A mirage or an oasis? Giving substance to substantive equality

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The Supreme Court of Canada released three equality rights decisions in the Spring of 1999: *Law*,[2] *Corbiere*,[3] and *M. v. H.*[4] In all three cases, the court applied a substantive, rather than formal, equality rights analysis. Section 15 now clearly requires a focus on adopting the perspective of the rights claimant, a review of the larger historical and social context, and an emphasis on considering the impact or effects of the differential treatment. This approach should assist the court in resisting the tendency to drift into a "similarly situated" formal equality analysis.[5]

In *Andrews*, the Supreme Court expressly rejected a formal equality approach.[6] However, over the next decade of s. 15 jurisprudence, the court often slipped back into a reliance on the similarly situated test. The promise of a substantive equality approach was not fully realized.

The problem reached a breaking point in the 1995 trilogy of *Egan*,[7] *Miron*,[8] and *Thibaudeau*,[9] where the court was divided as to the proper test for discrimination. The split was between those Justices who wished to inject consideration of "relevance" into s. 15[10] and those who wished to leave the issue of justification to s. 1.[11] The decisions of the minority supporting "relevance" showed many of the markers of a formal equality analysis. The reasoning was bound up with us–them comparisons, without consideration of the perspective of the claimant.

Following this fracturing, the court released a series of decisions in which there was unanimity as to the result. However, there was no clear resolution of the interpretation of s. 15.[12] The court then called for a rehearing of *Law v. Canada (Minister of Employment and Immigration)*, a case about age discrimination that had first been argued several months earlier, before a change in the composition of the court. When a unanimous decision in *Law* was released, the court pronounced that it had resolved its division over s. 15 and that *Law* would now "provide a set of guidelines for courts that are called upon to analyze a discrimination claim under the Charter."[13] The guidelines suggest a commitment to a substantive equality approach—at least in theory.

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With continuing criticism of the court as overly activist, it may be politically difficult for it to grant remedies that accord with the substantive equality guarantee. The approach to s. 15 may be beautifully articulated in the abstract, as was the case with *Law*, but it will not be helpful if there is hesitation to give effect to that vision of equality in the difficult cases. In *M. v. H.* and *Corbiere*, there is a sense of caution about remedy, a deference that was not so apparent in pre-*Law* equality cases like *Vriend* and *Eldridge*.[14]

The issue of judicial deference is not new to equality law. The governor of Alabama decried the activism of the Warren court when he refused to comply with the desegregation mandated by *Brown v. Board of Education*.[15] Deference is not new to the Supreme Court of Canada either—if anything, it is a persistent theme. In one of the earliest Charter cases, Justice Lamer felt it necessary to comment on the legitimacy of constitutional adjudication under the Charter, stating: "It ought not to be forgotten that the historic decision to entrench the *Charter* in our Constitution was taken not by the courts but by the elected representatives of the people of Canada."[16] For the next two decades, many justices spoke out in support of the court's mandate as a guardian of human rights appointed by the legislature. When Chief Justice McLachlin was sworn in this year, the notion of an "activist court" continued to be a central topic in media coverage and academic discussion.

While everyone knows that a right is worthless without a remedy, it appears that a serious judicial appreciation of this reality will be an ongoing challenge for equality jurisprudence in the coming years. A substantive equality analysis will allow the court to find discrimination. The court's courage cannot falter at the precise moment when it is called upon to do something about it. We must give substance to the promise of substantive equality.

LAW v. CANADA (MINISTER OF EMPLOYMENT AND IMMIGRATION)

Law provides a comprehensive review of s. 15 jurisprudence following *Andrews*, and sets out the best articulation

of the substantive equality analysis from the court to date. Of course, the test was defined in the abstract, in response to an "easy case." Nancy Law's appeal was unanimously dismissed by the court. The court held that she had not established discrimination in being denied CPP survivor's benefits available only to those who are 45 years of age or older, have children, or have a disability.[17] There was no discrimination because the differential treatment in the case did not "reflect or promote the notion that [those excluded from the benefit scheme] are less capable or less deserving of concern, respect and consideration. . . . Given the contemporary and historical context of the differential treatment and those affected by it, the legislation [did] not stereotype, exclude or devalue adults under 45."[18]

