) 321, 215 D.L.R. (4th) 223 (Sup. Ct. (Div. Ct.)) [*Halpern* (Sup. Ct.)].

<sup>79</sup> *Ibid.* at paras. 238-42.

procreative heterosexuals to marry; and underinclusive because it denies same-sex parents and intended parents the right to marry.<sup>80</sup>

Balancing the exclusion's deleterious effects against its benefits, LaForme J. concluded:

The restriction against same-sex marriage is an offence to the dignity of lesbians and gays because it limits the range of relationship options available to them. The result is they are denied the autonomy to choose whether they wish to marry. This in turn conveys the ominous message that they are unworthy of marriage. For those same-sex couples who do wish to marry, the impugned restriction represents a rejection of their personal aspirations and the denial of their dreams.<sup>81</sup>

With regard to the remedy, LaForme J. would have reformulated the common law rule<sup>82</sup> so that it would define civil marriage as “the lawful union of two persons to the exclusion of all others” and would have ordered the immediate issuance of marriage licences to the plaintiff same-sex couples. The majority remedy was, however, that of Blair J. (with the tacit support of LaForme J.): the common law rule would be reformulated, and same-sex couples in Ontario would be entitled to marriage licences in two years (on 12 July 2004), if the federal government had not acted by then.

In the Montreal case, *Hendricks c. Québec (P.G.)*,<sup>83</sup> Lemelin J. of the Superior Court of Quebec (District of Montreal) also found an unjustifiable violation of section 15(1) on 6 September 2002. She rejected the argument that there was no discrimination because existing Quebec and federal legislation provided sufficient rights and duties to same-sex couples. Quebec legislation allows same-sex couples to contract a “civil union”, which is identical to a civil marriage for all purposes of provincial law.<sup>84</sup> Moreover, unmarried same-sex and opposite-sex couples in Quebec are generally treated under Canadian federal law, after one year of cohabitation, in the same way as married different-sex couples.<sup>85</sup> Despite this “separate but almost equal” situation, Lemelin J. concluded that there is a difference in treatment that is discriminatory: “These laws correct certain inequities and confirm social acceptance of a new reality. It remains the case that Mr. Hendricks and Mr. LeBoeuf do not have the right to marry each other ... They are thus deprived of the choice of the type of union in which they wish to live their union ... ”<sup>86</sup> She noted that, under Quebec law, they have the choice of being “de facto spouses” or “civil union spouses” but cannot

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<sup>80</sup> *Ibid.* at paras. 248-50.

<sup>81</sup> *Ibid.* at para. 261.

<sup>82</sup> Parliament has never exercised its constitutional power to incorporate this rule into a federal statute for the 9 provinces and 3 territories with common law systems.

<sup>83</sup> [2002] R.J.Q. 2506 (S.C.) [*Hendricks*].

<sup>84</sup> See *Act instituting civil unions*, *supra* note 73.

<sup>85</sup> See *Modernization of Benefits and Obligations Act*, *supra* note 58.

<sup>86</sup> *Hendricks*, *supra* note 83 at para. 133 (unofficial translation).

be “married spouses”.<sup>87</sup> Opposite-sex couples in Quebec have all three options. She then quoted Linden J.A. of the Federal Court of Appeal:

One cannot avoid the conclusion that *offering benefits to gay and lesbian partners under a different scheme from heterosexual partners is a version of the separate but equal doctrine*. That appalling doctrine must not be resuscitated in Canada four decades after its much heralded death in the United States.<sup>88</sup>

With regard to the remedy, Lemelin J. declared invalid the federal statutory definition of marriage for Quebec: “Marriage requires the free and enlightened consent of a man and a woman to be the spouse of the other.”<sup>89</sup> However, she suspended the effect of the declaration until 6 September 2004 and declined to repair the constitutional defect by reading out “a man and a woman” and reading in “two persons.”<sup>90</sup>

The three cases then moved to the Courts of Appeal of British Columbia, Ontario, and Quebec. The first court to rule was the BC Court of Appeal on 1 May 2003 in *EGALE* (C.A.).<sup>91</sup> The court reversed the decision of Pitfield J., and became the first non-final appellate court in the world to order the issuance of civil marriage licences to same-sex couples, after a suspension period to allow for the adjustment of legislation (and subject to possible reversal by the Supreme Court of Canada).

In the lead judgment, Prowse J.A. preferred the reasoning of LaForme J. in *Halpern* (Sup. Ct.). Even if promoting unassisted procreation were a “pressing and substantial” objective, the means used to achieve it (excluding same-sex couples from civil marriage) were disproportionate. In particular, she disagreed with Pitfield J.’s view “that permitting same-sex marriages [would represent] a significant threat to the institution of marriage,” and agreed with the comments of Justices Cory and Iacobucci (in the non-marriage context of *Egan*) that they failed to see “how according same-sex couples the benefits flowing to opposite-sex couples in any way inhibits, dissuades or impedes the formation of heterosexual unions.”<sup>92</sup>

As to the appropriate remedy for the unjustifiable violation of section 15(1), Prowse J.A. again agreed with LaForme J. in *Halpern* (Sup. Ct.):

If [the absence of] same-sex marriage is recognized as being a contravention of the equality rights of same-sex couples, ... the obvious remedy is that chosen by Mr. Justice LaForme in *Halpern*—the redefinition of marriage to include same-sex couples. In my view, this is the only road to true equality for same-

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<sup>87</sup> See e.g. art. 15 C.C.Q. (“consent [to medical care] is given by his or her married, civil union or de facto spouse ...”).

<sup>88</sup> *Supra* note 83 at para. 134, quoting from *Egan*, *supra* note 18 (dissenting opinion) [emphasis in original].

<sup>89</sup> *Federal Law-Civil Law Harmonization Act, No. 1*, S.C. 2001, c. 4, s. 5 [*Harmonization Act*].

<sup>90</sup> *Hendricks*, *supra* note 83 at paras. 200-209.

<sup>91</sup> *EGALE Canada Inc. v. Canada* (A.G.) (2003), 225 D.L.R. (4th) 472, [2003] 7 W.W.R. 22 (B.C.C.A.) [*EGALE* (C.A.)].

<sup>92</sup> *Ibid.* at para. 127 (quoting *Egan*, *supra* note 18 at para. 211).

sex couples. Any other form of recognition of same-sex relationships, including the parallel institution of [registered domestic partnerships], falls short of true equality. This Court should not be asked to grant a remedy which makes same-sex couples “almost equal”, or to leave it to governments to choose amongst less-than-equal solutions.

If [the federal] Parliament concludes that this result is unacceptable, it continues to have options available to it. It could, for example, abolish marriage altogether.<sup>93</sup> ... In the alternative, it is open to the [federal] government to use its override power under s. 33 of the *Charter*.<sup>94</sup>

She therefore granted the only possible remedy: a declaration that “the common law bar against same-sex marriage is of no force or effect,” and a reformulation of the common-law definition of marriage to mean “the lawful union of two persons to the exclusion of all others.” She agreed, however, with Blair J. in *Halpern* (Sup. Ct.) that a suspension of the remedy until 12 July 2004 (the Ontario deadline at the time) was necessary, not to give Parliament time to consider alternative remedies (such as “registered domestic partnerships” or “civil unions”), but:

solely to give the federal and provincial governments time to review and revise legislation to bring it into accord with this decision. This period of suspension ... is necessary ... to avoid confusion and uncertainty in the application of the law to same-sex marriages. The appellants acknowledge that there will be consequential amendments required to both federal and provincial legislation to give effect to this decision.<sup>95</sup>

The second appellate court to rule was the Ontario Court of Appeal on 10 June 2003 in *Halpern* (C.A.).<sup>96</sup> As in *EGALE* (C.A.), the three judges were unanimous in finding an unjustifiable violation of section 15(1) and issued a single judgment “By the Court”. The court began its section 15(1) analysis by rejecting the federal government’s argument that “marriage, as an institution, does not produce a distinction between opposite-sex and same-sex couples. The word ‘marriage’ is a descriptor of a unique opposite-sex bond that is common across different times, cultures and religions as a virtually universal norm.”<sup>97</sup> The court responded as follows:

[W]hether a formal distinction is part of the definition itself or derives from some other source does not change the fact that a distinction has been made. If marriage were defined as “a union between one man and one woman of the Protestant faith”, surely the definition would be drawing a formal distinction

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<sup>93</sup> Prowse J.A. correctly assumed that Parliament would probably not wish to do so and would prefer to include a small excluded group (same-sex couples). Justices Cory and Iacobucci made the same assumption about Alberta’s anti-discrimination legislation in *Vriend*, *supra* note 33 (and see accompanying text).

