

COMMENT

Case Comment on *M v. H*

BRUCE MACDOUGALL*

I. INTRODUCTION AND FACTS

IN *M v. H*,¹ THE SUPREME COURT OF CANADA spoke significantly for the third time in recent years about the place of homosexuals in Canadian law and society. In particular, it is about the meaning of non-discrimination on the basis of sexual orientation under s. 15(1) of the *Canadian Charter of Rights and Freedoms*.² In *Egan v. Canada*,³ the Court confirmed that s. 15(1) protects against non-discrimination. However, The majority of the Court, gave that protection little practical significance because it was held to be justifiable under s. 1 to deny homosexuals the benefits involved in that case that were available to heterosexuals. In *Vriend v. Alberta*,⁴ the Court gave some meaning to the protection under s. 15(1) by saying that sexual orientation constitutionally ought to be included in human rights laws. In *M v. H*, the Court addressed again the issue of gay and lesbian access to equal benefits and the place of homosexuals under Canadian law and in Canadian society. As in the other judgments, what the Court left unaddressed is as interesting and significant as what it did address. The case is also interesting in containing, especially in one judgment, reminders of the traditional judicial hostility to homosexuals and the disbelief that the homosexual is the equal of the heterosexual. Due to the very different ap-

* Associate Professor, Faculty of Law, University of British Columbia.

¹ (1999), 171 D.L.R. (4th) 577 (S.C.C.). All subsequent references to *M v. H* are to this report, except at notes 6 and 7.

² Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Charter*]. One might argue that there is a fourth case, *Canada (Attorney-General) v. Mossop* (1993), 100 D.L.R. (4th) 658 (S.C.C.).

³ (1995), 124 D.L.R. (4th) 609 (S.C.C.) [hereinafter *Egan*].

⁴ (1998), 156 D.L.R. (4th) 385 (S.C.C.) [hereinafter *Vriend*].

proaches in the various judgments, I will make most of my comments in the context of discussing each particular judgment.

M and H are two women who had a relationship that lasted somewhere between five and ten years. During that time their finances had ups and downs. They lived in a home H owned before the relationship started. H paid for the upkeep of the home, but the parties agreed to share living expenses and household responsibilities equally. Their main source of income during the relationship was their own business. H's financial contribution was greater throughout the relationship. M appears to have devoted more time to domestic tasks than to the business. When the relationship ended, M moved out. M started an action for partition and sale of the house and a declaration that she was beneficial owner of certain lands and premises. H and the corporate defendants made a cross application. M amended her application to include a claim for support pursuant to the provisions of the *Family Law Act*⁵ and served Notice of a Constitutional Question challenging the validity of the definition of "spouse" in s. 29 of that Act. The trial judge, Epstein J., held that s. 29 of the FLA offended s. 15(1) of the *Charter* and was not saved by s. 1.⁶ H's appeal of that judgment was joined by the Attorney General of Ontario as an intervenor. The Ontario Court of Appeal, by a majority, upheld this decision.⁷ Neither M nor H appealed this decision but the Attorney General of Ontario sought leave to appeal to the Supreme Court of Canada. Leave was granted. Shortly before the appeal was heard by the Supreme Court, M and H concluded a settlement of the financial issues raised in the proceedings.

The main statutory provision impugned was s. 29 of the FLA, in particular its definition of "spouse" as follows:

29. In this Part,

...

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

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

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

⁵ R.S.O. 1990, c. F.3 [hereinafter FLA].

⁶ *M v. H* (1996), 132 D.L.R. (4th) 538 (Ont. Gen. Div.).

⁷ *M v. H* (1996), 142 D.L.R. (4th) 1 (Ont. C.A.).

The definition of “spouse” in s. 1(1) was as follows:

1. (1) In this Act,

...

“spouse” means either of a man and woman who

(a) are married to each other, or

(b) have together entered into a marriage that is voidable or void, in good faith on the part of the person asserting a right under this Act.

II. JUSTICES CORY AND IACOBUCCI

THE TAG TEAM OF JUSTICES CORY AND IACOBUCCI, who wrote so effectively together in *Egan* and *Vriend*, completed the hat-trick in *M v. H*. This time, however, their views were those of the majority of the court, for Lamer CJ., L’Heureux-Dubé, McLachlin and Binnie JJ. concurred. As in *Egan* and *Vriend*, they divided up their judgment, with Cory J. writing on the s. 15 issues and Iacobucci J., the s. 1 issues. They found that s. 29 of the *Family Law Act* violated equality guarantees in s. 15(1) of the *Charter* and could not be justified under s. 1. In the joint introduction to their reasons and setting the tone for their reasons, they wrote that

[t]he crux of the issue is that this different treatment [in s. 29] discriminates in a substantive sense by violating the human dignity of individuals in same-sex relationships.⁸

Cory J. first dealt with the issue of mootness that arose because the original parties to the dispute, M and H, had reached a settlement of the financial issues before the appeal was heard by the Court and thus no longer had a vested economic interest in its outcome. Cory J. said, however, that it was not M or H who sought leave to appeal but rather the Attorney General of Ontario. In any event, even if the appeal were moot it would be appropriate for the court to exercise its discretion in order to decide these important issues. Displaying again the recent sensitivity to gay and lesbian issues that have gone unaddressed by the high court for so long except in the criminal context, Cory J. said that the “social cost” of leaving this matter undecided would be significant.⁹ The trio of judgments of the Supreme Court of Canada on homosexual issues would be much less satisfactory without these characteristically sensitive statements by Cory J. They help to create a sense for gays and lesbians that the legal system may no longer be the forbidding place it traditionally has been.

⁸ *M v. H*, *supra* note 1 at 596–97.

⁹ *Ibid.* at 611.