After years of division among the Justices, the court recognized that it was necessary to "revisit the fundamental purpose of s. 15 and . . . seek out a means by which to give full effect to this fundamental purpose."[19] Writing for the court, Justice Iacobucci reviewed *Andrews* and subsequent decisions, concluding that the aim of s. 15 is to "prevent the violation of essential human dignity and freedom through the imposition of disadvantage, stereotyping, or political and social prejudice, and to promote a society in which all persons enjoy equal recognition at law as human beings or as members of Canadian society, equally capable of and equally deserving of concern, respect and consideration."[20]

The court affirmed that equality is a comparative concept and stated that it is necessary to consider the purpose and effect of the legislation and "biological, historical, and sociological similarities or dissimilarities" to locate the appropriate comparator. Importantly, however, "the determination of the appropriate comparator, and the evaluation of the contextual factors which determine whether the legislation has the effect of demeaning a claimant's dignity must be conducted from the perspective of the claimant"—it is a subjective–objective assessment. A discrimination claim may involve more than one ground simultaneously.

Pre-existing disadvantage is "probably the most compelling factor favouring a conclusion that differential treatment imposed by legislation is truly discriminatory." Historic disadvantage is not, however, a necessary pre-condition to proving discrimination. In determining whether the claimant's dignity has been violated, another factor to be assessed is the relationship between the ground of discrimination and the nature of the differential treatment. In some cases, differential treatment may reflect the claimant's actual needs, capacities, or circumstances, and so not be discriminatory. Still, differences must be recognized in a manner that respects a person's value as a human being and member of Canadian society.

Justice Iacobucci held that a three-step approach is appropriate for the assessment of equality claims. The claimant must establish differential treatment, the presence of enumerated or analogous grounds, and discrimination that brings into play the purpose of s. 15(1).

The *Law* decision retains many of the same problems that have threatened equality analysis since *Andrews*. While the minority's "relevance" step was not expressly accepted as a guideline in assessing equality claims, the court also failed to explicitly condemn it. Indeed, the court continued to advocate a three-step comparative approach that may invite a formal equality analysis. Justice Iacobucci states that the court must consider the purpose of legislation under s. 15 and "biological, historical, and sociological similarities or dissimilarities" of groups claiming equality to current rights holders. This might allow a relapse into the reasoning of the minority in *Egan* and *Miron*.

The court's consistent focus on the perspective of the rights claimant may help to prevent a regression to formal equality reasoning. Still, the *Law* decision was written purely in the abstract—those denied the benefit were not victims of stereotyping or prejudice; they had no history of vulnerability; their exclusion was not a threat to their human dignity.[21] The court had no need to actually "pivot the centre" and appreciate the experience of a vulnerable group.[22]

CORBIERE v. CANADA (MINISTER OF INDIAN AND NORTHERN AFFAIRS)

On May 20, 1999, the Supreme Court released its decisions in *Corbiere* and *M. v. H.* In both cases, the court found a violation of s. 15 that could not be demonstrably justified in a free and democratic society.[23]

The issue in *Corbiere* was whether the exclusion of off-reserve members of an Indian band from the right to vote in band elections was inconsistent with s. 15(1) of the *Canadian Charter of Rights and Freedoms*.[24] The court was unanimous that disenfranchisement was discriminatory, but the court split 5:4 with respect to the means to identify an analogous ground of discrimination.

Chief Justice McLachlin and Justice Bastarache authored joint reasons for the majority,[25] with Justice L'Heureux-Dubé writing minority concurring reasons.[26] All agreed that the impugned law made a distinction that denied the equal benefit of the law.[27] Aboriginals living off-reserve were completely denied the right to vote in band elections granted to those living on-reserve.

It was also agreed that off-reserve band member status constitutes a ground of discrimination analogous to the enumerated grounds. However, the majority rejected the assertion that the same ground may or may not be analogous depending on the circumstances. In their view, analogous grounds are simply markers of suspect classifications. The third step of the s. 15 test will determine whether a distinction drawn on the basis of an analogous ground is discriminatory. The determination of an analogous ground and the determination of discrimination must be kept distinct.

Chief Justice McLachlin and Justice Bastarache also wished to comment on the criteria that identify an analogous

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ground. They suggest that an analogous ground may be identified on the basis that these "often serve as the basis for stereotypical decisions made not on the basis of merit but on the basis of a personal characteristic that is immutable or changeable only at unacceptable cost to personal identity." These are personal characteristics which "the government has no legitimate interest in expecting us to change to receive equal treatment under the law." Other considerations, such as historical disadvantage and vulnerability, are said to flow from the immutability of the personal characteristic.

