EQUALITY FOR SAME-SEX COUPLES: A CANADIAN APPROACH

by

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ABSTRACT

In this thesis I start by reviewing the theoretical perspectives that have informed the debate around equality rights for gays and lesbians. Next, I will analyze the concept of equality developed by the Supreme Court of Canada under section 15 of the Canadian Charter of Rights and Freedoms. In the Andrews case, decided in 1989, the Supreme Court of Canada rejected a model based on formal equality, embracing instead the far-reaching concept of substantive equality as a way to redress historical prejudice and disadvantage of individuals and groups that fall within enumerated or analogous grounds of discrimination. In the last decade, a number of courts have applied this model to equality claims brought under the Charter by same-sex couples. I will explore the details of several of these cases as well as a variety of statutes relating to same-sex couples. Finally, I will discuss recent law reform proposals that recommend that state benefits should be allocated regardless of the relationship status of the beneficiaries, thereby envisaging more radical changes to the legal system. I conclude that the Canadian approach to equality for same-sex couples has followed an interpretive method that seems to apply a definition of family that is shifting and varies on an ad hoc basis, but that the denial of spousal status under marriage laws represents a limitation of equality rights still to be overcome. I also conclude that, in fact, the concept of status may still influence the adjudication process under section 15 of the Charter as far as marriage rights are concerned. This is because the framework of analysis under section 15 calls for an assessment of the claimant’s position in the larger socio-political context, and this element, if not properly circumscribed, risks being corrupted by existing prejudices and biases relating to family.
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A person has read part of this thesis while sitting in the emergency room, next to a relative of his same-sex partner. He has reminded me of how inconceivable it was when the legal system resisted so forcefully the acknowledgement of bonds between gay and lesbian partners. Thank you.
INTRODUCTION

Introduction and methodology

Today we recognize that the universality embedded in the ideals of early positivism, both in civil and common law systems, may have (unexpected) consequences on those who do not fit within the definitions generally set by law. In 1982, when the Canadian Charter of Rights and Freedoms was adopted, it was well known that during the previous decade, legal scholars had highlighted various shortcomings of the legal order under the Canadian Bill of Rights. My purpose in this thesis is to gain an insight into the crucial role of the guarantee for equality entrenched into the Charter in recognizing, accommodating and (for some) celebrating same-sex couples. My analysis will focus exclusively on court cases and, in some instances, on statutes. I acknowledge at the outset that a limitation of this approach is that it does not provide satisfactory results as far as the assessment or the fostering of wider social transformation is concerned. My objectives are more modest.

In Chapter 1, I will explore the theme of equality for same-sex couples as understood by the liberal approach based on “rights”. In addition, I will present competing views on equal rights and family developed by feminist thought and critical legal scholars. In Chapter 2, after reviewing various interpretations of equality, I will examine briefly the structure of section 15 of the Charter and summarize the concept of equality upheld by the Supreme Court of Canada in Andrews and subsequent relevant cases. I will look at section 15 with the aim of highlighting the specificities of the Canadian concept of equality that, in my view, help to shape a novel way of
dealing with diversity and “otherness” (e.g. substantive equality, inclusion, accommodation). Section 15 contains one of the broadest definitions of equality. It protects equality under the law and before the law, and guarantees the equal protection and the equal benefit of the law. As has been written, the reason for such a strong protection lies in the fact that in a world of differences, the fear of the “other” may lead to such consequences as exclusion and subordination. They, in turn, may be causes of a lack of human dignity and productivity, as well as factors that promote social anger, alienation and crime. The Supreme Court of Canada has held that the purpose of the guarantee of equality in the Charter is to help historically disadvantaged groups in society, thus counteracting phenomena of alienation.

In Chapter 3, I will try to assess, in particular, the arguments that have been employed with regard to same-sex couples rights, to trace the reasons why they have been accepted or rejected by courts, and to summarize the achievements that litigation under section 15 has accomplished as far as same-sex couples are concerned.

Finally, I will highlight what I consider the Canadian avenue to equality for same-sex couples and I will draw some conclusions regarding the validity of this approach. In Chapter 4 I will review some discrepancies existing between various definitions of “spouse” and the pros and cons of several legal frameworks for recognizing relationships. I will argue that the use of what I call an “interpretive method” (the widening of the definition of “spouse”) may enhance to a certain extent the equality of same-sex couples but does not satisfy the need for full legal personality of sexual minorities because of the fragmentation it involves. In fact, the common law approach to family law, based on the analysis of single cases arising before the courts, has not yet been able to address satisfactorily the lack of a family status of same-sex partners. In this

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context, the concept of legal status could be understood as the sum of rights and duties pertaining to an individual with regard to his or her position in society or in the family.

Most decisions have had the effect of equating same-sex couples with the positions enjoyed, for the purpose of single statutes, by opposite-sex spouses. Of course, it could be said that when opposite-sex cohabitants are treated equally to married couples, marriage does not perform the same functions. Arguably, one could question the role of marriage in such a scenario, and that is why traditionalists have fiercely opposed legal protection of cohabitants. It then follows that the whole idea of status receives less credit, since the benefits that it involves are now being granted to couples that have not formalized their union. However, as I will argue, it appears that the social and legal systems continue to be based on stronger and weaker statuses, and that some Canadian courts, overtly or covertly, do sometimes take into account such concept. It will be shown, in fact, that the framework of analysis for section 15 of the Charter contains some elements that may be viewed, in some circumstances, as a way for assessing the status of the claimant from an “objective” point of view. I will conclude, however, that the application of this “contextual approach” with regard to marriage rights for gays and lesbians has proved to be flawed. I will also conclude that the denial of any status in the family, through marriage, perpetuates the detrimental position of gays and lesbians in society because it distributes legal capacity on the basis of belonging to a particular category.
CHAPTER I. Competing theories

1. Introduction

The main purpose of this chapter is to present a brief overview of the different philosophical points of view that have informed the debate about recognition of same-sex relationship. In fact, there is a vast array of literature that, for more than one decade, has attempted to address at least two very general phenomena. One refers to the particular difficulties that gays and lesbians, and same-sex couples, faced when asking for recognition, and is entailed in the liberal framework of “rights talk”. Those inspired by these views believe that the community is based on certain fundamental rights and that, in the field of family as well, those who are excluded should claim recognition. Because exclusion was based on sexual orientation, these scholars felt the need to define this category, at the risk of being defined as essentialists. In addition, it has been necessary to identify those traits that qualified sexual orientation as an analogous ground of discrimination under section 15 of the Charter. In the field of family it has been necessary to analyze the function of marriage, the values that underpin its validity and the mechanisms that caused exclusion of same-sex couples.

The second view, in partial critique of the first, tackles the problems that recognition based on liberal values may pose to a certain conception of “identity politics” and of sexuality, and is entailed in scholarship inspired by socialism, feminism and CLS. These scholars view legal change as a limited strategy for radical social transformation. They criticize the quest for formal equality arguing that it would not bring about liberation from existing patriarchal and
heterosexist hierarchies. They criticize the construction of sexual orientation as immutable category because they focus on deconstruction of sexual categories and gender identity. In the field of family, they found problematic the claims for inclusion into a system considered as oppressive.

It is not my purpose to debate the validity of one or the other. However, I believe that taking into account the diversity of views will help in understanding the choices that have been made regarding strategies and methodologies for legal change regarding family and marriage. In fact, as the conclusion of this thesis will show, once the “if” regarding equality for same-sex couples has been answered positively, the debate has shifted to “how”. The influence of feminist thought has proved remarkable in the choice of certain models of recognition rather than others.