On the s. 15(1) issue, Cory J. discussed and applied the guidelines set out by Iacobucci J., in the recent decision *Law v. Canada (Minister of Employment and Immigration)*.¹⁰ *Law* states that the s. 15(1) equality guarantee is to be interpreted and applied in a purposive and contextual manner where a formalistic or mechanical approach should be avoided. In *M v. H* the difference among the three main judicial approaches (including the dissent) was essentially a difference regarding the context of the *FLA* and its purpose or effect, in particular s. 29. The case is a demonstration of the inherent faults of the *Law* approach if judges concentrate on the ameliorative purpose of the impugned legislation rather than the discriminatory or exclusionary effect of it. In a complex piece of legislation with a long history, the "purpose" of the legislation can be quite difficult to pin down. There are often different purposes, depending on the source or period one examines. A legislature can have a good purpose but create a terrible effect. Judges can find all sorts of statements surrounding the creation of legislation, particularly socially reformative legislation. Surely the present effect of the legislation is more important for equality concerns than the original context or purpose, a discussion of which consumed so much judicial time in this case. The appropriate approach to s. 15(1) issues, as set out in *Law*, does not emphasise the original purpose at the expense of present effect. Why in this case, the purpose of the *FLA*, rather than the effect of its distinctions, generated so much discussion is anyone's guess. It will be interesting to see how the courts deal with purpose and context in other cases in light of *Law* and whether judicial agreement on ameliorative purpose will be more easily and succinctly reached than in *M v. H*.

As noted by Cory J., according to *Law*, a court should make three broad inquiries in assessing a s. 15(1) claim. The first inquiry is as to whether there is differential treatment assessed on the basis of whether the impugned law draws a distinction on the basis of a personal characteristic or fails to take into account the claimant's already disadvantaged position within Canadian society. Cory J. found that this inquiry in the context of s. 29 of the *FLA* showed differential treatment. Section 29 set out a claim that an *individual* in an opposite-sex couple could make; it was not a claim of the couple. The legislation drew a distinction between M and others based on personal characteristics in that she was barred from making a claim because she had been part of a same-sex couple rather than an opposite-sex couple. Cory J. agreed with the lower courts that two of the three characteristics of a relationship in s. 29 could be met by same-sex couples, namely, a specific degree of permanence and conjugality. The only element of the s. 29 definition of a couple that the claimant did not meet was that her relationship had not been between a man and a woman. There was thus differential treatment. Members of same-sex couples were denied access to

¹⁰ (1999), 170 D.L.R. (4th) 1 (S.C.C.) [hereinafter *Law*].

the dependent spouse support system entirely on the basis of their sexual orientation.

In an oblique reference to his views in *Egan*, Cory J. noted:

Courts have wisely determined that the approach to determining whether a relationship is conjugal must be flexible. This must be so, for the relationships of all couples will vary widely.¹¹

This is a reiteration of what Cory J. stated in *Egan*,¹² which one might have wished to be somewhat stronger here, that gay and lesbian couples do not have to have the “perfect” relationship in order to make a relationship-based claim in the courts. Their relationship does not have to show “perfect” compliance with the traditional heterosexual ideal of what it means to be a couple in order to make a relationship-based claim in the courts. Homosexual relationships do not have to be textbook perfect; heterosexual relationships rarely are.

The second broad inquiry under *Law*, namely whether the claimant was subject to differential treatment on the basis of s. 15(1)’s enumerated or analogous grounds, was easily answered. *Egan* definitively stated that sexual orientation is an analogous ground.

The third broad inquiry is whether the differential treatment discriminates in a substantive sense, bringing into play the purpose of s. 15(1) to remedy such ills as prejudice, stereotyping and historical disadvantage. Cory J. rejected the view that there was no denial of a *benefit* of the law here but only the opportunity to gain access to a court-enforced process. According to Cory J. that was too narrow a view of benefit which should not be limited to an immediate economic benefit, but should also include access to a process that could confer an economic or other benefit. Furthermore, the denial of that benefit contributed to the general vulnerability experienced by individuals in a same-sex relationship and contributed to the idea that being in a same-sex relationship means being in impermanent or non-conjugal relationship. In a strong statement in answer to this third *Law* inquiry, Cory J. said:

The societal significance of the benefit conferred by the statute cannot be overemphasised. The exclusion of same-sex partners from the benefits of s. 29 of the *FLA* promotes the view that M., and individuals in same-sex relationships generally, are less worthy of recognition and protection. It implies that they are to be judged to be incapable of forming intimate relationships of economic interdependence as compared to opposite-sex couples, without regard to their actual circumstances. As the intervenor EGALÉ submitted, such exclusion perpetrates the disadvantages suffered by individuals in same-sex relationships and contributes to the erasure of their existence.¹³

¹¹ *M v. H*, *supra* note 1 at 616.

¹² *Egan*, *supra* note 3 at 672.

¹³ *M v. H*, *supra* note 1 at 623.

This is strong language from the Supreme Court of Canada compared with the attitude of the courts, including the Supreme Court, over the past few decades. In my book, *Queer Judgments*,¹⁴ I examine how the courts over the past decades have repeatedly pathologised and inferiorised homosexuals and homosexuality. Their ability to form worthwhile relationships or indeed to have much worth at all has, in the past, almost never been acknowledged. Courts thought it acceptable not only to ignore homosexual relationships but to ridicule the idea, along with homosexuals in general.¹⁵ We see in *M v. H*, a sea change in attitudes to homosexuals, at least to those in stable relationships.

Iacobucci J. approached his s. 1 analysis by reiterating the governance of the principles set out in *R. v. Oakes*.¹⁷ He stressed the point made in *Vriend* and by Dickson in *Oakes* that the whole point of the *Charter* is to ensure that Canadian society be free and democratic and that the introduction of the *Charter* meant a redefinition of our democracy. Courts are to defer to legislatures on those types of policy decisions that the legislatures are best placed to make. The simple or general claim that the infringement of a right is justified under s. 1 is not however, such a decision. The concept of judicial deference is not to be used to immunise certain kinds of legislative decisions from *Charter* scrutiny. Iacobucci J. engaged in this discussion of judicial deference because of comments made by Bastarache J. which might suggest that at the outset of a s. 1 inquiry the court should discuss the question of *deference* to legislative choices. Iacobucci J. made it clear, however, that the appropriate point to deal with deference is at the remedy stage of the analysis or at a particular point of a s. 1 analysis but not at the outset in a general sense.

In dealing with the first branch of the *Oakes* test—the objective of the legislation—Iacobucci J. had to deal with two purported valid objectives of the *FLA*, the protection of dependent women and the protection of children. As tools to assist in determining whether these were in fact the pressing and substantial objectives of s. 29 of the *FLA*, Iacobucci J. thought that the preamble, was of limited utility, at least in this case. The reference in the preamble to marriage and to the desirability of encouraging and strengthening the role of the family Iacobucci thought misleading. Section 29, at least, dealt with non-married persons as well as those married. The statute dealt with the situation on the break-up of a family rather than its strengthening. Preambles are strange creatures and fortunately do not often appear in statutes. They tend to appear

¹⁴ B. MacDougall, *Queer Judgments: Homosexuality, Expression and the Courts in Canada* (Toronto: University of Toronto Press, 2000).