In contrast, Justice L'Heureux-Dubé set out a more extensive list of relevant, but not necessary, contextual factors that may be considered in making the determination of whether a characteristic may be considered an analogous ground of discrimination. She states that "an analogous ground may be shown by the fundamental nature of the characteristic: whether from the perspective of a reasonable person in the position of the claimant, it is important to their identity, personhood, or belonging."

The third stage of the s. 15 analysis is whether the differential treatment results in a discriminatory impact. "In plain words, does the distinction undermine the presumption upon which the guarantee of equality is based—that each individual is deemed to be of equal worth regardless of the group to which he or she belongs?"

The majority concluded that disenfranchisement was discriminatory. The denial of voting rights perpetuated historic disadvantage, and treated off-reserve band members as less worthy and entitled. It denied the right to vote on the arbitrary basis of a personal characteristic, it attacked cultural identity, and it presumed a lack of interest in meaningful participation in the band. "This engages the dignity aspect of the s. 15 analysis and results in the denial of substantive equality."

The minority held that the finding of discrimination was based on the situation of the claimants and the general off-reserve population. However, the minority's reasons would not necessarily apply to off-reserve members who had a different composition or history from that of the general population of off-reserve band members in Canada.

The discriminatory treatment was not justified because off-reserve band members were completely denied the right to vote. While it was not necessary for non-residents to have identical voting rights to residents, it was necessary to develop an electoral process that considered the rights of both off-reserve and on-reserve band members.

When it came to remedy, the minority and majority decisions reached the same result, showing sensitivity to the legislative role and social context. The court granted a declaration of invalidity, and struck out the words in the statute that effected the exclusion of off-reserve members. A constititutional exemption was not granted, and the remedy was suspended for 18 months to allow the government time to respond.

M. v. H.

In *M. v. H.,* an 8:1 majority of the court, applying the s. 15 test articulated in *Law,* concluded that Ontario's *Family Law Act*[28](FLA) discriminated on the basis of sexual orientation by excluding same-sex couples from the definition of "spouse" for the purposes of spousal support.[29]

The court held that the infringement of gays' and lesbians' equality rights was not justified under s. 1. The appropriate remedy was to declare s. 29 of the FLA of no force and effect, and to suspend the application of the declaration for a period of six months. The court suggested that the legislature ought to address the rights of same-sex spouses in a more comprehensive fashion rather than burden private litigants and the public purse with piecemeal court reform.

M. v. H. was a huge achievement for gays and lesbians and for all those who believe in equality and justice. The result in *M. v. H.* confirmed that the court had fundamentally changed its perspective since *Egan*. The court adopted a truly substantive approach to equality, recognizing the history of discrimination and invisibility faced by lesbian and gay relationships. Given the larger social and political context of homophobia, the non-recognition of same-sex spouses was rightly regarded as offensive to the dignity of gays, lesbians, and bisexuals.

As Justice Cory explained, "the exclusion of same-sex partners from the benefits of the spousal support scheme implies that they are judged to be incapable of forming intimate relationships of economic interdependence, without regard to their actual circumstances." The court assessed the equality claim from the perspective of the rights holder, considered historical disadvantage and vulnerability, and weighed the nature of the interest affected. The court thereby concluded that the exclusion of same-sex spouses from the spousal support protections of the FLA was discriminatory.

The government failed to justify the violation of equality rights as a reasonable limit in a free and democratic society under s. 1 of the *Charter*. The government argued that the exclusion of same-sex couples was constitutional because the legislation was really aimed at protecting heterosexual couples. This was legitimate because only heterosexuals get married, only they have heterosexual sex that "naturally" produces children, or only they have economically dependent relationships.

