Sexual Orientation Discrimination as Sex Discrimination: Same-Sex Couples and the *Charter* in *Mossop*, *Egan* and *Layland*

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This comment considers four recent cases involving discrimination against same-sex couples. In *Canada (A.G.)* v. *Mossop*, the Supreme Court of Canada rejected an argument that such discrimination is discrimination on the basis of "family status", contrary to the *Canadian Human Rights Act*, but suggested that an argument under the *Canadian Charter of Rights and Freedoms* might have made a difference. In *Egan* v. *Canada* and *Layland* v. *Ontario (Minister of Consumer and Commercial Relations)*, the Federal Court of Appeal and the Ontario Divisional Court found that sexual orientation is an analogous ground under subsection 15(1) of the *Charter*. However, these courts held that denials of a benefit made available to unmarried opposite-sex couples (*Egan*) and of the right to marry (*Layland*) were not "discrimination" under subsection 15(1) of the *Charter*. The author agrees with the majority of the Supreme Court in *Mossop* that the discrimination in question was based on "sexual orientation", not "family status", but finds its reliance on "parliamentary intent" surprising, and its implicit conclusion that same-sex couples are not "families" incorrect and unnecessary. He then analyzes the reasoning used in *Egan* and *Layland*, noting various problems including the use of Justice McIntyre's requirement of "discriminatory impact" in *Andrews* v. *Law Society of British Columbia* to avoid a finding of "discrimination" under subsection 15(1).

In the fourth case, *Baehr* v. *Lewin*, the Supreme Court of Hawaii, interpreting an express prohibition of sex discrimination in the Hawaii Constitution, held that denying same-sex couples the right to marry is *prima facie* sex discrimination and must be justified. The author argues that this approach is correct and that virtually all cases of sexual orientation discrimination can also be viewed as cases of sex discrimination. Thus, *Mossop*, *Egan*, *Layland* and other cases of discrimination against same-sex couples could all be viewed as cases of sex discrimination, whether under subsection 15(1) of the *Charter* or under a human rights act that prohibits sex discrimination.

Ce commentaire d'arrêt propose une analyse de quatre décisions récentes portant sur la discrimination envers des couples formés de personnes du même sexe. Dans l'affaire *Canada (P.G.)* c. *Mossop*, la Cour suprême du Canada a rejeté l'argument selon lequel la discrimination envers ces couples est une forme de discrimination basée sur la «situation de famille», ce qui est interdit en vertu de la *Loi canadienne sur les droits de la personne*, mais a toutefois suggéré que la décision eût pu être différente si un argument fondé sur la *Charte canadienne des droits et libertés* avait été présenté. Dans les affaires *Egan* c. *Canada* et *Layland* c. *Ontario (Minister of Consumer and Commercial Relations)*, la Cour d'appel fédérale et la Cour divisionnaire d'Ontario ont mentionné que l'orientation sexuelle constitue un critère analogue à ceux énoncés au paragraphe 15(1) de la *Charte*. Cependant, ces tribunaux en sont venus à la conclusion que le refus d'accorder aux couples formés de personnes du même sexe les bénéfices accessibles aux couples formés de personnes de sexes opposés qui ne sont pas mariées (*Egan*), ainsi que le refus de leur accorder le droit de se marier (*Layland*), ne constituent pas une «discrimination» au sens du paragraphe 15(1) de la *Charte*. L'auteur est d'accord avec l'opinion majoritaire de la Cour suprême dans l'arrêt *Mossop* sur le fait que la discrimination dans cette affaire était basée sur l'orientation sexuelle et non sur la «situation de famille», mais il est aussi d'avis que l'importance accordée par la Cour à «l'intention parlementaire» est étonnante, et que la conclusion implicite selon laquelle les couples qui sont formés de personnes du même sexe ne sont pas des familles n'est ni correcte ni nécessaire. Il analyse ensuite le raisonnement adopté par les tribunaux dans les affaires *Egan* et *Layland*. Il relève plusieurs problèmes dont l'usage du concept «impact discriminatoire», tel que M. le juge McIntyre dans l'affaire *Andrews* c. *Law Society of British Columbia* l'a fait pour conclure à l'absence de discrimination au sens du paragraphe 15(1) de la *Charte*.

Dans la quatrième affaire, *Baehr* c. *Lewin*, la Cour suprême d'Hawaii, en interprétant une interdiction explicite de discrimination basée sur le sexe contenue dans la Constitution hawaiienne, soutient que le fait de refuser aux couples formés de personnes du même sexe le droit de se marier constitue, *prima facie*, une discrimination basée sur le sexe qui doit être justifiée. L'auteur soutient que cette approche est correcte et que presque toutes les affaires de discrimination basée sur l'orientation sexuelle peuvent aussi être considérées comme des affaires portant sur une discrimination basée sur le sexe. Ainsi, *Mossop*, *Egan*, *Layland* et d'autres décisions portant sur la discrimination envers des couples formés de personnes du même sexe pourraient aussi être considérées comme des affaires portant sur une discrimination basée sur le sexe, que ce soit en vertu du paragraphe 15(1) de la *Charte* ou en vertu d'une législation interdisant la discrimination basée sur le sexe.

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Synopsis

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Introduction

Discrimination against same-sex[1] couples is one of the most pervasive kinds of sexual orientation discrimination.[2] Many gay, lesbian and bisexual individuals (outside the armed forces) have not experienced discrimination in employment (in the form of dismissals or refusals to hire or promote), either because they are not open about their sexual orientation or because their employer abstains, for whatever reason, from discriminating in this way.[3] However, all same-sex couples are exposed to some form of discrimination in that they are denied the right to marry and the rights that flow from marriage (including the right of a Canadian to sponsor a non-Canadian opposite-sex legal spouse for immigration[4]), and they may also be denied a variety of employment or other benefits for which they would qualify if they were a (married or unmarried) opposite-sex couple. Extension of such benefits to same-sex couples will generally require a positive decision to provide equal treatment, as opposed to a negative decision to refrain from providing unequal treatment, and the discriminatory reason for non-extension will usually be overt. As a result, the majority of published cases of sexual orientation discrimination, in the areas of public or private (non-military) employment, benefits or services, has involved discrimination against same-sex couples. Indeed, one of the earliest such cases was Richard North and Chris Vogel's 1974 challenge to the denial of same-sex couples' right to marry.[5] And since 1982, a growing number of such cases have been brought by same-sex couples, under both the *Charter*[6] and human rights legislation.[7]

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[1]I will use the words heterosexual, bisexual, gay and lesbian to refer to the sexual orientations of persons, and opposite-sex (male-female) or same-sex (male-male or female-female) to refer to the sexual orientations of acts or relationships. Although the sexual orientations of the persons engaging in an act or relationship will often be the same as that of the act or relationship, this will not always be the case. This is especially true of sexual activity, but may also be true of couple relationships. Thus, it is hard to describe two bisexual women (or men) who are partners as a "lesbian (or gay) couple".

[2]For a discussion of the varieties of sexual orientation discrimination, in the context of U.K. law, see R. Wintemute, "Sexual Orientation Discrimination" in C. McCrudden & G. Chambers, eds., *Individual Rights and the Law in Britain* (Oxford: Oxford University Press, 1994) 491.

[3]But see *Waterman* v. *National Life Assurance Co. of Canada* (1993), 18 C.H.R.R. D/176 (Ont. H.R.C.) (openly lesbian employee dismissed).

[4]See *Immigration Act*, R.S.C. 1985, c. I-2, s. 6(2), as am. by S.C. 1992, c. 49, s. 3; *Immigration Regulations, 1978*, C.R.C., c. 940, s. 2(1), as am. by SOR/85-225, s. 1(1) ("spouse"), SOR/93-44, s. 1(5) ("member of the family class"). At least one Immigration Appeal Board case (Andrea Underwood and Anna Carrott) and twenty Canadian Human Rights Commission complaints involving discrimination against same-sex couples in immigration are pending. See Lesbian & Gay Immigration Task-Force, *Taking the Next Step* (Brief to the federal Minister of Immigration, 12 November 1993).

[5]See *Re North and Matheson* (1974), 52 D.L.R. (3d) 280 (Man. Co. Ct.).

[6]*Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Charter*].

[7]See *e.g. Canada (A.G.)* v. *Mossop*, [1993] 1 S.C.R. 554, 100 D.L.R. (4th) 658 [hereinafter *Mossop* cited to S.C.R.]; *Egan* v. *Canada*, [1993] 3 F.C. 401, 103 D.L.R. (4th) 336 (C.A.) [hereinafter *Egan* cited to F.C.]; *Layland* v. *Ontario (Minister of Consumer and Commercial Relations)* (1993), 14 O.R. (3d) 658 (Div. Ct.) [hereinafter *Layland*]; *Clinton* v. *Ontario Blue Cross* (1993), 18 C.H.R.R. D/377, 93 C.L.L.C. 17,026 (Ont. H.R.C.), rev'd (3 May 1994), (Ont. Div. Ct.) [hereinafter *Clinton* cited to C.H.R.R.]; *Vogel* v. *Manitoba (A.G.)* (1992), 90 D.L.R. (4th) 84, 79 Man. R. (2d) 208 (Q.B.) [hereinafter *Vogel II* cited to D.L.R.]; *Nielsen* v. *Canada (Human Rights Commis-*

In 1993, *Canada (A.G.)* v. *Mossop*[8] became the first same-sex couple case to reach the Supreme Court of Canada, which rejected the argument that discrimination against such a couple is discrimination based on "family status", contrary to the *Canadian Human Rights Act*.[9] The Court did leave open the possibility of an argument under subsection 15(1) of the *Charter*. Within two months of the decision in *Mossop*, *Charter* arguments were rejected by the Federal Court of Appeal in *Egan* v. *Canada*,[10] with regard to a benefit under the *Old Age Security Act*,[11] and by the Ontario Divisional Court in *Layland* v. *Ontario (Minister of Consumer and Commercial Relations)*,[12] with regard to same-sex marriage. Leave to appeal has been granted by the Supreme Court of Canada in *Egan*, and an appeal to the Supreme Court could follow a decision by the Ontario Court of Appeal in *Layland*. This comment will assess the impact of *Mossop* on the question of discrimination against same-sex couples and the prospect of the Supreme Court accepting a *Charter* argument. It will also examine the reasons for the rejection, in *Egan* and *Layland*, of the argument that discrimination against same-sex couples is discrimination based on sexual orientation and is prohibited by subsection 15(1) of the *Charter*. Finally, it will consider the viability of an alternative argument, not discussed in these three decisions, that discrimination against same-sex couples is simply discrimination based on sex, and is therefore contrary to subsection 15(1) or any human rights act that prohibits sex discrimination. Such an argument was accepted by the Supreme Court of Hawaii in a same-sex marriage case, *Baehr* v. *Lewin*,[13] decided shortly after the three Canadian cases.

I. Four Receut Same-Sex Couple Cases

A. Canada (A.G.) v. Mossop

Brian Mossop complaimed to the Canadian Human Rights Commission that his employer had denied him a day of bereavement leave to attend the

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sion), [1992] 2 F.C. 561, 9 C.R.R. (2d) 289 (T.D.) [hereinafter *Nielsen* cited to F.C.]; *Leshner* v. *Ontario* (1992), 16 C.H.R.R. D/184, 92 C.L.L.C. 17,016 (Ont. H.R.C.) [hereinafter *Leshner* cited to C.H.R.R.]; *Knodel* v. *British Columbia (Medical Services Commission)*, [1991] 6 W.W.R. 728, 58 B.C.L.R. (2d) 356 (S.C.) [hereinafter *Knodel* cited to W.W.R.]; *Veysey* v. *Canada (Commissioner of the Correctional Service)*, [1990] 1 F.C. 321 (T.D.), aff'd on other grounds (1990), 43 Admin. L.R. 316, 109 N.R. 300 (F.C.A.) [hereinafter *Veysey* cited to Admin. L.R.]; *Andrews* v. *Ontario (Minister of Health)* (1988), 64 O.R. (2d) 258, 49 D.L.R. (4th) 584 (H.C.J.) [hereinafter *Karen Andrews*]; *Anderson* v. *Luoma* (1986), 50 R.F.L. (2d) 127 (B.C.S.C.); *Vogel* v. *Manitoba* (1983), 4 C.H.R.R. D/1654 (Man. H.R.C.) [hereinafter *Vogel I*]. See also *Re Canada Post Corp. and P.S.A.C. (Guevremont)* (1993), 34 L.A.C. (4th) 104 [hereinafter *Guevremont*]; *Re Parkwood Hospital and McCormick Home and London and District Service Workers' Union* (1992), 24 L.A.C. (4th) 149 [hereinafter *Parkwood*]; *Re Canada (Treasury Board – Indian & Northern Affairs) and Watson* (1990), 11 L.A.C. (4th) 129; *Re Carleton University and CUPE Local 2424* (1988), 35 L.A.C. (3d) 96 [hereinafter *Carleton*].

[8]*Ibid.*

[9]R.S.C. 1985, c. H-6, s. 3(1) [hereinafter *CHRA*].

[10]*Supra* note 7.

[11]R.S.C. 1985, c. O-9.

[12]*Supra* note 7.

[13]852 P.2d 44 (Haw. 1993).

funeral of the father of his partner, Ken Popert, with whom he had lived for nine years.[14] On the apparent assumption that an employee with an opposite-sex partner whose parent had died would have been allowed such leave,[15] a Canadian Human Rights Tribunal held that the denial of leave was discrimination on the basis of "family status", contrary to subsections 3(1) and 10(*b*) of the *CHRA*, because "homosexual couples may constitute a family."[16] The Federal Court of Appeal, however, set aside the Tribunal's decision,[17] and the Supreme Court of Canada (in a 4-3 decision) dismissed Mossop's appeal.[18] The majority's reasoning was similar to that of the Federal Court of Appeal. In 1983, when Parliament added "family status" to the list of prohibited grounds of discrimination in subsection 3(1) of the *CHRA*, it did not add "sexual orientation", in spite of a recommendation of the Canadian Human Rights Commission to do so. It could not, therefore, have intended to cover the situation before the Court.[19] Thus, a "homosexual couple" did not constitute a "family" for the purposes of the *CHRA*, even if it might for the purposes of other legislation.[20] The minority would have upheld the Tribunal's interpretation of "family status" as including the relationship of a same-sex couple, because this interpretation was "correct" (according to Justices Cory and McLachlin) or not "patently unreasonable" (according to Justice L'Heureux-Dubé).[21]

1. The Majority Judgments

What is surprising about the majority judgments is their reliance on "parliamentary intent" in adopting the narrower of two possible interpretations of the *CHRA*. This would not be unreasonable if it did not appear to be such a marked departure from the Court's approach in other cases. Neither Chief Justice Lamer nor Justice La Forest referred to the line of Supreme Court decisions cited by Justice L'Heureux-Dubé as establishing that "human rights legislation has a unique quasi-constitutional nature, and ... is to be given a large, purposive and liberal interpretation."[22] She resolved the potential conflict between such an

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[14]See *Mossop* v. *Canada (Secretary of State)* (1989), 10 C.H.R.R. D/6064 at D/6067, 89 C.L.L.C. 17,010 (C.H.R.C.).

[15]See *Canada (A.G.)* v. *Mossop* (1990), [1991] 1 F.C. 18 at 29-30, 71 D.L.R. (4th) 661 (C.A.) [hereinafter *Mossop* cited to F.C.].

[16]*Supra* note 14 at D/6094, D/6097.

[17]*Supra* note 15.

[18]*Supra* note 7.

[19]*Ibid.* at 580, 586-87.

[20]*Ibid.* at 582, Lamer C.J. See also *ibid.* at 586, LaForest J.: "While some may refer to a [same-sex living arrangement] as a "family", I do not think it has yet reached that status in the ordinary use of language." Compare *Braschi* v. *Stahl Associates Co.*, 543 N.E.2d 49 at 54 (N.Y. 1989): "[A] family includes two adult [same-sex] lifetime partners"; *Bowers* v. *Hardwick*, 478 U.S. 186 at 191 (1986) [hereinafter *Bowers*]: "No connection between family ... and homosexual activity has been demonstrated"; *Simpson* v. *United Kingdom* (No. 11716/85) (1986), 47 Eur. Comm. H.R. D.R. 274 at 277-78: "[A] stable homosexual relationship between two men [or two women] does not fall within the scope of the right to respect for family life ensured by Article 8 of the Convention."

[21]*Ibid.* at 648-49.

[22]*Ibid.* at 611-12, citing *Insurance Corp. of British Columbia* v. *Heerspink*, [1982] 2 S.C.R. 145, 39 B.C.L.R. 145 [hereinafter *Heerspink*]; *Ontario (Human Rights Commission)* v. *Simpsons-Sears Ltd.*, [1985] 2 S.C.R. 536, 52 O.R. (2d) 799 [hereinafter *O'Malley* cited to S.C.R]; *Bhinder* v.

interpretation and the specific intention of Parliament at the time it added "family status" by arguing that,

> [e]ven if Parliament had in mind a specific idea of the scope of "family status", in the absence of a definition in the Act which embodies this scope, concepts of equality and liberty which appear in human rights documents are not bounded by the precise understanding of those who drafted them. ... The "living-tree" doctrine ... is particularly well suited to human rights legislation. The enumerated grounds of discrimination must be examined in the context of contemporary values, ... [their] meaning ... is not "frozen in time" and the scope of each ground may evolve.[23]

The brief judgments of Chief Justice Lamer and Justice La Forest did not acknowledge or explain their departure from the usual approach of giving human rights legislation a "large, purposive and liberal interpretation".[24] Justice La Forest did agree that the *CHRA* "should be interpreted generously with a view to effect its purpose", but then sought evidence of a specific legislative purpose of protecting same-sex couples rather than of a general legislative purpose of prohibiting discrimination based on "family status" as that concept might be understood in the future. He found that the evidence supported the conclusion that Parliament did not intend to protect same-sex couples.[25] Perhaps, then, he and Chief Justice Lamer would say that a "large, purposive and liberal interpretation" cannot override clear evidence of a specific, conflicting "parliamentary intent", and that there was no evidence of such a conflicting intent in the cases cited by Justice L'Heureux-Dubé. Indeed, in *University of British Columbia* v. *Berg*, decided shortly after *Mossop*, Chief Justice Lamer observed that "[i]t is the duty of ... courts to give [human rights legislation] a liberal and purposive construction, without ... circumventing the intention of the legislature."[26]

Although this might explain the majority's reasoning, it is hard not to notice history repeating itself. *Mossop* is only the second case of sexual orientation discrimination to reach the Supreme Court of Canada since the substantial decriminalization of sexual activity between men in 1969.[27] In the first, *Gay*

Canadian National Railway Co., [1985] 2 S.C.R. 561, 23 D.L.R. (4th) 481; *Canadian National Railway Co.* v. *Canada (Human Rights Commission)*, [1987] 1 S.C.R. 1114, 40 D.L.R. (4th) 193; *Robichaud* v. *Canada (Treasury Board)*, [1987] 2 S.C.R. 84, 40 D.L.R. (4th) 577; *Zurich Insurance* v. *Ontario (Human Rights Commission)*, [1992] 2 S.C.R. 321, 93 D.L.R. (4th) 346.

[23]*Ibid.* at 621-22.

[24]Chief Justice Lamer's silence regarding these cases, in *Mossop*, can be contrasted with his citation of several of them in *University of British Columbia* v. *Berg*, [1993] 2 S.C.R. 353 at 370, 102 D.L.R. (4th) 665 [hereinafter *Berg* cited to S.C.R.]: "This Court has repeatedly stressed that a broad, liberal and purposive approach is appropriate to human rights legislation, ... [which] 'must be so interpreted as to advance the broad policy considerations underlying it'." See also W. Tarnopolsky & W. Pentney, *Discrimination and the Law*, rev. ed. (Toronto: De Boo, 1993) at *9-16–9-18*.