¹⁵ *Ibid.*

¹⁶ *Ibid.* at c. 2.

¹⁷ [1986] 1 S.C.R. 103 [hereinafter *Oakes*].

in contentious legislation as a way to assuage the hostility of some members of the legislature to the legislation. Often, however, they seem to contradict the spirit of the rest of the statute and imply that the world will not fall apart despite what the statute is saying. An extreme example of this is the preamble to the Western Australian *Law Reform (Decriminalisation of Sodomy) Act 1989*¹⁸ which says, before going on to decriminalise sodomy:

...

AND WHEREAS, the Parliament disapproves of sexual relations between persons of the same sex;

AND WHEREAS, the Parliament disapproves of the promotion or encouragement of homosexual behaviour;

AND WHEREAS, the Parliament does not by its action in removing any criminal penalty for sexual acts in private between persons of the same sex wish to create a change in community attitude to homosexual behaviour;

AND WHEREAS, in particular the Parliament disapproves of persons with care supervision or authority over young persons urging them to adopt homosexuality as a lifestyle and disapproves of instrumentalities of the State so doing:

...

Iacobucci J. quite rightly put the preamble in its place.

Rather than the protection of women, Iacobucci J. thought that a better characterisation of the objective of the impugned legislation was to provide for the equitable resolution of economic disputes that arise when intimate relationships break down between individuals who have been financially interdependent. Iacobucci J. acknowledged the view that the legislation was meant to help women—especially those with children—who are economically dependent on their male partner when the relationship ends. However, Iacobucci J. was unwilling to say that that was the sole purpose of the legislation. He preferred to rely on statements from the Ontario Law Reform Commission whose recommendations in 1975, prefacing changes to the *FLA*, including s. 29, encouraged the government to premise support obligations on need and actual dependence rather than on the assumption that wives are inherently dependent upon their husbands for support because of the traditional roles assumed by men and women. The language of the *FLA* is gender neutral.

As for the idea that the Act was meant to protect children, Iacobucci J. quite simply and logically dismissed that by virtue of the fact that the spousal support provisions of Part III of the *FLA*, including s. 29, apply regardless of whether there is a child of the relationship.

¹⁸ W.A. Act No. 32 of 1989.

Iacobucci J. thought that the main purpose of the legislation was the allocation of economic resources in the event of the break-up of a relationship. He turned to evidence from the legislative debates that members of the legislature complained publicly about the number of dependent people who turn to the welfare rolls upon the breakdown of their relationships. The spousal support provisions of the *FLA* are in large part aimed at shifting the financial burden away from the government. Looking at the objective of the omission, Iacobucci J. could not find that an examination of possible reasons for the omission changed the objective of the legislation. The objective was not limited to women in opposite-sex relationships or to relationships where there are children.

Iacobucci J. then turned to the proportionality analysis. He thought that it defied logic to suggest that a gender-neutral support system is rationally connected to the goal of improving the economic circumstances of heterosexual women upon relationship breakdown. It was undemonstrated that the exclusion of same-sex couples from the spousal support regime of the *FLA* in any way furthered the objective of assisting heterosexual women. Just because same-sex relationships might not be as typically characterised by the same economic and other inequalities that affect same-sex relationships, that did not in itself explain the exclusion of same-sex relationships from s. 29 of the *FLA*. Heterosexual men are covered by the *Act* and are at least as unlikely to be affected by being economically dependent. In this case, the claimant was denied access to the support structure provided by the *Act* in order to make a support claim and she was a person who was economically dependent at the end of the relationship.

As for the argument that the *Act* was designed to protect children, Iacobucci J. found that this too failed the rational connection test. It was both over-inclusive and under-inclusive in that it allowed members of opposite-sex couples without children to have access to the spousal support structures while excluding from access a member of a same-sex couple with children. Iacobucci J. acknowledged the growing number of gay and lesbian couples who have children as a result of adoption, surrogacy and donor insemination.

If the objective of the legislation was, as Iacobucci J. and the majority of the Court of Appeal thought it was, to provide for the equitable resolution of economic disputes that arise upon the breakdown of financially interdependent relationships and to reduce the burden on the public purse, then it was "nonsensical" to limit the right to make private claims to heterosexuals. Inclusion of same-sex couples would in fact further such a goal. Thus, Iacobucci J. could find no rational connection.

Similarly, Iacobucci J. could not accept that the burden to satisfy the minimal impairment stage of this part of the *Oakes* test had been met. He rejected the argument that there were other reasonable alternative remedies available where economic dependence occurs in same-sex relationships. Equitable and contractual remedies are less flexible and not always available when needed. If

such remedies were considered satisfactory for same-sex couples then there should be no need for the spousal support structures in the *FLA* for anybody.

Iacobucci J. further rejected the argument that this was an appropriate case to defer to the legislature. No group would be disadvantaged by granting members of same-sex couples access to the spousal support scheme of the *FLA*. Therefore, the notion of deference to legislative choices in the sense of balancing claims of competing groups had no application to this case. Iacobucci J. also rejected the incremental approach to social change in this area. The argument was made that the government, through amendments and proposals for amendment, is advancing toward a situation where same-sex couples would be treated equally. Iacobucci J. could not accept that any of the reforms cited by the Attorney General of Ontario addressed the equal rights and obligations of individuals in same-sex relationships. In a rebuke of the government, Iacobucci J. stated that there is no evidence of any progress in respect to this group since the inception of the spousal support regime. He said: “[i]f the legislature refuses to act so as to evolve towards *Charter* compliance then deference as to the timing of reforms loses its *raison d’être*.”¹⁹

Finally, as to the proportionality between the effect of the measure and the objective, Iacobucci J. noted the “numerous and severe” effects of excluding same-sex couples from s. 29 of the *FLA*. There are no laudable legislative goals or salutary effects that could outweigh those deleterious effects. Therefore, the exclusion of same-sex couples from s. 29 of the *FLA* cannot be justified under s. 1.