Alternatively, Ontario suggested that the provision was primarily aimed at protecting dependent women, because heterosexual women are disadvantaged by relationships marked by gender inequality, unlike lesbians and gay men who enjoy egalitarian relationships. In support of the "anti-assimilationist" arguments, the government and "H" heavily relied on progressive law reform work and feminist writings.[30] The government's submission was that same-sex couples are simply different, forming more equal and

fair relationships. Therefore, the equal benefit of the law is unnecessary. In fact, spousal recognition would promote inequality by encouraging lesbians and gays to adopt a heterosexual model.[31]

The Supreme Court rejected the government's articulation of the objectives.[32] Instead, the court took a "broad and purposive" approach to determining the laudatory purpose of the legislation. The court had regard to legislative debates, as well as the past jurisprudence of the court, which indicated that the goal of the legislation had never been entirely limited to women or children. Most important, the government's articulation of the objectives was not supported by the legislation, which was a gender-neutral scheme including mutual support rights and obligations for unmarried and childless spouses, as long as they are of the opposite sex.[33]

The objective of the legislation could not be framed in terms that reinforce the discrimination, such as "to provide support for heterosexual families." The resulting reasoning would be circular.[34] Viewing heterosexuality and heterosexual sex as legitimate grounds for distinction would have been antithetical to s. 15's purpose of promoting the equality of lesbians and gay men.

Even if the objective of the legislation was to protect and assist heterosexual families because of their reproductive potential, the court held that there would be no rational connection between this objective and the exclusion of lesbians, gays, and bisexuals. The exclusion of same-sex couples from the spousal support regime of the FLA did nothing to assist heterosexuality or children. Moreover, the legislation provided mutual support rights and obligations irrespective of whether the spouses had children.

Having found that the definition of "spouse" is contrary to the constitution, the court should have designed a remedy to protect the substantive equality rights of same-sex couples and other disadvantaged groups. Instead, the relief granted by the court had the very real potential of permitting greater inequality. The majority held that:

Having found that the definition of "spouse" is contrary to the constitution, the court should have designed a remedy to protect the substantive equality rights of same-sex couples and other disadvantaged groups. Instead, the relief granted by the court had the very real potential of permitting greater inequality.

> In this case, . . . [t]he appropriate remedy is to declare s. 29 of no force and effect and to suspend the application of the declaration for a period of six months.

As a result of the remedial order, the extended definition of "spouse" under s. 29 of the FLA of Ontario was to be struck down on November 20, 1999. The legislature had until that date to amend s. 29 in accordance with equality principles. Rather than fixing the problem by striking out the offending words, as was done in *Corbiere*, the court struck down the whole extended definition of "spouse" and suspended the declaration.

The remedy granted could have created substantive inequality between married couples on the one hand, and unmarried opposite and same-sex couples on the other. Striking down the underinclusive extension of rights might have left all unmarried couples equally disadvantaged, with no unmarried spouses having spousal support rights and obligations in Ontario. This result cannot be easily reconciled with equality principles, particularly since the decision in *Miron* suggests that differential treatment between married spouses and unmarried opposite-sex spouses is unconstitutional. In *Corbiere,* the court fashioned its remedy with an eye to the entire social context, including the possibility of legislative inaction. In contrast, it failed to ensure a Charter-respecting remedial result in *M. v. H.*

Although there was remedial precision, the court held that it could not "read in" because that would not ensure the validity of the legislation as a whole. There were two other parts of the FLA that would have to be considered to ensure constitutional validity: part IV, concerning the right to make statutorily recognized agreements, and part V, dealing with the right to claim damages for the injury or death of a family member. This seems an odd justification for the remedial choice, especially since the court had made tough remedial orders in similar circumstances in *Vriend*. Perhaps the remedial order was an understandable expression of judicial reluctance to dictate social policy. Or was it a failure to be truly accountable, rooted in the concern that the decision would be unpopular?

One strong possibility is that the remedial order was a response to Ontario's approach to the litigation. In its s. 1 argument, the government claimed that the challenge to s. 29 of the FLA threatened the validity of 80 provincial statutes. However, when it came to argument on remedy, Ontario asked—pleaded even—that the court not suspend any declaration of invalidity. In fact, counsel went so far as to suggest that the court was *not permitted* to suspend the remedy be-

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cause the government was not seeking it. The other 80 statutes were suddenly less an issue. It was clear that Ontario did not want to engage in law reform in this politically troublesome area; it wanted the court to handle the problem instead.

Viewed in this context, the decision on remedy could be an almost subversive response to the position in which the court found itself. It was certainly clear during argument that the panel was shocked, even horrified, by the submissions that the court should read in, and that a suspension should only be granted if the government asked for it. The remedy chosen, striking down all of s. 29 with only a brief suspension, may have been an effort to force Ontario's hand, to make the government take responsibility.