2. Liberalism

One of the most important recent explanations of the concept of law, in the framework of a constitutional democracy, is that offered by Ronald Dworkin\(^3\). Dworkin, as has been said, holds that constitutional democracy is a legal and political system based on constraints imposed on majorities by a core of rights entrenched in the Constitution\(^4\). The ability to detect “the meaning, the origin, and the evolution”\(^5\) of those rights is therefore crucial. Dworkin’s view of constitutional democracies refers to the existence of enabling rules, which define subjects and methods of the decision making, and disabling rules, which provide for limitations of those powers. His idea of community is based on a principle of “equal consideration and respect”: as

\(^4\) This reconstruction is that of Bongiovanni, G., La teoria “costituzionalistica” del diritto di Ronald Dworkin, in *Filosofi del diritto contemporanei*, ed. by Zanetti, G.F. (Milano: Raffaello Cortina, 1999) 247 ff.
has been said, "the focus of his work is to defend the notion that a rights foundation exists to
ground law in a determinate and reasonably objective source"\(^6\). This theory, which takes as its
objects the relationship between the individual, the community and the State, on one hand, and
that between law and morals, on the other, appears rooted in liberal values such as tolerance and
neutrality, as opposed to illiberal and paternalistic perspectives on community.

The necessity of scrutinizing state action that interferes with fundamental interests is at
the core of a concept of the law as being based on certain "fundamental rights"\(^7\). Indeed, a
positive action (e.g. criminal prohibition) is usually the case that more evidently exemplifies this
concept. However, this theory seems to have been applied by lawyers and judges in cases of
state inaction, when there is no protection rather than active infringement. The Supreme Court
of Canada, which on more than one occasion has made reference to the concept of "equal
concern and respect", has concluded that an omission of the legislature may amount to
discrimination contrary to the values expressed by the *Charter*\(^8\). In general, this situation is the
one that more often concerns same-sex couples, and leads to the conclusion that an approach
based on "rights" may be able to produce legal change by calling upon the primacy of
Constitutions over political inaction.

As has been stated, "rights talk is a specific type of political discourse that has stemmed
from the entrenchment of the *Charter* [and] privileges the law and the courts as the mechanism
for the resolution and processing of political problems such as conflicts of interest and values

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\(^5\) Ibid., at 249.
University Press, 1995) 56.
\(^7\) Ibid., at 57.
\(^8\) Delwin Vriend and Gala –Gay and Lesbian Awareness Society of Edmonton, Gay and Lesbian Community Centre
of Edmonton Society, and Dignity Canada Dignite' for Gay Catholics and Supporters v. Alberta (A.G.), [1998] 1
between groups or conflicts between groups and the state”. Rights talk is often believed to be based on liberal values and claims equality and tolerance on the basis of sameness. In the field of family, it argues for an expansion of the definition of family, so as to include and accommodate same-sex couples. On the other hand critiques to this approach, as discussed below, argue for the rejection of the traditional concept of family as a whole: some have epitomized this idea by highlighting a dichotomy between “freedom in the family” and “freedom from the family”.

Aimed at unmasking what has been called the “heterosexual family privilege”, rights talk concerned itself with the quest for equality of gays and lesbians before and under the law. Therefore, questions like “what is sexual orientation?” were commonly asked. This raised a heated debate between “essentialists” and “social constructionists”. As has been summarized, “the essentialist view was used to develop an ‘ethnic politics’ model of lesbians and gay men as an oppressed minority, characterized by an immutable trait”. The effort was that of creating an identity based on sexuality and a political consciousness. From a political point of view, it has been concluded that during the 70’s “the tension between the liberation of sexuality and the need to construct a lesbian and gay identity for political purposes was constant”.

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10 From a political point of view, Smith, supra, at 76 draws a distinction between earlier “gay liberation” which “viewed rights as political resources rather than ends in themselves” and used rights to “build a sense of political identity” in a time when “many lesbians and gay men were unwilling to politicize their sexual preference or to recognize that lesbians and gays, as a group, had distinct political interests”; and rights talk, that rejected the claims for sexual freedoms and advocated integration in society. This shift is explained by making reference to the newly enacted Charter of rights, and a different political climate.
13 Smith, M., Lesbian and Gay Rights in Canada., supra, at 8.
14 Ibid., at 8: “in the early period of gay liberation and the women’s movement, lesbians and gay men did have to construct their sexual identity as a social and political category”.
15 Ibid., at 45.
Once the Charter was enacted, from a legal point of view the discussion on the nature of sexual orientation was rooted on the requisites necessary for qualifying as a (analogous) ground protected by section 15. As has been argued, "the 'sexuality is immutable' argument has provided a way out of medicalization, experimentation, and behaviour modification"\(^{16}\), and has been embraced by many activists and scholars. This led appellate judges to hold that sexual orientation is a ground analogous to those enumerated in section 15 of the Charter. As discussed in the next chapters, such determination was necessary, given the approach adopted by the Supreme Court of Canada to equality issues.

However, several other scholars involved with equality rights regarded "immutability" with suspicion. Ryder\(^{17}\) rejected immutability as a feature of sexual orientation because he considered sexual identities not essential but a social constructions. Instead, he compared sexual orientation with religion, which is also an invisible trait that could theoretically be disguised. Nevertheless, the first generation of studies, confronted with a legal system rigid and reluctant to change, was committed to advancing strong critiques of existing inequalities, and was aimed at demonstrating that those inequalities, albeit widespread, were entirely inconsistent with the principles embedded in the Charter of Rights. By trying to demonstrate that sexual orientation was an analogous ground under section 15 of the Charter, it favored the view that members of sexual minorities were fully entitled to the constitutional protection of equality. The effort was that of showing how discrimination against gays and lesbians took place in a number of fields, such as employment, education, services, accommodation, family, etc. These considerations entailed the conclusion, upon which many early lobbying efforts were based, that sexual orientation ought to be inserted into human rights codes as a prohibited ground of discrimination.

\(^{16}\) Herman, D., Rights of Passage. Struggles for Lesbian and Gay Equality (Toronto: University of Toronto Press, 1994) 5-6. The author is nevertheless critical; see below for more details.

\(^{17}\) Ryder, B., Equality Rights and Sexual Orientation: Confronting Heterosexual Family Privilege, supra, at 79-80.
Robert Wintemute has shown how this trend took place at the international level as well, where gay movements were seeking to “establish a general principle of human rights law: that discrimination based on a person’s sexual orientation is prima facie wrongful and requires a strong justification”\(^{18}\). His analysis was aimed at answering questions such as “who is primarily affected by sexual orientation discrimination and in what areas of their lives are they affected”\(^{19}\), or “what the right to be free from such discrimination has in common with other human rights”\(^{20}\).

To elaborate, in the field of recognition of same-sex relationships, literature of the first wave was focussed on confronting objections raised by opponents of those relationships\(^{21}\). Such objections, whether advanced by scholars, politicians, or judges, relied on arguments based on the traditional shape of marriage, always involving opposite-sex couples\(^{22}\). Furthermore, they asserted that the purpose of marriage, a social institution that enjoyed a particular place in society, was inherent in procreation and the raising of children. Scholars and activists involved in the rights talk, on the other hand, remarked that those objections tended to uphold the religious view of marriage embedded in Christianity. In confronting such objections, scholars of this generation undertook two onerous tasks: that of analyzing the function of marriage as well as the values underlying laws related to marriage, and that of describing how existing notions and legislation were discriminating against gays, lesbians, and their couples. In this regard, they attempted to interpret the *Charter* in a way that could provide avenues for redressing inequalities. By demonstrating that existing subordination could no longer be tolerated in the

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\(^{19}\) Ibid., at 12.

