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M v. H: TIME TO CLEAN UP YOUR ACTS

Brenda Cossman and Bruce Ryder

In the 1990s, the Supreme Court of Canada twice found ways to avoid dealing with the implications of anti-discrimination law for the rights of gay and lesbian couples. In *Mossop*,¹ a majority of the Court fashioned a ruling that amounted to a postponement of an engagement with the question of whether the law requires the recognition of gay family status. In *Egan*² a 5-4 majority of the Court bought legislatures some additional time to come to grips with the “novel concept”³ of conferring equality rights on same-sex couples. No doubt one reason for the Court’s equivocation was the large gap that existed between the logical requirements of equality principles and the exclusion of gay and lesbian couples from a multitude of laws dealing with the rights and responsibilities of family members. By 1999, a pattern of favourable rulings from lower courts and administrative tribunals,⁴ changes in the membership of the Court,⁵ and a steady increase in public support for the recognition of the rights of gay and lesbian couples, combined to create the conditions in which the Court was emboldened to start closing the gap between constitutional promise and legislative reality. In *M v. H*,⁶ the essence of the message the Court sent to legislators was: time to clean up your Acts.

THE MAJORITY’S RULING

By an 8-1 majority, the Court held in *M v. H* that section 29 of the Ontario *Family Law Act*⁷ discriminated on the basis of sexual orientation by excluding lesbians and gay men from the right to seek spousal support from a same-sex partner with whom they have cohabited. Applying the framework for section 15 equality analysis that a unanimous Court had elaborated earlier this year in *Law v. Canada*,⁸ the principal majority judgment of Cory and Iacobucci JJ.⁹ found that section 29 of the Act violates the human dignity of lesbian and gay couples by promoting the view that they are “less worthy of recognition and protection” and “incapable of forming intimate relationships of economic interdependence as compared to opposite-sex couples” Moreover, “it perpetuates the disadvantages suffered by individuals in same-sex relationships and contributes to the erasure of their existence.”¹⁰

In the section 1 analysis, the majority held that the exclusion was not rationally related to the objectives underlying the spousal support provisions in Part III of the *Family Law Act*, which they characterized as dealing equitably with the economic needs of persons in interdependent relationships and the alleviation of claims on the public purse by privatizing the costs of family breakdown.¹¹ The majority concluded that the appropriate remedy was to declare section 29 of the Act to be of no force and effect, with a suspension of the operation of the declaration of invalidity for six months

¹ *Mossop v. A.-G. Canada*, [1993] 1 S.C.R. 554 [hereinafter *Mossop*].

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

³ *Ibid.*, per Sopinka J. at 576.

⁴ The case law is thoroughly reviewed in Kathleen A. Lahey, *Are We ‘Persons’ Yet? Law and Sexuality in Canada* (Toronto: University of Toronto Press, 1999) at 78-92.

⁵ Justice Sopinka’s death in 1997, and Justice La Forest’s retirement in the same year, deprived the Court of two members of the 5-4 majority who had voted to dismiss the *Charter* claim in *Egan*, *supra* note 2.

⁶ [1999] S.C.J. No. 23 (QL), (1999), 171 D.L.R. (4th) 577 [cited to S.C.J.].

⁷ R.S.O. 1990, c. F.3.

⁸ [1999] 1 S.C.R. 497.

⁹ Cory J. wrote the s.15 portion of the analysis, and Iacobucci J. dealt with the s.1 and remedial issues. Lamer C.J. and L’Heureux-Dubé, McLachlin and Binnie JJ. concurred with their joint judgment. Major J. and Bastarache J. each wrote separate concurring judgments. Gonthier J. dissented.

¹⁰ *M v. H*, *supra* note 6 at para. 73.