To be fair, the court appeared to have complete faith that the government would respect its decision. We argued strenuously that the court should read in without any suspension of its remedy, given Ontario's clear position that it was not interested in engaging in responsive legislative reform. When pressed by former Chief Justice Lamer about why we cared about remedy if the court agreed that s. 29 was unconstitutional, we responded that our client wanted to know that this case, her case, resolved the issue. She wanted to be sure that her case meant an end to discrimination and that nobody else would be required to fight this particular battle again. In response, Lamer C.J. said that there had never been a case in which suspension had been granted and the court's decision had been ignored. Sometimes extensions were sought, and granted, but there was always compliance.

The court may have been too trusting because of that past history. By throwing the challenge back to the legislature after Ontario attempted to burden the court with the responsibility of law reform, the court perhaps lost sight of the social context—the same social context of homophobia that it had fully grasped when applying the s. 15 substantive equality analysis. Whatever the reason for the remedial order, the result was extremely problematic.

When it came to remedy, the minority and majority decisions reached the same result, showing sensitivity to the legislative role and social context.

On October 27, 1999, without any community consultation and after releasing the Bill to the public for the first time only 48 hours earlier, Ontario passed *An Act to Amend Certain Statutes Because of the Supreme Court of Canada Decision in M. v. H.* Second and third readings for the Bill were held in an evening session of the legislature, without any substantive debate, and without a recorded vote.

The *M. v. H.* Act introduces separate nomenclature for same-sex couples. Where married and unmarried heterosexuals are "spouses" and "families," gays and lesbians are deemed "same-sex partners" and "households."[35] The legislation introduces, in 67 statutes, an express distinction on the basis of sexual orientation. Rather than amend the discriminatory definition of "spouse" ruled to be unconstitutional in *M. v. H.*, Ontario has responded with defiance, saying in its press releases and in the debates that the purpose of the legislation was to "protect" traditional family values and to preserve the concept of spouse for heterosexuals only.[36]

Having argued consistently since the early '80s that "spouse" is an inherently heterosexual definition, having lost that argument in numerous lower court cases, and having heard once and for all from the Supreme Court in *M. v. H.* that it cannot be sustained, the government has responded with a new tactic—segregation. Having lost the right to deny gays and lesbians equal financial benefit of the law by the use of the term "spouse," Ontario now seeks to "protect" the label itself as the last bastion of discrimination. Segregated status sends a clear message of exclusion—gays and lesbians are a threat to "our" concept of family from which society must be "protected."

We went with M. and sat in the legislature on October 27, 1999, to bear witness to the passage of the Act. Instead of affirming the equality of gays and lesbians, the statute that credits her tireless court battle as its rationale instead contributes to the very real discrimination M. was seeking to remedy. That evening, it was clear to us that the Act flaunted both the letter and the spirit of *M. v. H.* Our client wondered aloud if any of the politicans had even read the court's decision. Watching MPPs do crossword puzzles and pass around family photos during the self-congratulatory "debate," it was difficult to answer in the affirmative.

While the suspension may have been an effort by the court to force Ontario to take responsibility for ensuring equality, it also permitted the government to introduce a new discriminatory regime. In the end, the legislature has reconfigured inequality while pretending compliance.

With faith that this was not the conclusion that the court had imagined, M. will shortly file a motion for rehearing before the Supreme Court of Canada. We will argue that the amendment of s. 29 of the FLA has not cured the constitutional violation, and we will request a remedy for the continuing infringement. Given the larger social, political, and historical context of homophobia, M. asserts that Ontario's separate nomenclature promotes a feeling

of exclusion and second-class status among members of the gay and lesbian community. It has the effect of condoning and promoting the discriminatory view that gays and lesbians are a threat to the cherished values of society, and that same-sex relationships are inherently different from and inferior to those of heterosexuals. The segregated scheme threatens the development of law in compliance with equality principles. It promotes, if not requires, separate interpretation and separate case law for "same-sex partners" as opposed to "spouses."

The constitutional question brought forward by M. continues to be answered in the same manner: the definition of "spouse" discriminates, without any rational justification for the rights infringement. If the court's promise of substantive equality, and its very remedial process, are to have integrity, the court should allow the rehearing and grant a declaration that the definition of "spouse" under s. 29 of the FLA continues to unjustifiably discriminate against gays and lesbians.