[25]*Mossop*, *supra* note 7 at 586-87 (S.C.C.). It is doubtful whether Parliament had a specific intent not to protect same-sex couples, as opposed to one not to prohibit sexual orientation discrimination, in that it may not have occurred to Parliament in 1983 that a same-sex couple would come to be seen as a "family".

[26]*Supra* note 24 at 371.

[27]*An Act to Amend the Criminal Code*, S.C. 1968-69, c. 38, s. 7.

Alliance Toward Equality v. *Vancouver Sun*, in 1979, the Court (in a 6-3 decision) reversed a board of inquiry finding that a newspaper's refusal of a classified advertisement for "GAY TIDE, gay lib paper" was discrimination "without reasonable cause" in a service "customarily available to the public", contrary to British Columbia's (then open-ended) human rights legislation.[28] In concluding that classified newspaper advertisements were not a service "customarily available to the public", the majority was exceptionally influenced by the guarantee of freedom of the press in the *Canadian Bill of Rights*,[29] and effectively gave a common law version of that guarantee a surprising precedence over a provincial statute (to which the *Bill of Rights* did not apply).[30] Now in *Mossop*, after a decade of expansive interpretation of human rights legislation, the Supreme Court has called a halt and has exceptionally invoked "parliamentary intent" when faced with a case of sexual orientation discrimination that could arguably be characterized as one of family status discrimination.

2. The Minority Judgments

By giving the *CHRA* a "large, purposive and liberal interpretation" regardless of any specific "parliamentary intent" in 1983, the minority adhered to the approach taken in earlier Supreme Court cases. But was its conclusion that such an interpretation of "family status" may include the relationship of a same-sex couple justified? Justice L'Heureux-Dubé began by noting that the French version of "family status" ("*situation de famille*") goes beyond "families with legal status",[31] and that Parliament had declined to define "family status", leaving its interpretation to the Canadian Human Rights Commission, its tribunals and the courts.[32] She then considered a variety of definitions of "family" from the "traditional family" (married opposite-sex couple with children) to "the family is who they say they are," before concluding that "there is no consensus as to the boundaries of family."[33] A compromise between a traditional definition and a completely subjective one might be one suggested by Justice L'Heureux-Dubé: "'[F]amily status' is an attribute of those who live as if they were a family, in a family relationship, *caring for each other*."[34] She observed that "a large number of Canadians do not live within traditional families," and that the values

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[28][1979] 2 S.C.R. 435, 10 B.C.L.R. 257 [hereinafter *Gay Alliance* cited to S.C.R.].

[29]S.C. 1960, c. 44. See W.W. Black, "*Gay Alliance Toward Equality* v. *Vancouver Sun*" (1979) 17 Osgoode Hall L.J. 649 at 665, 672-75.

[30]See *Gay Alliance*, *supra* note 28 at 454-56. The competing interest of freedom of the press in *Gay Alliance* was emphasized in *Berg* (*supra* note 24 at 376-79) and *Heerspink* (*supra* note 22 at 153). In *Heerspink*, the same B.C. human rights act as in *Gay Alliance* was described by Lamer J. (at 158) as "a fundamental law" that would govern in the event of a direct conflict with a B.C. insurance act. While Black (*ibid.* at 650-52, 672-75) saw *Gay Alliance* as a narrow decision turning on freedom of the press, other commentators viewed it as evidencing possible hostility on the part of the Supreme Court to human rights claims by gay, lesbian and bisexual persons. See *e.g.* H. Kopyto, "The *Gay Alliance* Case Reconsidered" (1980) 18 Osgoode Hall L.J. 639 at 652; J. Richstone & S. Russell, "Shutting the Gate: Gay Civil Rights in the Supreme Court of Canada" (1981) 27 McGill L.J. 92 at 93.

[31]*Mossop*, *supra* note 7 at 617-18 (S.C.C.).

[32]*Ibid.* at 619-20.

[33]*Ibid.* at 624-26.

[34]*Ibid.* at 624 [emphasis added].

promoted by "traditional families" (*e.g.*, stability and emotional relationships) "can be advanced by other types of families."[35] The Tribunal could thus conclude that the scope of "family status" "does not *prima facie* exclude same-sex couples."[36] It was also justified in adopting a "functional" rather than "formalistic" approach to defining "family status".[37] Thus, in view of the expert witness's conclusion that Mossop's relationship with Popert was a "familial relationship" because it satisfied a number of criteria relevant under a functional approach (relationship of some standing and expected to continue, joint residence, economic union, shared housework, emotional and sexual relationship), the Tribunal could conclude that it came within the scope of "family status".[38]

It is submitted that Justice L'Heureux-Dubé's analysis is correct, and that the majority ought to have concluded that a same-sex couple is a "family" and therefore has a "family status" for the purposes of the *CHRA*. But there remains the question of whether Mossop was denied bereavement leave because of his "family status" (*i.e.*, the kind of family relationship he had with Popert) or because of his "sexual orientation" (*i.e.*, his choice of a specific kind of family relationship, a "couple" or "spousal" relationship[39] with a person of the same sex rather than of the opposite sex). This is a difficult question. Justice L'Heureux-Dubé argued that the Mossop-Popert relationship "had functionally the same characteristics as other relationships for which bereavement leave was deemed appropriate" and that they were therefore "immediate family".[40] In excluding them from the definition of "immediate family", the collective agreement was discriminating on the basis of "family status" (as well as "sexual orientation") because the employer was treating their family relationship differently from other family relationships[41] and effectively refusing to recognise it as a "family relationship" or a "real family".[42] I would argue that Chief Justice Lamer (in agreeing with Marceau J.A.) correctly concluded that the real ground of distinction was sexual orientation and not family status,[43] whereas Justice L'Heureux-Dubé used the arguable overlap of sexual orientation and family status to do justice in this case.

3. "Family Status" or "Sexual Orientation"?

The decision on this point turns on whether or not sexual orientation is treated as entering into the definition of a kind of family relationship. If a couple relationship between persons of the same sex is a different kind of family relationship from a couple relationship between persons of opposite sexes (married or unmarried), then Justice L'Heureux-Dubé correctly concluded that there had been discrimination on the basis of "family status", in that the former kind of

[35] *Ibid.* at 629-31.
[36] *Ibid.* at 635.
[37] *Ibid.* at 636-39.
[38] *Ibid.* at 639-40.
[39] I will use these terms interchangeably.
[40] *Mossop, supra* note 7 at 643 (S.C.C.).
[41] *Ibid.* at 644.
[42] *Ibid.* at 646-47.
[43] *Ibid.* at 580-81.

family relationship had been excluded while the latter had been included. But if a couple relationship between persons of the same sex is the same kind of family relationship as a couple relationship between persons of opposite sexes (both are couple relationships), then the difference between them is one of sexual orientation and not family status (kind of family relationship). The same issue would have presented itself if the collective agreement had said "common-law spouse, except where such spouse is not of the same race or religion as the employee." Would an African-Canadian or Jewish employee with a European-Canadian or Christian common-law spouse be denied bereavement leave because of his or her "family status" (kind of family relationship, *i.e.*, mixed-race or mixed-religion couple relationship), or because of his or her race or religion? I would suggest that a couple relationship between two persons of different races or religions is not an inherently different kind of family relationship from one between two persons of the same race or religion. The same is true of the difference between a same-sex couple and an opposite-sex couple. The difference lies in the sexual orientations of the individuals (or of the relationship), but not in the kind of family relationship, which is the same in each case (both are couple relationships). Sexual orientation is thus a distinct (and, for the purposes of "family status", unrelated or irrelevant) kind of difference in that it does not reflect a difference in the kind of family relationship. The discrimination in *Mossop* was among family relationships of the same kind (couple relationships) according to the sexual orientation of those relationships.

The real question with regard to same-sex couples is not the highly emotive one of whether or not they constitute "families". This depends entirely on the definition of "family". A definition as broad as that used in the collective agreement in *Mossop* (*i.e.*, any definition that includes opposite-sex couples) certainly should include them. A narrow one (*e.g.*, parent-child relationships, to be discussed below) would exclude all couple relationships, whether opposite-sex or same-sex, married or unmarried. The real question is whether, whatever definition of "family" is adopted in a particular context, the definition may discriminate directly or indirectly on the basis of sexual orientation (or any other ground prohibited by human rights legislation or, where applicable, the *Charter*). A definition of "common-law spouse" as a "person of the opposite sex" discriminates directly (or expressly) on the ground of sexual orientation. A definition of "common-law spouse" as a person "publicly represented" as the employee's spouse, or with whom the employee resides, could discriminate indirectly against (disproportionately exclude or have an adverse effect on) same-sex couples who, for fear of discrimination, cannot publicly represent their relationship[44] or, in some cases, even live together. Thus, I would agree with the minority that (regardless of "parliamentary intent" in 1983) a same-sex couple may be a "family" for the purposes of the *CHRA* (given a definition of "family" that includes opposite-sex couples), and with the majority that, even though the Mossop-Popert relationship was a "family relationship", the discri-

[44]Justice L'Heureux-Dubé noted the discriminatory potential of a "public representation" requirement (*ibid.* at 638). See also Linden J.A. in *Egan* (*supra* note 7 at 441), where he stated that "gay and lesbian partners are not required to show that their relationship corresponds to an idealized heterosexual relationship."

mination was based on the sexual orientation of that relationship, and not on the kind of family relationship (*i.e.*, their "family status").

4. The Limitations of "Family Status"

The above analysis could be criticized for making an overly fine distinction between sexual orientation and family status, like the distinction between pregnancy and sex made in *Bliss* v. *Canada (A.G.)*,[45] to which Justice L'Heureux-Dubé implicitly compared the situation in *Mossop*.[46] Assuming that the minority was correct in finding "family status" discrimination, and that *Mossop* was wrongly decided, the question arises whether a family status discrimination argument is the best approach to cases involving discrimination against same-sex couples, and to other cases of sexual orientation discrimination, or whether it is a *faute-de-mieux* argument that was invoked to achieve a just result. Had the decision in *Mossop* gone the other way, would it have established a general principle that could be applied to all cases of sexual orientation discrimination, or to all cases of discrimination against same-sex couples?

Arguing family status discrimination in a case of sexual orientation discrimination raises several problems. First, as Justice L'Heureux-Dubé's judgment demonstrates, the concepts of "family" and "family status" are extremely amorphous and can be given a wide variety of meanings. The narrowest meaning of "family" is probably "parent-child relationship", as when a couple without children says that they are planning to "start a family". Such a meaning gives "family status" a manageable scope (being in a parent-child relationship) and has been incorporated by several provincial legislatures into statutory definitions of "family status".[47] If "family status" is not defined, as in the *CHRA*, it is hard to see what limits could be placed on its scope, for virtually any blood relationship (using a traditional approach) or a close friendship with any non-relative (using a functional approach) could conceivably qualify. Giving a broad scope to "family status" raises the question of when distinctions based on "family status" are permitted. Justice L'Heureux-Dubé clearly contemplated that all family relationships need not be treated alike and suggested that the distinction between "immediate family" and other family relationships, used in the bereavement-leave provision of the collective agreement in *Mossop*, was permissible.[48] Would there be *prima facie* family status discrimination where the deceased person was the employee's cousin (and did not reside with the employee), or an extremely close friend of the employee (such that their relationship was familial but not sexual), or a less close friend with whom the employee was not in a family relationship? In the latter case, does "family status" include not being in a family relationship with a particular person, as "marital status" may include not being married?[49]

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[45][1979] 1 S.C.R. 183, 92 D.L.R. (3d) 417.

[46]*Supra* note 7 at 646 (S.C.C.).

[47]See *e.g.* Ontario *Human Rights Code*, R.S.O. 1990, c. H-19, s. 10(1); *Saskatchewan Human Rights Code*, S.S. 1979, c. S-24.1, s. 2(1)(*h.1*).

[48]*Supra* note 7 at 641, 643 (S.C.C.).

[49]See *Mossop*, *supra* note 15 at 35 (F.C.A.).

Second, even if the uncertain scope of "family status" can be ignored, treating discrimination against a same-sex couple as family status discrimination does not establish a general principle that could easily be applied to other cases of sexual orientation discrimination, for example, discrimination in employment against gay, lesbian or bisexual individuals who do not have same-sex partners. Unless "family status" includes "desire for a particular family status", an employer's dismissal of such an individual would not be prohibited. The anomalous consequence that such individuals would not be protected by the *CHRA*, but members of same-sex couples would be, was noted by Chief Justice Lamer.[50]

Third, even if treating discrimination against a same-sex couple as family status discrimination is a useful principle for same-sex couples, it probably would not apply to many cases of discrimination against them. The Tribunal's decision in *Mossop* rested essentially on the similarity between a same-sex couple and an unmarried opposite-sex couple,[51] and its order required the amendment of the collective agreement "to provide that a person of the same sex as an employee who would otherwise meet the definition of 'common-law spouse' of that employee, except for the sex of that person, is included in the definition of 'common-law spouse'" (*i.e.*, by deleting "of the opposite sex" from the definition).[52] However, the Tribunal's conclusion that the discrimination was based on family status fails to reflect the similarity between same-sex and opposite-sex couples. It does recognise that two long-term same-sex partners are more than just "two friends" and are at least "two members of a family", but not that they are a "couple" or "spouses". It places them in an outer circle of family relationships, including brothers, sisters, other blood relatives and parents-in-law, rather than in an inner circle of couple or spousal relationships (opposite-sex or same-sex, married or unmarried). Even Justice L'Heureux-Dubé declined, in spite of the Tribunal's order that the definition of "common-law spouse" be amended, to interpret its decision as concluding "that a same-sex partner is a common law spouse."[53] Yet, as Marceau J.A. argued in the Federal Court of Appeal decision, "[t]he complainant's case must rest ... on the basis that not only was his lover a member of his family, but that they were spouses."[54] The distinction between being a "spouse" and being a "family mem-

[50]*Mossop*, *supra* note 7 at 581 (S.C.C.). A somewhat similar anomaly would exist if a human rights act prohibited discrimination based on pregnancy but not sex. A non-pregnant woman would have to argue that she was dismissed because of her desire or capacity to become pregnant.

[51]The Tribunal stated that the collective agreement definition of common-law spouse "excludes a person of the same sex who, but for gender, would otherwise be included as a common-law spouse" (*supra* note 14 at D/6097 (C.H.R.C.)).

[52]*Ibid.* at D/6099.

[53]*Supra* note 7 at 644 (S.C.C.). See also *Mossop*, *supra* note 15 at 41 (F.C.A.), where Stone J.A. stated, "[A] common-law relationship ... is one that exists between persons of the opposite sex"; *Veysey*, *supra* note 7 at 321-22, where the Federal Court of Appeal declined to express any view as to whether "common law partners of the same sex" are "common law spouses".

[54]*Supra* note 15 at 36-37 (F.C.A.). This assumes that Mossop was comparing his relationship with Popert's father with the relationship between a male employee and the father of his (legal or common-law) female spouse (in view of the inclusion of "father-in-law" in the collective agreement's definition of "immediate family"), rather than arguing that his relationship with Popert's father was simply a family relationship that had been excluded from that definition (and was of

ber" matters not just because of the real difference in the relationship between two men or two women who are partners and two brothers or two sisters (*i.e.*, existence, at least initially or potentially, of a sexual relationship), but also because there will be cases where benefits will be made available only to an employee's married or unmarried partner (and often to the children of the employee or the partner). In such cases, it would be difficult to argue that there was discrimination based on family status, because most family relationships (other than couple relationships or parent-child relationships) would be excluded from the benefit.[55] *Mossop* was not such a case, because the benefit in question was provided not only where the deceased was the opposite-sex spouse (legal or common-law) or the child of the employee or opposite-sex spouse, but also where the deceased was a parent, brother, sister, parent-in-law or ward of the employee, or a relative residing with the employee.[56] Because a wide variety of family relationships other than couple or parent-child relationships were included, Justice L'Heureux-Dubé could easily treat the exclusion of same-sex couples as the exclusion of one kind of family relationship where many others were included. It was not necessary to compare a same-sex couple directly with an opposite-sex couple.

5. The *Charter* Argument Not Made

In view of the rejection of a family status discrimination argument under the *CHRA*, and its limitations had it been accepted, are there other arguments that could have been made and that might have had a broader application if accepted? Why was a *CHRA* complaint used rather than a *Charter* action, and why was "family status" selected as the applicable prohibited ground of discrimination? Although *Mossop* involved "a collective agreement ... one of the co-authors of which [the Treasury Board] falls easily within the notion of government ... in section 32 of the Charter,"[57] the complainant chose not to make direct use of the *Charter* by arguing that his employer (the federal government) had discriminated against him on the basis of an analogous ground (sexual orientation), contrary to subsection 15(1) of the *Charter*. The probable reason is that the Canadian Human Rights Commission would bear the cost of a *CHRA* complaint, whereas Mossop may have had to pay much of the substantial cost of a *Charter* action.[58] Thus, although a *Charter* action might have established a more general principle that any government action (including legislation) discriminating against same-sex couples is *prima facie* prohibited by subsection 15(1), it may have been prohibitively expensive. In selecting the appropriate prohibited ground from the list in subsection 3(1) of the *CHRA*, several candidates other than "family status" might have been considered. "Marital status"

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a kind other than "son-in-law and father-in-law"). But without a direct comparison with an included family relationship, the case against exclusion of the Mossop-Popert Sr. relationship would be weakened.

[55]See *e.g. Egan*, *supra* note 7; *Leshner*, *supra* note 7; *Vogel II*, *supra* note 7; *Knodel*, *supra* note 7.

[56]*Supra* note 7 at 590 (S.C.C.).

[57]*Supra* note 15 at 38 (F.C.A.).

[58]See W. Tarnopolsky, "The Equality Rights in the *Canadian Charter*" (1983) 61 Can. Bar Rev. 242 at 255-56.

may have been rejected as inapplicable because both married and unmarried opposite-sex couples qualified for the benefit. "Sex" may have been seen as precluded by precedent (to be discussed below). As for "sexual orientation", Parliament had not yet added it at the time of the complaint, the oral argument in the Supreme Court, or the Court's decision.

However, between the oral argument and the Supreme Court's decision in *Mossop*, the Ontario Court of Appeal held in *Haig* v. *Canada*[59] that the omission of "sexual orientation" from subsection 3(1) of the *CHRA* violates subsection 15(1) of the *Charter* and must therefore be "read in". After the federal government decided not to appeal the decision, the Court "invited the parties [in *Mossop*] to submit new arguments," which would have permitted the Canadian Human Rights Commission to make indirect use of the *Charter* by arguing (as in *Haig*) that subsection 15(1) of the *Charter* requires that "sexual orientation" be read into the *CHRA*.[60] This would have permitted the Court to decide whether or not it agreed with the reasoning in *Haig*,[61] and if it agreed, to uphold Mossop's complaint as one of sexual orientation discrimination. The Commission declined the opportunity, perhaps because it had been rebuked in the past for trying to change the grounds of a complaint,[62] with the result that the Court decided the case solely as one of family status discrimination.[63] The majority did, however, stress that it was leaving open the question of how it would decide a similar case argued under the *Charter* and implied that the outcome might be different.[64] Two such cases, *Egan* and *Layland*, were decided by lower courts shortly after *Mossop*. How did the *Charter* argument fare?

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[59](1992), 9 O.R. (3d) 495, 94 D.L.R. (4th) 1 (C.A.) [hereinafter *Haig* cited to O.R.]. In *Vriend* v. *Alberta (A.G.)* (12 April 1994), Edmonton 9203-02452 (Alta. Q.B.), Russel J. followed *Haig* and held that subsection 15(1) of the *Charter* requires that "sexual orientation" be read into ss. 2(1), 3, 4, 7(1) and 8(1) of the *Individual's Rights Protection Act*, S.A. 1980, c. I-2.