¹¹ *Ibid.* at para. 93.

to enable the legislature to consider ways of bringing this provision, and other laws, into conformity with the equality rights in the *Charter*.¹²

AVOIDING CHARGES OF "JUDICIAL ACTIVISM"

It is clear from the language of the decision that members of the Court were anxious to minimize the kind of controversy about judicial power ignited by the Court's earlier gay rights ruling in *Vriend v. Alberta*¹³ and the ensuing trumped-up accusations of judicial activism emanating from the United Alternative, the *Alberta Report*, the *National Post* and other increasingly desperate voices of the waning forces of Canadian moral conservatism. The Court's caution was evident in the repeated emphasis it placed on the fact that the only issue before it was the constitutionality of section 29 of the *Family Law Act*, a provision which applies only to unmarried heterosexual couples. Justice Cory began his section 15 analysis by stating ". . . it must be stressed that the questions to be answered are narrow and precise in their scope;"¹⁴ the appeal had nothing to do with the definition of marriage, nor with the bundle of rights and responsibilities that attach to married persons, nor with other laws that excluded same-sex couples from common law definitions of spouse.¹⁵ Justice Iacobucci similarly emphasized that the ruling "does not challenge traditional conceptions of marriage"¹⁶ and that laws other than the one at issue in a particular challenge must be evaluated individually by reference to their unique objectives and context.¹⁷

The Court's sensitivity to charges of judicial activism was also evident in its avoidance of the "reading in" remedy that had proven so controversial after the Court added the words "sexual orientation" to the list of prohibited grounds of discrimination in Alberta human rights legislation in *Vriend*. The reasons Iacobucci J. gave for declining to read same-sex couples into section 29, which was the remedy adopted by the Ontario Court of Appeal, were not particularly convincing.

He argued that if members of same-sex couples were read into the definition of spouse in section 29 of the Act, they could be subject to spousal support obligations without being able to opt out by entering a domestic contract under Part IV of the Act.¹⁸ Common law couples can opt out of their statutory support obligations by signing cohabitation and separation agreements pursuant to sections 53 and 54 respectively. These provisions are expressly limited to contracts signed by "a man and a woman." However, the courts now recognize the enforceability of cohabitation contracts at common law, and it is highly unlikely that the terms of an agreement entered into by a same-sex couple would be ignored in considering a spousal support claim under Part III of the Act. Justice Iacobucci was also concerned that reading in is an inappropriate remedy when it would "have significant repercussions for a separate and distinct" part of an Act, in this case the dependants' tort claim in Part V, which incorporates the definition of spouse in section 29.¹⁹ Why the majority could not have limited the application of its order to Part III of the Act was not explained.

The concerns Iacobucci J. raised about the reading in remedy seem modest and easily avoided, especially when considered in light of the deficiencies of the remedy he did adopt. By declaring section 29 invalid if it is not rectified within six months, the Court has created a situation where the right to claim spousal support will be limited to married couples as of November 20, 1999 if the Ontario government does not pass amending legislation. Such a situation would discriminate on the basis of marital status, as the Alberta Court of Appeal recently held.²⁰ The remedy Iacobucci J. chose thus violates his own warning that courts should not "remedy one constitutional wrong only to create another, and thereby fail to ensure the validity of the legislation."²¹

¹² *Ibid.* at paras. 145-47.

¹³ [1998] 1 S.C.R. 493 [hereinafter *Vriend*].

¹⁴ *M v. H*, *supra* note 6 at para. 7.

¹⁵ *Ibid.* at paras. 52 and 55.

¹⁶ *Ibid.* at para. 134.

¹⁷ *Ibid.* at para. 75.

¹⁸ *Ibid.* at para. 141.

¹⁹ *Ibid.* at para. 142.

²⁰ *Taylor v. Rossu* (1998), 161 D.L.R. (4th) 266 (Alta. C.A.). Bill 12, the *Domestic Relations Amendment Act, 1999*, responded to the *Taylor* ruling by conferring spousal support rights and obligations on unmarried heterosexual couples. The Bill did not rectify the exclusion of same-sex couples. The amendment received Royal Assent on May 19, 1999, not coincidentally the day before the release of *M v. H*. It is now clear that the Alberta legislature remedied one constitutional wrong only to create another.

²¹ *M v. H*, *supra* note 6 at para. 141.