In dealing with s. 1, the majority briefly rebuffed Bastarache J.’s position that legislation must be designed to promote equality of status and opportunity to all persons in order to be consistent with *Charter* values and therefore to pass s. 1 analysis. Iacobucci J. found this approach to the *Charter* to be unnecessarily narrow. According to Iacobucci J.:

It may be that a violation of s. 15(1) can be justified because, although not designed to promote equality, it is designed to promote *other* values and principles of a free and democratic society. This possibility must be left open, as the inquiry into *Charter* values under s. 1 is a broad inquiry into the values and principles that, as Dickson CJ. stated in *Oakes* ... “are the *genesis* of the rights and freedoms guaranteed by the *Charter*” (emphasis added).²⁰

The majority asserted, therefore, that equality is not necessarily paramount. It is not clear exactly when this might be but it certainly opens the door to possible judicial creativity in future *Charter* analyses.

As for the remedy, Iacobucci J. was not convinced that the appropriate remedy was that given by the Court of Appeal, namely replacing the words “a

¹⁹ *M v. H*, *supra* note 1 at 640.

²⁰ *Ibid.* at 633.

man and a woman" in the definition of "spouse" in s. 29 by "two persons" and suspending the application of the order for a period of one year. He said that in determining whether the reading in/reading down option is more appropriate than either striking down or severance, the Court must consider: how precisely the remedy can be stated; budgetary implications; the effect the remedy would have on the remaining portion of the legislation; the significance or long-standing nature of the remaining portion; and the extent to which a remedy would interfere with legislative objectives. Iacobucci J. was not convinced that reading in could meet all these criteria given the evidence before the Court. Therefore, he preferred the striking down option. Striking down the whole of the *FLA* would be excessive as only the definition of spouse in Part III of the *Act* had been found to violate the *Charter*. Therefore, Iacobucci J. concluded that the most appropriate remedy was severing s. 29 such that it alone was declared of no force or effect.

At the end of his reasons on the remedy, Iacobucci J. gave another and somewhat veiled message to legislators regarding their inertia on homosexual equality. In justifying the temporary suspension of the remedy, Iacobucci J. said:

In addition, I note that declaring s. 29 of the *FLA* to be of no force or effect 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*. On this point, I agree with the majority of the Court of Appeal which noted that if 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. Thus, I believe the legislature ought to be given some latitude in order to address these issues in a more comprehensive fashion.²¹

The high court thus gave the legislature an indication that its slowness to move on issues of homosexual equality is costly and undesirable. It is a shame that the message was not clearer and had to be couched in terms of economics rather than more lofty ideals. In fact, as will be stated below, economic concerns rather than more purely idealistic matters figured largely in this equality decision that leaves a somewhat bittersweet sense of victory. Still, the reasons of the majority are a significant landmark in equality jurisprudence. The Court said in explicit terms that gays and lesbians must be included and accommodated in Canadian law. Not only do they have to be included, but the Court recognised the consequences of their exclusion. The broad scope given to the concept of benefit is also of profound importance to members of all groups who seek to participate in Canadian society.

²¹ *M v. H*, *supra* note 1 at 645.

III. JUSTICE MAJOR

MAJOR J. REACHED THE SAME CONCLUSION as the majority but put his reasons for doing so in a very succinct manner. Major J. said that M was excluded from applying for a benefit as a result of her relationship on the basis of sexual orientation contrary to s. 15(1) of the *Charter*. That exclusion served no purpose and unnecessarily burdened the public purse. It was *therefore* unjustified.

Major J.'s short reasons are the most blunt of the majority in being based largely on considerations of the "public purse." It is not a welcome development if equality issues are to be decided on the basis of the cost to the public. The enthusiasm for offloading government care responsibilities onto individuals and for privatising social services seems to have infected judicial decisions. Nowhere in the *Charter* are the principles of justice and equality premised on their being cheap. A free and democratic society should not be equated by the courts with a tax-free or a government-free society.

It is curious that the Supreme Court of Canada rather enthusiastically endorsed equality rights for same-sex couples in this case when the cost to the public purse was at the same time notionally reduced. Gay and lesbian citizens will not fail to note that such equal benefits were denied by the majority in *Egan* where at least some of the judges were fearful of the cost of implementing the machinery of equal benefits where it would cost the state something. In neither case was there any actual analysis of what the precise savings or cost would be. The notion of cost or saving seemed to be adequate to deny or to grant equality. Equality protection should not be predicated on cost-effectiveness.

Moreover, somewhat disturbing is the sense that the equality provisions of the *Charter* only come to the assistance of a person who was, in a sense, fortunate enough to have a financially secure partner. A person who had a similarly poor partner or in fact no partner at all—at least not one of any permanence or conjugality—derives nothing from this decision of the Court. Further, given the concern of judges about not making demands on the public purse, it seems they might hesitate before going to the court with claims that might end in public expenditure.

IV. JUSTICE BASTARACHE

READING THROUGH THE DECISIONS IN THIS CASE, one is struck by how often the other judges commented on what Bastarache J. had to say. It would appear that Bastarache J. wrote first but failed to completely satisfy any of his colleagues. Of the lengthier reasons, those of Bastarache J. are perhaps the least satisfying because they both say too much and too little. For their length they dwell inordinately on the purpose of the FLA. In fact, very little is said about equality on the basis of sexual orientation.

Bastarache J. reached the same result as the majority of the Court, but did so for different reasons. He found that, though the effect of the legislation was to discriminate contrary to s. 15(1), the purpose of the legislation was in fact constitutional. Bastarache J. found discrimination contrary to s. 15(1) because s. 29 of the *FLA* drew a distinction between opposite-sex partners and same-sex partners in relationships of permanence. The comparison was best made, according to Bastarache J., as with Charron JA. of the Court of Appeal, not with married couples whose status was consensually acquired, but with unmarried cohabiting couples. The exclusion of gay and lesbian couples from s. 29 suggested that their union was not worthy of recognition or protection. There was, therefore, a denial of equality within the meaning of section 15.

Bastarache J. then turned to s. 1. Bastarache J. thought the contextual factors of the impugned legislation important in applying the various steps inherent in the s. 1 analysis. This approach he expounded in *Thomson Newspapers Co. v. Canada (Attorney-General)*²² and was criticised, as was mentioned earlier, by Iacobucci J. who thought it inappropriate to do such analysis as a *preliminary* step to a s. 1 analysis in order to determine the deference to be afforded to the legislature.