[60]*Mossop*, *supra* note 7 at 579 (S.C.C.).

[61]The Canadian Human Rights Commission has relied on *Haig* in accepting sexual orientation discrimination complaints throughout Canada, not just in Ontario, and human rights commissions in all jurisdictions (other than the Northwest Territories) have been accepting such complaints on the assumption that the reasoning also applies to their human rights acts (telephone conversation with Charles Mojsej, Canadian Human Rights Commission, Ottawa, 17 December 1992). A Supreme Court decision upholding the reasoning in *Haig* would remove the uncertainty as to whether these commissions should be accepting complaints not governed by *Haig*. It could also address two issues raised by *Haig*: (1) Does subsection 15(1) of the *Charter* require that human rights acts include all the enumerated and analogous grounds of discrimination contained in or recognised under subsection 15(1)? (2) If so, does this requirement extend to the private sector as well as the public sector? In *McKinney* v. *University of Guelph* ([1990] 3 S.C.R. 229, 76 D.L.R. (4th) 545 [hereinafter *McKinney* cited to S.C.R.]), Justice L'Heureux-Dubé said (at 436) that the omission of a ground would not be a violation of subsection 15(1), Justice Wilson left the point open (at 412-13), and the majority was silent. Perhaps *Haig* can be explained on the basis that, whether or not subsection 15(1) requires the enactment of human rights legislation, a legislature that elects to do so (and to extend the legislation to the private sector) must treat all enumerated and analogous grounds of discrimination equally.

[62]See S. Fine, "Top Court Rejects Gay Man's Claim" *The [Toronto] Globe and Mail* (26 February 1993) A1 at A2. See also M. Falardeau-Ramsay, "The Changing Face of Human Rights in Canada" (Spring 1993) *Constitutional Forum* 61 at 65.

[63]*Mossop*, *supra* note 7 at 579-80 (S.C.C.).

[64]*Ibid.* at 581-82, 587. Chief Justice Lamer was referring to a *Charter* challenge to the omission of "sexual orientation" from the *CHRA* (*i.e.*, indirect use of the *Charter* as in *Haig*), rather than

B. Egan *v.* Canada

Upon turning 65, James Egan applied for a "spouse's allowance" under the *Old Age Security Act*[65] for John Nesbit, his partner since 1948. His application was rejected because Nesbit did not satisfy the requirement in the definition of "spouse" in section 2 of the Act that he be "a person of the opposite sex." Egan and Nesbit brought an action seeking a declaration that the definition of "spouse" is contrary to subsection 15(1) of the *Charter*. Martin J. dismissed their action,[66] and the Federal Court of Appeal (in a 2-1 decision) dismissed their appeal.[67] The majority of the Federal Court of Appeal appeared to give four reasons for its decision, each of which will be considered in turn.

1. The "Similarly Situated Test"

The plaintiffs could not argue that same-sex couples are "the same as" or "similar to" opposite-sex couples[68] because the "similarly situated test" (no distinctions may be made amongst "similarly situated" persons) was rejected in *Andrews* v. *Law Society of British Columbia*.[69] This reason shows a misunderstanding of why the "similarly situated test" had to be rejected in *Andrews* and the extent to which "similarity of situation" remains relevant after *Andrews*. Justice McIntyre's main criticism of the test in *Andrews* was that it might permit a discriminatory law to be upheld if the law was in fact applied equally to all to whom it applied.[70] I would suggest that this is not the best explanation for the rejection of the test because it does not address the distinction made between those to whom the law applies and those to whom it does not apply. The real problem with the "similarly situated test" is that it does not tell us what kinds of differences are permissible grounds of distinction because the difference makes those excluded from the law "differently situated" (or unalike), nor what kinds of differences are not permissible grounds of distinction, because those excluded from the law remain "similarly situated" (or alike) in spite of the difference. The test could only be used to justify religious or racial discrimination[71] if religion and race can be said to be permissible grounds of distinction, because the persons affected by the discrimination (for example, persons who are Jewish or of African origin) are "differently situated". But the test does not tell us whether these grounds of distinction are permissible. Indeed, it could be said to be meaningless. In one sense, no two persons are "similarly situated", because no two persons are alike in all respects. In another sense, all persons are "similarly situated" because we are all human beings. Which differences can be used as the basis for distinctions in the law?

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to direct use of the *Charter* as in *Egan* and *Layland*. But the questions of whether sexual orientation is an analogous ground under subsection 15(1), and whether discrimination against a same-sex couple is sexual orientation discrimination (under subsection 15(1) or a "post-reading-in" *CHRA*) are the same in all three cases.

[65] *Supra* note 11, s. 19(1).

[66] [1992] 1 F.C. 687, 87 D.L.R. (4th) 320 (T.D.) [hereinafter *Egan* cited to F.C.].

[67] *Supra* note 7.

[68] *Ibid.* at 413, 471-74.

[69] [1989] 1 S.C.R. 143, 56 D.L.R. (4th) 1 [hereinafter *Andrews* cited to S.C.R.].

[70] *Ibid.* at 161-68.

[71] *Ibid.* at 166-67.

The "enumerated or analogous grounds" approach adopted in *Andrews* attempts to answer this question by identifying those differences (characteristics) that cannot, *prima facie*, be used as grounds of distinction, unless a justification is established under section 1 of the *Charter*. Thus, it is no longer sufficient to assert that the plaintiff who is denied the benefit and the persons who are receiving the benefit are "similarly situated". The difference between the plaintiff and the benefited persons that has been used as a ground of distinction must be identified and involve an "enumerated or analogous ground". The only sense in which "similarity of situation" remains relevant after *Andrews* is that the plaintiff must show that, apart from the difference between the plaintiff and the benefited persons that involves an "enumerated or analogous ground", the plaintiff is in other respects "the same" as the benefited persons, or is "otherwise qualified". If this is the case, then the plaintiff should establish a *prima facie* case of discrimination under subsection 15(1) of the *Charter*. If the plaintiff is in some other respect different, then the "enumerated or analogous ground" is not in fact the operative ground of distinction in his or her case, and he or she does not have standing to challenge its use, unless of course his or her exclusion because of the other difference is itself directly or indirectly discriminatory.

The plaintiffs in *Egan* argued that their relationship was "the same as" or "similar to" that of an unmarried opposite-sex couple in all respects, except that it involved persons of the same sex and therefore had a different sexual orientation. Both Robertson J.A. and Mahoney J.A. accepted the trial judge's finding that, "had Nesbit been a woman cohabiting with Egan, substantially on the same terms as he in fact cohabited with Egan, he would have been eligible for the spouse's allowance."[72] This argument was entirely consistent with *Andrews* in that it sought to establish that the only difference between the plaintiffs and recipients of the "spouse's allowance" was one of sexual orientation (an "analogous ground"), and that in all other respects they were "similarly situated". The majority misread the rejection of the "similarly situated test" in *Andrews* as precluding any comparison between the plaintiff's situation and that of the benefited persons. If this were true, discrimination under subsection 15(1) of the *Charter* could rarely be established, because a comparison is almost always necessary to show unequal treatment. For example, a woman denied a position as a firefighter solely because she was a woman, would compare herself with men who had been hired and show that she was in all respects the same as them (in terms of physical characteristics and other qualifications) except for her sex. The majority's reasoning would prevent her from doing so.

2. "Irrelevant Personal Differences"

The plaintiffs could not succeed because "sexual orientation is both relevant and essential to [their] argument," whereas *Andrews* "defines discrimination in terms of a distinction based on an irrelevant personal difference."[73] Here again, Robertson J.A. misapplied a concept mentioned by McIntyre J. in

[72]*Egan*, *supra* note 7 at 410, 458-59 (F.C.A.).
[73]*Ibid.* at 477.

Andrews.[74] He correctly interpreted it as meaning that "sexual orientation is neither a valid criterion of disentitlement, nor a valid criterion of entitlement."[75] However, he mistakenly treated sexual orientation as a criterion of entitlement in *Egan* by asserting that "it is the characteristic which makes them similar to an opposite-sex (common law) couple and distinguishes them from other non-spousal relationships."[76] In fact, the criterion of entitlement to a "spouse's allowance" is "being in a spousal or couple relationship." It is this criterion that should include opposite-sex and same-sex couples and exclude non-spousal or non-couple relationships. What makes a same-sex couple similar to an opposite-sex couple and different from persons in a non-couple relationship is "being a couple". What makes a same-sex couple different from an opposite-sex couple, and what was in fact the criterion of disentitlement applied to the plaintiffs, is "being a *same-sex* couple" (*i.e.*, the couple's sexual orientation). Thus, the distinction between same-sex couples and opposite-sex couples is based on an "irrelevant personal difference" (sexual orientation). The distinction between couples and non-couples is made on the basis of another difference (being or not being in a couple relationship). Whether or not that difference may validly be used as a ground of distinction under subsection 15(1) was not the issue before the court in *Egan*.

By asserting that the plaintiffs were using their sexual orientation as a criterion of entitlement, Robertson J.A. implied that they were seeking some kind of "special treatment" not made available to non-couple relationships. In fact, they were arguing that their couple relationship should not be treated less favourably than opposite-sex couple relationships because of its sexual orientation. There is no "special treatment" of same-sex couples. The only "special treatment" is of couples generally, most of whom are opposite-sex. The same is true where a qualified doctor is denied a job because she is a woman. She is not using her sex to obtain "special treatment" (an opportunity to practice medicine) not made available to non-doctors. She is asking that the opportunity to practice medicine made available to other qualified doctors not be denied to her because of her sex. Any "special treatment" is as between all qualified doctors and non-doctors.

Robertson J.A. also suggested that "the [plaintiffs'] claim for spousal benefits represents a fundamental shift in the nature of the rationale underscoring gay and lesbian rights in Canada."[77] He characterized *Haig*, which involved discrimination against gay, lesbian and bisexual individuals in military employment, as "based on the understanding that sexual orientation must remain an

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[74]*Supra* note 69 at 165.

[75]*Egan*, *supra* note 7 at 477 (F.C.A.). I would suggest that this statement is generally correct, except that sexual orientation could be a "valid criterion of disentitlement" in extremely rare circumstances in which a section 1 justification could be established, and could be a "valid criterion of entitlement" in situations where subsection 15(2) applies or a section 1 justification (*e.g.*, some kind of "special need") could be established.

[76]*Ibid.* at 474. See also *ibid.* at 413 where Mahoney J.A. stated that "[t]he distinction [between 'homosexual couples' and 'non-conjugal couples'] is necessarily made on the basis of an irrelevant personal difference, sexual orientation."

[77]*Ibid.* at 475.

irrelevant consideration."[78] But there is no inconsistency or "fundamental shift" between *Haig* and the plaintiffs' claim in *Egan*. In both cases, sexual orientation was used as a criterion of disentitlement, and the plaintiffs were seeking equality, without regard to sexual orientation. In *Haig*, the equality sought was between gay, lesbian and bisexual individuals and heterosexual individuals in the armed forces. In *Egan*, it was between same-sex couples and opposite-sex couples. Thus, both cases are consistent with the "irrelevant consideration" rationale for "gay and lesbian rights" and the "neutral difference" model ("sexual orientation ... should not be a basis for discriminatory treatment"), both of which Robertson J.A. saw reflected in the Supreme Court's interpretation of the *Charter* in *Andrews*.[79]

Robertson J.A. found it puzzling that decriminalization of sexual activity between men "was premised on an unarticulated right to privacy" and on courts remaining outside "the bedrooms of the nation", while the plaintiffs seemed to be inviting the Court into their household to see its similarity to that of an opposite-sex couple.[80] This merely illustrates the inadequacy of a "spatial privacy" rationale where sexual orientation discrimination affects, not private sexual activity, but public situations such as public displays of affection and recognition of couple relationships. Gay, lesbian and bisexual individuals and same-sex couples who are seeking the right to kiss and hold hands in public like heterosexual individuals and opposite-sex couples, and the right to the same benefits as opposite-sex couples, are not asking for "privacy" of a particular space. Instead, they are seeking "equality" with heterosexual individuals and opposite-sex couples in the respect given to their "personal autonomy"[81], or "privacy" in making particular decisions[82] (which may require a "waiver" of "spatial privacy" where comparison is necessary).

3. The Ground of Distinction

The plaintiffs "do not benefit because of their non-spousal status rather than because of their sexual orientation."[83] This statement of Martin J. was adopted by both Mahoney J.A. and Robertson J.A. as the ultimate conclusion of their reasoning.[84] Thus, even though they had both accepted that sexual orientation is an analogous ground of discrimination under subsection 15(1),[85] they seemed to suggest that sexual orientation is not the operative ground of distinction in *Egan*. Instead, it is the distinction between spousal and non-spousal relationships. Martin J. asserted that

> [t]he plaintiffs do not fall within the meaning of the word "spouse" any more than *heterosexual couples* who live together and do not publicly represent themselves

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[78]*Ibid.*

[79]*Ibid.* at 476-77.

[80]*Ibid.* at 475.

[81]See *R.* v. *Morgentaler*, [1988] 1 S.C.R. 30 at 171, 44 D.L.R. (4th) 385, Wilson J.

[82]On the distinction between "spatial privacy" and "decisional privacy", see *Bowers*, *supra* note 20 at 203-204, Blackmun J., dissenting.

[83]*Egan*, *supra* note 66 at 704 (F.C.T.D.).

[84]*Egan*, *supra* note 7 at 413, 486 (F.C.A.).

[85]*Ibid.* at 410, 461.

> as man and wife such as brother and sister,[86] brother and brother, sister and sister, two relatives, two friends, or parent and child. The [same-sex] couple fall [*sic*] into the same category as those, i.e., the non-spousal couple category.[87]

Martin J.'s use of the word "couple" is much broader than mine. I use "couple" and "spouses" interchangeably and see both as implying an actual, potential or past sexual relationship. Martin J. uses "couple" to mean a pair of individuals. It is only in this sense that a brother and sister, or a parent and child (of opposite sexes), could be described as "heterosexual couples".[88] Once this meaning of "couple" is understood, it becomes clear that the plaintiffs were not arguing that they were a "same-sex couple" (in Martin J.'s terminology), but that they were a "same-sex spousal couple", that they should not have been included in a category of "non-spousal couples", and that they were excluded from the category of "spousal couples" (for which they otherwise qualified) because the definition of "spouse" as "opposite-sex spousal couple" discriminates on the basis of sexual orientation.

Robertson J.A. ultimately characterized the plaintiffs' action as "an indirect challenge to the common law and statutory concept of marriage, as reflected in the definition of 'spouse'."[89] In fact, as Mahoney J.A. acknowledged, it was a direct challenge to the incorporation of a discriminatory concept of "common law marriage" into the Act's definition of "spouse".[90] But he treated the issue of "whether otherwise qualified same-sex couples should be entitled to benefits available to opposite-sex ones," of "whether we are prepared to recognise that same-sex couples are no different from opposite-sex couples," as one which the Court could not address,[91] presumably for the first two reasons discussed above. Yet that was the issue raised by the plaintiffs' action, and it did involve a distinction based on "sexual orientation", not one based on the "existence or non-existence of a spousal relationship".

4. "Discriminatory Impact"

The plaintiffs have not reached "the threshold of disadvantage that must be demonstrated before the impugned legislation can be declared discriminatory."[92] Robertson J.A. found that the "adverse impact" on same-sex couples was not sufficient to make "the denial of the spouse's allowance ... cross the line from 'distinction' to 'discrimination'."[93] I will discuss below, in Part **I.C.**3, this "dis-

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[86]The possibility of lumping same-sex couples together with pairs of siblings illustrates one of the limitations of a family status discrimination argument. See *supra* notes 55ff and accompanying text.

[87]*Egan*, *supra* note 66 at 703-704 (F.C.T.D.) [emphasis added].

[88]It is not clear in what sense two brothers or two sisters can be described as "heterosexual couples" if "heterosexual" means "of opposite sexes". Perhaps Martin J. was referring to their individual sexual orientations. See also *Egan*, *supra* note 7 at 412 (F.C.A.) where siblings are described as "couples".

[89]*Ibid.* at 485.

[90]He states that "[t]he attack is ... on the failure of the definition to comprehend the concept of common law marriage between persons of the same sex" (*ibid.* at 413).

[91]*Ibid.* at 485.

[92]*Ibid.* at 481.

[93]*Ibid.* at 486.

criminatory impact" requirement, introduced by Justice McIntyre in *Andrews*, and the ways in which it has been expanded well beyond what seems to have been its intended scope, and has thus distorted subsection 15(1) jurisprudence. Here, I will only examine Robertson J.A.'s reasons for finding insufficient "discriminatory impact". His main argument (and primary concern) was that "the definition of 'spouse' ... excludes a broad class of [cohabiting] non-spouses," including "siblings, friends and relatives."[94] He asked "whether [the] rights [of same-sex couples] should be determined in isolation of those also affected by the impugned legislation" and suggested that "same-sex couples are [not] more deserving of the spouse's allowance than those [in another non-spousal category] whose financial needs may be just as substantial."[95] He then rejected the argument that the extension of the allowance to "siblings or parent or child" was not before the Court, because it could "generate an inequality on the basis of sexual orientation."[96] He concluded that proper consideration must be given, in assessing "discriminatory impact", to the fact that "the impugned legislation excludes persons other than those who are members of a particular disadvantaged group."[97]

I would suggest that Robertson J.A. should have reached the opposite conclusion and ignored the fact that persons in non-spousal relationships do not qualify for the benefit. Whether they "deserve" it as much as couples (not just same-sex couples), and whether it is discrimination contrary to subsection 15(1) of the *Charter* to exclude them, was not an issue before the Court. (They may or may not be able to show the use of an enumerated or analogous ground, and there may or may not be a section 1 justification for the discrimination.) Robertson J.A.'s approach amounts to saying that unless the plaintiff's group is the only category of persons denied a benefit or opportunity then a finding of discrimination against the plaintiff cannot be made, because exclusion of another category of persons from the benefit or opportunity might also be discrimination. If all questions of discrimination cannot be resolved in a single case, none should be resolved. Thus, refusal to hire a qualified doctor because she is a woman would not be sex discrimination because the vast majority of persons (who are not qualified doctors) are denied the right to practice medicine. Similarly, refusal to hire gay, lesbian and bisexual soldiers would not be sexual orientation discrimination if persons with a particular disability were also excluded. Moreover, a definition of "spouse" that excludes mixed-race couples from a "spouse's allowance" would not be race discrimination because persons in non-spousal relationships are also excluded. These potential consequences of Robertson J.A.'s approach demonstrate that it cannot be correct.

Robertson J.A. also asserted that the "benefit has been conferred on a narrow class of persons ... who are in financial need because of a pattern of financial interdependency, characteristic of heterosexual couples, and which cannot

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[94]*Ibid.* at 479.

[95]*Ibid.* Any inequality would be based on "existence or non-existence of a spousal relationsbip" and not on sexual orientation. See Part I.B.2., above.

[96]*Ibid.* at 480.

[97]*Ibid.* at 481.

... be deemed relevant to same-sex couples or ... other non-spousal relationships."[98] Here, Robertson J.A. introduced a requirement that is not found in the Act. It provides for the payment of a "spouse's allowance" to the "spouse of a pensioner who is in receipt of a guaranteed income supplement," which is based on the combined incomes of the pensioner and his or her spouse.[99] It does not require that the pensioner and the spouse demonstrate a "financial need because of a pattern of financial interdependency". The plaintiffs satisfied the financial need requirement in the Act but were excluded by the definition of "spouse". Whether or not the sexual orientation discrimination in this definition could be justified because a "pattern of financial interdependency" is more characteristic of opposite-sex couples than same-sex couples is a matter that should only have been considered under section 1 of the *Charter*.[100]

Robertson J.A. seemed unimpressed by the financial consequences of denial of a "spouse's allowance" or other spousal benefits to same-sex couples. He suggested that same-sex couples could not be characterized as "an economically disadvantaged group."[101] And, although he said that the plaintiffs in *Egan* need not be "financially disadvantaged by the denial of benefits" (in noting the apparently positive financial impact of the denial on them),[102] he stressed the neutral or only slightly negative financial impact of a denial of benefits to a same-sex partner in *Karen Andrews* and *Knodel* (forty-two dollars extra per year in the latter case).[103] The reference to "economically disadvantaged groups" raises the question of whether membership in such a group should be essential for "discriminatory impact". And the consideration of financial impact on the plaintiffs may preclude claims of principle. It is hard to imagine that financial impact would even be discussed if a mixed-race couple (excluded from a definition of "spouse") had to pay forty-two dollars extra per year for medical coverage, or if a public bus fare were ten cents more for women than for men.