<sup>94</sup> *Ibid.* at paras. 156-57.

<sup>95</sup> *EGALE* (C.A.), *supra* note 91 at para. 161.

<sup>96</sup> *Halpern v. Canada (Attorney General)* (2003), 65 O.R. (3rd) 161, 225 D.L.R. (4th) 529 (C.A.) [*Halpern* (C.A.)].

<sup>97</sup> *Ibid.* at para. 66.

between Protestants and all other persons. ... Similarly, if marriage were defined as “a union between two white persons”, there would be a distinction between white persons and all other racial groups. In this respect, an analogy can be made to the anti-miscegenation laws that were declared unconstitutional in *Loving v. Virginia*, 388 U.S. 1 (1967) because they distinguished on racial grounds.<sup>98</sup>

In finding that this distinction is “discriminatory”, the court observed that recent federal and provincial legislation equalizing the rights and obligations of unmarried opposite-sex and same-sex couples did not remove the three remaining sources of inequality mentioned above:

... In many instances, benefits and obligations do not attach until the same-sex couple has been cohabiting for a specified period of time. Conversely, married couples have instant access to all benefits and obligations.

Additionally, not all benefits and obligations have been extended to cohabiting couples [such as those in *Walsh*]. ...

[Section] 15(1) guarantees more than equal access to economic benefits. One must also consider whether persons and groups have been excluded from fundamental societal institutions. ...

In this case, same-sex couples are excluded from a fundamental societal institution—marriage. The societal significance of marriage, and the corresponding [non-economic] benefits that are available only to married persons, cannot be overlooked. ... Exclusion perpetuates the view that same-sex relationships are less worthy of recognition than opposite-sex relationships. In doing so, it offends the dignity of persons in same-sex relationships.<sup>99</sup>

Under section 1, the court rejected the “promotion of unassisted procreation” justification, pointing out that many opposite-sex couples choose not to or are unable to have children. The court also dismissed as speculative any threat to the institution of marriage. Having found an unjustifiable violation of section 15(1), the court then agreed with LaForme J. in *Halpern* (Sup. Ct.) and the BC Court of Appeal in *EGALE* (C.A.) that the only possible remedy was the reformulation of the common-law definition of marriage. Despite the federal government’s request for a two-year suspension, the court also agreed with LaForme J. [they disagreed with BC Court of Appeal on this point] that there was no reason to delay the granting of this remedy because it would not “require the volume of legislative reform that followed in *M. v. H.*”<sup>100</sup> The court therefore made the following historic order on 10 June 2003, and

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<sup>98</sup> *Ibid.* at para. 70.

<sup>99</sup> *Halpern* (C.A.), *supra* note 96 at paras. 104-107.

<sup>100</sup> *Ibid.* at para. 153. This is not necessarily true at the provincial level. Lo Veng Bun has pointed out to me that at least 40 of the 67 Ontario statutes amended after *M. v. H.*, *supra* note 58, require legislative amendment or judicial repair: they exclude a married same-sex partner both from the category “spouse” (defined as a person of the opposite sex) and from the category “same-sex partner” (defined as a person living “in a conjugal relationship outside marriage”). See *e.g. Election Act*, R.S.O. 1990, c. E-6, s. 1.

became the first non-final appellate court in the world to order the *immediate* issuance of civil marriage licences to same-sex couples (despite possible reversal by the Supreme Court of Canada):

To remedy the infringement of these constitutional rights, we:

- (1) declare the existing common-law definition of marriage to be invalid to the extent that it refers to “one man and one woman”;
- (2) reformulate the common-law definition of marriage as “the voluntary union for life of two persons to the exclusion of all others”;
- (3) order the declaration of invalidity in (1) and the reformulated definition in (2) to have immediate effect;
- (4) order the Clerk of the City of Toronto to issue marriage licenses to the [applicant same-sex] Couples; and
- (5) order the Registrar General of the Province of Ontario to accept for registration the marriage certificates of Kevin Bourassa and Joe Varnell and of Elaine and Anne Vautour [who were married in a religious ceremony at the Metropolitan Community Church in Toronto on 14 January 2001].<sup>101</sup>

Because the judgment had immediate effect, one of the applicant same-sex couples, Michael Leshner and Michael Stark, obtained a marriage licence from the City of Toronto and were married that day.<sup>102</sup> By 13 June, Toronto City Hall had issued eighty-nine marriage licences to same-sex couples. Unlike in the Netherlands or Belgium, Ontario’s *Marriage Act* has no residence or nationality requirements,<sup>103</sup> which meant that any same-sex couple from anywhere in the world had become able to marry in Ontario (even if recognition at home might be unlikely).<sup>104</sup>

From a legal perspective, the Ontario Court of Appeal’s ordering the immediate issuance of marriage licences to same-sex couples is questionable. A much more orderly remedy would have been that of the BC Court of Appeal in *EGALE* on 1 May 2003, and the Supreme Judicial Court of Massachusetts (to be discussed below), which allows time for legislation and forms to be adjusted, and for same-sex couples to plan their weddings, rather than stampede to the city’s clerk office. Moreover, given the national dimension of the question (one of federal rather than Ontario law), and the significance of the change from the legal status quo, the Ontario Court of Appeal ought to have suspended the effect of its judgment at least until the expiry of the appeal period in *EGALE* (30 June 2003), if not in *Halpern* (9 September 2003).<sup>105</sup> This would have allowed the federal government time to seek a stay of the judgment

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<sup>101</sup> *Ibid.* at para. 156.

<sup>102</sup> See Tracy Tyler & Tracy Huffman, “Gay Men Get Married After Appeal Court Ruling” *Toronto Star* (11 June 2003) A4.

<sup>103</sup> R.S.O. 1990, c. M-3, s. 5(1).

<sup>104</sup> See John Deverell, “Gays Flocking Down Aisle in Toronto: Same-Sex Couples Arrive from U.S.” *Toronto Star* (14 June 2003) E1.

<sup>105</sup> See *Supreme Court Act*, R.S.C. 1985, c. S-26, s. 58.

from the Supreme Court, thereby giving the Supreme Court the final say as to whether the first same-sex civil marriages in Canada should go ahead (or be retroactively validated) before the Supreme Court ruled on any appeal, or only after any appeal.

From a political perspective, the Ontario Court of Appeal's order was brilliant. One of the main reasons why many heterosexual individuals oppose equal access to civil marriage for same-sex couples is very simply "fear of the unknown". As has been seen in the Netherlands (2001) and Belgium (2003),<sup>106</sup> and now in Canada, the fear of many opponents dissipates quickly once married same-sex couples become a reality, and it is clear that their marriages do not harm anyone. The Ontario Court of Appeal appears to have decided that the best way to ensure a permanent end to the discriminatory exclusion of same-sex couples from civil marriage in Canada, as required by the Charter, was for marriages to begin immediately. The Court could be said to have "let the genie out of the bottle", "created a fait accompli", or "pushed a nervous heterosexual majority into the swimming pool of marriage equality".