\(^{20}\) Ibid., at 15.

\(^{21}\) McCarthy, M., & Radbord, J., *Family Law for Same-Sex Couples: Chart(er)ing the Course* (1998) 15:2 Can. J. Fam. L. 101, hold that reforms in the field of family law, because of their importance, should come first, not last.

type of society that the Charter had attempted to shape -characterized by a strong protection of equality rights- those studies were aimed at enhancing legal change. Their research, constructions and interpretations of the law had the purpose of favouring invalidation of discriminatory legislation. In so doing, a vital element of this work was, evidently, litigation. Test cases were brought before courts, so that legal arguments advocating equality could be subsumed into new law.

As discussed in the next chapter, arguments proposed by legal scholars and lawyers in court cases had to face the above-mentioned objections. In addition, they were also confronted with the particular kind of discrimination faced by gays, lesbians and same-sex couples, which was mainly caused by failure of the law to take into account those communities, and to address their problems. Silence, or omission, often caused discrimination. While more evident in the context of human rights legislation, when sexual orientation was not enumerated as a protected ground, efforts to unmask discrimination were significant as far as relationship recognition was concerned. Due to the opposite arguments based on tradition, advocates of equal rights engaged in demonstrating how existing structures of family law, by ignoring entirely the existence of gays and lesbians as partners and parents, were heavily biased in favour of an unexpressed heterosexual norm. The legal problem in this task was that of demonstrating that omission of protection was not justifiable under the equality rights protected by the Charter. Could such guarantee be used in order to produce legal change? Could the Charter force legislatures to act? Translation of evident examples of discrimination into legal arguments has not been an easy task. Judges often argued that gays and lesbians were not banned from marriage, provided that they would marry a person of the opposite sex.
A second generation of studies in the field of law and sexuality was concerned with the forms that the process of recognition has taken over the years. As the legal system reacted to challenges, changes took place that progressively let some initial claims to fade away. At the same time, new fields of interest took shape. According to some, sexual orientation was first constructed as a legal category empty of any meaning, and served only the purpose of excluding gays and lesbians from a protected juridical space. While the effort of early scholars has been that of filling that legal category with significant content, scholars of the second wave, while sympathetic with those struggles, tried to analyze more critically the nature and effects of this process.

The perception that a uniform application of the law – a fundamental liberal dogma- was not sufficient in order to guarantee equality began to break through, although it has been emphasized that gays and lesbians face mainly direct discrimination due to explicit exclusion from statutory definitions of “family” or “spouse”. Scholars focussed on the way in which differences based on personal characteristics could be included and accommodated in society.

An area of particular concern was the observation on the nature of rights recognized by the legal system. Authors became more concerned with the nature and the type of recognition, analyzing the distinction between individual and public rights, which reflected the extent of the recognition afforded to gays and lesbians in different spheres of life. Wintemute also highlighted the “inadequacy of a ‘spatial privacy’ rationale where sexual orientation affects, not private sexual activity, but public situations such as (...) recognition of couple relationship”.

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23 Lahey, Are We Persons Yet? Law and Sexuality in Canada (Toronto: University of Toronto Press, 1999).
As legal change began to be produced, although not always along a linear progression, a new awareness developed that same-sex couples ought not only to be tolerated but celebrated as well. Today, it has been possible to argue that the values expressed by them and manifestations that give meaning to gay and lesbian culture should be recognized as having an intrinsic worth.

3. Feminism and critical legal studies

Aside from the rights talks, other currents of thought raised concerns and objections that were not connected to the conservative and religious views mentioned above, but rather came from the left. Such views were critical about the discourse on rights on a number of grounds. First, several authors involved in social, legal, and political studies shared the consideration that the struggle for legal rights was only a small part of strategies for change deployed by "new social movements". As Didi Herman stated: "within lesbian and gay rights movements, few, if any, people believe that winning human rights will achieve equality, much less liberation. The acquisition of formal rights was always one strategy among many." Miriam Smith shared this point of view by stating, more critically: "the meaning frame of rights talk (or the myth of rights) treats legal change as the only form of political change and, by ignoring the mobilization of social movements behind rights claims, assumes that legal change occurs in a vacuum, as if the

28 For an overview of different positions see Smith, M., Lesbian and Gay Rights in Canada, supra, passim, especially at 16.
litigants are free-floating atoms. Rights talk equates legal change with social change and neglects the deployment of rights as political resources”\textsuperscript{30}.

More specifically, scholars such as Herman questioned the assumption that “progressive social movements \textit{necessarily} rearticulate rights in such a way as to challenge power relations”\textsuperscript{31}. Sharing with Alan Hunt his opinion that the discourse on rights might be helpful in the construction of subjects and identities, Herman was, however, concerned with questions such as “what kinds of subjects, and identities oriented to what end”\textsuperscript{32} were produced by that discourse. Herman found questionable advocating for \textit{any} construction, and considered unsatisfactory the definition of liberal discourse, which depicted the gay person as “the abnormal member of an immutable sexual minority who deserves tolerance and protection, rather than repression and discrimination”\textsuperscript{33}. Her contribution to the debate about immutability was that such a concept had been useful in the past but, on the one hand, had ceased to have any positive use and, on the other, was “at odds with those theories of sexuality which deconstruct the naturalness of heterosexuality and gender identity”\textsuperscript{34}.

Herman also looked at the process of lobbying for inclusion of sexual orientation in Ontario’s human rights code. She concluded that arguments offered by supporters of such an amendment rested mainly on concepts that were at the core of the liberal tradition: tolerance, rights, harm, privacy, and pluralism\textsuperscript{35}. By viewing human rights legislation as the tool for eradicating social problems, such as racism and sexism, she found that “the model currently hegemonic within human rights-type struggles is one of a homogeneous minority population. As applied to sexuality, the model represents society as having always contained a majority of

\textsuperscript{31} Herman, D. Beyond the Rights Debate, \textit{supra}, at 35 (emphasis in original).
\textsuperscript{32} Herman, D. Beyond the Rights Debate, \textit{supra}, at 36.
\textsuperscript{33} Herman, D. Beyond the Rights Debate, \textit{supra}, at 37.
\textsuperscript{34} Herman, D., \textit{Rights of Passage}. \textit{supra}, 6.
\textsuperscript{35} \textit{Ibid.}, at 40.
heterosexuals and a minority of homosexuals. The object of her critiques was mainly the monolithic conception of sexuality as something sharply polarized between two fixed and immutable categories. Translated into legal concepts, such premise led to the conclusion that "legal liberalism, upon which human rights laws are premised, thus assumes a series of truths: society is pluralistic, there are majorities and minorities, true democracy necessitates the protection of minorities from the tyranny of majorities, and true minorities share characteristics that differentiate them from the majority norm." Herman's main source of criticism was that feminist views on sexuality, gender, and power distribution were not allowed citizenship in the debate, hegemonized by the liberal rights discourse. The author's aim appears clear once these statements are joined with her opinion that equality rights are not going to challenge heterosexuality "and the forces which render it nearly unavoidable". Her critique, in conclusion, was that "lesbians and gay men are granted legitimacy, not on the basis that there might be something problematic with gender roles and sexual hierarchies, but on the basis that they constitute a fixed group of 'others' who need and deserve protection."