5. The Dissenting Judgment

Linden J.A. found that there had been a *prima facie* violation of subsection 15(1), that it could not be justified under section 1,[104] and that the appropriate remedy was the "reading down" of the words "of the opposite sex" in section 2 of the Act, and the "reading in" of the words "or as in an analogous relation-

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[98]*Ibid.* at 484.

[99]*Ibid.* at 411.

[100]Even if this assumption is correct, under the "minimal impairment" branch of the test in *R.* v. *Oakes* ([1986] 1 S.C.R. 103, 26 D.L.R. (4th) 200 [hereinafter *Oakes* cited to S.C.R.]) insertion of a "financial interdependency" requirement into the Act would seem to be a viable alternative to the exclusion of all same-sex couples.

[101]*Egan, supra* note 7 at 484 (F.C.A.). Presumably, same-sex couples entitled to claim a spouse's allowance would be as "economically disadvantaged" as opposite-sex couples entitled to claim the allowance.

[102]*Ibid.* at 458-59, n. 13.

[103]*Ibid.* at 468-71. See *Karen Andrews, supra* note 7; *Knodel, supra* note 7.

[104]The plaintiffs conceded that the objective of the "spouse's allowance program" is "pressing and substantial", therefore satisfying the first requirement of the *Oakes* test. I would argue that it is the program's opposite-sex definition of "spouse" (*i.e.*, the limit on the *Charter* right) that must have a "pressing and substantial" objective.

ship" after the phrase "publicly represent themselves as husband and wife."[105] He began by rejecting the conclusion of the majority that the plaintiffs "do not benefit because of their non-spousal status rather than because of their sexual orientation." He described this reasoning as "circular" because the issue before the Court was whether "the definition of 'spouse' ... creates a distinction ... which is discriminatory on the basis of sexual orientation."[106]

Turning to subsection 15(1) of the *Charter*, he found that the distinction made in the definition of "spouse" "den[ies] otherwise qualified gay men and lesbians the equal benefit of the law,"[107] that "sexual orientation is an analogous ground of discrimination for the purposes of s. 15(1),"[108] and that "gay men and lesbians are ... excluded ... based on a matter [or characteristic] in relation to sexual orientation."[109] He rejected Robertson J.A.'s argument that "admitting one group [same-sex couples] to the benefits program would leave another unjustly excluded," holding that "[t]he better solution is to address the claim before the Court, leaving other groups ... to advance their own claims."[110] Finally, he was able to find that "the distinction [denying equal benefit of the law] ... drawn on the basis of an analogous ground" had a "discriminatory impact ... virtually ... by definition," because it affected a "disadvantaged group".[111] In the course of a lengthy discussion of "discriminatory impact", he dismissed the majority's argument that rejection of the "similarly situated test" precludes comparative analysis. Instead, he argued that "a group raising a s. 15 challenge to a benefit-conferring scheme can legitimately compare itself to a group receiving benefits under the scheme in order to establish that the exclusion of the first group is discriminatory."[112] He also said that "[t]he discriminatory impact of denying benefits ... cannot be measured in dollars and cents."[113]

This judgment makes several points worth noting. First, Linden J.A. departed from a recent trend which assumes that sexual orientation is an analogous ground under subsection 15(1) of the *Charter*. Of six cases in which it has been held (in the absence of binding authority) that sexual orientation is an analogous ground,[114] counsel for the defendant government has conceded the point in four cases (including *Egan*), and the deciding court (or tribunal) has accepted that concession. Only in the first two cases, *Veysey* and *Brown*, did the courts give any reasons for their conclusions. In *Egan*, the trial judge[115] and the majority of judges in the Federal Court of Appeal[116] all accepted the concession with-

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[105]*Egan*, *supra* note 7 at 450, 457.
[106]*Ibid.* at 417.
[107]*Ibid.* at 423.
[108]*Ibid.* at 430.
[109]*Ibid.* at 433.
[110]*Ibid.* at 435.
[111]*Ibid.* at 438.
[112]*Ibid.* at 436.
[113]*Ibid.* at 443.
[114]See *Veysey*, *supra* note 7; *Knodel*, *supra* note 7; *Egan*, *ibid.*; *Leshner*, *supra* note 7; *Haig*, *supra* note 59; *Brown* v. *British Columbia (Minister of Health)* (1990), 42 B.C.L.R. (2d) 294, 48 C.R.R. 137 (S.C.) [hereinafter *Brown*].
[115]*Supra* note 66 at 700 (F.C.T.D.).
[116]*Supra* note 7 (F.C.A.). Mahoney J.A. said that it was "conceded to be a ground analogous to discrimination based on 'sex'" (*ibid.* at 410).

out discussion. Only Linden J.A. went on to give reasons for his conclusion. He referred to legislation prohibiting sexual orientation discrimination in Canada[117] and in the United States, and to "a person's sexual orientation [having] been a basis for discrimination and persecution throughout history."[118] He also described gay men and lesbian women as "two historically disadvantaged groups,"[119] which are "legally, economically, socially and politically disadvantaged", "suffer widespread stereotyping and prejudice", "endure the constant threat of verbal [and] physical abuse" and harassment, have experienced criminalization of their sexual activity and exclusion from the armed forces, and "have often felt that they must conceal their lifestyles."[120]

Although these factors are all arguably relevant, they do not address the question of whether sexual orientation is immutable,[121] or whether it is a choice that must be respected. Nor do they consider the connection between being gay, lesbian or bisexual and (to some) morally controversial same-sex sexual activity.[122] It must be implicit in a finding that sexual orientation is an analogous ground under subsection 15(1), and that the *Charter* prohibits some kinds of sexual orientation discrimination (against gay, lesbian or bisexual individuals in employment, or against same-sex couples), that the *Charter* would prohibit the grossest form of sexual orientation discrimination (criminalization of same-sex sexual activity) if Parliament were to re-enact such a prohibition. But what principle would explain the *Charter*'s protection in such a case? Is it enough that gay, lesbian and bisexual persons are a "disadvantaged group"? These issues can make the question of whether sexual orientation is an analogous ground more difficult than it appears[123] and have led to differing responses to cases of sexual orientation discrimination under the *United States Constitution* and the *European Convention on Human Rights*.[124]

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[117]*Ibid.* at 427. See the Quebec *Charter of Human Rights and Freedoms*, R.S.Q. c. C-12, s. 10; Ontario *Human Rights Code*, *supra* note 47, ss. 1-6; Yukon *Human Rights Act*, S.Y. 1987, c. 3, s. 6; Manitoba *Human Rights Code*, S.M. 1987-88, c. 45, s. 9(2)(*h*); Nova Scotia *Human Rights Act*, R.S.N.S. 1989, c. 214, s. 5(1)(*n*); New Brunswick *Human Rights Act*, R.S.N.B. 1973, c. H-11, ss. 1, 3-8, as am. by S.N.B. 1992, c. 30; British Columbia *Human Rights Act*, S.B.C. 1984, c. 22, ss. 3-6, 8-9, as am. by S.B.C. 1992, c. 42; *Saskatchewan Human Rights Code*, *supra* note 47, ss. 9-19.

[118]*Ibid.* at 429.

[119]*Ibid.* at 428.

[120]*Ibid.* at 429-30.

[121]See *Veysey*, *supra* note 7 at 329 (F.C.T.D.).

[122]The absence of any blanket criminal prohibition of sexual activity between men or between women in Canada since 1969 may explain why this issue is not raised, unlike in the United States and in Council of Europe countries, where such prohibitions persist.

[123]See R. Wintemute, "Sexual Orientation Discrimination and Constitutional Human Rights Law: The *United States Constitution*, the *European Convention on Human Rights*, and the *Canadian Charter of Rights and Freedoms*" (D.Phil. Thesis, Faculty of Law, University of Oxford, submitted 18 January 1993) c. 6 [to be published by Oxford University Press in 1995; copy deposited with Supreme Court of Canada Library].

[124]*European Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, Eur. T.S. 5, 213 U.N.T.S. 221 [hereinafter *European Convention*]. See also Wintemute, *ibid.*, c. 2-5. Compare *Bowers* (*supra* note 20) with *Dudgeon* v. *United Kingdom* (1981), Eur. Ct. H.R. Ser. A, No. 45. See also *Toonen* v. *Australia* (No. 488/1992) (31 March 1994), United Nations Human Rights Committee Document No. CCPR/C/50/D/488/1992 [hereinafter *Toonen*], in which the U.N. Human Rights Committee found that Tasmania's prohibition of sexual activity

Second, Linden J.A. concluded that a distinction between same-sex and opposite-sex couples is, "strictly speaking, ... not a distinction based directly on sexual orientation, since being in a same-sex relationship is not necessarily the defining characteristic of being gay or lesbian."[125] It is, however, a distinction based "on a characteristic or matter related to sexual orientation, since it is lesbians and gay men who may enter into same-sex relationships."[126] This is a narrow view of sexual orientation as a characteristic or status of an individual person (*e.g.*, an innate attraction or an identity), which does not include conduct (*e.g.*, sexual activity, couple relationships) in which that person chooses to engage. Such a distinction is not unlike distinguishing between religious beliefs and religious practices, and arguing that religion *per se* does not include the latter. A broader view of sexual orientation that includes the direction (as between the sexes) of chosen conduct can apply not only to the sexual orientations of individuals, but to particular instances of conduct (*e.g.*, a same-sex couple relationship), which can also be said to have sexual orientations.[127] Because Linden J.A. effectively extended the protection of the analogous ground of sexual orientation to "related characteristics or matters", he still concluded that discrimination against a same-sex couple is discrimination on the ground of sexual orientation, contrary to subsection 15(1). But such a narrow view of sexual orientation could permit other judges to find that related conduct is not protected. This is the position in the United States, where judges, as a result of *Bowers* v. *Hardwick*,[128] have found it necessary to hold that a constitutional prohibition of sexual orientation discrimination applies only to a status (being gay, lesbian or bisexual), and not to conduct (engaging in same-sex sexual activity).[129]

C. Layland *v.* Ontario (Minister of Consumer and Commercial Relations)

Todd Layland and Pierre Beaulne, partners of five months, went to the City Clerk's office in Ottawa on 16 January 1992 and applied for a marriage licence. Their application was refused. They sought judicial review of the refusal and argued that the common law definition of a marriage as restricted to two persons of opposite sexes discriminates on the ground of sexual orientation, contrary to subsection 15(1) of the *Charter*. The Ontario Divisional Court (in a 2-1 decision) dismissed their application, holding that "the common law limitation of marriage to persons of opposite sex does not constitute discrimination ... contrary to s. 15."[130] Greer J., in dissent, found that the definition is a *prima facie* violation of subsection 15(1) and cannot be justified under section 1 of the *Charter*. She would have ordered the Ministry to issue the marriage licence to

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between men violates the right of privacy in Article 17 of the *International Covenant on Civil and Political Rights*, 16 December 1966, 999 U.N.T.S. 171 [hereinafter *International Covenant*].

[125]*Egan*, *supra* note 7 at 432 (F.C.A.).

[126]*Ibid.*

[127]See generally Wintemute, *supra* note 2 at 492-98; Wintemute, *supra* note 123 at 182-90.

[128]*Supra* note 20.

[129]See *Watkins* v. *United States Army*, 875 F.2d 699 at 716-20, 723-25 (9th Cir. 1989), Norris J., concurring.

[130]*Layland*, *supra* note 7 at 667.

the applicants and would have declared that "the prohibition of same-sex marriages is unconstitutional and of no force and effect."[131]

1. The Majority Judgment

The majority began by deciding, mainly by relying upon *Re North and Matheson* (the first Canadian case in which a same-sex couple sought the right to marry),[132] that "under the common law of Canada ... a valid marriage can take place only between a man and a woman, and that persons of the same sex do not have the capacity to marry one another."[133] In considering whether this common law definition of marriage violates subsection 15(1), it held that "the disadvantage to the applicants ... does not exist ... independent of ... [the legal] distinction" (implying that the applicants are not members of a "disadvantaged group"), but that "professed homosexuals ... make up a discrete and insular minority," before noting that the Ontario Court of Appeal had held in *Haig* that sexual orientation is an analogous ground.[134] After citing Justice McIntyre's requirement of "discriminatory impact" in *Andrews*, and the references of Justices McIntyre and La Forest to "irrelevant personal differences",[135] the majority went on to give three reasons for finding no "discrimination" under subsection 15(1) of the *Charter*.

First, the judges argued that "homosexuality" is "a matter of capacity" and "not irrelevant" to the restriction of marriage to opposite-sex couples, because one of the principal purposes of marriage is having children. This purpose "cannot, as a general rule, be achieved in a homosexual union because of the biological limitations of such a union." The argument that "some married couples are unable or unwilling to have children, and that the incapacity or unwillingness to procreate is not a bar to marriage" was dismissed, because "the institution of marriage is intended ... to encourage the procreation of children."[136] The majority did not consider the exceptions to its "general rule" that same-sex couples cannot procreate. In fact, a female-female couple is in the same position as a male-female couple in which the man is infertile. Both couples can procreate using donor insemination (which is relatively easy to arrange), or they can adopt a child. A male-male couple is in the same position as a male-female couple in which the woman is infertile. Both couples can procreate with the assistance of a surrogate mother (which could be very difficult to arrange), or they can adopt a child.[137] Even assuming that marriage could justifiably be

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[131] *Ibid.* at 681.

[132] *Supra* note 5.

[133] *Layland, supra* note 7 at 663.

[134] *Ibid.* at 664-65.

[135] *Ibid.* at 665-66.

[136] *Ibid.* at 666.

[137] Compare *Mossop, supra* note 7 at 631 (S.C.C). Justice L'Heureux-Dubé, dissenting, and discussing "family" rather than "marriage", said that

> the Tribunal could not have accepted that the capacity to procreate limits the boundaries of family. If this were so, childless couples and single parents would not constitute families. Further, this logic suggests that adoptive families are not as desirable as natural families.

restricted to couples able and willing to have children with genetic input from both partners, the majority acknowledged that the common law definition does not do that. Rather, it permits all opposite-sex couples (who are not closely related to each other) to marry regardless of procreative capacity or willingness to have children, and excludes all same-sex couples even if they have already procreated by alternative means or have adopted, or are able and willing to do so.

What is striking about the majority's "procreative capacity" argument is that it is an excellent example of an argument that should be made, not at the "discriminatory impact" stage of a subsection 15(1) analysis, but rather under section 1. At this stage it would have to satisfy the strict requirements of the *R.* v. *Oakes* test.[138] Assuming that "encouraging procreation by providing benefits to couples able and willing to have children with genetic input from both partners" is a "pressing and substantial" objective, how could the means adopted (providing the benefits to virtually all opposite-sex couples regardless of capacity or willingness to procreate) be said to be "rationally connected" to this objective? The benefit is "overinclusive" in the same way as the burden (presumption of intent to traffic drugs) was in *Oakes*.

Second, the majority argued that there was no discrimination because gay, lesbian and bisexual persons are free to marry a person of the opposite sex. The fact that they do not do so "is the result of their own preferences, not a requirement of the law."[139] This kind of argument may be a consequence of the narrow view of sexual orientation, discussed above, which perceives it to be a characteristic of an individual (for example, being emotionally and sexually attracted to persons of the same sex) and which does not include the direction (as between the sexes) of the conduct he or she chooses as a result of his or her sexual orientation (for example, choosing to marry a person of the same sex). Imagine a zoning law that permitted the construction of Christian churches but no other places of worship. It would not be argued that there was no discrimination based on religion because Jews, Muslims, Hindus, Sikhs and Buddhists were free to attend a church, and that not doing so was "the result of their own preferences, not a requirement of the law." It is true that the exclusion of same-sex couples affects a gay, lesbian or bisexual individual because of his or her choice of a same-sex partner. But that choice is part of his or her sexual orientation, and prohibiting discrimination based on sexual orientation means respecting that choice, just as prohibiting discrimination based on religion means respecting both religious beliefs and religious practices.[140]

Third, the majority held that "[u]nions of persons of the same sex are not 'marriages', because of the definition of marriage," and that the applicants could

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[138]*Supra* note 100 at 138-40.

[139]*Layland, supra* note 7 at 667.

[140]Commentators who have also drawn an analogy between sexual orientation and religion include B. Ryder, "Equality Rights and Sexual Orientation: Confronting Heterosexual Family Privilege" (1990) 9 Can. J. Fam. L. 39 at 80-81; D. Herman, "Are We Family?: Lesbian Rights and Women's Liberation" (1990) 28 Osgoode Hall L.J. 789 at 811, n. 88; R. Mohr, *Gays/Justice: A Study of Ethics, Society and Law* (New York: Columbia University Press, 1988) at 189-91.

not "use s. 15 of the *Charter* to bring about a change in the definition of marriage."[141] The effect of this statement is to give the common law definition of marriage, as confined to opposite-sex couples, some kind of constitutional status superior to that of the *Charter*. This is hard to understand. Surely, the only kind of definition that could override subsection 15(1) of the *Charter* is one found within the *Charter* itself or elsewhere in the Constitution, and not one found in a (non-subsection 33(1)) statute, a regulation or a common law rule. As McIntyre J. stated in *R.W.D.S.U.* v. *Dolphin Delivery Ltd.*, executive or administrative action "will ... be unconstitutional to the extent that it relies for authority or justification on a rule of the common law which constitutes or creates an infringement of a *Charter* right or freedom. ... [T]he *Charter* will apply to the common law ... in so far as the common law is the basis of some governmental action ... "[142] The decision of the Ottawa City Clerk's Office to refuse a marriage licence is certainly the action of a government under paragraph 32(1)(*b*) of the *Charter*.

2. The Dissenting Judgment

Unlike the majority, Greer J. found that, because "[t]he common law ... is able to grow to meet the expanding needs of society ... there is no common law prohibition against same-sex marriages in Canada."[143] However, such a finding is, on its own, an invitation to the legislature to introduce a statutory prohibition.[144] Thus, it is fortunate that she went on to consider whether a restriction of marriage to opposite-sex couples violates subsection 15(1) of the *Charter*. She began by observing that "the applicants have been denied their right to choose whom they wish to marry."[145] Furthermore, she described "the right to choose" as "a fundamental right" and described "s. 15 guarantees" as being "designed to protect the individual's right to choose."[146] She thus recognised the importance of protecting chosen conduct, which is essential if the *Charter* is to provide meaningful protection against sexual orientation discrimination. She then found that the applicants had demonstrated that they have been subjected to "unequal treatment under the law" on the basis of their sexual orientation, an analogous ground both on the authority of *Haig* and because "homosexuals have been politically powerless" (like non-citizens), and "subject to negative treatment and bigotry."[147] She also found "discriminatory impact" in that the exclusion from marriage is "burdensome on the applicants" and sends the message that "they are inferior persons in our society."[148]

Having found a *prima facie* violation of subsection 15(1), Greer J. then considered whether "the preservation of traditional heterosexual families" could

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[141]*Layland*, *supra* note 7 at 667.