Bastarache J. looked at a great deal of “social science evidence” to determine the context of the exclusion. He did caution that such social science evidence had to be treated carefully because of the possible experiential, systemic or political bias. Bastarache J.’s conclusion from his examination of the evidence constitutes a curious negative picture of heterosexual relationships, as compared with homosexual relationships. According to the evidence, heterosexual relationships are characterised by a power imbalance which puts women at the economic mercy of men. On the other hand,

The preponderance of this social science evidence indicates that same-sex, particularly lesbian, relationships do not generally share the imbalance in power that is characteristic of opposite-sex couples and which causes economic dependency in the course of an intimate relationship.²³

After reading the comparison one might wonder how anyone could suggest that heterosexual relationships are somehow inherently superior to homosexual relationships.

Given the conclusion that partners in same-sex relationships are not usually subject to economic dependence as are partners in opposite-sex relationships, Bastarache J. then considered whether this was reason enough to give deference to the legislative choice to exclude. First, he considered the nature of the interest affected by the exclusion—the more fundamental the interest affected, the less deference a court should be prepared to accord to the legislature. Here, he

²² (1998), 159 D.L.R. (4th) 385 (S.C.C.).

²³ *M v. H*, *supra* note 1 at 706.

agreed that the failure to provide same-sex couples with any consensus avenue for mutual and public recognition perpetuated a legal invisibility that was inconsistent with the moral obligation of inclusion that informs the spirit of the *Charter*. Another factor militating in favour of deference was complexity. Courts are, according to Bastarache J., “simply ill-suited to manage holistic policy reform.”²⁴ If a court must intervene, it must therefore circumscribe that intervention as much as possible. Here, it was possible to isolate the feature of the family law regime that caused the offence. This approach is a bit worrisome, indicating as it does that the courts might simply refuse to intervene to ensure equality in a legislative regime that is complex. Given the pervasiveness and systemic nature of discrimination against gays and lesbians, this will often be the case. An attitude such as Bastarache J.’s might mean that gays and lesbians will have to go to court time and again to challenge specific sections of legislation, rather than a whole legislative regime.

A final factor with regard to deference set out by Bastarache J. is “the role of moral judgments in setting social policy.”²⁵ Gays and lesbians are rightly alarmed when “moral judgments” are brought into play because of the centuries of oppression against them. Issues relating to homosexuality are often cast in terms of morality so that the predictable outcome of a moral judgment will follow. Bastarache J. trotted out the factors to be assessed in such a moral judgment—traditional family, children, sanctity of marriage. He was, however,

satisfied ... that the government’s legitimate interest in setting social policies designed to encourage family formation can be met without imposing through exclusion a hardship on non-traditional families.²⁶

Thus, Bastarache J. concluded that there was no need to be deferential to the legislative choice in this area.

Bastarache J. then turned to the more traditional s. 1 analysis of assessing whether there was a legitimate purpose in the exclusion and whether the legislative means were appropriate to achieve this purpose. The first stage of his analysis repeated much of what he discussed in his assessment of the deferential question. Much of the discussion was taken up in setting out the pitfalls of trying to establish the legislative purpose. In his discussion of legislative purpose, Bastarache J. elaborated further on the idea that the relief of the invidious position of women in heterosexual relationships that break down was the purpose of the legislation. The fact that the legislation used gender-neutral language was simply to avoid sexist language. Bastarache J. said, and probably rightly so, that same-sex couples were not excluded deliberately but were simply overlooked in

²⁴ *M v. H*, *supra* note 1 at 709.

²⁵ *Ibid.* at 713.

²⁶ *Ibid.* at 714.

the desire to narrow the situations where support obligations would exist as much as possible. Ignoring homosexual existence, rendering gays and lesbians invisible—outside the criminal and pathological contexts—is a time-honoured practice and is at least as offensive as a deliberate exclusion.

Bastarache J. concluded that the need for imposition of support payments in the case of traditional family relationship breakdown was a pressing and substantial objective in Canadian society. At the very end of the reasons, however, and almost as an afterthought, Bastarache J. added that such justification for legislative intervention affecting the actions of heterosexual couples “does not ... explain the pressing need to exclude all other family relationships from the governmental regime.”²⁷ As Bastarache J. asked: “Even though most same-sex couples do not experience economic imbalance, some do. What is the purpose in excluding them?”²⁸ M’s situation was an example of a situation where there was dependence in a same-sex relationship. Bastarache J. added that even if the purpose of s. 29 was to recognise and promote the traditional family,

[d]enial of status and benefits to same-sex partners does not *a priori* enhance respect for the traditional family, nor does it reinforce the commitment of the legislature to the values in the *Charter*.²⁹

Bastarache J. therefore concluded that there was no justification under s. 1 for the s. 15(1) breach.

Bastarache J.’s judgment is a difficult one to assess. It would be difficult to apply in a subsequent case because of its somewhat unorthodox approach to *Charter* analysis. There was little said about s. 15(1); the *Oakes* approach to s. 1 was given but token recognition. The reasons are essentially an assessment of why the government might pass such legislation and whether the court ought to defer to its decisions. As has been stated, the problem with this emphasis on *history* and *purpose* is that it can overlook the real harm of inequality that the legislation imposes *now* on actual people like M. It tends to be forgiving too of illogicalities such as that that allowed heterosexual men to be covered by the legislation while gays and lesbians were completely excluded. Of further concern is the solicitous regard Bastarache J. had for the preservation of the “traditional family” and for “moral judgments.” These are the idols worshipped when gay and lesbian interests are sacrificed. The usual legal result of such worship is the outcome reached by Gonthier J.

²⁷ *M v. H*, *supra* note 1 at 731.

²⁸ *Ibid.* at 732.

²⁹ *Ibid.*

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A LONE DISSENTING JUDGMENT might be thought to be of little consequence in a case, but there are several points made by Gonthier J. on which comment needs to be made. Furthermore the very existence of such a dissent is disappointing. It would have been preferable in a case such as this to have had a ringing endorsement of a unanimous court, or at least a reasonably united court, as in *Vriend*. When, as Cory J. acknowledged, the human dignity of gays and lesbians is at stake (again) it is upsetting at best that a member of the highest court could make a judgment about homosexuals in terms that would not today be used by a high court judge in a case about racial, religious or gender minorities.