TOSSING THE ISSUE TO THE LEGISLATURE

Unlike the reading in remedy, the suspended declaration of invalidity does have the important advantage of tossing the issue on to the legislative agenda where it ought to have been addressed in the first place. Clearly the majority was in no mood to give Ontario legislators further reasons for doing nothing, heaping the entire burden of law reform in this area on litigants and the courts, and thus continuing to invite the judicial activism they purport to abhor. Indeed, despite the fact that the Court was deciding the narrow issue of the constitutionality of one law, in truth the many other statutes containing spousal definitions that exclude same-sex couples raise constitutional issues that differ little from the issues addressed in *M v. H*. Justice Iacobucci acknowledged this when he closed his analysis of the remedial issue by noting that:

... declaring section 29 of the *FLA* to be of no force and effect may well affect numerous other statutes that rely upon a similar definition of the term 'spouse.' The legislature may wish to address the validity of these statutes in light of the unconstitutionality of section 29 of the *FLA*. On this point, I agree with the majority of the Court of Appeal which noted that if left up to the courts, these issues could only be resolved on a case-by-case basis at great cost to private litigants and the public purse. Thus, I believe the legislature ought to be given some latitude in order to address these issues in a more comprehensive fashion.

Gwen Landolt of REAL Women missed the mark in inimitable fashion when she alleged that the Court has "opened the gates to the pack-dogs to attack the traditional family."²² Justice L'Heureux-Dubé succinctly dismissed this kind of paranoid familial fundamentalism with her remark in *Mossop* that "[i]t is not anti-family to support protection for non-traditional families. The traditional family is not the only family form, and non-traditional family forms may equally advance true family values."²³ Yet it is true that the Court has signaled to legislatures that there are broad implications to its ruling in *M v. H*. It has directed legislatures to examine all statutes with similar spousal definitions, and told them to "address these issues in a more comprehensive fashion." And ironically, it has done so in a judgment

²² Quoted in Carmen Wittmeier, "Playing House: Politicians cower as the Supreme Court overrides the natural family order" *Alberta Report* (31 May 1999) 20 at 21.

²³ *Supra* note 1 at 634.

otherwise couched in the language of judicial deference.²⁴ Below the political packaging, however, the legal ramifications are broad. The Court has recognized the limitations of the judiciary in addressing these issues — the courts can proceed only on a case by case basis, deciding the narrow issue of law before them. Responsibility for bringing legislation into conformity with constitutional norms lies more appropriately with the legislatures who can address the issues in a comprehensive fashion. But, the underlying message is also clear — having failed to deliver earlier when the courts bought them time, the legislatures must now clean up their Acts. If they do not, then the courts will, at no small expense to all involved.

Immediately after *M v. H* was released, Premier Harris indicated that he would "comply" with the ruling and would not seek to invoke the notwithstanding clause of the *Charter* to preserve the legislative *status quo*.²⁵ Other governments — with the exception of Alberta, which is keeping its options open — made similar statements. But what exactly does complying with the ruling mean?

LEGISLATIVE IMPLICATIONS

(i) Section 29 of the *Family Law Act*

First, there is the narrow question of the implications of the ruling for spousal support under the Ontario *Family Law Act*. If the Ontario government fails to act within the six month period, the result will be that all unmarried couples — same-sex and opposite sex — will be excluded from the spousal support provisions in Part III of the Act. Given the increasing emphasis on privatizing support obligations, this is unlikely to be an attractive option for a government committed to fiscal conservatism. However, revising a definition of spouse to include same-sex couples is also unlikely to be an attractive option for a morally conservative government that has made it clear that bringing legislative definitions of family into conformity with its constitutional responsibilities is not a priority.²⁶

Given this conservative dilemma, the Ontario government may adopt a minimalist approach — fix as little as possible. Such an approach would amend section

²⁴ See for example Justice Iacobucci's comments on judicial deference, *supra* note 6 at paras 78-81.

²⁵ Quoted in Kirk Makin, "Gay couples win rights" *Globe and Mail* (21 May 1999) A1.

²⁶ "It's not my priority. It's not my definition of family but it is others' . . ." Premier Mike Harris quoted in Tonda MacCharles and Tracey Tyler, "Same-sex ruling to rewrite many laws" *Toronto Star* (21 May 1999) A1.