[142][1986] 2 S.C.R. 573 at 599, 33 D.L.R. (4th) 174. See also *R.* v. *Swain*, [1991] 1 S.C.R. 933 at 968, 66 C.C.C. (3d) 481: "[I]f a common law rule is inconsistent with ... the Constitution, it is ... of no force or effect ..."

[143]*Layland*, *supra* note 7 at 667-68.

[144]Compare art. 365 C.C.Q.: "Marriage may be contracted only between a man and a woman ... "

[145]*Layland*, *supra* note 7 at 672.

[146]*Ibid.*

[147]*Ibid.* at 674-75.

[148]*Ibid.* at 674.

justify the exclusion of same-sex couples from marriage under section 1 of the *Charter*. She described such a purpose as "discriminatory" and therefore invalid under the first limb of the *Oakes* test. She also held that it fails the second, proportionality, limb of the test in that there is "no rational connection between supporting heterosexual families and denying homosexuals the right to marry." The exclusion of same-sex couples does not advance the goal, and their inclusion does not "prevent heterosexuals from marrying." She concluded that "the interests of gays and lesbians cannot be fully accommodated without the incidents of marriage ... "[149] Some might argue that "the preservation of traditional heterosexual families" is a legitimate goal of government, and that there is a rational connection between such a goal and the exclusion of same-sex couples from marriage in that the exclusion might encourage some gay, lesbian and bisexual persons to choose opposite-sex couple relationships to be able to obtain the benefits of marriage. But if the purpose of the common law definition of marriage is to give gay, lesbian and bisexual persons an incentive to "convert", and to interfere with their choice of sexual orientation, that would be as unconstitutional a purpose as that of the *Lord Day's Act* (coercing observance of the Christian Sabbath) in *R.* v. *Big M Drug Mart Ltd.*,[150] or any other legislation seeking to influence an individual's choice of religion. Once it is accepted that subsection 15(1) prohibits sexual orientation discrimination, a purpose of influencing a person's choice of sexual orientation cannot be used as a justification under section 1.

3. The Distorting Effect of the "Discriminatory Impact" Requirement

A full analysis of subsection 15(1) jurisprudence lies well beyond the scope of this comment. But there is one aspect of it that figures prominently in *Egan* and *Layland*. This is Justice McIntyre's requirement in *Andrews* that, in addition to (1) a distinction (denying equality before or under the law, or the equal protection or equal benefit of the law), which is (2) based on an enumerated or analogous ground, the plaintiff must show (3) that "the legislative impact of the law is discriminatory."[151] Justice McIntyre's discussion in *Andrews* of the effect of the rule that lawyers must be citizens in order to practise law within a given province, seems to indicate the meaning of his third requirement: merely "not receiving equal treatment" or a "differential impact" is not enough; the law must impose a "burden" on the plaintiff, so that "obviously trivial and vexatious" claims will be screened out.[152] However, Justice

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[149]*Ibid.* at 677-78.

[150][1985] 1 S.C.R. 295 at 347-51, 18 D.L.R. (4th) 321.

[151]*Supra* note 69 at 182.

[152]*Ibid.* at 151, 182. See also *R.* v. *Hess*, [1990] 2 S.C.R. 906 at 941, 79 C.R. (3d) 332, McLachlin J. [hereinafter *Hess* cited to S.C.R.]: "[I]t is sufficient to establish a violation of s. 15 to show that a distinction is drawn on the enumerated or analogous grounds, and that the distinction results in a hurden being placed on the complaining individual or group"; *McKinney*, *supra* note 61 at 278, La Forest J.: a distinction based on an enumerated ground that "impose[s] burdens on" affected individuals is enough for a *prima facie* violation of subsection 15(1); *Haig* v. *Canada*, [1993] 2 S.C.R. 995 at 1043, 156 N.R. 81, L'Heureux-Dubé J.: a complainant must show that "the law has a negative impact"; *Rodriguez* v. *British Columbia (A.G.)*, [1993] 3 S.C.R. 519 at 552, 158 N.R. 1, Lamer C.J., dissenting: the inequality must "impose ... a disadvantage or burden".

Wilson transformed the third requirement, in subsequent cases, into a requirement that the plaintiff show that he or she is a member of a "disadvantaged group",[153] or that the distinction involves "prejudice [bias] or stereotype".[154] Both Justice McIntyre's and Justice Wilson's versions of the "discriminatory impact" requirement can be questioned, but each has a relatively limited scope. The problem with the "discriminatory impact" requirement is that courts such as those in *Egan* and *Layland*, inspired by statements of Justice Wilson in *Andrews* and *Turpin*,[155] are using the third requirement as the pretext for a wide-ranging discussion of the "larger social context". This has at least two negative consequences.

First, it permits justifications for discrimination, which should only be considered under section 1, to creep in at the subsection 15(1) stage. Consideration of these justifications may lead to the conclusion that there has been no "discrimination" under subsection 15(1), and consequently, that no justification under section 1 is required. This undermines the distinction that Justice McIntyre made in *Andrews* between the roles of subsection 15(1) and section 1: "Where discrimination is found a breach of s. 15(1) has occurred and ... any justification, any consideration of the reasonableness of the enactment ... would take place under s. 1."[156] This followed from his rejection of the approach which defines discrimination under subsection 15(1) as "an unjustifiable or unreasonable distinction," under which "the determination would be made under s. 15(1) and virtually no role would be left for s. 1."[157] Making the determination under subsection 15(1) deprives the plaintiff of the benefit of the *Oakes* test and the presumption of unconstitutionality that prevails at the section 1 stage.

The judgments in *Egan* and *Layland* abound with examples of justifications for sexual orientation discrimination being considered as potential reasons why there has been insufficient "discriminatory impact", and therefore no "discrimination". Robertson J.A., in *Egan*, considered the exclusion of other groups from the benefit, which should not even be a justification under section 1, but only a potential basis for a separate subsection 15(1) claim.[158] He also argued that the benefit is aimed at a "pattern of financial interdependency, characteristic of heterosexual couples," which is a section 1 issue.[159] His references to financial impact[160] are at least in keeping with Justice McIntyre's "burden" version of "discriminatory impact", but they illustrate the potential of this version to exclude subsection 15(1) claims where a distinction injures feelings, or has a symbolic or stigmatizing effect but does not injure the pocketbook. And his

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[153]*R.* v. *Turpin*, [1989] 1 S.C.R. 1296 at 1330-33, 48 C.C.C. (3d) 8 [hereinafter *Turpin* cited to S.C.R.]. In *Haig* v. *Canada* (*ibid.*), L'Heureux-Dubé J. required that the complainant's group be not only one defined by an enumerated or analogous ground but also a "discrete and insular minority group."

[154]*McKinney*, *supra* note 61 at 387, 391-93, 413.

[155]See *Andrews*, *supra* note 69 at 152; *Turpin*, *supra* note 153 at 1331-32.

[156]*Ibid.* at 182.

[157]*Ibid.* at 181-82.

[158]*Supra* note 7 at 395-97 (F.C.A.).

[159]*Ibid.* at 400.

[160]*Ibid.* at 388.

reference to "economic disadvantage",[161] although consistent with Justice Wilson's "disadvantaged group membership" version of "discriminatory impact", is symptomatic of the increasingly common argument that gay, lesbian and bisexual persons should be denied protection against discrimination if it can be shown that they have higher per capita incomes than heterosexual persons.[162]

Linden J.A. (in dissent) could have concluded his subsection 15(1) analysis by finding that "a distinction is drawn on the basis of sexual orientation [an analogous ground] with the effect that gay and lesbian partners [a disadvantaged group] are denied benefits ... "[163] But he went on to consider the government's argument about "economic, administrative and institutional considerations" (section 1 issues) and to discuss in some detail "the impact of other legislative benefit schemes," even after stating that this impact "should only be considered under the s. 1 analysis, not under ... s. 15."[164] As for *Layland*, the majority's "procreative capacity" justification has been discussed above,[165] while Greer J.'s "discriminatory impact" analysis was limited to findings of "burden" and "message of inferiority".[166]

Second, the "discriminatory impact" requirement has been used by the majorities in *Egan* and *Layland* to find no "discrimination", contrary to subsection 15(1), even though there was a distinction based on the analogous ground of sexual orientation. This renders the finding that sexual orientation is an analogous ground practically meaningless. Justice McIntyre's version of "discriminatory impact" was intended to exclude "obviously trivial and vexatious claims", which is not true of the claims in either *Egan* or *Layland*. Justice Wilson's version of "discriminatory impact" was intended to exclude distinctions affecting members of "advantaged groups", or not involving "prejudice [bias] or stereotype", which presumably would not be true of distinctions affecting the gay, lesbian and bisexual minority. Why is this happening? Why do the courts not move quickly to section 1 after a plaintiff, who is arguably a member of a "disadvantaged group", establishes a distinction based on an analogous ground under subsection 15(1)?

I would suggest that, in the move from "formal equality" to "substantive equality" reflected in *Andrews*, the baby ("formal equality") has been thrown out with the bath water (the "similarly situated test"). The concept of "substantive equality" can be seen as an important supplement to the concept of "formal equality", especially when it addresses the exclusion of a group that results from its differences, and in spite of the provision of "formal equality" (equal treatment of individuals). But "formal equality", as it relates to groups defined by enumerated or analogous grounds, is an essential aspect of "equality". It tends

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[161]*Ibid.* at 400.

[162]See *e.g.* "Right against Rights" *Perceptions [Saskatoon]* (28 October 1992) 9 (argument used by REAL Women of Saskatchewan in opposing the addition of "sexual orientation" to Saskatchewan's human rights legislation).

[163]*Egan, supra* note 7 at 363 (F.C.A.).

[164]*Ibid.* at 363, 365-67.

[165]See *supra* notes 136-38 and accompanying text.

[166]*Layland, supra* note 7 at 675.

to be trivialized by groups (for example, women and racial minorities) that have already largely achieved it (in the sense of the absence of formal sex and race distinctions in legislation). However, for groups such as gay, lesbian and bisexual persons who have yet to achieve it, and face potentially hundreds of statutes[167] with express distinctions based on sexual orientation, "formal equality" looks quite attractive.

The same-sex couples in *Mossop*, *Egan*, and *Layland* were all seeking, at least initially, "formal equality" with opposite-sex couples. What the "discriminatory impact" requirement has done, primarily in the name of "substantive equality", is to eliminate any presumption that a clear denial of "formal equality" based on an enumerated or analogous ground is "discrimination" contrary to subsection 15(1). It would seem that even a blatant distinction disfavouring women or a racial minority would not automatically be a *prima facie* violation of subsection 15(1), triggering a section 1 analysis. Instead, a (potentially lengthy) assessment of "discriminatory impact" would be required to determine whether, taking into account "the larger social context", the distinction was in fact beneficial or detrimental to the group in question. I would suggest that the requirement should be abandoned, and that any distinction based on an enumerated or analogous ground (not saved by subsection 15(2)) should be referred automatically[168] to section 1.[169] Failing that, the requirement should at least be rethought and defined more precisely.

D. Baehr *v.* Lewin

In spite of the majority's implication in *Mossop* that a *Charter* argument might make a difference, same-sex couples making such an argument (discrimination based on sexual orientation, contrary to subsection 15(1)) have so far failed in *Egan* and *Layland*.[170] Shortly after these three Canadian decisions, the

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[167]See *Egan*, *supra* note 7 at 398 (F.C.A.) (over 50 federal statutes); Coalition for Lesbian and Gay Rights in Ontario, *Happy Families: The Recognition of Same-Sex Spousal Relationships* (Brief to the Ontario legislature recommending amendments to over 30 Ontario statutes, Toronto, April 1992).

[168]Robertson J.A., in *Egan* (*ibid.*), recoiled from the suggestion that a "distinction [based on an analogous ground]" would automatically lead to a finding of "discrimination":

> [T]he ... [plaintiffs] ask that we declare those provisions of approximately 50 federal statutes which define rights and obligations on the basis of spousal status as being a violation of s. 15(1) ... Without question, that result is antithetical to the reasoning advanced in *Andrews*.

Is the number of statutes not just a measure of the extent of denial of "formal equality" at the federal level?

[169]The "larger social context" should be examined under section 1, as Justice McLachlin did in *Hess* (*supra* note 152 at 956-58), and Justice La Forest did in *McKinney* (*supra* note 61 at 298-318). Compare W. Black & I. Grant, "Equality and Biological Differences" (1990) 79 C.R. (3d) 372 at 379-80. In *Weatherall* v. *Canada (A.G.)* ([1993] 2 S.C.R. 872, 105 D.L.R. (4th) 210), Justice La Forest suggested that the clear sex distinction at issue in the case might not be "discrimination" at all under subsection 15(1), in view of the "larger social context", but found that, in any event, it was justified under section 1.

[170]The sexual orientation discrimination argument was accepted by trial courts and a human rights tribunal in *Veysey*, *Knodel* and *Leshner* (*supra* note 7), but has yet to be accepted by an appellate court in a same-sex couple case.

Supreme Court of Hawaii held in *Baehr* v. *Lewin* that exclusion of same-sex couples from marriage is discrimination based, not on sexual orientation, but on sex, an enumerated ground in article I, section 5 of the Hawaii Constitution.[171] It remanded the case to the trial court to determine whether any "compelling state interests" exist which would justify this sex discrimination.[172] Would a sex discrimination argument under the *CHRA*[173] or the *Charter* have been a possibility in *Mossop*? Would a sex discrimination argument under the *Charter* have made a difference in *Egan*[174] or *Layland*?[175]

II. Is Sexual Orientation Discrimination Sex Discrimination?

Sexual orientation can be seen as the direction (to the opposite sex, the same sex, both, or neither) of a person's attraction to "emotional-sexual conduct" (his or her "emotional-sexual attraction"), or of his or her actual choice of "emotional-sexual conduct", whether of a particular instance of such conduct or of such conduct generally. By "emotional-sexual conduct" I mean any kind of activity or relationship involving two (or more) persons that has, or could be perceived as having, both emotional and sexual aspects or a purely sexual aspect, including private sexual activity, public displays of affection, and the formation of couple relationships. In treating sexual orientation as the direction of a person's emotional-sexual attraction, or as the direction of a person's emotional-sexual conduct, one focuses on the *direction* of desired or actual emotional-sexual conduct, that is, the *sex of the partner* with whom the person desires to engage, or actually engages, in the conduct. However, the direction of a particular instance of conduct (*i.e.*, opposite-sex or same-sex) is merely the combination of the sexes of the two persons (A, the choosing person, and B, the chosen partner) engaging in the conduct. (These choices are, of course, reciprocal.)

Suppose that A has been treated unequally because of his or her choice of B. Instead of taking the sex of A as given (*i.e.*, a person of a particular sex is choosing a partner), and looking at the sex of B to determine whether it is A's choice of B that has caused A to be treated unequally, one can take the sex of B as given (*i.e.*, a person of a particular sex is being chosen), and look at the

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[171]*Supra* note 13 at 50, n. 5: "No person shall ... be denied the equal protection of the laws ... or be discriminated against ... because of ... sex ... "

[172]*Ibid.* at 74.

[173]See *Nielsen*, *supra* note 7; *Guevremont*, *supra* note 7.

[174]Such an argument was made at the trial in *Egan* (*supra* note 66 at 701-702), but was withdrawn in the Federal Court of Appeal (*supra* note 7 at 459).

[175]It must be acknowledged that a sex discrimination argument might not make a difference in Canada, because courts have had no difficulty in concluding that sexual orientation is an analogous ground, whereas courts in the U.S. have interpreted *Bowers* (*supra* note 20) as precluding a finding that sexual orientation is a "suspect classification". See *e.g. Padula* v. *Webster*, 822 F.2d 97 (D.C. Cir. 1987). If a court's reason for deciding against a same-sex couple is either a lack of "discriminatory impact" or section 1, a sex discrimination argument would not make a difference. If, like the majorities in *Egan* and *Layland*, a court does not see sexual orientation as the operative ground of distinction, a sex discrimination argument might help. It would also be useful where a human rights act prohibits discrimination based on "sex", but not "sexual orientation", and a court declines to follow *Haig*.

sex of A to determine whether it is A's sex, rather than A's choice of B, that has caused A to be treated unequally. In other words, if a man chooses a man, it is just as much his sex (male) that is the source of the objection (because only a woman may choose a man) as it is his choice of a man (because a man may only choose a woman). When one focuses on the *sex of the choosing person*, rather than the sex of the chosen partner, one realizes that it is the choosing person's sex which makes his or her choice of direction of emotional-sexual conduct (sex of partner) and his or her direction of emotional-sexual attraction objectionable, and which therefore constitutes the ground of distinction. Why then is it not obvious that discrimination on the basis of sexual orientation is nothing more than discrimination on the basis of sex?[176]

A. *The Traditional Response*

Six reported decisions in Canada appear to have dealt with the argument that sexual orientation discrimination is sex discrimination:[177] *Re Board of Governors of the University of Saskatchewan and Saskatchewan Human Rights Commission*[178] and *Vogel I*, under provincial human rights legislation, *Knodel* and *Egan*, under the *Charter*, and *Nielsen* and *Guevremont*, under the *CHRA*.[179] In *University of Saskatchewan*, a gay lecturer, Douglas Wilson, challenged the suspension of his right to supervise practice teaching in public schools. Johnson J. prohibited the Human Rights Commission from investigating the complaint, holding that the "sex" of a person meant "whether or not that person was a man or a woman," not their "sexual orientation, ... sexual proclivity, or sexual activity."[180] In *Vogel I*, a Board of Adjudication relied on *University of Saskatchewan*

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[176]The owner of the copyright to Cole Porter's musical "Anything Goes" refused to permit a production that changed the sex of a character, casting a male actor in the lead female role and "turning the tuneful 1920s romp into a gay romance" ("Anything goes ... almost" *The Economist* (4 May 1991) 92).

[177]*Gay Alliance* (*supra* note 28 at 461) is often cited as an authority rejecting this interpretation. See A. Bruner, "Sexual Orientation and Equality Rights" in A. Bayefsky & M. Eberts, eds., *Equality Rights and the Canadian Charter of Rights and Freedoms* (Toronto: Carswell, 1985) 457 at 461-63; W. Tarnopolsky, *Discrimination and the Law in Canada* (Don Mills, Ont.: De Boo, 1982) at 257-58; M. Eberts, "Sex-Based Discrimination and the *Charter*" in Bayefsky & Eberts, eds., *ibid.*, 183 at 213, n. 77. However, the statement of Dickson J. that sexual orientation was not included in the list of prohibited grounds in the former *Human Rights Code of British Columbia* (S.B.C. 1973, c. 119, ss. 3, 18) must be treated as an observation that sexual orientation was not *expressly* included in the list. An attempt to infer a rejection of the argument that sexual orientation was *implicitly* included in the ground "sex" is not warranted because the argument does not appear to have been made (at least, the Supreme Court's decision does not mention it). See Black, *supra* note 29 at 650, n. 7.

[178](1976), 66 D.L.R. (3d) 561, [1976] 3 W.W.R. 385 (Sask. Q.B.) [hereinafter *University of Saskatchewan* cited to D.L.R.].

[179]*Supra* note 7. See also *Haig*, *supra* note 59 at 502: "Homosexual persons ... fall within a ground analogous to the ... ground of sex ... "

[180]*Supra* note 178 at 564. The Saskatchewan Court of Appeal later said that Johnson J. erred in issuing the order of prohibition and should have allowed the Commission to consider the complaint. See *Re CIP Paper Products Ltd. and Saskatchewan Human Rights Commission* (1978), 87 D.L.R. (3d) 609 at 612. See also *Re Damien and Ontario Human Rights Commission* (1976), 12 O.R. (2d) 262 (Div. Ct.), in which a gay employee of the Ontario Racing Commission was dismissed and the Ontario Human Rights Commission refused to investigate his complaint, holding

in upholding the denial of dental plan benefits to Richard North, the male partner of Chris Vogel, a male government employee (the male "common-law spouse" of a female employee would have qualified for the benefits).[181] More recently, in *Knodel*,[182] *Egan*,[183] *Nielsen*[184] and *Guevremont*,[185] each of which concerned a denial of benefits to a same-sex partner, sex discrimination arguments under subsection 15(1) or the *CHRA* were rejected.