On balance, I would have to congratulate the Ontario Court of Appeal for its courage and for taking the lead in North America. Both the courts and the legislatures in Canada and the US were reluctant to "press the button" and make marriage equality happen, fearing that the foundations of civilization might "explode". Someone had to be the first. Given the legal and political culture in Canada and the US with regard to controversial human rights issues, an appellate court was in a better position to do so than a legislature. Without the Ontario Court of Appeal's remedy, and the ensuing same-sex marriages, it is possible that the federal government would have appealed, no such marriages would have been celebrated in Canada for two or three years, and the Massachusetts court would not have been inspired to follow the example set by Canada (as we will see below).

Perhaps taken by surprise by the Ontario Court of Appeal's remedy, and reluctant to continue fighting a change that seemed inevitable, the federal government did not attempt to seek a stay from the Supreme Court. After seven days studying the BC and Ontario judgments, then Prime Minister Jean Chrétien abruptly changed course<sup>107</sup> in an historic "Statement of the Prime Minister on Same-Sex Unions". On 17 June 2003,

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<sup>106</sup> Netherlands, *Act of 21 December 2000 amending Book 1 of the Civil Code, concerning the opening up of marriage for persons of the same sex (Act on the Opening Up of Marriage)*, *Staatsblad* 2001, nr. 9; Belgium, Law of 13 February 2003 opening up marriage to persons of the same sex and modifying certain provisions of the Civil Code, *Moniteur belge*, 28 February 2003, Edition 3, 9880.

<sup>107</sup> In response to the decisions of the BC, Ontario, and Quebec trial courts, on 12 November 2002, then federal Minister of Justice, Martin Cauchon, published a discussion paper and referred the question of what measures should be taken to recognize "same-sex unions" to the House of Commons Standing Committee on Justice and Human Rights, which held a series of public hearings on the options discussed in the paper. See Department of Justice, News Release, "Minister Refers Question of Marriage and Same Sex Unions to Standing Committee" (12 November 2002), online: Department of Justice <[http://canada.justice.gc.ca/en/news/nr/2002/doc\\_30740.html](http://canada.justice.gc.ca/en/news/nr/2002/doc_30740.html)>; Department of Justice, "Marriage and Legal Recognition of Same-Sex Unions: A Discussion Paper" (November 2002), online: Department of Justice <[http://canada.justice.gc.ca/en/dept/pub/mar/mar\\_e.pdf](http://canada.justice.gc.ca/en/dept/pub/mar/mar_e.pdf)>.

he announced that the federal government would not appeal either appellate court judgment<sup>108</sup> (or pursue its appeal of the Quebec trial court decision), and would instead introduce legislation complying with the opinions of ten of eleven judges in the three cases (and with recommendations of the Law Commission of Canada and the Canadian Human Rights Commission).<sup>109</sup>

The federal government's decision to end all appeals caused the BC Court of Appeal to lift the suspension of its judgment in *EGALE* on 8 July 2003:

[A]ny consequential amendments to the law which may be required as a result of this Court's decision do not require the suspension of remedy which this Court originally imposed. ... [A]ny further delay in implementing the remedies will result in an unequal application of [federal] law as between Ontario and British Columbia ... [T]he declaratory relief and the reformulation of the common-law definition of marriage as "the lawful union of two persons to the exclusion of all others" will take immediate effect.<sup>110</sup>

Antony Porcino and Tom Graff were married in Vancouver within an hour of the decision.<sup>111</sup>

Similarly, the Quebec Court of Appeal ruled on 19 March 2004 that, because of the pending Supreme Court reference (to be discussed below), the intervener, *Ligue Catholique pour les droits de l'homme* no longer had a sufficient interest to appeal the *Hendricks* trial court decision and that its appeal had become moot.<sup>112</sup> The court therefore said nothing about the merits of the section 15(1) issue. With the consent of the federal Attorney General, the court granted the cross-appeal, ended the suspension of Lemelin J.'s judgment (giving it effect from 19 March 2004 instead of 6 September 2004), and ordered that Michael Hendricks and René LeBoeuf be allowed to marry twenty days after publication of the notice required by article 368 of the *Civil Code*.<sup>113</sup>

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<sup>108</sup> On 9 October 2003 (Case No. 29879), the Supreme Court dismissed attempts to appeal by two *Halpern* interveners: the Association for Marriage and the Family in Ontario and the Interfaith Coalition on Marriage and Family.

<sup>109</sup> See Law Commission of Canada, *Beyond Conjuality: Recognizing and Supporting Close Personal Adult Relationships* (Ottawa: Minister of Public Works and Government Services, 2001), recommendation 33, online: Law Commission of Canada <<http://www.lcc.gc.ca/en/themes/pr/cpra/report.asp>>; Canadian Human Rights Commission, "Submission of the CHRC to the Standing Committee on Justice and Human Rights study on marriage and the legal recognition of same-sex unions", online: Canadian Human Rights Commission <[http://www.chrc-ccdp.ca/legislation\\_policies/submission\\_marriage-en.asp](http://www.chrc-ccdp.ca/legislation_policies/submission_marriage-en.asp)>.

<sup>110</sup> (2003), 228 D.L.R. (4th) 416 at paras. 6-8, 15 B.C.L.R. (4th) 226 (C.A.).

<sup>111</sup> See Gwendolyn Richards, "B.C. Joins Ontario in Embracing Same-Sex Marriage" *The Globe and Mail* (9 July 2003) A1.

<sup>112</sup> *Ligue Catholique pour les droits de l'homme v. Hendricks* (2004), J.E. 2004-724 (Que. C.A.) [*Ligue Catholique*].

<sup>113</sup> The Court of Appeal (like Lemelin J.) declined to repair the constitutional defect in the challenged federal statute (*Harmonization Act*, *supra* note 89), by reading out "a man and a woman" and reading in "two persons" (*Ligue Catholique*, *ibid.* at para. 55). The BC and Ontario Courts of Appeal made the corresponding changes to the federal common-law definition of marriage. As Lo

After the judgment, Quebec Minister of Justice and Attorney General, Marc Bellemare, issued a press release announcing that same-sex couples would henceforth be able to marry in Quebec and that courthouse staff were ready to process their applications.<sup>114</sup> With special permission, Hendricks and LeBoeuf married on 1 April 2004, the third anniversary of the world's first same-sex civil marriages in the Netherlands.<sup>115</sup>

As of 19 March 2004, exclusion from civil marriage had been ended for all same-sex couples living in British Columbia, Ontario, and Quebec, which together have seventy-five per cent of Canada's thirty-two million people. The impact of the proposed federal bill announced by Prime Minister Jean Chrétien on 17 June 2003, and published that same day, has therefore been reduced to extending the decisions of the British Columbia, Ontario, and Quebec Courts of Appeal in *Halpern*, *EGALE*, and *Hendricks* to the other twenty-five per cent of Canada's population: those living in the other seven provinces and the three territories where no Charter litigation is pending, including my home province of Alberta (which would resist same-sex marriage as strongly as Texas or Utah but for federal jurisdiction over capacity to marry).<sup>116</sup>

The *Proposal for an Act respecting certain aspects of legal capacity for marriage for civil purposes* ("Proposal"), which omits necessary consequential amendments to other federal legislation, reads as follows:

1. Marriage, for civil purposes, is the lawful union of two persons to the exclusion of all others.
2. Nothing in this Act affects the freedom of officials of religious groups to refuse to perform marriages that are not in accordance with their religious beliefs.<sup>117</sup>

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Veng Bun pointed out to me, it is arguable that the Quebec Court of Appeal inadvertently removed any civil law obstacle in Quebec to valid simultaneous polygamy (a marriage of three or more persons). But see *Criminal Code*, s. 290 (prohibiting simultaneous marriage with more than one person), and the astonishing s. 293 (prohibiting "practis[ing] ... any form of polygamy, or ... any kind of conjugal union with more than one person at the same time, whether or not it is by law recognized as a binding form of marriage," and requiring no proof of "hav[ing] or intend[ing] to have sexual intercourse"). Groups of three or more adults living together in "conjugal unions" outside of marriage, beware!