Gonthier J. saw his views as the more logical conclusions to be had from Bastarache J.'s assessment of the context of the *FLA*. Gonthier J.'s views were also a reiteration of the views of gays and lesbians and of the "traditional" family which were so preponderant in La Forest J.'s views of the same subjects in *Egan*. It is a shame to see such antiquated views based largely on dated stereotypes of homosexuals repeated again in the Supreme Court of Canada. One might have hoped that they had been laid to rest by the court in *Vriend*.

Gonthier J.'s assessment of the case was essentially that opposite-sex couples have a specific and special role in society and that there is a dynamic of dependence that flows from what Gonthier J. called "three basic realities." The first "basic reality" of the "dynamic of dependence" relates to "the biological reality of the opposite-sex relationship and its unique potential for giving birth to children and its being the primary forum for raising them."³⁰ The second "basic reality" is connected to a "unique form" of dependence that is unrelated to children but is specific to heterosexual relationships. Third, this dynamic is specifically acute for women in opposite-sex relationships who suffer from pre-existing economic disadvantage compared with men. According to Gonthier J.:

Providing a benefit (and concomitantly imposing a burden) on a group that uniquely possesses this social function, biological reality and economic disadvantage, in my opinion, is not discriminatory.³¹

Gonthier J., with his natural law "basic realities," managed to privilege people in heterosexual relationships both by indicating that heterosexual relationships are superior to homosexual relationships and by indicating that they are disadvantaged compared to homosexual relationships, and so need special attention. Gonthier J. said: "The evidence does not suggest that same-sex rela-

³⁰ *M v. H*, *supra* note 1 at 647–48.

³¹ *Ibid.*

tionships fulfil the same social role [as opposite-sex relationships], nor that they suffer the consequences of that unique social role."³² In fact, Gonthier J. never identified any role for same-sex couples. What heterosexual relationships are not is the same as homosexual relationships. Heterosexual relationships are unique and special. They are superior in Gonthier J.'s view because of similar factors to those that La Forest J. in *Egan* thought made them superior.

Gonthier J. privileged heterosexual relationships because of their supposedly special connection with children. They are the "unique" and "natural" place for raising children. The fact that children can be and are raised outside heterosexual relationships appears to be irrelevant. The fact that historically there is little evidence that a sole male/female couple together was responsible for raising children was irrelevant. The fact that in many heterosexual relationships one of the couple often has very little to do with raising the children was irrelevant. The fact that same-sex couples can quite easily conceive and raise children was irrelevant. The fact that many people in heterosexual relationships do not have children was irrelevant. In fact, Gonthier J. appeared to go beyond heterosexuality as a basic requirement to raising children; he cast marriage in that role. He said: "... marriage is a fundamental social institution because it is the crucible of human procreation and the usual forum for raising children."³³ One wonders how Gonthier J. did in biology class. This is quite clearly the judicial imposition of a particular religious ideology to decide national social issues and it has no place in the highest court.³⁴ At one point, Gonthier J. said: "*Cohabiting* opposite-sex couples are the *natural* and most likely site for the procreation and raising of children and that is their specific, *unique* role."³⁵ Everything else is apparently an aberration. There are vestiges here of the idea that homosexuals and children do not mix. Given such attitudes it is unlikely that Gonthier J. would reach any conclusion other than that he did.

Quite apart from the issue of children, Gonthier J. is of the opinion that heterosexual relationships are quite different from homosexual ones. Those in heterosexual relationships develop a dynamic of dependence that is not usual in homosexual relationships. Behind this attitude lies perhaps more than a trace of the idea that homosexual relationships are not as stable or committed as hetero-

³² *M v. H*, *supra* note 1 at 693.

³³ *Ibid.* at 677-78.

³⁴ See MacDougall, *supra* note 13 at c. 3. Although he is not cited, this judgment seems four-square with the ultra-conservative views of John Finnis whose approach to homosexuality has been criticised even by his fellow Roman Catholics. See J. Finnis, "Law, Morality, and 'Sexual Orientation'" (1995), 9 *Notre Dame J. L. Eth's & Public Policy* 11; M.J. Perry, "The Morality of Homosexual Conduct: A Response to John Finnis" (1995), 9 *Notre Dame J. L. Eth's & Public Policy* 41.

³⁵ *M v. H*, *supra* note 1 at 679-80 (emphasis added).

sexual relationships. At one point, commenting on the possibility of a man in a heterosexual relationship making a support claim, Gonthier J. said:

Although the dynamic of dependence unique to opposite-sex relationships plays out differently for men, it flows from similar factors: in essence, the dynamic of dependence reduces autonomy and increases attachment in heterosexual relationships.³⁶

Heterosexuals are more “attached” in their relationships. Furthermore, there is the idea that homosexuals are economically privileged and have no legitimate place complaining about an infringement of their rights. There are others more deserving of consideration. As did Bastarache J., Gonthier J. brushed aside the arguments that the *FLA* is gender neutral and that it applies to heterosexual couples who do not have children and to heterosexual men who are in a class not usually dependent. Those were simply aberrations that should not upset the accepted norms. The situation in cases where men in a heterosexual relationship make a claim for support were not just aberrations. He said:

... it must be observed that even in the small number of cases in which men make claims against their female spouses, those claims are still claims arising out of opposite-sex relationships, which generate their own dynamic of dependence regardless of who is making a claim.³⁷

What we are to make of this is not clear. It seems to amount to a statement that same-sex relationships can simply never be like opposite-sex relationships no matter how much dependence might develop. They never achieve this elusive quality of “dynamic.”

Gonthier J.’s approach was somewhat similar to Bastarache J.’s and Gonthier J. in fact took comfort in many of Bastarache J.’s conclusions. Gonthier J. gave his own historical analysis of the spousal support laws. His went back further than the others and started with Blackstone. Gonthier J. concluded that the legislative intention was clearly to relieve economic pressures on women in situations of the breakdown of a heterosexual relationship. Gonthier J. could find no evidence of an intention to cover same-sex couples which Gonthier J. said legislation could do by intention and pointed to recent B.C. laws which do just that. The *FLA* was designed to achieve this purpose of helping to relieve the situation women found themselves in. Gonthier J. took some comfort from the language of the preamble to reach his conclusions. I have already noted the rather different conclusion Cory J. reached from the same preamble.

To this point in his assessment of the context of the legislation, Gonthier J. was to a large extent in agreement with Bastarache J. However, as Gonthier J. noted, where Bastarache J. and he parted company was in their answers to the

³⁶ *M v. H*, *supra* note 1 at 682.