The reasoning in *University of Saskatchewan* and *Vogel I*, which will be examined below, has not been seriously questioned by commentators. Most have accepted these decisions as conclusive authority that "sex" in human rights legislation, and by extension in subsection 15(1) of the *Charter*, does not include sexual orientation.[186] In the *Charter* context, Anne Bayefsky has suggested that the open-endedness of subsection 15(1) makes it unnecessary to determine whether "sex" includes "sexual orientation" (or "pregnancy").[187] But Nicole Duplé has observed that sex, rather than sexual orientation (understood narrowly as direction of attraction), will often be the ground of distinction used in legislation (*e.g.*, providing the right to marry or claim tax benefits) that treats same-sex couples unequally.[188] (No man may marry another man; it is not the case that heterosexual men may marry each other, but gay and bisexual men may not.) And Wendy Williams has recognised that "discrimination against homosexuals and sex-distinct grooming codes ... are the ultimate sex discrimination (in the sense of sex distinction) and therefore invisible to us as such."[189]

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that "sex" did not include "sexual orientation". The decision containing the reasoning for this holding does not appear to have been reported. Compare *Perceptions [Saskatoon]* (12 June 1991) 18 (Nova Scotia Human Rights Commission announced in 1990 that it would investigate sexual orientation discrimination complaints using a statutory prohibition of sex discrimination).

[181]*Supra* note 7 at D/1656-57. Chris Vogel filed his complaint again in 1988 after sexual orientation was included in the new Manitoba *Human Rights Code*. His complaint was dismissed again in *Vogel II* (*supra* note 7). In refusing to permit him to relitigate the sex discrimination issue, Hirschfield J. said (*ibid.* at 97) that "'[s]ex' in the Code still refers to gender and not sexual preference."

[182]*Supra* note 7 at 742-43.

[183]*Supra* note 66 at 701-702 (F.C.T.D.).

[184]*Supra* note 7 at 570, 573-74.

[185]*Supra* note 7 at 115.

[186]See Bruner, *supra* note 177 at 459-63; Eberts, *supra* note 177 at 213 (argument against inclusion described as "technical"); M.A. Hickling, "Employer's Liability for Sexual Harassment" (1988) 17 Man. L.J. 124 at 137; P. Hughes, "Feminist Equality and the *Charter*: Conflict with Reality?" (1985) 5 Windsor Y.B. Access Just. 39 at 81-82; Tarnopolsky, *supra* note 177; M. Leopold & W. King, "Compulsory Heterosexuality, Lesbians, and the Law: The Case for Constitutional Protection" (1985) 1 C.J.W.L. 163 at 176-77.

[187]"Defining Equality Rights" in Bayefsky & Eberts, eds., *supra* note 177, 1 at 48-49. Compare *Bordeleau* v. *R.* (1989), 32 F.T.R. 21 at 26: "[It] must be resolved [under subsection 15(1)] ... whether discrimination based on sex also covers discrimination involving sexual orientation." For further discussion of discrimination based on pregnancy, see *infra* notes 213-20 and accompanying text.

[188]"Homosexualité et droits à l'égalité dans les Chartes canadienne et québécoise" (1984) 25 C. de D. 801 at 825.

[189]"Sex Discrimination under the *Charter*: Some Problems of Theory" (1983) 4 C.H.R.R. C/83-1 at C/83-9, C/83-10. See also G. Brodsky & S. Day, *Canadian Charter Equality Rights for Women: One Step Forward or Two Steps Back?* (Ottawa: Canadian Advisory Council on the Status of Women, 1989) at 54 (supporting the sex discrimination argument); L.A. Turnbull, "*Brooks, Allen*

B. *Why the Answer Is Not So Obvious*

The logic underlying the view that sexual orientation discrimination is not sex discrimination is spelled out clearly in *Vogel I*:

> Both males and females are treated the same under the Dental Services Plan. ... The entire issue in this case arises *not because Mr. Vogel is a male but because he chooses to live with another male* for whom he seeks dental benefits ... Denial of benefits to [his male partner] arises because of Mr. Vogel's sexual preference [*i.e.*, his choice of a same-sex partner] and not his gender.[190]

This kind of analysis implicitly assumes that the discrimination is based, not on the plaintiff's sex, but on the plaintiff's choice between two different kinds of conduct (same-sex and opposite-sex).[191] However, the sex discrimination at work here is rendered invisible (i) by incorporating the sex-based distinction into the definitions of the two kinds of conduct, and (ii) by creating the illusion of equal treatment of men and women, in that the same treatment seems to be applied to both men and women choosing each kind of conduct. Thus, the reasoning in *Vogel I* permits the assertion that a denial of benefits to persons choosing same-sex conduct applies to all equally, regardless of sex, because men choosing such conduct with men are treated the same as women choosing such conduct with women. Similarly, a grant of benefits to persons choosing opposite-sex conduct applies to all equally, regardless of sex, because every man or woman is permitted to choose such conduct.

This illusion of equal treatment was accepted by Rowles J. in *Knodel*:

> [T]he effect of the legislation is not aimed at a characteristic related to gender. The definition of "spouse" ... affects both men and women who are engaged in a homosexual relationship. Further, there is no indication that the discriminatory effects fall entirely on men ... Sexual orientation is not gender specific nor is it a characteristic that affects one gender primarily.[192]

In *Egan*, Martin J. merely quoted this reasoning and stated his agreement with it.[193] In order to unmask the sex discrimination that occurs in cases such as *Vogel I*, *Knodel* and *Egan*, one must (i) expose the sex-based distinction that is being used, and (ii) show that the "mirror-image symmetry" of its application to both sexes does not constitute equal treatment.

1. The Hidden Sex-Based Distinction

Presenting the choice in *Vogel I* as between living (in a couple relationship) with a person of the same sex as the choosing person (same-sex conduct, prohibited to all without regard to sex), or living with a person of the sex opposite to that of the choosing person (opposite-sex conduct, permitted to all without

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& Dixon v. *Canada Safeway Ltd.* – A Comment (*Bliss* Revisited)" (1989) 34 McGill L.J. 172 at 182-83 ("sex" equals "gender" view described as narrow).

[190]*Supra* note 7 at D/1657 [emphasis added].

[191]See Hickling, *supra* note 186 at 137 (the protected class is defined "by reference to the kind of sexual activity involved").

[192]*Supra* note 7 at 743. See also *Guevremont*, *supra* note 7 at 115.

[193]*Supra* note 66 at 701-702 (F.C.T.D.).

regard to sex), incorporates the choosing person's sex into the definitions of the two kinds of conduct in respect of which there is discrimination. This misrepresents the choice between these two kinds of conduct (and hides the sex discrimination) by assuming that the choosing person's sex is (together with the chosen partner's sex) an inherent part of the definitions of these two kinds of conduct. Excluding the choosing person's sex from the definitions and looking only at the possible sexes of the chosen partner reveals the true nature of the choice: it is between living with a man and living with a woman. Viewed in this way, it is immediately clear on what basis the choice is restricted: a woman, but not a man, may choose to live with a man; a man, but not a woman, may choose to live with a woman.[194] Thus, the reason Chris Vogel cannot "[choose] to live with another male" (and obtain benefits for his partner) *is* "because Mr. Vogel is a male."[195]

The same kind of analysis can be applied to almost all cases of discrimination directed against individuals or particular aspects of emotional-sexual conduct.[196] Thus, the discrimination in *University of Saskatchewan* was not, without regard to sex, between gay, lesbian and bisexual lecturers (male or female) and heterosexual lecturers (male or female). Rather, it was between men choosing emotional-sexual conduct with men, and women choosing such conduct with men (or between women choosing such conduct with women, and men choosing such conduct with women). And discrimination between private same-sex sexual activity, public same-sex kissing, or same-sex marriage and equivalent opposite-sex conduct, allegedly without regard to sex, actually constitutes discrimination on the basis of sex as to who may choose to engage in sexual activity with a man in private, to kiss a man in public, or to marry a man, and who may choose the equivalent conduct with a woman.

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[194]See D. Pannick, *Sex Discrimination Law* (Oxford: Clarendon Press, 1985) at 203: "The differentiation is on the ground of sex: women may have relationships with Mr. X and retain their jobs; if men have such relationships they will be sacked." See *O'Rourke & Wallace* v. *B.G. Turnkey Services (Scotland) Ltd.* (7 June 1993), Nos. S/457/93, S/458/93 (preliminary ruling by Scottish Industrial Tribunal under the G.B. *Sex Discrimination Act 1975*): impossible to lay down a categoric rule that "the dismissal of a woman, because she is carrying on a lesbian relationship, is never sex discrimination." See also J. Cusick, "Lesbians' Hearing Will Set a Legal Precedent" *The Independent* (9 June 1993) 7; "Scottish Lesbians Win Job Fight" *Pink Paper* (22 October 1993) 3 (cash settlement prior to hearing).

[195]See *supra* note 190 and accompanying text.

[196]Discrimination solely against bisexual persons, but not against gay or lesbian persons, is unlikely to occur, but could fall through a "loophole" in the sex discrimination argument, in that restrictions on being bisexual could be applied equally to men and women. This theoretical problem resembles that of the hypothetical bisexual person who harasses men and women equally. See *Bundy* v. *Jackson*, 641 F.2d 934 at 942, n. 7 (D.C. Cir. 1981). Another problem, which is the same whether sex discrimination or sexual orientation discrimination is argued, is presented when a law applies equally to same-sex and opposite-sex emotional-sexual conduct (*e.g.*, sexual activity). Section 159 of the *Criminal Code* (R.S.C. 1985, c. C-46, as am. by *An Act to Amend the Criminal Code and the Canada Evidence Act*, S.C. 1987, c. 24, ss. 3-4) continues to prohibit male-male and male-female anal intercourse to unmarried persons 14 to 18, who are free to consent to vaginal and oral intercourse under sections 151-153 of the *Code* (as am. by R.S.C. 1985 (3d Supp.), c. 19, s. 1). To challenge section 159 under subsection 15(1) of the *Charter*, one would have to argue that the disproportionate effect on gay and bisexual males 14 to 18 is indirect (adverse effect) discrimination based on sex or sexual orientation.

One can attempt to escape this conclusion by using an argument similar to that of Justice Wilson in *R.* v. *Hess*:[197] a man's choice of emotional-sexual conduct with a man and a woman's choice of emotional-sexual conduct with a man are "biologically different" acts or choices, of which only men and only women respectively are capable. However, such an argument relies entirely on the difference in the choosing person's sex and cannot point to any significant "biological difference" between the conduct chosen by a man and that chosen by a woman. For example, there is no more "biological" difference between a man performing oral intercourse on a man and a woman doing so on a man,[198] or between a woman living with a woman and a man living with a woman, than between a male lawyer advising a male client and a female lawyer advising a male client. The only "biological differences" between same-sex emotional-sexual conduct and opposite-sex emotional-sexual conduct are that the former never has potential for unassisted procreation (which the latter may have in some but not all cases), and that the former can never involve penile-vaginal intercourse (which the latter may involve).

However, these differences are virtually never the basis of legislative and other distinctions. A public employer might refuse to hire "men who choose emotional-sexual conduct with men" (but hire women who do so), or refuse to hire "women who choose emotional-sexual conduct with women" (but hire men who do so). But a public employer would not refuse to hire "persons who engage in sexual activity that does not have procreative potential or does not involve penile-vaginal intercourse" or "persons who are unable to procreate with their partners without assistance". Such policies would arguably not discriminate on the basis of sex, in that the choice (*e.g.*, of sexual activity with a person of a given sex that has procreative potential) is one of which only persons of the opposite sex are biologically capable. But such policies would exclude many heterosexual persons and would therefore not be adopted.[199]

Neither race discrimination nor other forms of sex discrimination could be hidden by incorporating the choosing person's race or sex into the definition of the kinds of conduct (or opportunity) at issue. A boy of African origin, excluded from a school for children of European origin, could not be told that his choice of a school reserved for a particular race was the reason for his exclusion rather than his own race (attending a "same-race" school being open to all, without regard to race, and attending a "mixed-race" school being prohibited to all, without regard to race).[200] Nor could a refusal to permit a woman of East Asian origin to marry a man of European origin be explained as resulting from her choice of a spouse of a particular race rather than from her own race ("same-

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[197]*Supra* note 152.

[198]See Note, "Developments in the Law – Sexual Orientation and the Law" (1989) 102 Harv. L. Rev. 1508 at 1527, n. 57 [hereinafter "Developments"]: no "biological differences" because "[t]he physical acts themselves – anal and oral sex – are the same whether between a man and a woman or two persons of the same sex; the difference is the cultural significance attached to the gender of the participants."

[199]Most opposite-sex sexual activity involves the use of contraception and is not intended to have any procreative potential.

[200]See *Brown* v. *Board of Education*, 347 U.S. 483 (1954).

race" marriage being open to all, without regard to race, and "mixed-race" marriage being prohibited to all, without regard to race).[201] Similarly, a girl barred from a boys' ice hockey league would not have her claim of sex discrimination denied on the ground that her exclusion was based on her choice of the league of the other sex rather than on her own sex ("same-sex" ice hockey being open to all, without regard to sex, and "mixed-sex" hockey being prohibited to all, without regard to sex).[202]

2. The Illusion of Equal Treatment

Once the sex-based distinctions that underlie virtually all sexual orientation discrimination have been exposed, the next step is to challenge the argument that these distinctions do not constitute sex discrimination and do not need to be justified because they are made "symmetrically", in the sense that the choices of both men and women are restricted. Thus, even though we have established that Chris Vogel is treated differently "because [he] is a male," we must refute the claim that "[b]oth males and females are treated the same under the Dental Services Plan."[203] Clearly, this claim is false if it means that the Plan permits each individual man and woman the same choices. As was demonstrated above, these choices are plainly not the same (*i.e.*, they are unequal): a man can live with a woman, a woman cannot; a woman can live with a man, a man cannot. This is "mirror-image symmetry", in that the treatment on one side is the reverse of that on the other, and therefore different. It is not "symmetry" in the sense in which I use it, that is, treatment is the same on both sides. The claim that the treatment is "the same" can only be defended if it is interpreted as a claim that the treatment is "different but equivalent", in the sense that all individuals of both sexes are denied one option and no one is permitted to choose a person of his or her own sex.

The short answer to this claim is that it attempts to justify one case of discrimination by invoking the existence of another related case (*i.e.*, the discrimination against men in *Vogel I* is justified by a related, but different, discrimina-

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[201]See *Loving* v. *Virginia*, 388 U.S. 1 (1967) [hereinafter *Loving*] (mixed-race marriage); *McLaughlin* v. *Florida*, 379 U.S. 184 (1964) (mixed-race cohabitation).

[202]*Re Blainey and Ontario Hockey Assoc.* (1986), 54 O.R. (2d) 513, 26 D.L.R. (4th) 728 (C.A.).

[203]See *supra* note 190 and accompanying text. See also *Nielsen*, *supra* note 7 at 570: "[T]he dental care plan is ... available to both women and men equally"; *Guevremont*, *supra* note 7 at 115: opposite-sex definition of "common law spouse" in collective agreement "applies equally to the corporation's male and female employees"; *DeSantis* v. *Pacific Telephone & Telegraph Co.*, 608 F.2d 327 at 331 (9th Cir. 1979) [hereinafter *DeSantis*]: "[W]hether dealing with men or women the employer is using the same criterion: it will not hire or promote a person who prefers sexual partners of the same sex"; *State* v. *Walsh*, 713 S.W.2d 508 at 510 (Mo. 1986): rejecting a sex discrimination challenge to a law prohibiting same-sex sexual activity, because of "equal" application to men and women; *Phillips* v. *Wisconsin Personnel Commission*, 482 N.W.2d 121 at 127-28 (Wis. Ct. App. 1992): woman denied health insurance for her female partner treated the same as "similarly situated males", *i.e.*, those with male partners; *X & Y* v. *U.K.* (No. 9369/81) (1983), 32 Eur. Comm. H.R. D.R. 220, 5 E.H.R.R. 601 at 602: no evidence of sex discrimination against male-male couple; "the only comparable group being that of lesbians, but a stable lesbian couple would ... have been treated in the same way ..." Compare *Valdes* v. *Lumbermen's Mutual Casualty Co.*, 507 F. Supp. 10 (S.D. Fla. 1980): sex discrimination argued where gay men preferred over lesbian women.

tion against women).[204] This is something that can only be done under section 1 of the *Charter*. A second, allegedly "offsetting" sex-based distinction simply cannot negate the sex-based distinction that was initially challenged nor cause it to cease to be a *prima facie* violation of subsection 15(1). Some pairs of sex-based distinctions would surely survive section 1 review (*e.g.*, separate toilets for men and women). Other pairs (*e.g.*, a law that only men could be doctors and only women could be nurses) would not.[205]

If there were a principle that "mirror-image symmetry" precludes a finding of a *prima facie* violation of subsection 15(1), it could be stated as follows: a first distinction based on an enumerated or analogous ground that excludes group A, but not group B, from opportunity C, is not discriminatory if a second distinction, based on the same ground as the first distinction, excludes group B, but not group A, from opportunity D, in a way that could be said to correspond to, offset or compensate for the first distinction. Such a principle would insulate from section 1 review all forms of segregation or "separate but equal" (or "different but equivalent") treatment, whether they are based on sex, race or another enumerated or analogous ground.

The "discriminatory impact" requirement in *Andrews*, as interpreted in subsequent cases, makes it more difficult to dismiss such an argument than if a distinction based on an enumerated or analogous ground were automatically a *prima facie* violation of subsection 15(1). Assuming that substantially equivalent opportunities are in fact provided separately to each group (*e.g.*, in separate locations), one may have to show that the justification for the separation is based on some prejudice or stereotype, or that the separation actually inflicts some kind of harm on one of the groups, if only by stigmatizing its members as inferior. In the case of sexual orientation, one could argue that the different options for each sex (which combine to make integration of the sexes, and opposite-sex emotional-sexual conduct, compulsory) harm women by stigmatizing them as inferior (*i.e.*, they are incomplete without a man, and any man who seeks a relationship with another man degrades himself by "acting like a woman"), or constitute the imposition of traditional sex roles and the prejudices or stereotypes inherent in those roles.[206]

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[204]See Pannick, *supra* note 194 at 204:

> It is no defence to a charge of sex discrimination in one's treatment of men that one has discriminated against women in another respect. ... [E]mployers [cannot] ... impose detriment X on men, and ... justify it by the fact that they impose detriment Y on women, and [do so] by reference to what they believe to be relevant differences between the sexes.

[205]See *Loving*, *supra* note 201 at 7-12 (holding that a prohibition of mixed-race marriages is race discrimination in spite of the "mirror-image symmetry" in its application to all races); *Barnes* v. *Costle*, 561 F.2d 983 at 990, n. 55 (D.C. Cir. 1977) (sexual harassment of a woman by a man was sex discrimination even though "a similar condition could be imposed on a male subordinate by a ... female ... ").