<sup>114</sup> See Cabinet du ministre de la Justice et Procureur général, Communiqué, "Mariages entre conjoints de même sexe autorisés au Québec" (19 March 2004), online : Gouvernement du Québec <<http://communiqués.gouv.qc.ca/gouvqc/communiqués/GPQF/Mars2004/19/c2114.html>>.

<sup>115</sup> See Brian Daly, "Quebec's First Same-Sex Marriage Legally Unites Partners of 31 Years" *The Globe and Mail* (2 April 2004) A7.

<sup>116</sup> As a result of the *Marriage Amendment Act, 2000*, S.A. 2000, c. 3, ss. 4-5, the *Marriage Act*, R.S.A. 2000, c. M-5, purports in subsection 1(c) to define "marriage" as "a marriage between a man and a woman" and in section 2 to override sections 2 and 7 to 15 of the Charter, but is almost certainly ultra vires the Alberta legislature.

<sup>117</sup> Canada, Department of Justice, "Fact Sheet: Reference to the Supreme Court of Canada on Civil Marriage and the Legal Recognition of Same-Sex Unions" (January 2004), online: Department of

The government of Prime Minister Jean Chrétien announced on 17 July 2003 that it had referred to the Supreme Court three questions about the *Proposal*, while the government of Prime Minister Paul Martin announced on 28 January 2004 that it had added a fourth question. Together these are:<sup>118</sup>

1. Is the annexed *Proposal* ... within the exclusive legislative authority of the Parliament of Canada? If not, in what particular or particulars, and to what extent?
2. If the answer to question 1 is yes, is section 1 of the proposal, which extends capacity to marry to persons of the same sex, consistent with the ... *Charter* ... ? If not, in what particular or particulars, and to what extent?
3. Does the freedom of religion guaranteed by paragraph 2(a) of the ... *Charter* ... protect religious officials from being compelled to perform a marriage between two persons of the same sex that is contrary to their religious beliefs?<sup>119</sup>
4. Is the opposite-sex requirement for marriage for civil purposes, as established by the common law and set out for Québec in s. 5 of the *Federal Law—Civil Law Harmonization Act, No. 1* [S.C. 2001, c. 6] consistent with the ... *Charter* ... ? If not, in what particular or particulars and to what extent?<sup>120</sup>

*In the Matter of a Reference by the Governor in Council concerning the Proposal for an Act respecting certain aspects of legal capacity for marriage for civil purposes* (No. 29866) is scheduled to be heard by the Supreme Court on 6-8 October 2004. If the Court answers “Yes, Yes, Yes, No (the opposite-sex requirement is completely invalid)”, the federal government plans to introduce the proposed bill in the House of Commons in 2005.

It seems very likely that a majority of the Supreme Court will: (i) agree with the opinion of ten of eleven judges in the lower courts that “the opposite-sex requirement for marriage for civil purposes” is inconsistent with the Charter (the five judges of the Quebec Court of Appeal expressed no opinion on this question); (ii) find that the proposed bill removing the requirement respects both the equality rights of same-sex

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Justice Canada <[http://www.canada.justice.gc.ca/en/news/fs/2004/doc\\_31110.html](http://www.canada.justice.gc.ca/en/news/fs/2004/doc_31110.html)> [“Reference to the Supreme Court”].

<sup>118</sup> See Canada, Department of Justice, News Release, “Government of Canada Reaffirms Its Position on Supreme Court Reference” (28 January 2004), online: Department of Justice <[http://www.justice.gc.ca/en/news/nr/2004/doc\\_31106.html](http://www.justice.gc.ca/en/news/nr/2004/doc_31106.html)>; Canada, Department of Justice, “Fact Sheet: Background: Civil Marriage and the Legal Recognition of Same-sex Unions” (29 March 2004), online: Department of Justice <[http://www.justice.gc.ca/en/news/fs/2004/doc\\_31108.html](http://www.justice.gc.ca/en/news/fs/2004/doc_31108.html)>. The only advantage of the fourth question is that it will permit the Supreme Court to make it clear that the Charter requires (and does not merely permit) equal access to civil marriage. Same-sex couples around the world will be able to cite the Court’s reasoning on this question.

<sup>119</sup> See art. 367 C.C.Q. None of the lower courts suggested that the Charter would require equal access for same-sex couples to *religious* marriage. See *EGALE* (C.A.), *supra* note 91 at paras. 133-34, 181; *Halpern* (C.A.), *supra* note 96 at para. 138; *Halpern* (Sup. Ct.), *supra* note 78 at paras. 7-11, 124, 263; *Hendricks*, *supra* note 83 at paras. 28-30, 164-71.

<sup>120</sup> “Reference to the Supreme Court”, *supra* note 117.

couples under section 15(1) and freedom of religion under section 2(a); and (iii) find that the bill is within the exclusive authority of Parliament under subsection 91(26) of the *Constitution Act, 1867* because it is confined to capacity to marry.<sup>121</sup> These probable answers to the reference questions will be a logical extension of *M. v. H.*, and will be consistent with recent decisions of the Supreme Judicial Court of Massachusetts (the first *final* appellate court in the world to order the issuance of civil marriage licences to same-sex couples, after a 180-day suspension period to allow for the adjustment of legislation),<sup>122</sup> and potential future decision(s) of one or both of South Africa's highest courts (the Supreme Court of Appeal and the Constitutional Court).<sup>123</sup>

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<sup>121</sup> The formalities of marriage, and most other aspects of family law (except for divorce), fall under the jurisdiction of the provincial and territorial legislatures under the *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, ss. 92(12)-(13).

<sup>122</sup> See *Goodridge v. Department of Public Health*, 798 N.E.2d 941 (Mass., 18 November 2003) (The Massachusetts constitution requires equal access to civil marriage for same-sex couples); *Re the Opinions of the Justices to the Senate*, 802 N.E.2d 605 (Mass., 3 February 2004) (a separate law establishing "civil unions" for same-sex couples only is not sufficient). The Supreme Judicial Court has the final say on interpretation of the Massachusetts constitution. Its decisions ending the exclusion of same-sex couples from civil marriage, effective 17 May 2004, can be overruled only by an amendment to the Massachusetts constitution or an amendment to the US constitution. On 29 March 2004, the Massachusetts legislature gave preliminary approval to a proposed amendment to the state's constitution ("only the union of one man and one woman shall be valid or recognized as a marriage ... Two persons of the same sex shall have the right to form a civil union ..."), but even if the legislature approves the proposed amendment a second time in 2005, it seems unlikely that a majority of voters would support it (with the possible effect of "divorcing" thousands of married same-sex couples) in a referendum in November 2006. The proposed amendment to the US constitution ("[m]arriage in the United States shall consist only of the union of a man and a woman") is unlikely to be adopted by the federal Congress or ratified by the necessary 38 states, because capacity to marry has always been regulated by state law. Thus, the decisions of the Supreme Judicial Court of Massachusetts are likely to stand and represent the beginning of slow, turbulent, 20 to 40-year process of ending the exclusion of same-sex couples from civil marriage in the US. See *Perez v. Lippold*, 198 P.2d 17, 32 Cal. 2d 711 (Cal., 1948) (first judicial invalidation of a law prohibiting different-race marriage, with the dissent citing South Africa as a positive model of racial segregation in marriage); *Loving v. Virginia*, 388 U.S. 1, 18 L. Ed. 2d 1010 (1967) (invalidating similar laws that remained in 16 states). The striking differences between Canada and the US on this issue are: (i) that it would almost be politically unthinkable for the federal government to invoke section 33 of the Charter, or propose a permanent amendment to the Charter, to override the Supreme Court's judgment in the same-sex marriage reference; and (ii) that, by late 2005, same-sex couples should be able to marry in all ten provinces and three territories (and have their marriages recognized in federal law), whereas Massachusetts might still be the only one of 50 US states in which same-sex couples are able to marry with the authority of the highest court or the legislature (and the federal *Defense of Marriage Act*, Pub. L. No. 104-199, 110 Stat. 2419 (1996) will preclude recognition of their marriages in federal law, including immigration law). See also Australia, *Marriage Amendment Act 2004* (Cth.) (adding man-woman definition).