³⁷ *Ibid.* at 666.

question: What is the purpose of excluding same-sex couples? Here was where Gonthier J. elaborated on his idea that same-sex couples do not characteristically develop the situation of dependence and are outside the ambit of "social function" that opposite-sex relationships have of raising children. As La Forest J. did in *Egan*, Gonthier J. allowed that his sweeping statements do not always hold true. He conceded that some married couples do not have children. Single people or even same-sex couples can have children. These were, however, "exceptional."³⁸ In making allowance for the fact that opposite-sex couples with no children were covered by the *FLA*, Gonthier J. said:

The *Charter* cannot possibly require the Legislative Assembly to revise the *FLA* to exclude non-procreative opposite-sex couples from its scope. As La Forest J. indicated, the legislative and administrative scheme necessary to do so would be highly intrusive and would likely violate *Charter* privacy guarantees. By contrast, exclusion of same-sex couples, who are inherently, rather than situationally, non-procreative, from the *FLA* support regime raises none of these concerns.³⁹

Just what the source of these "*Charter* privacy guarantees" is was not stated. Gonthier J. did seem to expect remarkably little from the legislature or in fact the *Charter* in the context of same-sex couples.

With such a background, Gonthier J. dealt with the question of whether the impugned legislation treated individuals in same-sex relationships differently from individuals in opposite-sex relationships. He then discussed whether the differential treatment discriminated. Gonthier J. stressed that the legislation provided a benefit to a class of people (heterosexual couples) *and* imposed a burden on the same class. Gonthier J. concluded that there was no discrimination against homosexuals because they do not have the characteristic of dependence that heterosexual couples have. The *FLA* dealt with "spouses" and Gonthier J. said in essence that people in a homosexual relationship could never be considered spouses. Gonthier J. said:

The definition of "spouse," as I have already suggested, is an extension of marriage. To be a spouse is, in essence, to be as if married, whether or not one is actually married. Spousehood is a social and cultural institution, not merely an instrument of economic policy. The concept of "spouse," while a social construct, is one with deep roots in our history It is rooted in Western history, in which the concept of "spouse" has always referred to a member of a cohabiting opposite-sex couple. That is what it means to be a spouse That well-recognised definition does not discriminate on the basis of sexual orientation, any more than the status of "child" or "adult" discriminates on the basis of age, or "male" or "female" discriminates on the basis of sex.⁴⁰

³⁸ *M v. H*, *supra* note 1 at 681.

³⁹ *Ibid.* at 695.

⁴⁰ *Ibid.* at 677.

One cannot help but wonder how Gonthier J. managed to overlook all recent cases and legislation that redefine spouse. One cannot help but wonder whether Gonthier J. has any idea at all of evolving social concepts. One wonders how he might have decided cases that led to the relief from historic oppression for other groups who had been defined out of a privileged class. How would he have decided the “persons” case?⁴¹ How would he have decided a miscegenation case?⁴²

Gonthier J. went out of his way to present evidence that in same-sex relationships there is not the dependence that exists in opposite-sex relationships. There is no pattern of dependence. Unlike heterosexual men, who have no such pattern either, apparently there is no “dynamic” in same-sex relationships that accounts for allowing heterosexual men to make support claims even though they are in groups where there is no such pattern. Gonthier J. can be criticised for his citation of sources for how same-sex relationships work. Most are well over ten years old and most are from outside Canada. He appeared to have no concept of how much social attitudes in the gay and lesbian community and outside it could have changed in ten years or that the constitutional and social situation in Canada might make gay and lesbian lives and relationships different from those in, for example, the U.S. Gonthier J. appeared to have no grasp of the concept that his diminishment of same-sex relationships might in fact be part of the cause of whatever greater lack of commitment there might be in a same-sex relationship as compared with an opposite-sex relationship. He might have profited by considering what Iacobucci J. said in *Egan* in the context of the denial of spousal allowances for members of same-sex couples:

Whereas there is a presumption of interdependence in heterosexual relationships, there is a presumption against interdependence in same-sex relationships. The latter presumption is not only incorrect, but it is also the fruit of stigmatising stereotypes.⁴³

Gonthier J. conceded that there might be individuals from same-sex couples who might bring applications under Part III of the *FLA*. He could hardly say otherwise given the case he was deciding. However, “as a practical matter” he thought they would be infrequent. This infrequency was a reason to deny the access to gays and lesbians altogether. What would Gonthier J.’s conclusion be in a case where protection from religious discrimination was denied to Christians because they rarely face such discrimination, or where protection from ethnic discrimination was denied to white people because they rarely face it or where access to the *FLA* was denied to mixed-race couples because there are not many of them.

⁴¹ *Re Section 24, BNA Act*, [1930] 1 D.L.R. 98 (P.C.).

⁴² See e.g. *Loving v. Virginia*, 388 US 1 (1967).

⁴³ *Egan*, *supra* note 3 at 682.

Gonthier J. was careful, as was La Forest J. in *Egan*, to protest that

nothing in my reasons should be taken as suggesting that same-sex couples are incapable of forming enduring relationships of love and support, nor do I wish to imply that individuals living in same-sex relationships are less deserving of respect.⁴⁴

He also reiterated the validity of *Vriend*. *Vriend*, however, was a case of discrimination. This was a case of benefits. Freedom from discrimination is in my opinion just the basic step in achieving equality. A court cannot say that it has done what it can to achieve equality for members of a particular group just by ensuring that there is no discrimination against the members of that group. That is bare formal equality. It is simple compassion. Members of a group will not truly be equal while they are simply treated with compassion. They must be entitled to the same social and legal benefits as others. The state must *condone* them and their activities, including the formation of relationships. The state must *celebrate* them and their relationships. As La Forest J. was in *Egan*, Gonthier J. here seemed unwilling to take equality to mean anything beyond a prohibition on being mean to members of a group—at least when that group is homosexuals. Gonthier J.'s minimalist view of what s. 15(1) means was summed up in his statement:

However, s. 15(1) is not a guarantee of human dignity *per se*. It is a comparative equality guarantee which focuses on discrimination as between groups or persons that leads to a denial of human dignity.⁴⁵

In Gonthier J.'s view the invisibility of gays and lesbians in the *FLA* legislative regime—not to mention his own comments on gays and lesbians and their relationships—in no way violated the claimant's human dignity. Therefore, there was no discrimination contrary to s. 15(1) in the *FLA* regime impugned in this case. As a result, he did not have to deal with s. 1.