[206]See Hughes, *supra* note 186 at 49-73; Leopold & King, *supra* note 186 at 163-65; "Developments", *supra* note 198 at 1526-28, 1570, 1578-81; M. Fajer, "Can Two Real Men Eat Quiche Together? Storytelling, Gender-Role Stereotypes, and Legal Protection for Lesbians and Gay Men" (1992) 46 U. Miami L. Rev. 511 at 617-50; A. Koppelman, "The Miscegenation Analogy: Sodomy Laws as Sex Discrimination" (1988) 98 Yale L.J. 145 at 158-60; B. Capers, "Sex(ual Orientation)

If one succeeds in establishing that the different treatment is harmful, it does not necessarily follow under the "discriminatory impact" requirement that the prohibition of discrimination is symmetrical (*i.e.*, the same on both sides). A number of writers have argued that subsection 15(1) should be interpreted as protecting only members of "disadvantaged groups".[207] This would mean that the *prima facie* prohibition of sex discrimination in subsection 15(1) protects only women (a "disadvantaged group") and not men (an "advantaged group"), and therefore that the only kind of sexual orientation discrimination that would constitute sex discrimination would be discrimination against lesbian and bisexual women and emotional-sexual conduct (including couple relationships) between women. One can avoid this conclusion by arguing that discrimination against gay and bisexual men and emotional-sexual conduct (including couple relationships) between men harms women in the ways referred to above.[208] However, no such argument should be necessary, because I would argue that both the text of subsection 15(1) (which refers to "every individual", not "every member of a disadvantaged group", and to "discrimination ... based on sex", not "discrimination against women"), and the text of section 28 ("the rights referred to in [this *Charter*] are guaranteed equally to male and female persons"),[209] make it impossible to read men out of "sex" in subsection 15(1).

3. Form vs. Substance?

If the sex-based distinctions inherent in virtually all sexual orientation discrimination are sufficient to trigger *prima facie* violations of subsection 15(1), then any justifications that might be asserted for restricting same-sex and not opposite-sex emotional-sexual conduct (for example, same-sex sexual activity is "immoral", "unnatural" or "offensive", or lacks procreative potential or potential for penile-vaginal intercourse; same-sex couple relationships are

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and Title VII" (1991) 91 Colum. L. Rev. 1158 at 1163-67; Note, "Custody Denials to Parents in Same-Sex Relationships: An Equal Protection Analysis" (1989) 102 Harv. L. Rev. 617 at 627-30; E.R. Arriola, "Sexual Identity and the Constitution: Homosexual Persons as a Discrete and Insular Minority" (1988) 10 Women's Rts. L. Rep. 143 at 164; S. Law, "Homosexuality and the Social Meaning of Gender" [1988] Wis. L. Rev. 187 at 196; K. Karst, "The Freedom of Intimate Association" (1980) 89 Yale L.J. 624 at 683-84; B.A. Babcock *et al.*, *Sex Discrimination and the Law: Cases and Remedies* (Boston: Little, Brown, 1975) at 179-80.

[207]See *e.g.* W. Black & L. Smith, Case Comment on *Andrews* v. *Law Society of British Columbia* (1989) 68 Can. Bar Rev. 591 at 607-608; A. Petter, "Legitimizing Sexual Inequality: Three Early Charter Cases" (1989) 34 McGill L.J. 358 at 362; C. Sheppard, "Recognition of the Disadvantaging of Women: The Promise of *Andrews* v. *Law Society of British Columbia*" (1989) 35 McGill L.J. 206 at 222-25; D. Proulx, "L'objet des droits constitutionnels à l'égalité" (1988) 29 C. de D. 567 at 589-93. See also *Turpin*, *supra* note 153 at 1330-33. Compare *Hess*, *supra* note 152 at 943-44 (not essential for subsection 15(1) protection that men be "a 'discrete and insular minority' disadvantaged independently of the legislation under consideration").

[208]See *supra* note 206. One could also argue that gay and bisexual men, as opposed to heterosexual men, are members of a "disadvantaged group" and are therefore entitled to benefit from the *prima facie* prohibition of sex discrimination in subsection 15(1).

[209]See *Hess*, *supra* note 152 at 932-33, 943-44 (section 28 protects men as well as women); W. Black & I. Grant, "Equality and Biological Differences" (1990) 79 C.R. (3d) 372 at 380: "The complete exclusion of men from s. 15 would be difficult to reconcile with the language of s. 28." Compare Brodksy & Day, *supra* note 189 at 37, 62, 82 (interpreting section 28 as protecting men is "cruel" and "perverse").

"inherently unstable", are not "financially interdependent" or require assistance with procreation) could only be raised under section 1. Thus, the "formal" similarity of same-sex and opposite-sex emotional-sexual conduct (but for the sex of one of the persons involved) would permit a gay, lesbian or bisexual plaintiff to move from subsection 15(1) to section 1. At this stage, in rebutting any asserted justifications, the plaintiff could emphasize that the similarity is not just a matter of "form" but of "substance"; that the feelings arising from same-sex conduct are as intense as those arising from opposite-sex conduct; and that being in love, making love, strolling hand in hand in a park, and setting up a home with a partner have the same importance and value regardless of the sexes of the persons involved. This "substantive" similarity should help counter any asserted section 1 justifications.[210]

Assuming that crude, sex-based distinctions could not be used to discriminate between same-sex and opposite-sex couples, other neutral criteria (*e.g.*, a monogamous sexual relationship, living together, owning property jointly, merging finances) might exclude a disproportionate number of same-sex couples from a particular benefit in spite of their long-term emotional commitment. This would raise issues under subsection 15(1) of indirect (or adverse effect) discrimination based on sex (or sexual orientation), accommodation of difference, and the inadequacy of "formal" equality where same-sex couples are in fact different from opposite-sex couples. As Douglas Sanders has pointed out, in discussing the use of "'we are the same' data" by same-sex couples, "[t]he idea of good homosexuals and bad homosexuals, judged by the degree to which their lives parallel ideal heterosexual models, is rejected by many lesbians and gays."[211] Thus, the Board of Inquiry in *Leshner* hastened to add:

> People organize their intimate relationships differently depending on a variety of factors ... This is ... true for heterosexuals as it is for homosexuals ... [I]t [is not] necessary for same-sex relationships to mirror the idealized model perceived with respect to a heterosexual conjugal relationship. An administrative need for identification should be met by neutral, objective criteria rather than the prospect of detailed personal inquiries, which we do not believe are the business of employers.[212]

C. *Other Not So Obvious Kinds of Sex Discrimination: Sexual Harassment and Pregnancy*

Because sexual orientation involves a choice (of emotional-sexual conduct), because the choice is restricted (on the basis of sex) on what appears to be a "symmetrical" basis, and because the restrictions do not affect most women or men (who are heterosexual), it is a less obvious example of sex discrimination. Similarly, because sexual harassment and pregnancy discrimination may not affect all women, some courts have been reluctant (for this and other rea-

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[210]Courts and tribunals have tended not to question the substantial similarity between a long-term same-sex couple relationship and a long-term opposite-sex couple relationship. See *e.g. Egan*, *supra* note 66 at 695-97 (F.C.T.D.); *Knodel*, *supra* note 7 at 745; *Leshner*, *supra* note 7 at D/188-D/189; *Vogel II*, *supra* note 7 at 95.

[211]"Drawing Lines on Lesbian and Gay Rights" (7 January 1993) at 19, 28-29 [unpublished].

[212]*Supra* note 7 at D/189. See also *supra* note 44 and accompanying text.

sons) to treat these phenomena as sex discrimination. The Supreme Court of Canada has, however, settled this issue (at least with respect to human rights legislation) by interpreting "sex" in the former Manitoba *Human Rights Act*[213] as including sexual harassment, in *Janzen* v. *Platy Enterprises Ltd.*,[214] and pregnancy discrimination, in *Brooks* v. *Canada Safeway Ltd.*[215] The Court concluded in *Janzen* that it is sufficient for sex to be *a* factor in the decision to treat an employee differently, and therefore that not all women or men need be affected.[216] Similarly, in *Brooks*, the Court held that the fact that not all women are pregnant at any one time makes no difference.[217]

Although sanctions against same-sex emotional-sexual attraction or conduct will apply to all men and all women, one could argue that they will affect only those men and women who have such an attraction or engage in such conduct. But the fact that only some men or some women are affected is irrelevant. As the Supreme Court of Canada held in *Janzen* and *Brooks*, they will be treated differently because they are men or because they are women. A refusal to hire Muslim women (but not Muslim men) or women with small children (but not men with small children)[218] is nonetheless sex discrimination, even though only a subset of women is affected. The same is true when an employer refuses to hire or provide benefits to women with female partners (but not men with female partners), or men with male partners (but not women with male partners). Thus, treating sexual orientation discrimination as sex discrimination should not be conceptually more difficult than treating sexual harassment[219] and pregnancy discrimination as sex discrimination.[220]

D. The Drafters' "Original Intent" as to What Sex Discrimination Is

Even if a plaintiff succeeds in convincing a court that sexual orientation discrimination is "literally"[221] sex discrimination because it involves sex distinc-

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[213]S.M. 1974, c. 65.

[214][1989] 1 S.C.R. 1252, 59 D.L.R. (4th) 352 [hereinafter *Janzen* cited to S.C.R.]. Dickson C.J. (at 1279) defined sex discrimination as unequal treatment "on the basis of a characteristic related to gender." In *Knodel* (*supra* note 7 at 742-43), Rowles J. purported to apply this statement and found that sexual orientation is not such a characteristic.

[215][1989] 1 S.C.R. 1219, 59 D.L.R. (4th) 321 [hereinafter *Brooks* cited to S.C.R.].

[216]*Supra* note 214 at 1288-90.

[217]*Supra* note 215 at 1247-49.

[218]See Hickling, *supra* note 186 at 139-40.

[219]Harassment of gay, lesbian and bisexual persons in the workplace can also be analyzed as sex discrimination. See S. Marcosson, "Harassment on the Basis of Sexual Orientation: A Claim of Sex Discrimination under Title VII" (1992) 81 Georgetown L.J. 1.

[220]In Wisconsin, employment discrimination based on sexual orientation is prohibited by a prohibition of employment discrimination based on sex. See Wis. Stat. Ann. §§ 111.321, 111.36(1) (West 1993). Subsection 111.36(1) states:

> Employment discrimination because of sex includes, but is not limited to ... (b) [e]ngaging in sexual harassment ... (c) [d]iscriminating against any woman on the basis of pregnancy, child-birth, maternity leave or related medical conditions ... (d) 1. ...[discriminating] against an individual ... because of the individual's sexual orientation ...

[221]See *Macauley* v. *Massachusetts Commission Against Discrimination*, 397 N.E.2d 670 at 671 (Mass. 1979) [hereinafter *Macauley*]: "As a matter of literal meaning, discrimination against homosexuals could be treated as a species of discrimination because of sex. We treat distinctions

tions that are different for each sex, he or she must confront a final hurdle: Was the constitutional or statutory prohibition of sex discrimination intended to apply to cases of sexual orientation discrimination? A number of courts and human rights tribunals in Canada and the United States have refused to interpret prohibitions of sex discrimination in human rights legislation as extending to sexual orientation discrimination, because they assumed that the legislature could not have intended such a result,[222] especially if it had rejected a proposed amendment that would have added "sexual orientation" expressly.[223]

It is questionable whether a narrow interpretation of "sex", as circumscribed by the legislature's "original intent", is appropriate in the case of human rights legislation, especially in Canada where the Supreme Court has held that such legislation "is of a special nature, not quite constitutional but certainly more than ordinary," and is to be given "an interpretation which will advance its broad purposes."[224] The "original intent" of the Manitoba legislature did not seem to be a significant factor in determining whether "sexual harassment" and "pregnancy" were implicitly included in "sex" in *Janzen* and *Brooks*.[225] If a court concludes that sexual orientation discrimination is sex discrimination, it need not ask whether the legislature "intended" an unambiguous prohibition of sex discrimination to apply to cases where the sex discrimination interferes with a person's choice of the direction of his or her emotional-sexual conduct. It should ask only whether there is any statutory language expressly excluding the application of such a prohibition to such cases. If not, and if no other statutory exception (such as a *bona fide* occupational qualification) can be established, the conclusion that the legislation has been violated should be inescapable.

An "original intent" argument is even weaker in the context of subsection 15(1) of the *Charter*, which is to be given a "broad and generous" interpreta-

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based on pregnancy as distinctions based on sex, calling them 'sex-linked' ... In a somewhat different sense, homosexuality is also sex-linked."

[222]See *University of Saskatchewan*, *supra* note 178 at 564-65; *Vogel I*, *supra* note 7 at D/1658; *DeSantis*, *supra* note 203 at 329-30: "Congress has not shown any intent other than to restrict the term 'sex' to its traditional meaning"; *Gay Law Students Association* v. *Pacific Telephone & Telegraph Co.*, 595 P.2d 592 at 612 (Cal. 1979): "Although, as a semantic argument, the contention may have some appeal ... when viewed in terms of expressed intent, the Legislature ... did not contemplate discrimination against homosexuals"; *Macauley*, *ibid.*; *Singer* v. *Hara*, 522 P.2d 1187 at 1194 (Wash. Ct. App. 1974) [hereinafter *Singer*] (the majority that voted for Washington's Equal Rights Amendment did not intend it to permit same-sex marriages).

[223]See *De Santis*, *ibid.* at 329. Compare *Mossop*, *supra* note 7 (S.C.C.) ("family status").

[224]*O'Malley*, *supra* note 22 at 547. But see *Mossop*, *supra* note 7 (S.C.C.) and text accompanying notes 22 and 23.

[225]See *Brooks*, *supra* note 215 at 1228, 1250: "One cannot conclude from the fact that some provinces [including Manitoba] have added pregnancy ... that discrimination on the basis of sex does not encompass pregnancy-based discrimination"; *Janzen*, *supra* note 214 at 1261, 1286: amendments in Manitoba and other jurisdictions expressly prohibiting sexual harassment "were no doubt intended to make ... explicit what had previously been implicit". Similarly, it is highly doubtful that Parliament "intended" or "foresaw" that the *CHRA*'s prohibition of sex discrimination would be applied to the exclusion of women from combat duties in the Armed Forces. Nevertheless, this absence of "original intent" did not preclude the perfectly logical conclusion that such exclusion violates the *CHRA*. See *Gauthier* v. *Canada (Canadian Armed Forces)* (1989), 10 C.H.R.R. D/6014 (C.H.R.C.).

tion,[226] and with respect to which evidence of legislative intent is given "minimal weight".[227] As has been demonstrated above, sexual orientation discrimination clearly falls within the *prima facie* scope of the prohibition of sex discrimination in subsection 15(1). That prohibition should be given its full *prima facie* effect. Any special justification for excluding a particular case of sexual orientation discrimination from the *prima facie* protection offered by "sex" in subsection 15(1) must be raised under section 1 of the *Charter*.

Whatever weight is given to the "original intent" of the drafters of the *Charter* (or of human rights legislation), it can be argued that treating sexual orientation discrimination as sex discrimination is entirely consistent with that intent. This is true if the "original intent" or purpose behind a prohibition of sex discrimination is defined, not with respect to specific applications of the prohibition, but in terms of a general goal of eliminating the enforcement of traditional sex roles by legislatures or public (or private) employers.[228] The obligation of men to choose emotional-sexual conduct only with women, and the obligation of women to do so only with men, are perhaps the most fundamental (and therefore invisible[229] and unchallenged) aspects of traditional sex roles. The legal and social persecution of gay and bisexual men (who violate the traditional male role, thereby betraying and forfeiting their superior male status by engaging in conduct that is only permitted to women)[230] and lesbian and bisexual women (who violate their traditional female role by seeking to live independently of men) is an integral aspect of enforcing traditional sex roles (men in the workplace and women in the home, joined exclusively by traditional opposite-sex marriages).[231] As conservative writer William Gairdner argues:

> [H]omosexuality ... thrives when male/female role distinctions are discouraged. Cultures that want to guard against the threat of homosexuality must therefore

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[226]Justice McIntyre said in *Andrews*, *supra* note 69 at 175:

> Both the enumerated grounds ... and other possible grounds of discrimination recognised under s. 15(1) must be interpreted in a broad and generous manner, reflecting the fact that they are constitutional provisions not easily repealed or amended but intended to provide a "continuing framework for the legitimate exercise of governmental power" and, at the same time, for "the unremitting protection" of equality rights ...

[227]See *Reference Re Section 94(2) of the Motor Vehicle Act, R.S.B.C. 1979*, [1985] 2 S.C.R. 486 at 507-509, 24 D.L.R. (4th) 536.

[228]For a discussion of how "original intent" can be defined more broadly, see R. Dworkin, "The Bork Nomination" *The New York Review of Books* (13 August 1987) 3. See also Pannick, *supra* note 194 at 204: the G.B. *Sex Discrimination Act 1975* "was introduced precisely to prevent reliance on real or perceived biological or cultural differences between the sexes, except where Parliament expressly provided an exception to the anti-discrimination principle."

[229]See *supra* note 189 and accompanying text.

[230]See *e.g.* J. Boswell, *Christianity, Social Tolerance and Homosexuality: Gay People in Western Europe from the Beginning of the Christian Era to the Fourteenth Century* (Chicago: University of Chicago Press, 1980) at 74-75 (discussing loss of status of adult male citizens of Rome if they permitted themselves to be penetrated by another man's penis, which only politically powerless women, adolescent males and slaves were supposed to do).

[231]See *supra* note 206 and accompanying text. Compare W. Gairdner, *The Trouble with Canada* (Toronto: Stoddart, 1990) at 73, 82-83, 209-10, 273-84 (suggesting that traditional sex roles, that assign women to the home and insist on traditional opposite-sex marriage as the only option, are essential to the success of a capitalist economy); T. Honoré, *Sex Law in England* (London: Duckworth, 1978) at 103-105: "Homosexual men are less likely to marry and support wives," which "tends to undermine the economic position of women ... "

> drive a cultural wedge down hard between maleness and femaleness, for it is no simple coincidence that homosexuality is flourishing in a time of feminism. They go together like the two sides of a coin. The attempt of the state to neutralize male and female differences is manifest in its effort to "normalize" homosexuality, marketing it to us in its agencies and schools as a "value-free" matter of sexual "orientation".[232]

Of such writers, Kenneth Karst has observed:

> It is not just coincidence that [those] most disturbed about the liberalization of society's response to same-sex orientation are also the most concerned to see that women return to "the family" ... to domesticity.[233]

E. Sex Discrimination against Same-Sex Couples

A sex discrimination argument is well suited to cases of discrimination against same-sex couples. One need only ask whether, if the plaintiff were a person of the opposite sex, his or her partner would qualify for the benefit in question. In *Vogel I*, *Karen Andrews*, *Mossop*, *Veysey*, *Knodel*, *Egan*, *Vogel II* and *Leshner*[234] the answer was yes because, in each case, the benefit was made available to unmarried opposite-sex couples. Courts have failed to recognise this because they have focused solely on the sex of the (chosen) partner, and not on the sex of the plaintiff (the choosing partner).[235] In *Mossop*, the Tribunal noted that Brian Mossop's partner, Ken Popert, would have qualified as a "common-law spouse" "but for [his] gender" or "except for [his] sex."[236] Similarly, in *Egan*, Martin J. said that "had [John] Nesbit [the partner] been a woman cohabiting with [James] Egan [the plaintiff] ... [Nesbit] would have been eligible for the spouse's allowance."[237] What courts need to do is to shift their focus from the sex of the (chosen) partner, which gives the relationship its sexual orientation, to the sex of the plaintiff (the choosing partner). If Martin J. had merely reversed the names of Nesbit and Egan (*i.e.*, "had Egan [the plaintiff] been a woman cohabiting with Nesbit [the partner] ... [Nesbit] would have been eligible for the spouse's allowance"), he would have stated a *prima facie* case of sex discrimination under subsection 15(1).

A sex discrimination approach can also be applied to same-sex marriage.[238] In *Layland*, if Todd Layland were a woman, he would have been permitted to marry Pierre Beaulne (and *vice versa*). Until *Baehr* v. *Lewin*, Canadian and

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[232]*Ibid.* at 281.

[233]"The Pursuit of Manhood and the Desegregation of the Armed Forces" (1991) 38 U.C.L.A. L. Rev. 499 at 509.

[234]*Supra* note 7.