The rehearing application will show whether the new commitment to substantive equality is a mirage or an oasis for the disadvantaged. This contrast between the theoretical victory and the practical reality is one that we have lived in *M. v. H.* Throughout her decade-long battle for equality, M. was consistently successful on an entirely theoretical level, fighting only for a right to *claim* support, and eventually settling her case with H., without ever receiving any relief from the financial stress of separation. If her case ends with the court condoning the *M. v. H.* Act, she will have achieved nothing more than having her pseudonym on a piece of discriminatory legislation. Substantive equality will be a loose and meaningless theory—an enticing mirage that disappears when you finally think you've arrived.

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1 The authors must thank Jung-Kay Chiu, Student-at-Law, for his assistance with the citations and revisions to this paper.

2 *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497.

3 *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203.

4 *M. v. H.*, [1999] 2 S.C.R. 3.

5 M.A. McCarthy and J.L. Radbord, "Foundations for 15(1): Equality Rights in Canada" (1999), 6 *Mich. J. Gender & L.* 261.

6 *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143.

7 *Egan v. Canada,* [1995] 2 S.C.R. 513.

8 *Miron v. Trudel*, [1995] 2 S.C.R. 418.

9 *Thibaudeau v. Canada,* [1995] 2. S.C.R. 627.

10 Justices LaForest, Gonthier, and Major, and Chief Justice Lamer.

11 Justices Cory, Iacobucci, L'Heureux-Dubé, McLachlin, and Sopinka.

12 *Benner v. Canada (Secretary of State)*, [1997] 1 S.C.R. 385; *Eaton v. Brant County Board of Education*, [1997] 1 S.C.R. 241; *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624.

13 *Law*, above note 2, at para. 5.

14 *Vriend v. Alberta*, [1998] 1 S.C.R. 493; *Eldridge,* above note 15.

15 *Brown et al. v. Board of Education of Topeka et al.*, 347 U.S. 483 (1954).

16 *Re B.C. Motor Vehicles Act*, [1985] 2 S.C.R. 486 at 497.

17 *Canada Pension Plan*, R.S.C. 1985, c. C-8, ss. 44(1)(d) and 58.

18 *Law*, above note 2, at para. 102.

19 *Egan,* above note 7, at 541.

20 *Law*, above note 2, at para. 51.

21 *Ibid.*, at para. 100: There was no discrimination because Nancy Law could not demonstrate that either the "purpose or effect of the impugned legislative provisions violate[d] her human dignity."

22 For a helpful discussion of the multiplicity and particularity of experience, and the ability to centre in the experience of another, without the need for comparison and without adopting that framework as one's own, see Elsa Barkley Brown, "African-American Women's Quilting: A Framework for Conceptualizing and Teaching African-American Women's History" (1989), 14 *Signs* 921.

23 *Corbiere*, above note 3; and *M. v. H.*, above note 4.

24 *Corbiere*, *ibid.*, at para. 3.

25 The majority also included Justices Lamer, Cory, and Major.

26 The minority also included Justices Gonthier, Iacobucci, and Binnie.

27 *Corbiere,* above note 3, at paras. 4 and 57.

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

29 Spousal support (alimony) has been available to unmarried opposite-sex couples in Ontario since 1978 (see *Family Law Reform Act*, *1978*, S.O. 1978, c. 2). Although the number of years required for cohabitation varies, all Canadian provinces except Quebec have similar legislation. Generally, unmarried heterosexual spouses are granted many of the same benefits and responsibilities as married couples. See also, *Miron,* above note 8, establishing that differential treatment between unmarried opposite-sex cohabitants and married spouses is unconstitutional.

30 The Ontario government particularly relied on the Ontario Law Reform Commission, *Report on the Rights and Responsibilities of Cohabitants under the Family Law Act* (Ministry of the Attorney General: Toronto, 1993), at 46-47, and B. Cossman and B. Ryder, *Gay, Lesbian and Unmarried Heterosexual Couples and the Family Law Act* (Research paper prepared for the Ontario Law Reform Commission, Osgoode Hall Law School, June 1993), at 142 and 143, citing works by feminist scholars like Didi Herman, Shelley Gavigan, and Ruthann Robson.