VI. CONCLUDING COMMENTS

RUNNING THROUGHOUT THE JUDGMENTS WAS CONCERN about the effect of the judgment on the institution of marriage. Gonthier J., of course, was the most apoplectic that marriage be kept the sole preserve of heterosexuals. He tied it to human procreation and to the raising of children. This connection with procreation and children is patently absurd. All that can really support the exclusion of same-sex couples from the institution of marriage is the simple fact that historically gays and lesbians have been excluded from the institution. It would not, in fact, matter much if marriage were simply the traditional indicator of the union of a man and a woman. The fact, however, that people, including the

⁴⁴ *M v. H*, *supra* note 1 at 686.

⁴⁵ *Ibid.* at 692.

judges in this case, get so worked up about the application of the label means that it is more than just a label describing a male/female couple. This celebration of a union between two people is an enormous benefit conferred on the people in the union. Aside from possible economic benefits, it accords priceless social respect, cachet and honour. It is the signifier of societal approval for a relationship. It is the signifier that society expects a sort of stability from the relationship. It is the signifier that certain privacy and benefits are expected for and within the relationship. It is society's traditional way of *celebrating*—not just recognising—the union of two people. In some societies, of course, it goes beyond two people. Who can be considered married is a flexible thing. At different times and places, people now considered children could be married. A person could be married to more than one person. Two people of the same sex could be married. That it is the “crucible of human procreation and the usual form for the raising of children” is a rose-tinted view of a particular religious conception of marriage dated to a specific time. Like so many other concepts of similar provenance—family, spouse, person, and so on—it is subject to reconsideration in the Canadian *Charter* democracy.

While Gonthier J.'s conception of marriage can be easily faulted, his conclusion is correct that the majority's decision in this case leaves little room for any decision other than that an exclusion of same-sex spouses from the conception of marriage is contrary to the equality provisions of s. 15(1). The majority did not directly address the issue except to protest that they were not pronouncing on marriage. They did not, however, say specifically how they would decide the question were it to come before them. Iacobucci J. said:

This appeal does not challenge traditional conceptions of marriage, as s. 29 of the Act expressly applies to *unmarried* opposite-sex couples. That being said, I do not wish to be understood as making any comment on marriage or indeed on related issues.⁴⁶

The judges were aware that the issue is unsettled and might have to be visited at another time. Given the extent to which the court recognised the similar situation of same-sex and opposite-sex couples in this decision, the only thing that remains to differentiate them is that opposite-sex couples are given the choice of entering the state-celebrated status of marriage whereas same-sex couples are denied this

As Gonthier J. noted, there is a difference among the judgments as to which comparator to use in assessing the s. 15(1) claim in the present case.⁴⁷ Gonthier J. appeared to use the comparator of opposite-sex couples and same-sex couples. Due to his conclusion as to the special and unique status of members of an opposite-sex couple as “spouses” he found no discrimination. He also preserved marriage as a heterosexual institution without its being a breach of s. 15(1)

⁴⁶ *M v. H*, *supra* note 1 at 641.

⁴⁷ *Ibid.* at 651.

equality guarantees. The majority used unmarried cohabiting opposite-sex couples as the comparator with same-sex couples who are living together. Thus the majority was able to say that the rights and obligations that exist between married persons played no part in the analysis. Bastarache J. made a similar comparison. The use of the different comparators did not make much difference to the actual outcome of this case, but there was a fear that use of the wrong comparator would make a difference, that is, would prejudice, future cases about the status of marriage. The fact that Charron JA. of the Ontario Court of Appeal used a comparison between opposite-sex partners (*simpliciter*) and same-sex partners in relationships of permanence was thought by the majority to be too sweeping and possibly prejudging the marriage issue. The marriage issue is bound to come before the court at some time in the not-so-distant future and the judges in *M v. H* were carefully preparing the ground work for possible responses.

The other issue about which the majority was reluctant to say anything

was whether financially interdependent individuals who live together in non-conjugal relationships, such as friends and siblings, ought to be constitutionally entitled to apply for support upon the breakdown of their relationships.⁴⁸

As Iacobucci J. made clear this involves a more elaborate consideration of issues that were not before this Court. It would impugn more elements of the s. 29 definition of spouse beyond being a man and a woman. It would also involve the assessment of analogous grounds in s. 15(1) beyond sexual orientation. Such a process, if it extended non-discrimination to a basis such as a friendship, siblinghood and so on would have much more profound social consequences than extension to sexual orientation. Extension to protect homosexuals in a sense has been an assimilative measure, despite protestations of traditionalists to the contrary. Decisions such as *M v. H*, rather than undermining social structures and norms, in fact strengthen them by extending them to individuals previously excluded but in very analogous situations to those included. This reinforcement of existing social structures and norms is, in fact, the source of disagreement within the gay and lesbian community which Iacobucci J. acknowledged.⁴⁹ Some gays and lesbians argue against the goal and effect of such assimilation. Extension of benefits to friends and siblings and so on would be much more corrosive of traditional conceptions of family and support and conjugality. Gonthier J.'s alarmist statement that Bastarache J.'s position could make it difficult to deny the expansion of the scope of spousal support regime to any relationship of dependency is, therefore, a stretch. It might, in fact, be something that ought to be considered. It does not, however, follow as the "natural" result of *M v. H*.

⁴⁸ *M v. H*, *supra* note 1 at 641.

⁴⁹ *Ibid.* at 639.

The decision in *M v. H* is significant, but it is unlikely that the Supreme Court of Canada will be able to stop its pronouncements on sexual orientation discrimination and the place of homosexuals in Canadian law and society at the three major judgments to date. As was suggested, true equality consists not just in the recognition of the principle of non-discrimination which was established in *Egan* and *Vriend*. It demands as well that there be access to equal direct or indirect economic benefits from the law, which was the point of some of the judges in *Egan* and the majority in *M v. H*. A further, perhaps final, component of true equality, as opposed to formal equality, is state *celebration* of groups whose members have traditionally been discriminated against for belonging to that group. This celebration must go beyond the facilitation of access to equal economic benefits and must carry over to “purely” symbolic celebration of things such as proclamation of gay and lesbian pride days, school curriculum content and, dare one say it, marriage. The Supreme Court of Canada seems aware that cases involving such issues will be on their way to the court.