Particularly regarding the field of family, socialist feminists focussed on the history of oppression of marriage and of dynamics of domination that took place within the family. Scholars committed to these views analyzed the impact of the process of recognition of families on the gay and lesbian community, or at least on part of it. They highlighted the possibility that recognition of relationships would have the effect of assimilating gay and lesbian couples into the dominant concept of traditional family that might be deemed responsible both for the exploitation of women and for the reproduction of a capitalist economic organization. Such

36 Ibid., at 38.
37 Ibid.
38 Ibid., at 51.
39 Ibid., at 44.
40 The literature is abundant. See e.g. Boyd, S., From Outlaw to Inlaw: Bringing Lesbian and Gay Relationships into the Family System (1999) 3(1) Yearbook of New Zealand Jurisprudence 31.
views argue that claims of gays and lesbians based purely on equality refrain from challenging the material place of family in capitalist relations\textsuperscript{41}: since family is based on heterosexuality, and is a vital component of the division of labour in capitalism, there may be no fundamental social change if the role of the family is not challenged along with its heteronormativity. A main source of criticism among socialist feminist thought is that there are no systems of support for families that produce and raise children, or care for dependent members. This lack of support leads to the “privatization” of all costs within the family, particularly with regard to women. Authors such as Boyd draw attention to the “complex intersections between family, sexuality, poverty and capitalism”\textsuperscript{42}, by concluding that equality (in the area of family law) will not be the answer for social problems caused by the intersection between sexuality and other traits such as class, race and gender.

Several feminist authors found it difficult to reconcile their critiques with legal arguments brought before courts in struggles for equality, with which they nonetheless sympathized. The dilemma “we are family/we are not family” is visible in these positions. As has been said: “those who argued in favour of expansion of the definition of ‘spouse’ in order to recognize gay/lesbian relationships in \textit{M. v. H.} were, at least implicitly, endorsing family law’s purpose as being (at least in part) the privatization of economic responsibility”\textsuperscript{43}. An attempt to shape “strategies of resistance” was suggested by Brenda Cossman, who stated: “The family/not family dilemma begins to dissolve when we refuse to accept the dilemma on its own terms, when we reject its either/or, and recognize that we are both. Exploring the contradictory nature of subjectivity can help us begin to reveal the ways in which we live at multiple and conflicting sites of family, and the ways in which the increasing dichotomization of the debate obscures and negates the

\textsuperscript{42}Ibid., at 381.
\textsuperscript{43}Ibid., at 380.
complexities of our lives"\textsuperscript{44}. On one hand, the author acknowledged the need for equality for gays and lesbians "as long as the dominant cultural representation of lesbians and gay men remains one of deviance and otherness"\textsuperscript{45}. On the other hand, she subscribed to the findings of other feminist writers that "it may be unrealistic to expect that the struggle for and realization of formal equality rights within lesbian and gay relationships is likely to displace the traditional and dominant familial discourse"\textsuperscript{46}. Her conclusion was that gay and lesbian movements should be able to perform different, and sometimes conflicting, strategies in order to achieve the desired social changes.

In fact, the need to analyze critically the system of social and legal rules that surrounds the concept of family is shared by several authors that, nonetheless, do state clearly their propensity to accept and support demands based on equality. Nitya Duclos, for example, emphasized the need to reject any essentialist suggestion within the debate on same-sex marriage, by taking into account various differences that, in her view, usually go unnoticed. Differences within the lesbian and gay community (race, class, etc.), or with regard to the legal consequences of marriage, or with regard to parenting, may lead to different conclusions. In fact, the author identifies four major arguments deployed by same-sex marriage supporters: a way to radical political reform of heterosexism, public legitimation of gayness, socio-economic benefits, legitimation of parenting. Her multiple critiques to such arguments reflect feminist views of social relations. Marriage cases "have been based on trying to establish that lesbian and gay relationships conform to prevailing legal ideologies of family and marriage"\textsuperscript{47}. Assimilation

\textsuperscript{45} Ibid., at 32.
\textsuperscript{46} Ibid., at 34.
\textsuperscript{47} Duclos, N., Some Complicating Thoughts on Same-Sex Marriage, in Family Matters, ed. by Minow, M., (New York: The New Press, 1993) 164.
into existing hierarchies may not only be unfavourable but may also foster the conceptualization of “good” gays—who adopt the prevailing norms—and “bad gays”—who depart from socially accepted behaviour and remain “deviant”. The author concluded that “for some lesbians and gay men, gaining legal recognition of their relationships will not address the most significant reasons for their experiences of inequality and oppression”.

Miriam Smith has characterized these views as expressions of conflict between some gay movements and some lesbian movements. However, these groups have also worked together in the Mossop case, in the attempt to present their critical views on the family. Their effort to deconstruct the family meant “exposing the function of family ideology and explaining how its pervasiveness insulates conventional families from criticism, helps maintain the invisibility of child and spousal abuse, reinforces heterosexuality as the only legitimate sexual identity (thereby fuelling and legitimizing homophobia), and denies non-conforming families the material and psychological benefits of recognition and legitimation”. Coalitions that intervened in the case attempted to support a view of family not dependent on the definitions given by the law, the employer, or the state, making the argument that “its meaning is subjective and shifting”. Jody Freeman, who reviewed the intervenors’s factum in Mossop, reported the concern that a definition (or any definition) of family could create a dichotomy between socially accepted gay people and those still “deviant”. She concluded that “the intervenors’ factum is an attempt to preserve the ability of families to be different but to receive the benefits and burdens of legal

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48 Ibid., at 165: “lesbian and gay marriages could easily come to occupy one of the lower tiers of an already hierarchical social marriage system”.
49 Ibid., at 165.
50 As she put it: “The difference between lesbian politics and the gay liberation perspective as I have outlined it is that gay liberationists saw civil rights as a means of political mobilization for social transformation, as well as a worthy end in itself, whereas many lesbians saw civil rights as a less important strategy for social transformation”. Smith, M., Lesbian and Gay Rights in Canada, supra, at 62.
52 Freeman, J., Defining Family in Mossop, supra, at 61.
53 Ibid., at 67.
recognition nonetheless. It is akin to the feminist argument that women should not have to claim sameness in order to obtain privileges men obtain by virtue of being men"\textsuperscript{54}.