29 to include same-sex couples, as well as sections 53 and 54 to make explicit their ability to opt out of the support scheme through domestic contracts. The government would also need to consider the implications for Part V of the Act dealing with the dependants' tort claim for damages. Unfortunately, the six month time period for reform, unless it is extended by the Court, creates pressure towards a minimalist approach and a truncated legislative process involving little or no consultation with the gay and lesbian communities most affected by any amendments. Not only did the six month clock start running in the middle of an election campaign, but it also ran over the summer break, when the new legislature was not yet sitting.

In undertaking any reforms, the legislature will not be assisted by the majority's failure to clarify the meaning of the term "conjugal" and its relationship to the objectives underlying the legislative scheme. The word "conjugal" plays a central role in dividing "spouses" from other people living together. The extended definition of spouse in section 29 requires a couple to have cohabited. "Cohabit" is defined in section 1(1) of the Act as "to live together in a conjugal relationship." Conjugal is not defined, except in some rather anachronistic case law that Cory J. simply cited with approval.²⁷ All the majority judgment told us is that same-sex couples are capable of meeting the conjugality requirement. If section 29 is revised to include same-sex couples, then they too will be governed by the outdated, intrusive and vague common law test of conjugality — a test that is poorly related to the majority's characterization of the objectives of the legislation and one that comes perilously close to a 'I know it when I see it' definition.²⁸

²⁷ Justice Cory cited *Molodowich v. Penttinen* (1980), 17 R.F.L. (2d) 376 (Ont. Dist. Ct.) as setting out "... the generally accepted characteristics of a conjugal relationship. They include shared shelter, sexual and personal behavior, services, social activities, economic support and children, as well as the societal perception of the couple." *M v. H*, *supra* note 6 at para. 59. He agreed with the lower court that these dimensions of family life will be present in varying degrees, and that it will not be necessary for a couple to satisfy all of these dimensions for their relationship to be conjugal: "neither opposite sex couples nor same-sex couples are required to fit precisely the traditional marital model to demonstrate that the relationship is 'conjugal'." *Ibid.* Justice Cory stated that the approach to determining whether a relationship is conjugal must be "flexible," since the "relationships of all couples will vary widely." *Ibid.* at para. 60. In other words, he provided virtually no guidance on how conjugality should be defined or applied.

²⁸ For a discussion of the problems with the notion of conjugality, see Brenda Cossman and Bruce Ryder, *Gay, Lesbian and Unmarried Heterosexual Couples and the Family Law Act: Accommodating a Diversity of Family Forms* (Toronto: OLRC, 1993) at 77-83.

(ii) All legislative definitions of common law spouse

The most obvious problem with the minimalist approach to reform is that it ignores the clear implications of *M v. H* for all common law spousal definitions, at both the provincial and federal levels. The Court, as it emphasized, was not addressing the constitutionality of all common law spousal decisions. However, the message in Iacobucci J.'s concluding words that the ruling on section 29 "may well affect numerous other statutes that rely upon a similar definition of the term 'spouse'" is not subtle. All of these definitions are now vulnerable to constitutional challenge. If left to the courts, these definitions are likely to fall, case by case.

This conclusion is bolstered by the fact that Iacobucci J. clearly rejected the view that "government incrementalism" ("the notion that government ought to be accorded time to amend discriminatory legislation") can provide the basis for a section 1 justification.²⁹ This reasoning had been central to Sopinka J.'s swing judgment dismissing the challenge to the exclusion of same-sex couples from eligibility for an old age spousal allowance in *Egan*. The Court in *M v. H*, however, did not explicitly overrule *Egan*. Instead, it emphasized that, unlike the claim in *Egan* which sought an extension of public funding, the claim in *M v. H* advanced the goals of fiscal conservatism by reducing claims on the public purse. Thus, a window has been left open to governments to argue that they are only obliged to extend equal rights to same-sex couples if it does not cost them anything. *M v. H* does ring the death knell for *Egan*'s moral conservatism, but it leaves *Egan*'s fiscal conservatism intact. While that fiscal conservatism has been eroded by recent decisions, including those that have extended pension benefits to the surviving members of same-sex couples, it still haunts equality jurisprudence in this and other areas.