31 Factum of the attorney general of Ontario before the Supreme Court of

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Canada, see discussion *ibid.* A note of caution for academic writers. Dialogues internal to the community as to the desirability of pursuing spousal recognition can and will be used by conservatives, particularly as their sectarian religion-based arguments lose force. Although such critical commentary is intended to promote and further equality, if not sufficiently nuanced, it will most certainly be used for anti-equality purposes. In *M. v. H.*, the Government also argued that the court should not grant a remedy because the community was deeply divided over the issue of spousal recognition.

32 Justice Gonthier dissented. Justice Bastarache adopted a different approach with respect to the identification of the objectives.

33 *R. v. Big M. Drug Mart*, [1985] 1 S.C.R. 295; *Egan,* above note 7, at 558-59.

34 *Egan,* above note 7, at 547-48 and 596; *Miron,* above note 8, at 488; *Re K.* (1995), 23 O.R. (3d) 679 (Prov. Div), at 699; P.W. Hogg, *Constitutional Law of Canada*, 3d ed. (Supp.) (Scarborough: Thomson Canada, 1992), at 35-18.

35 *An Act to Amend Certain Statutes because of the Supreme Court of Canada Decision in M. v. H.*, S.O. 1999.

36 Ontario Ministry of the Attorney General, *Press Release*, "Ontario protects traditional definition of spouse in legislation necessary because of Supreme Court of Canada decision in *M. v. H.*" (October 25, 1999); Legislative Assembly, *Ontario Hansard* (October 27, 1999), at 1-4.

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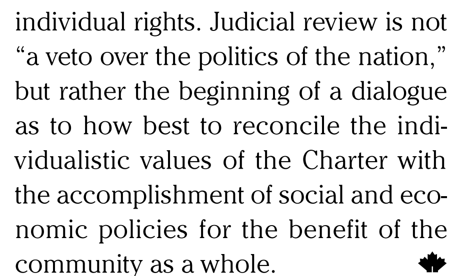
CONCLUSION

The proof of the pudding is in the eating, and our researches have showed that most of the decisions of the Supreme Court of Canada in which laws have been struck down for breach of a Charter right have in fact been followed by the enactment of a new law. In a study published in 1997 (35 *Osgoode Hall Law Journal* 75), we found that there had been 66 cases in which a law had been struck down by the Supreme Court of Canada for breach of the Charter. Only 13 of these had received no legislative response at all, but they included some of the most recent cases (to which there had been little time to react) and some cases in which corrective action was under discussion. In 7 cases, the legislature simply repealed the law that had been found to violate the Charter. In the other 46 cases, a new law was enacted to accomplish the same general objective as the law that was struck down.

It seems reasonable to conclude that the critique of the Charter based on democratic legitimacy cannot be sustained. To be sure, the Supreme Court of Canada is a non-elected, unaccountable group of middle-aged lawyers. To be sure, from time to time the court strikes down statutes enacted by the elected, accountable, representative legislative bodies. But the decisions of the court almost always leave room for a legislative response, and they usually get a legislative response. In the end, if the democratic will is there, the legislative objective will still be capable of accomplishment, albeit with some new safeguards to protect individual rights. Judicial review is not "a veto over the politics of the nation," but rather the beginning of a dialogue as to how best to reconcile the individualistic values of the Charter with the accomplishment of social and economic policies for the benefit of the community as a whole.



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court) to use his or her power of judicial review to overrule the policy choices of governments. Judicial activism is the opposite of judicial self-restraint: the propensity of a judge, when there are two or more equally plausible interpretations, to choose the one that upholds government policy. Since judicial activism is an empirical concept—it seeks to describe the decisions of a judge or a court—it can be tested against the historical record. By this standard, there can be no disputing that since the adoption of the Charter in 1982 our Supreme Court has embarked on a decidedly more activist exercise of judicial review. Under the 1960 *Bill of Rights*, the court struck down only one statute in 22 years. Since 1982, the court has struck down 58 statutes (31 federal and 27 provincial) in just 16 years. Surely, this qualifies as a significant increase in judicial activism, and has been duly noted by many other than myself—including the recently retired Chief Justice Lamer and Professor Monahan.[1]

Using a more sophisticated definition of judicial activism yields a similar verdict. Judicial activism can be defined