A subjective approach to family, which rejects fixed definitions, reflects particular themes such as deconstructionism and fragmentation advanced and supported by postmodern scholars. The myriad of "local situations generated by a fragmented society" highlights that "human subjects in general seem increasingly resistant to containment within any essentialist formulae"\textsuperscript{55}. Postmodern theories claim to be able to "take differences seriously"\textsuperscript{56}, and this is a point particularly relevant as far as sexuality and family are concerned. As Carl Stychin has pointed out, the postmodern view on "identity" is that it is "complex, (...), fragmented, intersected, subject to alteration, socially constructed, and it exhibits only a partial fixity at any moment"\textsuperscript{57}. Consequently, a postmodern identity politics "centres upon the plurality of subject positions in which each individual is constituted"\textsuperscript{58}. In the author's view, Canada's national identity embraces these themes because "within the conditions of late modern society, a shift may be experienced away from the homogeneity of the discourse of nationalism towards a politics open to non-assimilationist claims of difference. These claims redefine the national subject itself, as the nation becomes a performative space for the articulation of competing visions"\textsuperscript{59}. Stychin constructs a deep link between postmodern views on identity, identity politics and constitutionalism by arguing that the openness of the Canadian concept of equality rights finds its roots in a vague and shifting construction of national identity. However, when it comes to sexual orientation, he recognizes that the focus on "history" and "immutability" of such

\textsuperscript{54} Ibid., at 71, note 72.
\textsuperscript{56} Ibid., at 127.
\textsuperscript{58} Ibid., at 62.
\textsuperscript{59} Ibid., at 67.
category or characteristic is at odds with postmodern views. In sharp contrast with his
description of Canadian views on equality, Stychin provides elsewhere an analysis of national
rhetoric that, drawing from the concept of Republicanism in France, dominated the debate about
the law on the *Pacte civil de solidarité*. The central concept, Republicanism, entailed several
assumptions, such as the prohibition of the “politicization of identities”, the “central role of the
state”, an “assimilationist model of citizenship” and the need for individuals to transcend their
particular affiliation, a “clear differentiation between public and private spheres” and the
privatization of cultural difference, as well as a universalist, neutral, liberal vision of the
Republic. Equality is expressed through the language of universality, which resists any claims to
difference. The new form of contract (PACS) passed for regulating certain aspects of the “vie
commune” has finally been adopted in the name of “social utility” rather than individual rights.
Stychin points out that “the PACS debate underscores the manipulability of a formal conception
for equality, depending, as it does, on deciding what two things are *essentially* alike.” Similar
critiques of the concept of formal equality were advanced in France by Lochack, who claimed a
droit à l’indifference which, as discussed in the second chapter, are recurrent in Canadian
democracy. Although there appears to be no visible link between Canadian higher Courts and
postmodern thought, the Canadian judicial approach, as will be discussed, rejects neutrality in
favour of inclusion.

Rights talk, as defined above, has been criticized by scholars who refer to Critical Legal

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60 See chapter 4, s. 4 for more details.
61 Stychin, C., Civil Solidarity or Fragmented Identities? The Politics of Sexuality and Citizenship in France (2001)
10:3 Soc. & Leg. Studies 352.
62 Ibid., at 358, (emphasis in original).
63 Lochak, Egalites et Differences. Reflexions sur l’universalite’ de la regle de droit, in Homosexualites et Droit, ed.
realism, and have gone beyond it to show how the dominant tradition in legal scholarship (...) helped to justify an abstract legal discourse that ignored the politics of power. Critical legal scholars point out that liberal legalism tends to deny the "fundamental contradiction", the tension between the individual and the group, the self and the other, by emphasizing instead individual autonomy. As summarized by Harris, "contradictions have been everywhere unearthed: between intentionalism and determinism in criminal law; between public and private in domestic relations law; between ownership and collective-resource-use in property law; between consensual contracting and job security in employment law; and so on. Because of such fundamental tensions inherent in law, there cannot be any politically neutral way to analyze law itself. More specifically, it is said that "all the talk of 'rights' serves only to depict real people as abstract entities, subsisting apart from their communities. Critical legal scholars join the views of postmodern movements, which reject the Enlightenment quest for universal truths and "relate the human condition to broad expository narratives. Critical legal scholars do not share the faith in fundamental principles, entrenched in bills of rights, constitutions or Charters of rights, that liberal scholar demonstrated. One consequence of these views has been that of emphasizing how rights talk was not concerned with a transformation of society broader than the expansion of legal rights to selected groups previously excluded. 

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64 Minda, G., Postmodern Legal Movements, supra, 106.
66 Ibid., at 109-10.
67 Ibid., at 110.
68 Harris, ibid., at 110, reports oppositions to a British bill of rights. Mandel, M., The Charter of Rights and The Legalization of Politics in Canada, rev. ed. (Toronto: Thompson Educational Publishing, 1994) 341, claims that "Those who conceived and drafted the Charter did their best to ensure that [the] system of private power remained well beyond the reach of the Charter and the courts have applied it accordingly."
CHAPTER II. Section 15 of the Canadian Charter: from formal to substantive equality

1. Introduction

The purpose of this chapter is to examine the concept of equality that has been adopted in the Canadian context, in order to understand the framework in which same-sex couples' claims have been assessed. I will explore the differences among various approaches and the interpretation that the Supreme Court of Canada has given to section 15 of the Charter in numerous cases. In this chapter, I will review the steps that have led to the rejection of a mere formal concept of equality, criticized by some for its manipulability. My analysis is aimed at highlighting the details of the section 15 test, based on substantive equality, that appear to have played an important role in same-sex couples' claims for equality. In fact, I will discuss the "grounds of discrimination" approach, the nature of the concept of discrimination, the test of relevancy of the personal characteristic with regard to the functional values of the law, and the duty to accommodate differences. I will emphasize the novelty of the section 15 test, characterized by an analysis that shifted, from the internal coherence of the legal system, to the position of the claimant in society. I will also introduce my argument that this shift could be problematic if not properly circumscribed.

Although I acknowledge the importance of substantive equality, I would argue that, when the law traces distinctions expressly, as used to be the case for issues regarding sexual orientation and same-sex couples, even formal equality is denied. This is still the case as far as
marriage is concerned. The trend that I analyze in this and in the next chapter shows that with regard to those situations, an approach based on sameness, directed at demonstrating that the law treats equal situations differently, is (or was) likely to be used. In the following paragraphs, thus, I will review the framework of analysis for the application of the equality principle in general, whereas in the next chapter I will look more closely at how equality for gay and lesbian families has been built into the scope of section 15.

2. Concepts of equality

The problem of the need for protection from discrimination (in the private sector) was first acknowledged in Canada during the 1960s, when legislation was enacted to protect rights of various groups in areas such as employment, housing, and services. The enactment of such human rights legislation, which was to be enforced by bodies specifically set up for this task, meant that, in the following years, the work of dealing with the treatment of differences was transferred from courts to those administrative agencies. Several authors refer to this shift as a success, because when the Supreme Court was called to decide its first equality case in 1989, it relied heavily on notions developed by such jurisprudence.

In such a context, the role of judges continued to find its sources in two kinds of powers. First, they were entrusted with the interpretation and application of the Canadian Bill of Rights. It has been highlighted that, in performing this task, courts often took an extremely narrow approach, as cases such as Bliss demonstrate. Second, judges were responsible for reviewing

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70 Lepofsky, D., The Canadian Judicial Approach to Equality Rights, supra, 320;
decisions rendered by human rights tribunals. Even in this task, as the Supreme Court of Canada
Gay Alliance Toward Equality v. Vancouver Sun\textsuperscript{72} case demonstrates, the approach that courts
took with respect to equality in pre-Charter jurisprudence witnessed diverging and contradictory
theoretical views\textsuperscript{73}.