[235]Although the partner is often a co-plaintiff (as was John Nesbit in *Egan*) and also suffers sex discrimination, it simplifies the above analysis to treat the party who has the relationship with the defendant government (*e.g.*, the pensioner, employee or prisoner) as the plaintiff, and the other party (who has no such relationship) as the partner.

[236]*Supra* note 14 at D/6097-D/6099 (C.H.R.C.).

[237]*Supra* note 66 at 695 (F.C.T.D.).

[238]See *e.g.* W. Eskridge, "A History of Same-Sex Marriage" (1993) 79 Va. L. Rev. 1419 at 1504-10; J. Trosino, "American Wedding: Same-Sex Marriage and the Miscegenation Analogy" (1993) 73 Boston U.L. Rev. 93; M. Strasser, "Family, Definitions and the Constitution: On the Antimiscegenation Analogy" (1991) 25 Suffolk U.L. Rev. 981; Note, "The Legality of Homosexual Marriage" (1973) 82 Yale L.J. 573.

United States courts that had considered the issue had all concluded that marriage is "by definition" opposite-sex.[239] They did so even when the plaintiff relied on *Loving* v. *Virginia*,[240] in which the United States Supreme Court struck down laws prohibiting mixed-race marriage as racially discriminatory, in spite of the "mirror-image symmetry" of the treatment of races.[241] In *Singer*, a Washington Court of Appeals considered whether the "definition of marriage ... in and of itself ... constitutes a violation of [the Washington Equal Rights Amendment]," prohibiting discrimination "on account of sex". It held that the Amendment did not apply to distinctions "founded upon the unique physical characteristics of the sexes," and that "the refusal of the state to authorize same-sex marriage results from ... impossibility of reproduction rather than ... discrimination 'on account of sex'." The fact that opposite-sex couples are permitted to marry even when one or both partners are infertile or when they do not want to have children was dismissed as an "exceptional situation",[242] as it was by the majority in *Layland*. But, as mentioned above,[243] these facts cannot be ignored and clearly demonstrate that the distinction *is* based on sex and not on "impossibility of reproduction" (meaning inability to have children with genetic input from both partners).

In *Baehr* v. *Lewin*, the Supreme Court of Hawaii became possibly the first court in the world[244] to accept the argument that sexual orientation discrimina-

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[239]See *Layland*, *supra* note 7; *Re North and Matheson*, *supra* note 5; *Singer*, *supra* note 222 at 1191-92; *Jones* v. *Hallahan*, 501 S.W.2d 588 (Ky. Ct. App. 1973); *Baker* v. *Nelson*, 191 N.W.2d 185 at 186 (Minn. 1971) [hereinafter *Baker*].

[240]*Supra* note 201.

[241]*Singer*, *supra* note 222; *Baker*, *supra* note 239 at 187: "[T]here is a clear distinction between a marital distinction based merely upon race and one based upon the fundamental difference in sex ..."

[242]See *Singer*, *ibid.* at 1193-95.

[243]See *supra* notes 136-38 and accompanying text.

[244]In *Toonen*, *supra* note 124, para. 8.7, the U.N. Human Rights Committee said *obiter* that "'sex' in articles 2 ... and 26 [of the *International Covenant*] is to be taken as including sexual orientation." In *Engel* v. *Worthington*, 23 Cal. Rptr. 2d 329 (Ct. App. 1993), a California Court of Appeal held that a publisher's refusal to include a picture of a male-male couple in a high school reunion memory book was sex discrimination contrary to s. 51 of the California *Civil Code*.

The highest courts of Germany and the Netherlands have refused to strike down the exclusion of same-sex couples from marriage. See *Herr S & Herr W*, No. 1 BvR 640/93, German Federal Constitutional Court (*Bundesverfassungsgericht*) (4 October 1993), [1993] *Neue Juristische Wochenschrift* 3058; Netherlands Supreme Court (*Hoge Raad der Nederlanden*) (19 October 1990), RvdW 1990, nr. 176, [1992] *Nederlandse Jurisprudentie*, No. 129. In both decisions, the word "marriage" (in Article 6(1) of the German *Basic Law* and Article 12 of the *European Convention*) was given a traditional interpretation as meaning "opposite-sex marriage", and a sex discrimination argument does not seem to have been made. Both decisions cited the European Court of Human Rights' interpretation of "marriage" in Article 12 of the *European Convention* as referring "to the traditional marriage between persons of opposite biological sex," in a case where a transsexual man was seeking the right to marry (*Rees* v. *United Kingdom* (1986), Eur. Ct. H.R. Ser. A, No. 106, paras. 49-50, 9 E.H.R.R. 56). The European Court has not yet heard a case involving same-sex marriage. The French Cour de cassation has denied claims of same-sex couples to the same benefits as unmarried opposite-sex couples. See Cass. soc., 11 July 1989, Bull. civ. 1989.V.311, No. 514; Cass. soc., 11 July 1989, Bull. civ. 1989.V.312, No. 515. See generally K. Waaldijk, "The Legal Situation in the Member States" in K. Waaldijk & A. Clapham, eds., *Homosexuality: A European Community Issue* (Dordrecht, Neth: Martinus Nijhoff, 1993) 71 at 91-101.

tion is sex discrimination, and to hold that exclusion of same-sex couples from marriage is at least *prima facie* sex discrimination that must be justified.[245] It rejected the "liberty" or "privacy" argument of the plaintiffs, three same-sex couples, that they had "a fundamental constitutional right to same-sex marriage arising out of the right to privacy or otherwise."[246] However, the Court accepted their "equality" or "equal protection" argument, not on the basis that "homosexuals" are a "suspect class",[247] but on the basis that "sex" is a "suspect category" under the Hawaii Constitution[248] and that the marriage law "denies same-sex couples access to the marital status and its concomitant rights and benefits ... on the basis of the applicants' sex."[249] It rejected the dissent's argument that "all males and females are treated alike. A male cannot obtain a license to marry another male, and a female cannot obtain a license to marry another female."[250] In so doing, it accepted the analogy to *Loving* v. *Virginia*[251] and the United States Supreme Court's rejection of "mirror-image symmetry" of the treatment of races as precluding a finding of race discrimination. The Supreme Court of Hawaii described as "tautological and circular" and as "tortured and conclusory sophistry" the arguments that "same sex marriage is an innate impossibility" and that the plaintiffs "were denied a marriage license because of the nature of marriage itself." Instead it observed that, "as *Loving* amply demonstrates, constitutional law may mandate, like it or not, that customs change with an evolving social order."[252]

Same-sex couples should not book their flights to Hawaii quite yet, as the Supreme Court of Hawaii did not strike down the "opposite-sex couples only" marriage law. Rather, it held that the law "is presumed to be unconstitutional ... [unless the State of Hawaii] can show that (a) the statute's sex-based classification is justified by compelling state interests and (b) the statute is narrowly drawn to avoid unnecessary abridgments of the [plaintiffs'] constitutional rights."[253] It remains to be seen whether the State can discharge this heavy burden, but an argument such as "lack of procreative capacity" should not be enough. If the Supreme Court of Hawaii ultimately holds that the State has failed to do so, and the Hawaii Constitution is not amended to overturn the decision,[254] "the State of Hawaii will no longer be permitted to refuse marriage

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[245]The argument was initially accepted by two judges, with one concurring on other grounds, and two dissenting. A motion for reconsideration, together with a change in the composition of the Court, seems to have altered the result to three judges accepting the argument, one concurring on other grounds and one dissenting (*supra* note 13 at 48, 68, 70, 74-75).

[246]*Ibid.* at 57.

[247]"[I]t is irrelevant ... whether homosexuals constitute a 'suspect class' because it is immaterial whether the plaintiffs ... are homosexuals" (*ibid.* at 58, n. 17). The Court defined sexual orientation narrowly as direction of attraction, and neither saw it as including the choice of direction of conduct, nor saw particular instances of conduct (*e.g.*, a marriage) as having sexual orientations. "Parties to a same-sex marriage could theoretically be either homosexuals or heterosexuals" (*ibid.* at 51, n. 11).

[248]*Ibid.* at 67.

[249]*Ibid.* at 60.

[250]*Ibid.* at 67-68, 71.

[251]See Koppelman, *supra* note 206.

[252]*Supra* note 13 at 63.

[253]*Ibid.* at 67.

[254]Attempts to have the Hawaii legislature propose a referendum on a constitutional amendment

licenses to couples merely on the basis that they are of the same sex."[255] Business could boom both for travel agents and experts on inter-jurisdictional recognition of marriages.

Couclusion

Attempts by same-sex couples to achieve equality with opposite-sex couples raise a number of issues for legislatures and courts. One issue is the question of whether the equality, if granted, should take the form of "equalizing up" or "equalizing down": Should benefits (including the right to marry) be extended to same-sex couples, or should they be taken away from opposite-sex couples, thereby eliminating the ways in which couple relationships are preferred (justifiably or not) over non-couple relationships?[256] For legislatures, the answer will depend on the popularity of the benefit. For courts, the initial answer should be clear, in that the principles set out in *Schachter* v. *Canada (Employment and Immigration Commission)*[257] will almost always favour extension to the small group of persons excluded by the challenged distinction (same-sex couples). A challenge to another distinction excluding a different group of persons could produce a different result.

A second issue is how to define "couple" or "spousal" relationships. What distinguishes such relationships from "non-couple" or "non-spousal" relationships? I would suggest that shared housing or finances and commitment or caring will not be enough in some cases, and that the main distinguishing feature will be an actual, former or potential sexual relationship. But it is difficult for courts to treat this as the deciding factor, both because it is not a requirement of a valid marriage and because courts are understandably reluctant to enquire into the sexual activities of couples. What must be noted about both these issues (extension or abolition of benefits and definition of "couple") is that they can and must be kept separate from the issue of discrimination against same-sex

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prohibiting same-sex marriage, under Article XVII, section 3 of the Hawaii Constitution, have so far been unsuccessful. See P. Freiberg, "In Hawaii, Fight for Marriage Heats Up" (25 March 1994) *The Washington [D.C.] Blade* 1.

[255]*Supra* note 13 at 57.

[256]There is a debate within the gay, lesbian and bisexual community as to whether same-sex couples should be seeking the right to marry or an end to the ways in which married couple relationships are preferred over other relationships. See *e.g.* Herman, *supra* note 140 at 794-804; N. Duclos, "Some Complicating Thoughts on Same-Sex Marriage" (1991) 1 L. & Sexuality 31; N. Polikoff, "We Will Get What We Ask For: Why Legalizing Gay and Lesbian Marriage Will Not 'Dismantle the Legal Structure of Gender in Every Marriage'" (1993) 79 Va. L. Rev. 1535. I would argue that, in the short term, the heterosexual majority is unlikely to abolish civil marriage or remove all of the benefits it may bring. As long as it exists, and even if the only additional benefit is a symbolic one, same-sex couples will not have the same range of options as opposite-sex couples and will not be "equal" to them, unless they are permitted to marry. It is true that although burdens tied to the benefits of marriage could be avoided by not marrying, certain "involuntary" burdens would accompany equal treatment of unmarried same-sex and opposite-sex couples (*e.g.*, calculation of welfare benefits based on combined incomes). See Duclos, *ibid.* at 52-55. Perhaps "involuntary" burdens must be accepted as part of the "package" that equality with opposite-sex couples represents, and their elimination sought by other means for all unmarried couples, or all couples.

[257][1992] 2 S.C.R. 679, 93 D.L.R. (4th) 1.

couples. The basic equality claim of same-sex couples is that, whatever benefits (including a right to marry) the State decides to allocate to couples, and however it decides to define "couples", "spouses" or "families", the allocation or definition should not discriminate against them, either directly or indirectly, whether on the basis of sexual orientation or sex.

In *Egan*, the Supreme Court of Canada is presented with the opportunity of deciding that sexual orientation is an analogous ground under subsection 15(1) of the *Charter*, and that discrimination against same-sex couples is discrimination on the basis of sexual orientation or sex and must be justified under section 1. If it were to adopt such a principle (and find no section 1 justifications), it would establish that same-sex couples are generally entitled to the same benefits as unmarried opposite-sex couples, where such benefits are provided for by statute, or are otherwise provided by "government". But its reasoning in interpreting an analogous ground (sexual orientation) or an enumerated ground (sex) in subsection 15(1) as applying to discrimination against same-sex couples in the provision of benefits, would probably apply to human rights acts that expressly prohibit discrimination based on sexual orientation or sex. It would thereby lend support to the reasoning in *Leshner* that a prohibition of sexual orientation discrimination in a human rights act protects same-sex couples, and that subsection 15(1) of the *Charter* precludes attempts to limit such a prohibition to discrimination against gay, lesbian and bisexual individuals, by using opposite-sex definitions of "spouse" or "marital status" to exclude same-sex couples from protection.[258] If the Tribunal's reasoning is ultimately accepted by appellate courts,[259] it could mean that the recent attempt to insert such a limit into the Nova Scotia *Human Rights Act* could be struck down,[260] and that all Canadian employers (public and private sector) bound by such statutory prohibitions would have to extend employment benefits provided to unmarried opposite-sex partners to the same-sex partners of their employees.[261]

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[258]*Leshner*, *supra* note 7 at D/197-D/201.

[259]In *Clinton* (*supra* note 7), an Ontario Human Rights Commission board of inquiry held, without relying on subsection 15(1) of the *Charter*, that the denial of benefits to Elizabeth Clinton's partner, Laurie Anne Mercer, constituted sexual orientation discrimination, in spite of the opposite-sex definitions of "marital status" (and "spouse") in the Ontario *Human Rights Code* (*supra* note 47, s. 10(1)). The Ontario Divisional Court relied on these definitions (and did not permit a *Charter* argument) in reversing the Board of Inquiry's decision on 3 May 1994. See "Bill to Be Introduced, Free Vote Confirmed" *XTRA [Toronto]* (13 May 1994) 13. Compare *Parkwood*, *supra* note 7; *Carleton*, *supra* note 7.

[260]See R.S.N.S. 1989, c. 214, as am. by *An Act to Amend Chapter 214 of the Revised Statutes, 1989, The Human Rights Act*, S.N.S. 1991, c. 12, s. 3(i). See also Bill C-108, *An Act to Amend the Canadian Human Rights Act and Other Acts in Consequence Thereof*, 3d Sess., 34th Parl., 1992, s. 10. Compare the Quebec *Charter of Human Rights and Freedoms*, *supra* note 117, s. 137 (prohibitions of sexual orientation and sex discrimination do not apply to pension and other social benefit plans).

[261]This could mean *all* Canadian employers, if the Supreme Court approves the reasoning in *Haig* (*supra* note 59) or accepts a sex discrimination argument. In *Clinton* (*supra* note 7 at D/384), the board of inquiry ordered that "no employee benefit plan be offered in ... Ontario which limits common-law conjugal benefits to persons of the opposite sex." But see *supra* note 259. On 9 June 1994, the Ontario legislature voted (68-59) against a bill (Bill 167, the *Equality Rights Statute Law Amendment Act*) that would have amended 56 statutes that discriminate against same-sex couples (including the opposite-sex definitions of "spouse" and "marital status" in the Ontario *Human*

What about any benefits that may justifiably be restricted to married couples, and the right to marry itself? The Supreme Court of Canada may also have the opportunity in *Layland* (if there is an appeal from the Ontario Court of Appeal's decision) to apply any principle it adopts in *Egan* to the most fundamental and historically entrenched kind of discrimination against same-sex couples: denying them the right to marry. In its impact on discrimination against same-sex couples, a decision striking down the exclusion as contrary to the *Charter* would be equivalent to *Brown* v. *Board of Education*.[262] The heterosexual majority in Canada may be reluctant to see the institution of civil marriage[263] "demeaned" by allowing same-sex couples to sit in the same marriage clerk's waiting room as opposite-sex couples,[264] or might prefer them to have their own "separate but equal" registration procedure with a name other than "marriage".[265] But the Supreme Court of Canada would be declaring that

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Rights Code, *supra* note 47, s. 10(1)), and that would have permitted same-sex couples to adopt children jointly but not marry (a matter seen as falling within federal jurisdiction). See C. McInnes & J. Rusk, "Gay-Couples Bill Survives [first reading] Vote" *The [National] Globe and Mail* (20 May 1994) A1; E. Payne, "What's in the Equality Rights Statute Law Amendment Act" *The Ottawa Citizen* (3 June 1994) A4; B. Powell, "Ontario Rejects [on second reading] Same-Sex Bill" [10 June 1994) A1. In the case of pension plans, an additional obstacle is the opposite-sex definition of "spouse" in the federal *Income Tax Act*. See *Leshner*, *supra* note 7 at D/196. The Canadian Union of Public Employees is bringing a *Charter* action to challenge the definition. See *Capital XTRA [Ottawa]* (19 November 1993) 13.

[262]See *Egan*, *supra* note 7 at 441-43 (F.C.A.); *Layland*, *supra* note 7 at 680; *Leshner*, *supra* note 7 at D/196.

[263]Civil marriage must be distinguished from religious marriage, which would probably be protected by subsection 2(*a*) of the *Charter* against any attempt to apply a statutory prohibition of sexual orientation discrimination or sex discrimination.

[264]See *e.g.* A. Santin, "Protect Gays, Survey Says, but Don't Sanction Marriage" *Winnipeg Free Press* (6 February 1993) A11: Angus Reid poll finds that 56% of Canadians "believe tbat homosexual couples who wish to marry should not qualify for legal recognition of their union."

[265]In 1989, Denmark established a "separate and not quite equal" procedure that permits two persons of the same sex to register their partnership but not to adopt children jointly. See Denmark, *Lov om registreret partnerskab (Law on Registered Partnership)*, Lov 7 June 1989, nr. 372; L. Nielsen, "Family Rigbts and the 'Registered Partnership' in Denmark" (1990) 4 Int'l J.L. & Fam. 297; M.H. Pedersen, "Denmark: Homosexual Marriages and New Rules Regarding Separation and Divorce" (1992) 30 J. Fam. L. 289; L. Nielsen, "Denmark: New Rules Regarding Marriage Contracts and Reform Considerations Concerning Children" (1992-93) 31 Univ. Louisville J. Fam. L. 309; D. Henson, "A Comparative Analysis of Same-Sex Partnership Protections: Recommendations for American Reform" (1993) 7 Int'l J.L. & Fam. 282. In 1993, Norway adopted a similar procedure but confined it to "two homosexual persons of the same sex." See Norway, *Lov om registrert partnerskap (Law on Registered Partnership)*, Lov 30 April 1993, nr. 40, § 1. On 7 June 1994, Sweden's parliament adopted registered partnership legislation that is similar to the Danish and Norwegian laws. See "Sweden to Let Homosexuals Marry" *International Herald Tribune* (8 June 1994) 2. On 8 February 1994, the European Parliament called on the Commission of the European Communities to draft a recommendation ending "the barring of lesbians and homosexual couples from marriage or from an equivalent legal framework" and "any restrictions on the rights of lesbians and homosexuals to be parents or to adopt or foster children" (EC, *Resolution on Equal Rights for Homosexuals and Lesbians in the EC*, No. A3-0028/94 (8 February 1994), paras. 12-14.

The Ontario Law Reform Commission has recommended that legislation be enacted that would permit any two unmarried adults to register a "Registered Domestic Partnership" (*Report on the Rights and Responsibilities of Cohabitants under the Family Law Act* (Toronto: Ontario Law Reform Commission, 1993) at 53-55, 70-71). Like the Ontario proposal, procedures for registering "domestic partnerships" that have been established in a number of U.S. cities are open both to

such exclusion or segregation cannot be permitted in a "free and democratic society" that believes in equality without discrimination based on sexual orientation or sex.

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same-sex couples and to unmarried opposite-sex couples, giving the former, one recognition option (registration) and the latter, two (registration or marriage). See C. Bowman & B. Cornish, "A More Perfect Union: A Legal and Social Analysis of Domestic Partnership Ordinances" (1992) 92 Colum. L. Rev. 1164.