At the very least, a government committed to following the implications of the Supreme Court ruling in this case, and avoiding unnecessary and expensive litigation, should undertake a serious examination and revision of all common law spousal definitions contained in its statutes. Passing amendments to include same-sex couples in statutes that apply to unmarried heterosexual couples was the approach adopted earlier this year in Quebec,³⁰ that was defeated on a free vote on Ontario's Bill 167 in 1994, that B.C. has embarked upon at least in

²⁹ *M v. H*, *supra* note 6 at para. 128.

³⁰ *Loi modifiant diverses dispositions législatives concernant les conjoints de fait*, S.Q. 1999, c. 14.

part,³¹ and that the federal government is currently contemplating in response to *M v. H* and an omnibus challenge to federal statutes launched by the Foundation for Equal Families.³²

(iii) Spousal Rights of Married Couples

However, an approach limited to giving same-sex couples the same legal status as common law couples is not likely to provide an enduring solution. It is a formulaic, "find and replace" approach to law reform that assumes there is a principled basis to current differences in the legal status of married and unmarried heterosexual couples when, in fact, this may not be the case. A number of laws, typically those dealing with property rights, continue to extend rights and responsibilities only to married couples. This is true of all provincial legislation dealing with the division of family property, of most provincial laws providing a right to exclusive possession of the family home, and of provincial laws dealing with intestate succession. It is true that the Court in *M v. H* was not dealing directly with marriage, nor with the legal rights extended exclusively to married couples. Yet, the combination of the Court's rulings in *M v. H* and *Miron v. Trudel*³³ means that the constitutionality of any distinctive legal status for married spouses must be demonstrably justified by governments. The majority in *Miron* held that legislation limiting automobile insurance benefits to married spouses was discriminatory because marital status was not a reasonable way of identifying persons in an economically interdependent relationship with insured persons. Unmarried heterosexual couples had to be included in the legislation. If *Miron* leans strongly towards merging the legal status of married and common law couples, and *M v. H* does the same for common law couples and same-sex couples, then the end result is momentum towards conferring the entire package of marital rights and responsibilities on same-sex couples.

(iv) The Definition of Marriage

M v. H also strengthens the argument that the exclusion of same-sex couples from the common law definition of marriage violates the human dignity of gay

men and lesbians.³⁴ In the absence of any other means of relationship recognition, the opposite sex definition of marriage means that, unlike heterosexual couples, same-sex couples are denied any legally effective means of choosing to have their relationships recognized as spousal by their communities and the government. In an ineffectual response to the constitutional pall hanging over the law of marriage, on June 8 the House of Commons, by a vote of 216-55, approved a motion brought by the Reform Party stating that "marriage is and should remain the union of one man and one woman to the exclusion of all others" and that Parliament "will take all necessary steps" within its jurisdiction "to preserve this definition of marriage in Canada."³⁵ The motion itself has no legal force. To protect the common law definition of marriage from constitutional challenge in the courts, Parliament would have to reproduce the definition in legislation that included a notwithstanding clause. The public pressure necessary to goad Parliament into its first use of section 33 has not yet materialized. To the contrary, an Angus Reid poll released the day after Parliament debated the marriage motion indicated that a majority of Canadians (53%) are in favour of gay marriage.³⁶

(v) Domestic Partnership

One way that governments may be able to placate the intense opposition of a minority of Canadians to gay marriage is to leave the common law definition of marriage intact and to put in place an alternative means of permitting couples to choose to have their relationships recognized by the state as spousal. If gay and lesbian couples had access to a legal status such as "domestic partner," legally equivalent to marriage in all but name, then the section 15 *Charter* challenge to the common law definition of marriage would likely founder on the absence of legal disadvantage. Even conservative governments and commentators have expressed support recently for the enactment of domestic partnership regimes.³⁷ For moral conservatives who believe they have lost the battle over gay rights,³⁸ domestic

³¹ By virtue of the *Adoption Act*, R.S.B.C. 1996, c. 5, s. 29(1), the *Family Relations Amendment Act*, S.B.C. 1997, c. 20 and the *Family Maintenance Enforcement Amendment Act*, S.B.C. 1997, c. 19, same-sex couples now have the right to apply to adopt a child, and the same rights as common law couples in relation to spousal support, child support, and custody and access issues.