In fact, most scholars have pointed out that there are different concepts of equality: the
like-treatment model of formal equality, the equal opportunity model, and the substantive
model\textsuperscript{74}. In addition to the different practical results that the adoption of one or the other may
entail, they also reflect different views regarding, more broadly, the role of the law. The first
model is often said to derive from the Aristotelian concept of equality, which provides that
similar situations should be treated equally, and different situations should be treated differently.
When Canadian courts have adopted such a model, they applied the so-called “similarly situated
test”. This idea of equality is deemed to be “formal” because it provides that the law does not
literally infringe the dogma of universality. What matters here is that the law still continues to
have as its unique reference the abstract and neutral concept of the citoyen that anyone may
theoretically be. This idea of equality is meant to make sure that particular groups in society do
not enjoy legislation specifically designed for them: neither conferring privileges nor imposing
burdens. The law should have in mind the average human being considered in the abstract,
without referring to particular conditions in society. Of course, this concept is strictly linked
with the early positivist and liberal concept that the law is an autonomous set of rules that are

\textsuperscript{72} [1979] 2 S.C.R. 756, 18 D.L.R. (3\textsuperscript{rd}) 1.

Rights Reporter, 1986) 49, noted how the lack of “constitutional status” of the Canadian Bill of Rights did not allow
more than a “timid interpretation” of its provisions. Similarly Tarnapolsky, W., \textit{The Equality Rights in the

\textsuperscript{74} This distinction is explicit in McLachlin, B., \textit{The Evolution of Equality}, \textit{supra}, note 2. Other authors adopt
different categories: see Black, W., & Smith, L., \textit{The Equality Rights}, in Beaudoin, G., & Mendes, E., (eds.) \textit{The
not, or should not, be affected by real dynamics of society, such as social location or power distribution.

Critics refer to this model as one that allows the perpetuation of existing definitions and relations, no matter how unequal or unjust, as long as they appear to be homogeneous. It justifies the rejection of any difference with respect to the standard "neutral" situation, and it offers "no guarantee of relief to those suffering from subordination on the basis of their differences from those who held power. Those who were perceived as different tended to be classified as "unlike". Being unlike, differential treatment was justified". This concept of equality reveals a particular view of the law's role as something that should be somewhat detached from society. As the famous saying of Anatole France makes clear, the law, in its great superiority, prohibits equally the poor and rich to steal bread and to sleep under bridges. As long as the same behaviour is mandated to or requested from an abstract idea of individual (that, it is claimed, has no race, no economical status, no sex, no sexual orientation, etc.) the law is satisfied that equality exists. The main criticism of the similarly situated test refers to its subjectivity. Some scholars have pointed out that "once two people or groups are classified as different with respect to the purposes of a law, the test does not determine whether the way the law treats that difference is justifiable". Others highlighted that the pitfall of this test is precisely the process of classification of the plaintiff and of the definition of the purpose of the law. It is concluded that "since both these criteria are subjective (...) there is a real danger that the approach can be manipulated to achieve a desired result". Manipulation consists of the fact that the purpose of the law is individuated on the basis of the distinction made by it, so as to conclude that such distinction is necessary to achieve that purpose. Peter Hogg views the similarly situated test as

of little use, because it “does not supply the crucial criteria that are required to determine who is similarly situated to whom, and what kinds of differences in treatment are appropriate to those who are not similarly situated”\textsuperscript{78}.

A second concept of equality, that of equal opportunity, views the role of the law in different terms. Here the law acknowledges that people are kept inferior because of personal characteristics, and mandates that law is used in order to forbid different treatment. This concept lies at the heart of human rights codes that tend to protect, rather than classical political rights, economic and social rights. They impose obligations not only on government but also on private entities, therefore highlight the fact that the threat to the autonomy of the individual may arise not only from the state –one of the central assumptions of liberalism\textsuperscript{79}– but also from power relations in society. However, within such context, although the law establishes that those considered different should not be treated differently, it still provides only for the possibility of access to a better economical and social position, not the actual redress of imbalances. The limits of this approach are that it may not be able to make concrete and practical changes in people’s lives.

The third concept of equality does not consider the law as something distant, impartial, neutral and existing in a vacuum. Substantive equality may take two forms\textsuperscript{80}. First, it may be the source of affirmative action through legislative programs. Since the disadvantaged individual was not able to profit from the opportunities opened by anti-discrimination legislation, then the law went on to require agencies, colleges or businesses to enhance diversity and take in members of underrepresented minorities. Section 15(2) of the Charter expressly recognizes the

\textsuperscript{78}Hogg, P., \textit{Constitutional Law of Canada, 4\textsuperscript{th} student ed.} (Toronto: Carswell) 1996, 903.
\textsuperscript{79}Elliot, R., \textit{The Supreme Court of Canada and Section 1: The Erosion of the Common Front} (1988) 12 Queen’s L.J. 280 ff.
\textsuperscript{80}McLachlin, B., \textit{The Evolution of Equality, supra.}, 563.
constitutionality of affirmative action. Second, substantive equality may be viewed as a judicial concept. Under this point of view, it acquires a highly technical meaning, especially with regard to the different logical operations that judges must perform when dealing with equality cases. *Andrews v. Law Society of British Columbia*\(^{81}\) has been the case where the Supreme Court of Canada not only took its position in favour of substantive equality, but also made clear how judges should look at the impugned law, in light of section 15, in order to achieve that goal. As far as the content of substantive equality is concerned, *Andrews* has been considered a “revolutionary decision” because “for the first time in Canadian jurisprudence, it pointed out the potential vacuity of formalistic concepts of equality and emphasized the need to look at the reality of how differential treatment has an impact on the lives of members of stigmatized groups”\(^{82}\). This concept is based on the faith that the law may serve the purpose of an instrument to “better the situation of members of groups that had traditionally been subordinated”\(^{83}\). The performance of this active role in redressing inequalities requires the law to plunge deeply into society and to be able to identify groups of people that suffer from pejorative treatment because of prejudice associated to their personal characteristics. Equality ceases to be only a formal concept. As I will argue later on, this concept is reflected more technically in the *Andrews* test, which inserts in the decision making process some extrajuridical factors needed in order for the equality clause to achieve its goal.

Thus, it appears evident from this brief summary that the enactment of the *Charter* has facilitated the adoption of a far-reaching concept of equality that courts had not been willing to recognize –under the *Canadian Bill of Rights*- before section 15 came into effect. From this point of view, it should be recognized that the *Charter* literally marked a fundamental turning

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\(^{83}\) *Ibid.* 564.
point. In fact, soon after the *Charter*, strong protection of a certain idea of equality began at the Supreme Court of Canada level, which entailed the conclusion that law should not be just neutral. First of all, in *Simpsons-Sears*\(^8^4\), the Court held that human rights codes are quasi-constitutional law and must receive large and liberal interpretation. This case also stated that the envisionable concept of equality has far reaching effects, prohibiting both intentional and unintentional discrimination (also called adverse effect, systemic, or indirect discrimination). This point should be emphasized because it is directly relevant to the position of differences in society. In *Simpsons-Sears*\(^8^5\), the Court held that neutral requirements might have discriminatory effects on differences. Instead, differences should be accommodated rather than ignored or overlooked. This point will be discussed again later. I would argue that this conclusion, taken in connection with other features of the Canadian concept of substantive equality, such as the special test required under section 15, is a sign of multiculturalism that challenges the traditional concept of the universality of law.