<sup>123</sup> Because the exclusion of same-sex partners from civil marriage is the result of a common-law rule, rather than a statute, a constitutional challenge must first be heard by the Supreme Court of Appeal, which will have a chance to reformulate the rule so that it conforms to the South African

I would argue that, after answering the reference questions, the Supreme Court of Canada should provide the following definitive Charter remedy to same-sex couples throughout Canada: (i) a declaration reformulating the federal common-law definition of civil marriage as “the voluntary union of two persons to the exclusion of all others,” with immediate effect; and (ii) with respect to the equivalent definition for Quebec,<sup>124</sup> a declaration reading out the words “a man and a woman” and reading in the words “two persons”, with immediate effect. Although there may be no precedent for providing a remedy in the course of answering reference questions,<sup>125</sup> the Supreme Court would be entirely justified in doing so in the unusual circumstances that led to this reference, especially given that the fourth reference question has made the case *in substance* an appeal of *EGALE*, *Halpern*, and *Hendricks* (even though *in form* it remains a reference). This impressive procedural “lateral arabesque” has allowed the federal government to appeal the main issue, switch to the same side of the issue as the plaintiff same-sex couples, and leave counter-arguments to interveners.

The federal government implied on 17 June 2003 that it had understood from the lower courts’ decisions what the Charter required, that the work of the courts was over, and that the federal government and Parliament would take over and ensure a speedy end to the ongoing violations of the equality rights of same-sex couples across Canada. It has, instead, ended up providing a good example of how *not* to conduct a Charter dialogue with the Supreme Court. The Chrétien government did so first by referring the proposed bill to the Supreme Court instead of introducing it in the House of Commons. This means that the reference will take as long as an appeal would have taken, but would seem to deprive the Supreme Court of the opportunity of providing a remedy for the Charter violation.

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constitution. See *Marie Fourie & Cecilia Bonhuys v. Minister of Home Affairs*, [2003] 10 B.C.L.R. 1092 (S. Afr. Const. Ct.), which was heard instead by the Supreme Court of Appeal on 23 August 2004 as Case no. 232/02. South African case law is such that reformulation by one or both courts is highly probable. See Constitutional Court decisions, *supra* note 59, as well as *National Coalition for Gay & Lesbian Equality v. Minister of Home Affairs* (1999), [2000] 1 B.C.L.R. 39 (S. Afr. Const. Ct.) (same-sex partners entitled to same immigration rights as married opposite-sex partners); *Satchwell v. President of Republic of South Africa* (2003), [2004] 1 B.C.L.R. 1 (S. Afr. Const. Ct.) (same-sex partners of judges entitled to same employment benefits as married opposite-sex partners). See also *Du Plessis v. Road Accident Fund*, [2003] 11 B.C.L.R. 1220 (S. Afr. S.C.A.) (common-law dependant’s action extended to cover surviving partner in a same-sex permanent life relationship similar in other respects to a marriage).

<sup>124</sup> See *Harmonization Act*, *supra* note 89, s. 5.

<sup>125</sup> The *Supreme Court Act*, *supra* note 105, s. 53(4), does not expressly preclude a remedy, stating only that “the Court shall certify to the Governor in Council, for his information, its opinion on each [referred] question, with the reasons for each answer, and *the opinion shall be pronounced in like manner as in the case of a judgment on an appeal to the Court ...*” [emphasis added]. Thanks to Lo Veng Bun for suggesting a possible precedent: *Re Manitoba Language Rights*, [1985] 1 S.C.R. 721, [1985] 2 S.C.R. 347 (Court declares unilingual Manitoba laws invalid but orders period of temporary validity to allow for time for translation into French and re-enactment).

Then, by adding the fourth question and removing any substantive distinction between the reference and an appeal, the Martin government succeeded in delaying the hearing of the reference by nearly six months (from 15 April 2004 to 6 October 2004). The net result is that the proposed bill might not be introduced in the House of Commons before 17 June 2005, the second anniversary of Prime Minister Chrétien's historic announcement. I would argue that same-sex couples in Alberta, Manitoba, New Brunswick, Newfoundland, the Northwest Territories, Nova Scotia, Nunavut, Prince Edward Island, Saskatchewan should not have to wait a single day beyond the Supreme Court's judgment in the reference to be granted equality. Nor should they have to start their own Charter cases in their provincial or territorial courts (which could take five years to reach the Supreme Court), just in case (even after the reference judgment) either the House of Commons or the Senate does not pass the proposed bill.<sup>126</sup>

If the Supreme Court provides a remedy, the proposed bill will not be necessary, except to codify the Supreme Court's remedy in federal legislation. But if the bill goes ahead, its chances were greatly improved by the results of the 28 June 2004 federal election, in which it was one of the main issues. The Conservative Party stated its belief that "Parliament, not unelected judges, should have the final say on contentious social issues like the definition of marriage," and promised to "withdraw the current marriage reference ... and hold a free vote in Parliament."<sup>127</sup> Although party leader, Stephen Harper, would not say whether he would invoke section 33 of the Charter to protect the "one woman, one man" definition of marriage from review by the Supreme Court, a Conservative MP was quoted as saying: "Well the heck with the courts, eh. You know, one of these days we in this country are going to stand up and say, the politicians make the laws and the courts do not. The courts interpret that law. And if we don't like that interpretation there's the Notwithstanding clause in the Charter ..."<sup>128</sup> If the results of the election are treated as a "referendum" on this aspect of the Conservative platform, 56.7 per cent of voters supported either the Liberal Party (36.7 per cent) or a party that included unequivocal support for marriage equality in its platform: the New Democratic Party (15.7 per cent) or the Green Party (4.3 per cent). Coincidentally, a poll conducted between 16 and 21 June 2004 found that 57 per cent of respondents (including 77 per cent of eighteen to twenty-nine-year-olds) agree that "gays and lesbians should be allowed to get married."<sup>129</sup>

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<sup>126</sup> See the Senate's 21 January 1991 defeat of Bill C-43 on abortion (*Debates of Senate*, 34th Parl., No. 134). As of 7 September 2004, Charter cases were pending in Manitoba and Nova Scotia, and had succeeded in the Yukon: See *Dunbar v. Yukon* (14 July 2004), 2004 YKSC 54, online: EGALE Canada <<http://www.egale.ca/extra/yukon.pdf>>.

<sup>127</sup> Conservative Party of Canada, *Platform 2004* at 14, online: Conservative Party of Canada <<http://www.conservative.ca/platform/english/>>.

<sup>128</sup> "Randy White Interview, May 19, 2004" (25 June 2004), online: Liberal Party of Canada <[http://www.liberal.ca/news\\_e.aspx?site=news&news=838](http://www.liberal.ca/news_e.aspx?site=news&news=838)>.

<sup>129</sup> "Canadians Reject Ban on Religious Symbols or Clothes in Schools: Majority Sees Racial or Religious Background of Party Leaders as Irrelevant" (1 July 2004) online: Centre for Research and

### III. Indirect Discrimination Claims: From Formal to Substantive Legal Equality?

From 1985 (when sexual orientation discrimination was prohibited only in Quebec and equality for same-sex couples was not seen as an issue) to 1995 (when the Supreme Court held in *Egan* that sexual orientation is an “analogous ground” under section 15(1) but that discrimination against unmarried same-sex couples can be justified under section 1) to 2005 (likely the year of the Supreme Court decision holding that the Charter requires equal access to civil marriage for same-sex couples), the Charter-assisted achievement of formal legal equality by LGB individuals and same-sex couples in Canada has been extraordinarily quick. A general principle has been established that direct sexual orientation discrimination in legislation or other governmental action is contrary to section 15(1), whether the discrimination relates to the criminal law, access to employment, the rights of unmarried same-sex couples, the rights of actual or prospective LGB parents, or (subject to confirmation by the Supreme Court) access to civil marriage.