³² A copy of the Foundation's notice of application can be found at <<http://www.ffef.ca/>>.

³³ [1995] 2 S.C.R. 418 [hereinafter *Miron*].

³⁴ In 1993, before the Supreme Court rulings in *Egan, Friend* and *M v. H*, a majority of an Ontario court dismissed a constitutional claim by a gay couple seeking to marry. See *Layland v. Ontario (Minister of Consumer & Commercial Relations)* (1993), 14 O.R. (3d) 658 (Gen. Div.). A new challenge, brought by Michael Hendricks and René Leboeuf, is underway in Québec.

³⁵ *House of Commons Debates* (8 June 1999) at 16069; 15960.

³⁶ Anne McIlroy, "Most in poll want gay marriages legalized" *Globe and Mail* (10 June 1999) A1.

³⁷ See, for example, Rainer Knopff, "The Case for Domestic Partnership Laws" *Policy Options* (June 1999) at 53.

³⁸ See Link Byfield, "So where's the party?" *Alberta Report* (31 May 1999) at 4: "... the gay rights war is over. We have been

partnership schemes, which could be open to any two persons living together in an interdependent relationship, offer a last-ditch means of avoiding legislation that explicitly validates gay and lesbian relationships and also of preserving the privileged legal status of marriage. As is the case with European domestic partnership laws,³⁹ conservatives no doubt would fight for the enactment of a regime that confers a second-class spousal status on partners, with less than the full package of rights accorded to married persons.

In principle, there are good reasons to explore the possibility of enacting domestic partnership regimes. Domestic partnership would provide an alternative to, not a displacement of, existing routes to spousal status.⁴⁰ As the widespread availability of birth control, abortion and reproductive technologies drives an increasingly large wedge between the coupling of heterosexuality and procreation, we are moving further away from limiting spousal status to marital or conjugal relationships, and more towards measuring spousal relationships by their duration and functional qualities of economic and emotional interdependence. In addition to its limitation to conjugal relationships, ascribed spousal status, such as the common law definition of spouse at issue in *M v. H*, has the further disadvantage of imposing legal rights and responsibilities on cohabitants that may or may not correspond to their own needs and expectations. A domestic partnership regime that, like marriage, enables any two persons living together to choose spousal status, rather than having it imposed upon them, and permits them to take on a full range of rights and responsibilities equivalent to those available to married couples if they so choose, has much to recommend it.⁴¹

CONCLUSION

The style of judicial reasoning in *M v. H* reflects the impact of the increasingly aggressive attacks directed by some politicians and the media at the exercise of judicial power required by the *Charter*. Caution was written all over the decision. The narrow focus on the challenged provision, the absence of lengthy discussions of the surrounding legal and social context, the employment of the “reading in” remedy – all signal a Court treading lightly in the face of the attacks on its legitimacy. But, despite the caution, the Court to its credit did not back down from fulfilling its basic democratic role of protecting minority rights. As politely as it could, the Court has sent a clear message to all legislatures: opposite sex definitions of spouse are discriminatory. If you don’t change them, we’ll have to do it for you, case by case, definition by definition. □

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defeated. There is nothing left to lose, all that remains amounts to a mopping-up operation by the victors.”

³⁹ See the discussion in Lahey, *supra* note 4, at 326-30.

⁴⁰ See Bruce Ryder, “Becoming Spouses: The Rights of Lesbian and Gay Couples” in Law Society of Upper Canada Special Lectures, *Family Law: Roles, Fairness and Equality* (Toronto: Carswell, 1994) 399 at 430-50.

⁴¹ See Cossman and Ryder, *supra* note 30 at 154-56; Ontario Law Reform Commission, *Report on the Rights and Responsibilities of Cohabitants Under the Family Law Act* (Toronto: OLRC, 1993) at 53-56.