Some authors, while recognizing the leading role of the Supreme Court of Canada during the late '80s in shaping these concepts, have been very critical of the case law of lower courts, which seem to have interpreted section 15 as imposing only a formal standard of equality. This led them, at times, to resolve issues of different treatment by withholding benefits rather than expanding them to the excluded group\(^8^6\). In a pre-*Charter* case, McIntyre J. expressed his faith in "the general principle of universal application of the law"\(^8^7\). He concluded that any eventual distinction should be contained within those limits (albeit variably identified), later systematized in *Oakes*. This approach assesses different treatment with suspicion. Because of the principle of universal application of the law, differences in treatment, if based on certain grounds, are


\(^8^5\) Ibid., at 552-556.

considered *prima facie* discriminatory. Later developments, briefly quoted above, have shown that a uniform treatment might not guarantee equality if a needed distinction is not drawn (e.g. *Bhinder*\(^88\)) or if some individuals, because of their characteristic, do not fall within the regulated "universe". The above mentioned cases have made clear that a substantive concept of equality entails the capacity of observing differences accurately.

3. Application of equality in Canadian jurisprudence: brief overview of the analytical framework for section 15

3.1 The "grounds" approach and definition of "discrimination"

As noted, the purpose of the preferred interpretation of section 15 is to remove the obstacles that trigger inequalities and hinder the human dignity of people disadvantaged because of the assumptions or generalizations made with regard to the class they belong to due to their personal characteristic. Uniform application of the law to the abstract *citoyen* – the liberal free and autonomous self - ignores the obstacles to substantive equality existing for those who have been historically disadvantaged\(^89\).

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\(^89\) These conclusions were very clear to the drafters of the Italian constitution in 1948. I'd like to quote sec.3, the equality clause. Subsection 1 reads: "All citizens have equal social dignity and are equal before the law without distinction of sex, race, language, religion, political opinions, personal and social conditions". This provision is referred to as a provision of formal equality. Subsection 2 refers to substantive equality: "It is a duty of the Republic to remove the obstacles of economic and social nature that, by limiting *de facto* liberty and equality of citizens, hinder the full development of the human being and the effective participation of all workers to the political, economical and social organization of the country".
The analytical framework for dealing with equality cases has been first laid out in *Andrews*[^90]. In this decision, the Supreme Court of Canada held that the first step should be that of assessing that a distinction has been made by the law. A first, remarkable novelty is that comparison does no longer encompass the affected individual and those in similar situation, but “the condition of others in the social and political setting in which the question arises”[^91]. As has been said, thus, “distinction should not be understood as a disadvantage to a group or individual relative to others in a similar situation, but as the deleterious effect on the party relative to the rest of society”[^92]. In order to satisfy this first step, it is sufficient to establish that the law draws a distinction between the claimant and others.

The distinction traced by law must be based on certain “grounds”. The function of this requirement is to make clear that only differential treatment on their basis, resulting in disadvantage, is *prima facie* discriminatory. The emphasis on the grounds of discrimination reinforces the view that “section 15(1) is designed to prevent discrimination against certain kinds of groups”[^93]. Section 15 lists explicitly the characteristics that appear as the “most common and probably the most socially destructive and historically practiced basis of discrimination”[^94]: race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Not every distinction is *contra jus*. It is therefore necessary to establish a further specification, the existence of discrimination. One of the concerns that the Supreme Court of Canada addressed in this case was that of the potentially unlimited scope of the equality clause. The definition of what amounts to discrimination has been written by Justice McIntyre in the following terms: “discrimination may be described as a distinction, whether intentional or not,

[^90]: *Supra*, note 81.
[^91]: *Andrews*, *supra*, at 10 D.L.R.
[^94]: *Andrews*, *supra*, at 18 D.L.R.
but based on grounds relating to personal characteristics of the individual or group. Scholars have read this part of the definition as setting the “grounds approach” to equality. This idea reflects the concept of equality adopted by Canadian courts: section 15 is aimed at helping historically disadvantaged groups, as made clear in *R. v. Turpin*. In that case the Supreme Court held that accused persons outside of Alberta, although object of a distinction made by law, were not a historically disadvantaged group, therefore less favourable treatment could not amount to discrimination. Discrimination is limited to distinctions based on such grounds that cause prejudice or disadvantage, seen as the phenomena that section 15 aims at eradicating.

Under the ‘grounds’ approach to equality, therefore, it appears clear that the process of comparison, entailed in the judgment on equality, shifts from the formal coherence of legislation to the social and political context.

Like the trial judge and the B.C. Court of Appeal in *Andrews*, the Supreme Court of Canada had to address the potentially unlimited scope of section 15. The Court of Appeal had considered, under this point of view, a “pure ‘rationality’ test”, aimed at limiting unlawful discrimination to those distinctions deemed not reasonable, or rational. The emphasis is on an internal factor: consistency of the body of laws. The Supreme Court of Canada took a different approach: the emphasis should be put on an external factor, the grounds of distinction. In doing so, it referred to jurisprudence interpreting human rights statutes, providing a strong interrelation with the constitutional discourse that is lacking in the U.S.

It is generally recognized that grounds not explicitly listed in section 15 may be at the basis of discrimination. Section 15 of the *Charter* allows for the protection of discriminatory practices based on grounds other than those expressed by its wording. In fact, every individual

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95 *Andrews, supra*, at 18 D.L.R. The definition goes on by saying that discrimination “has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or (...) withholds or limits access to opportunities, benefits, and advantages available to other members or society”.
enjoys equality rights without discrimination based “in particular” on the listed grounds. Lepofsky made the argument that the Charter contains an open ended clause because analogous grounds under section 15 could be developed over time, as it had been the case for human rights codes, where “recognition of groups deserving protection from discrimination has evolved gradually”\textsuperscript{98}.

In Andrews, the Supreme Court has determined that discrimination is rooted in “personal characteristics”, but has not stated clearly when a group can qualify as analogous to those enumerated in section 15. More specific criteria have been highlighted in later cases. As has been stated, the Court has pointed out two features shared by enumerated and analogous grounds:

“one is that inequality related to these grounds is associated with human dignity. The second is that the grounds are often subject to stereotypes that prevent a fair assessment of members of the group”\textsuperscript{99}.

William Black and Lynn Smith have summarized the criteria identified by the Court in several cases, among which can be found a history of prejudice and stereotyping, lack of political power, social and economic disadvantage, immutability, beyond a person’s unilateral control, or a fundamental choice in a person’s life\textsuperscript{100}. In conclusion, as it has been written, “the focus on analogous grounds leaves open the expansion of the bases upon which unconstitutional

\textsuperscript{96}[1989] 1 S.C.R. 1296.
\textsuperscript{98}Lepofsky, D., The Canadian Judicial Approach to Equality Rights, supra., 331.
\textsuperscript{100}Black, W., & Smith, L., The Equality Rights, in Beaudoin, G., & Mendes, E., (eds.) The Canadian Charter of Rights and Freedoms, supra, 62,
discriminatory treatment may be found". An important effect of the analogous ground approach has been the possibility to read such grounds as sexual orientation in human rights codes that omitted protection on their basis, as discussed in the following chapter.

3.2 Justification under section 1 and unintended adverse effects

The Court of Appeal in *Andrews* had placed the onus on the petitioner to show that the distinction was unreasonable and unfair. However, the Supreme Court made clear that any possible justification for the violation of the rights to equality—as for any other Charter right—should be assessed at a following stage. If section 15 is violated, because a distinction (with discrimination) has been found, any consideration regarding reasonableness, rationality, or proportionality of the distinction must be performed according to the norm contained in section 1. Section 1 reads:

"The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society".