Apart from “tidying up” remaining pockets of clearly unjustifiable direct sexual orientation discrimination in the public sector, future Charter litigation will concern the limits of this formal legal equality and the section 15(1) general principle. For example, are there exceptional situations in which the Charter (especially freedom of religion in subsection 2(a)) permits direct sexual orientation discrimination? Does the Charter prohibit indirect sexual orientation discrimination (neutral rules that disproportionately affect LGB individuals or same-sex couples)?

Because I have discussed potential conflicts between freedom from direct sexual orientation discrimination and freedom of religion at length elsewhere,<sup>130</sup> I will instead focus on claims of indirect discrimination.

Once a group that has historically faced pervasive direct discrimination achieves formal legal equality (the elimination of such discrimination in legislation and public sector rules and policies, and legal protection against such discrimination in the public and private sectors, although specific decisions to discriminate by individual public and private sector actors may continue), attention shifts to indirect discrimination. In other words, there is a shift from claims that “we are the same” in all relevant respects (and therefore entitled to formal legal equality) to “we are different” in some relevant respects that require accommodation (in order to achieve substantive equality). Given the paucity (at the Supreme Court level) of successful Charter claims for indirect discrimination violating section 15(1),<sup>131</sup> LGB individuals and same-sex couples can

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Information on Canada <[http://www.cric.ca/pdf\\_re/new\\_canada\\_redux/new\\_canada\\_redux\\_summary.pdf](http://www.cric.ca/pdf_re/new_canada_redux/new_canada_redux_summary.pdf)> at 4 (Enviroics poll for the Centre for Research and Information on Canada).

<sup>130</sup> See Robert Wintemute, “Religion vs. Sexual Orientation: A Clash of Human Rights?” (2002) 1 J.L. & Equality 125; see also Rémi Samson, “Oser dire l’homosexualité en droit ... et la rendre intelligible” (2004) 49 McGill L.J. 815.

<sup>131</sup> Apart from *Vriend*, *supra* note 33, in which the disproportionate impact was obvious and particularly serious, the only successful indirect discrimination claim at the Supreme Court level

expect an uphill struggle in persuading courts that neutral rules must be invalidated (for the benefit of all) to accommodate their differences or that they must be exempted from such rules.

Indirect discrimination arguments have already been made, and will continue to be made, with regard to the criminal law on sexual activity. The Criminal Code contains no direct sexual orientation discrimination, in the sense of overt distinctions between male-female, male-male, and female-female sexual activity, and the Charter would prevent the introduction of any such discrimination. What the Code contains instead are neutral (formally equal) rules: (a) which can be indirectly discriminatory against LGB individuals, even if they are applied neutrally, because LGB individuals might be more likely to want to break them; and (b) which can, in their practical application by police and customs officials as opposed to their legislative formulation, be directly discriminatory against LGB individuals because they are not, in fact, applied neutrally.

The higher age of consent for anal intercourse in section 159 of the Criminal Code is an example of a rule in category (a). On its face, it is neutral in applying both to male-female and male-male anal intercourse. In practice, however, anal intercourse is much more important in male-male sexual activity than in male-female sexual activity, in which the generally preferred alternative is vaginal intercourse. Thus, section 159 has been struck down by the Quebec Court of Appeal in *R. v. Roy*<sup>132</sup> and by the Ontario Court of Appeal in *R. v. M.(C.)*.<sup>133</sup> Under section 15(1), all three judges in *Roy* found indirect sexual orientation discrimination against gay men, as did Abella J.A. (as she then was) in *M.(C.)* (the other two judges found direct age discrimination). Under section 1, all six judges held that “prevention of HIV transmission” is not a proportionate justification for criminalization of private, consensual sexual activity above an age when it would otherwise be legal. Unfortunately, the federal government declined to appeal either decision to the Supreme Court (thereby denying the Court the opportunity to affirm) and has yet to repeal section 159,<sup>134</sup> which arguably remains in force in provinces and territories other than Ontario and Quebec.<sup>135</sup>

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would appear to be *Eldridge v. British Columbia (A.G.)*, [1997] 3 S.C.R. 624, 151 D.L.R. (4th) 577 (sign-language interpreters for medical patients with hearing impairments). Two claims of alleged indirect sex discrimination have been rejected: *Thibaudeau v. Canada*, [1995] 2 S.C.R. 627, 124 D.L.R. (4th) 449; *Symes v. Canada*, [1993] 4 S.C.R. 695, 110 D.L.R. (4th) 470. In *Sauvé v. Canada (Chief Electoral Officer)*, [2002] 3 S.C.R. 519, 294 N.R. 1, the majority found it unnecessary to consider section 15(1), but noted (at para. 60) the disproportionate effect on Aboriginal Canadians of the exclusion of many prisoners from the section 3 right to vote. The minority found (at paras. 202-204) that the disproportionate effect was insufficient to violate section 15(1).

<sup>132</sup> [1998] R.J.Q. 1043, 125 C.C.C. (3d) 442 [*Roy*].

<sup>133</sup> (1995), 98 C.C.C. (3d) 481 [*M.(C.)*].

<sup>134</sup> The federal Department of Justice has consulted on the possibility of an equal age of consent of 16 or even 18 for all sexual activity (including anal intercourse). See Department of Justice, *Child Victims and the Criminal Justice System* (November 1999), online: Department of Justice

It is possible that other neutral rules could be challenged as indirect sexual orientation discrimination violating section 15(1), when they affect activities that are possibly of greater importance in the sexual culture of the LGB minority than that of the heterosexual majority. Examples could include sexual activity that involves sado-masochism or multiple participants, or takes place in outdoor locations, public toilets, bathhouses, or “backrooms” of bars, as well as literature, erotica, and pornography depicting such activity. However, the Supreme Court’s only decision to date on such a challenge suggests that it is not yet willing to take seriously claims that the law has failed to accommodate the cultural differences of the LGB minority in the way that it would be required to accommodate the cultural differences of an ethnic or religious minority.

In *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*,<sup>136</sup> it was argued that the Supreme Court’s interpretation of the definition of “obscene” in subsection 163(8) of the Criminal Code (“any publication a dominant characteristic of which is the undue exploitation of sex, or of sex and crime, horror, cruelty [or] violence”) should not apply to literature, erotica, or pornography depicting same-sex sexual activity. In *R. v. Butler*,<sup>137</sup> the Court had adopted a new, feminist-inspired, harm-based interpretation of subsection 163(8) in order to reconcile the prohibition of obscene publications with the right to freedom of expression in section 2(b) of the Charter. The *Butler* definition of obscenity effectively legalized hardcore pornography in Canada, as long as it does not involve children, violence, or treatment that is degrading or dehumanizing if the material “creates a substantial risk of harm.”<sup>138</sup>

The violence and “degrading or dehumanizing” exceptions have, however, been used by police and customs officials against lesbian and gay erotica, especially depictions of same-sex sado-masochism or anal intercourse. In *Little Sisters*, the appellants argued that *Butler*:

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<[http://canada.justice.gc.ca/en/cons/child/consul3.html#3\\_8](http://canada.justice.gc.ca/en/cons/child/consul3.html#3_8)>. Even in Ontario, police have attempted to enforce section 159 at least once since *M.(C.)*. See *Lucas v. Toronto Police Service Board* (2001), 54 O.R. (3d) 715, 148 O.A.C. 215 (Sup. Ct. (Div. Ct.)).

<sup>135</sup> In *Ligue Catholique*, *supra* note 112 at paras. 27-28, the Quebec Court of Appeal suggested that *EGALE* (C.A.) and *Halpern* (C.A.) are binding on all Canadian courts, because the federal government failed to appeal. If this were true, *M.(C.)* should have been binding in *Roy*. Until the Supreme Court clearly rules otherwise, it is unlikely that one province or territory’s courts will consider themselves bound by judgments of another province or territory’s courts on a question of federal law. The Alberta Court of Appeal did not consider the Ontario Court of Appeal’s decision in *Haig*, *supra* note 31, as binding in *Vriend v. Alberta* ((1996) 184 A.R. 351, 141 D.L.R. (4th) 44), even though the main issue (application of section 15(1) of the federal Charter to the omission of sexual orientation from anti-discrimination legislation) was the same.

<sup>136</sup> [2000] 2 S.C.R. 1120, 193 D.L.R. (4th) 193 [*Little Sisters*]. See also Brenda Cossman, “Disciplining the Unruly: Sexual Outlaws, *Little Sisters* and the Legacy of *Butler*” (2003) 36 U.B.C. L. Rev. 77.

<sup>137</sup> [1992] 1 S.C.R. 452, 89 D.L.R. (4th) 449 [*Butler*].

<sup>138</sup> *Ibid.* at para. 136.

cannot be freely transferred from heterosexual erotica to gay and lesbian erotica, ... [which] plays an important role in providing a positive self-image to gays and lesbians, who may feel isolated and rejected in the heterosexual mainstream, ... [which] in the context of gay and lesbian culture is a core value, ... [and which] plays a different role in a gay and lesbian community than it does in a heterosexual community ... [T]he *Butler* approach based ... on heterosexual norms is oblivious to this fact. Gays and lesbians are defined by their sexuality and are therefore disproportionately vulnerable to sexual censorship.<sup>139</sup>

All nine judges rejected the argument. Justice Ian Binnie held that:

[G]ay and lesbian culture as such does not constitute a general exemption from the *Butler* test ... Portrayal of a dominatrix engaged in the non-violent degradation of an ostensibly willing sex slave is no less dehumanizing if the victim happens to be of the same sex, and no less (and no more) harmful in its reassurance to the viewer that the victim finds such conduct both normal and pleasurable. Parliament's concern was with behavioural changes in the *voyeur* that are potentially harmful. There is no reason to restrict that concern to the heterosexual community.<sup>140</sup>

He added that the *Butler* test is gender neutral and not solely concerned with violence by men against women. Thus, he dismissed the arguments of the intervener, Women's Legal Education and Action Fund (the original proponent of the *Butler* test) "that sado-masochism performs an emancipatory role in gay and lesbian culture and should therefore be judged by a different standard from that applicable to heterosexual culture," and that "gender discrimination is not an issue in 'same-sex erotica.'"<sup>141</sup> Justice Iacobucci agreed with Justice Binnie, writing that "*Butler* should apply to all obscenity, regardless of the sexual orientation of its audience."<sup>142</sup>

Although the Court found that neither the *Butler* test, nor the Customs Tariff's ban on the importation of obscene publications, contained any direct or indirect sexual orientation discrimination,<sup>143</sup> the application of the tariff by Canada Customs to Little Sisters Book and Art Emporium (a lesbian and gay bookstore in Vancouver) did constitute direct sexual orientation discrimination (category (b), above). The trial judge found that "up to 75 per cent of the material from time to time detained and examined for obscenity [by Customs] was directed to homosexual audiences."<sup>144</sup> Justice Binnie concluded that "the appellants suffered differential treatment [based on sexual orientation] when compared to importers of heterosexually explicit material," that it was "discriminatory" because it could be interpreted as "demeaning gay and

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<sup>139</sup> *Supra* note 136 at para. 53.

<sup>140</sup> *Ibid.* at para. 60.

<sup>141</sup> *Ibid.* at paras. 63-64.

<sup>142</sup> *Ibid.* at para. 199.

<sup>143</sup> Justice Iacobucci, joined by Justices Arbour and LeBel, would have struck down this ban as containing procedural defects contrary to subsection 2(b) (*ibid.* at paras. 214-53).

<sup>144</sup> *Ibid.* at para. 113.

lesbian values”, and that it was not “prescribed by law” and could not, therefore, be justified under section 1.<sup>145</sup> By way of remedy,<sup>146</sup> he declared that:

[t]he rights of the appellants under s. 2(b) and s. 15(1) of the *Charter* have been infringed [because] [t]hey have been targeted as importers of obscene materials despite the absence of any evidence to suggest that gay and lesbian erotica is more likely to be obscene than heterosexual erotica, or that the appellants are likely offenders in this regard.<sup>147</sup>

Indirect discrimination claims by LGB individuals are similar to those by religious minorities. The only possible remedies are usually invalidation of the neutral rule for the benefit of all, or exemption of the minority from the rule.<sup>148</sup> In *Little Sisters*, it was unlikely that the Supreme Court would abolish the “violence” or “degrading or dehumanizing” branches of the *Butler* test (for the benefit of all interested in pornography) because of their allegedly disproportionate effect on LGB individuals, or that the Court would create an exemption from these branches for depictions of same-sex sexual activity. A minority’s entitlement to formal legal equality must be well-established legally, and accepted by the majority socially, before indirect discrimination claims will be taken seriously. Otherwise, some members of the majority are likely to complain about “special rights” if the minority is exempted from a neutral rule. The Christian majority might understand why the Sikh minority is entitled to an exemption from rules on hardhats at construction sites,<sup>149</sup> but the heterosexual majority is currently unlikely to accept that the LGB minority should be exempted from rules relating to pornography or sexual activity that the heterosexual majority must obey.

Despite judicial resistance, LGB individuals will continue to make indirect discrimination claims, but will probably seek the remedy of invalidation of the neutral rule, rather than exemption from it. With regard to the criminal law on sexual activity, this will mean attempting to expand the sexual freedom of all, either because a particular aspect of sexual freedom enjoys independent protection under section 7 (or subsection 2(b))<sup>150</sup> of the Charter, or because the neutral rule restricting this freedom

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<sup>145</sup> *Ibid.* at paras. 116, 118, 123, 141.

<sup>146</sup> By a six to three vote, the Court rejected the appellants’ attempt to have the provision of the Customs Tariff that is used to harass them struck down. With hindsight, the appellants should perhaps have claimed compensatory or even punitive damages, which might be the only effective way to deter administrative officials from enforcing non-discriminatory laws in a discriminatory manner. The harassment of the appellants by Canada Customs has continued. See *Little Sisters Book & Art Emporium v. Canada (Commissioner of Customs & Revenue)* (2003), 105 C.R.R. (2d) 119 (B.C.S.C.).

<sup>147</sup> *Little Sisters*, *supra* note 136 at para. 154.

<sup>148</sup> See *Ontario Human Rights Commission v. Simpsons-Sears*, [1985] 2 S.C.R. 536, 23 D.L.R. (4th) 321 (Seventh-Day Adventist employee who was obliged to work on Saturdays).

<sup>149</sup> See *Bhinder v. Canadian National Railway Co.*, [1985] 2 S.C.R. 561, 23 D.L.R. (4th) 481.

<sup>150</sup> See *R. v. Glad Day Bookshops Inc.* (2004), 183 C.C.C. (3d) 449 (Ont. Sup. Ct.) (a judgment upholding a subsection 2(b) freedom of expression claim by an LGB bookstore without using the words “lesbian” or “gay” or “same-sex”).

has a disproportionate effect on LGB individuals contrary to section 15(1). The case of a police raid on Goliath's Sauna & Texas Lounge ("Goliath's") in Calgary in December 2002, currently before a criminal trial court, could reach the Supreme Court. The raid resulted in the prosecution of one owner, six employees, and thirteen patrons under section 210 of the Criminal Code, which prohibits keeping, being found in, or permitting a place to be used as a "common bawdy-house", defined in subsection 197(1) as a place that is kept for "the practice of acts of indecency".<sup>151</sup> Those contesting the charges will argue that consensual, non-commercial sexual activity between adult men in a place that is private (except for consenting witnesses) is not "indecent", and that "acts of indecency" must be interpreted (as was "obscenity" in *Butler*) in a way that respects the section 7 liberty and section 15(1) equality rights of gay and bisexual men.<sup>152</sup> For many such men, anonymous sexual encounters in bathhouses are an important part of their sexual culture, even if this is not the case for most of the heterosexual majority.

Indirect discrimination claims, like those that can be advanced in the case of Goliath's, will be challenging for both judicial doctrine and solidarity within the LGB community. While some LGB individuals would see such claims as part of accommodation of a shared "group difference" and a necessary part of substantive equality, other LGB individuals would characterize such claims as being about aspects of "sexual freedom" that do not interest them (e.g., bathhouses, semi-public sexual activity, sado-masochism) but do interest many heterosexual individuals. Expert witnesses might be required in order to show the disproportionate interest of LGB individuals in a particular sexual activity, which other expert witnesses might contest.

Outside the criminal law, other indirect discrimination claims (which might be less controversial for courts and for LGB solidarity) could relate to neutral rules regarding the recognition of unmarried couples (e.g., a requirement of a joint residence or bank account), or access to assisted reproduction. Same-sex couples could argue that, because of common differences in the way their relationships are structured or the biological fact that they can only have children (with genetic input from one partner) through assisted reproduction, it is more difficult for them to comply with these rules than it is for opposite-sex couples.

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<sup>151</sup> See Patrick Brehour, "Calgary Bathhouse Raid Angers Gays" *The Globe and Mail* (18 December 2002) A11. "Bawdy Work: Getting the Criminal Code Out of Your Sex Life", online: xtra.ca <<http://www.xtra.ca/bawdywork/bawdySeries.asp>> (ongoing series by *Xtra!*, *Xtra! West* and *Capital Xtra!* on Canada's laws on sexual activity).

<sup>152</sup> Terence Semenuk J. ruled that "males masturbating in front of other males at a gay premise may constitute indecent acts within the meaning of [s. 197(1)]." See Amy Steele, "Tub Wonks to Be Indecent" *Xtra! West* (10 June 2004), online: xtra.ca <<http://www.xtra.ca/site/toronto2/archvx/body522.shtml>>.

An example of accommodation of such a difference is found in the *Immigration and Refugee Protection Regulations*,<sup>153</sup> which exempt a same-sex or opposite-sex common-law partner from the one-year cohabitation requirement if, “due to persecution or any form of penal control”, they have been unable to cohabit with the person sponsoring them for immigration to Canada.<sup>154</sup> In *M. v. H.*, the Supreme Court stressed that “neither opposite-sex couples nor same-sex couples are required to fit precisely the traditional marital model to demonstrate that the relationship is ‘conjugal,’” and that “the approach to determining whether a relationship is conjugal must be flexible.”<sup>155</sup>

An example of failure to accommodate, currently before the Ontario Court of Appeal, is the *Processing and Distribution of Semen for Assisted Conception Regulations*, which (combined with other rules or policies on eligible donors and non-donor insemination) permit a man who would otherwise be banned from donating semen to a clinic (because he has engaged in sexual activity with another man since 1977 or is aged forty or more) nonetheless to make a donation, but only if the woman who will receive it is his spouse or sexual partner, and not merely his friend.<sup>156</sup> This requirement is more likely to be satisfied by a heterosexual woman who is having difficulty conceiving with her spouse or sexual partner, than by a lesbian woman who wishes to combine the advantages of clinic insemination and those of a known donor.

## Conclusion

Since 17 April 1985, progress towards achieving formal legal equality for LGB individuals and same-sex couples in Canada has been dramatic. In only two decades, Canada has moved from an age of consent of twenty-one for same-sex sexual activity, and only one jurisdiction out of thirteen having an anti-discrimination law, to “coast-to-coast” anti-discrimination legislation, legislation on “hate crimes” and “hate speech”,<sup>157</sup> comprehensive equal treatment for unmarried same-sex and opposite-sex couples (including in relation to adoption) at the federal level and in the majority of

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<sup>153</sup> Canada S.O.R./96-254.

<sup>154</sup> *Immigration and Refugee Protection Regulations*, S.O.R./2004-227, s. 1(2). See also Nicole LaViolette, “Coming Out to Canada: The Immigration of Same-Sex Couples Under the *Immigration and Refugee Protection Act*” (2004) 49 McGill L.J. XXX.

<sup>155</sup> *Supra* note 49 at paras. 59-60.

<sup>156</sup> See *Jane Doe v. Canada (A.G.)* (2003), 68 O.R. (3d) 9 (Sup. Ct.).

<sup>157</sup> On “hate crimes”, see *Criminal Code*, *supra* note 26, s. 718.2(a), as am. by S.C. 1995, c. 22, s. 6: “evidence that the offence was motivated by bias, prejudice or hate based on ... sexual orientation ... shall be deemed to be aggravating circumstances” causing a sentence to be increased. On “hate speech”, see *Criminal Code*, ss. 318-319, as am. by S.C. 2004, c. 14, Svend Robinson MP’s Private Member’s Bill C-250, *An Act to Amend the Criminal Code*, 2d Sess., 37th Parl., 2002, which makes it a criminal offence “by communicating statements, other than in private conversation, [to] wilfully promot[e] hatred against any [section of the public distinguished by ... sexual orientation]”, subject to a new defence when “in good faith, the person expressed or attempted to establish by an argument an opinion on a religious subject or an opinion based on a belief in a religious text.”

provinces and territories, equal access to civil marriage in at least three provinces and one territory, and the prospect of a Supreme Court decision requiring equal access to civil marriage across the country. Although the Charter cannot take sole credit for this progress, it has served to crystallize as constitutional principle the anti-discrimination rules adopted voluntarily by legislatures in the late 1980s and early 1990s, which resulted from political campaigns made possible by increasing social acceptance of LGB individuals. Charter litigation has permitted LGB individuals and same-sex couples to focus this new constitutional principle on remaining areas of formal legal inequality and gradually to compel their removal by courts and legislatures.

Once formal legal equality has been achieved, and proves inadequate, there is a tendency among equality-seeking groups to dismiss it as trivial, even insulting. Of course, formal legal equality on its own is not enough. Neutral rules that exclude LGB individuals and same-sex couples disproportionately must be challenged. And full social equality will require education and a substantial change in attitudes among the heterosexual majority. Its attainment might be defined as the day when two men or two women will be able to kiss and hold hands in public anywhere in Canada, without fearing a violent reaction from passersby.<sup>158</sup>

But formal legal equality on its own has tremendous material and symbolic value, which only those who have been denied it for many years can fully appreciate. Recalling my closeted secondary school years (1968-1974) when the sight of the word “homosexual” in print sent a chill down my spine,<sup>159</sup> and having devoted a substantial part of my adult life to the struggle to achieve formal legal equality, I know that it is far from trivial. As an expatriate Canadian, I am extremely proud of Canada’s leadership in this area of human rights law, and hope that it will inspire the majority of US states and the vast majority of the 191 member states of the United Nations, where formal legal equality for LGB individuals and same-sex couples remains a distant dream.

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<sup>158</sup> See “Gay Kiss Too Hot for Canadian School” (18 April 2004), online: 365gay <<http://www.365gay.com/newscon04/04/041804bckiss.htm>> (North Vancouver high school drama students told to remove female-female kiss from play); “Lesbian Kiss Lands Canadian Bar in Trouble” (4 May 2004), online: 365 gay <<http://www.365gay.com>> (Red Deer, Alberta bar owner tells female-female couple to stop kissing or leave).

<sup>159</sup> See Robert Wintemute, “Lesbian and Gay Inequality 2000: The Potential of the Human Rights Act 1998 and the Need for an Equality Act 2002” [2000] *Eur. H.R. L. Rev.* 603 at 604.