The leading authority for the interpretation of such provision is *R. v. Oakes*. In this decision the Court held that the law found in violation of a right recognized by the Charter must serve a pressing and substantial purpose; that there must be a rational connection between the means used and the goal to be achieved; that there must be minimum impairment of the Charter

right; and that there must be proportionality between means and ends. The test for justification is passed only if all of these requirements are met. Unlike the doctrine of equality in the U.S., a rational connection between the distinction and the purpose of the law is not enough.

The rejection of the similarly situated test, rather than being resolved in the rejection of the comparative nature of the logical process\textsuperscript{103}, as seen above, is remarkable because it puts the emphasis on the effect of the distinction on the affected group. The analogy that it offers refers to the concrete conditions of life of the person or group affected by a distinction caused by prejudice. As has been said, “the Andrews/Turpin approach to equality ensures that section 15’s protection focuses squarely on those discrete and insular groups in society who have been disadvantaged because of a personal attribute”\textsuperscript{104}. Section 15 prohibits unintentional or adverse effect discrimination\textsuperscript{105}. Justification for the discrimination must be demonstrated by the state, not the claimant\textsuperscript{106}. In other words, plaintiffs do not have the “burden of justifying why they should be treated as equals”\textsuperscript{107}.

In my view, this approach injects into the decision making process a powerful extrajuridical element. Under the postulates of formal equality, the role of judges should be that of assessing the internal coherence of the legal system, by comparing two norms. The judge should be strictly limited to a judgment on equality. On the other hand, by referring to such extrajuridical factors as the “broader socio-political context”, “prejudice”, or “disadvantage”, courts seem willing to review the justice or “opportunity” of that particular legislative choice. The outcome of the adjudication seems influenced not only by the reasoning based on a formal comparison. In addition, it makes clear that equality is, logically, a fiction. The meaning of

\textsuperscript{104} Lepofsky, D., The Canadian Judicial Approach to Equality Rights, \textit{supra.}, 329.
\textsuperscript{105} \textit{Andrews}, \textit{supra.}, at 16 D.L.R.
\textsuperscript{106} Ibid. at 178/180.
equality is not that all individuals share the same characteristics, but that all individuals should be treated as if they were equal. It is my view that this fiction may operate in different ways, because at times it may require the universal application of the law, and at times a more specific consideration of the characteristic involved.

3.3 The “relevancy test”

The Supreme Court of Canada has subsequently revisited the framework laid out in Andrews, and its commitment to substantive equality, in three equality cases decided in 1995. In Miron, four of the nine judges held that the assessment of the impugned norm should be performed through a three-step analysis, thus adding one step previously not existent. Although not added by the majority, this third step refers to the relevancy of the personal characteristic upon which the different treatment is imposed with regard to the functional values of the law. Following this approach, discrimination only exists when a distinction is based on a characteristic irrelevant with regard to the values that underpin legislation.

The discourse on the relevancy of a differentiation has several ramifications. I will only explore those that seem to me relevant to the object of this thesis. As was stated above, I would argue that the S.C.C., in deciding equality cases, relies on extrajuridical factors in an effort to achieve substantive equality. This particular stage of the analytical framework regarding the application of sec. 15 may provide some clarification. One author has argued that the purpose of the test on relevancy (of the personal characteristic) is to assess the reasonableness of the

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distinction in light (not only of the law's purpose, but also) of the social and cultural context in which it operates. The same author also concluded that the courts' central concern is to decide whether the distinction is socially justifiable. The Supreme Court itself stated in *Turpin* that judges should take a broad, socio-political, contextual approach to s.15(1) analysis.

I would argue that it is precisely this contextual approach that allows reaching beyond the principle of the universal application of the law as traditionally interpreted. The latter seems to be concerned uniquely with its own internal rationality. It is not concerned with the purposes of the laws, and does not consider the impact of the laws on society. In other words, either the body of law is considered to be inherently just, or no inquiry is considered appropriate. The Supreme Court of Canada, notwithstanding several shifts, has adopted a novel framework of analysis because it relies on a rationality external to the norm. This is made clear by the purpose attached to sec. 15: that of redressing inequalities historically suffered by particular groups of people. Not that of guaranteeing coherence within an autonomous body of law. This point was also set out in *McKinney*, where Justice Wilson stated that it is "clearly established that what lies at the heart of s. 15(1) is the promise of equality in the sense of freedom from the burdens of stereotype and prejudice in all their subtle and ugly manifestations".

While this reference to the socio-political and historical context seems to have fostered a more progressive attitude toward equality, there is doubt whether it could be entirely convincing. In fact, any assessment of the "spirit of the people" is hardly demonstrable but, rather, highly discretionary. Second, there is no guarantee that discrimination made by law will be considered

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111 Ibid. at 785. On the other hand, it has been argued that in the trilogy cases of 1995 the approach taken by Justices Lamer, La Forest, Gonthier and Major constitutes an implicit adoption of the similarly situated test rejected in *Andrews* (Bavis, supra, 696).
socially or socio-politically inappropriate. The reference to a contextual approach might not
enhance equality if the distinction made founds its “relevance” on public attitudes, beliefs, and
prejudices existing in society, albeit the Court often stated that equality is meant to combat them.
An example of this reluctance is found in *Layland*, as discussed in the next chapter, and in the
latest case regarding marriage rights, *EGALE*, discussed in chapter 4.

The relevancy test has been the object of some critiques. It has been claimed that the
three-step approach puts too much emphasis on the purpose of the legislation, and does not
consider appropriately the effect of the distinction on members of the targeted groups. The
crucial argument is that the only way to avoid the manipulation that rests within the similarly
situated test is to assess the impact of the distinction on members of the targeted group. A
second reason of criticism refers to the fact that testing “relevancy” under the third step uses the
justification test of section 1 under sec. 15. If the Court surreptitiously imports the similarly
situated test into the framework of analysis, it will proceed following a “sameness approach”.
This way, once the underlying functional values of the impugned law are established, the
plaintiff will be forced to prove its similarity with the *tertium comparationis*. In *Egan*, if the
underlying value of the law was to protect heterosexual couples, plaintiff had the burden of
proving similarity with such couples and to demonstrate the unreasonableness of the
distinction. Unreasonableness can be found if the personal characteristic upon which the
distinction is made is irrelevant for the achievement of the purpose of the law. Thus, the burden
of proof shifts from the state to the plaintiff; while, under *Andrews*, the latter should only prove
that a distinction has been made and that a burden was imposed due to an enumerated or
analogous ground.

114 *Bavis, supra.*, 700, reports this critique as part of Justice McLachlin’s dissent in *Miron, supra.* at 488.
It is worth noting that Justice L’Heureux-Dubé proposed, in *Egan*\textsuperscript{116}, to expand the scope of the analytical framework, by using a different way of determining discrimination. She would find discrimination proven when it is capable of promoting or perpetuating the view that the individual affected is less worthy of recognition as a human being and as a member of society. This test is deemed susceptible of taking into account the nature of the affected group and the nature of the affected interest, which accounts for a distinction of the “grounds” approach set forth in *Andrews*\textsuperscript{117}. Arguably, Justice L’Heureux-Dubé went further than the other judges in recognizing disadvantage by focusing on the particular group (e.g. gays and lesbians) rather than the ground (e.g. sexual orientation, which includes heterosexuals).

3.4 Iacobucci’s summary in *Law v. Canada*

Subsequent cases such as *Law v. Canada (Minister of Employment and Immigration)*\textsuperscript{118} have emphasized the need to consider discrimination from the perception of the claimant. In the *Law* case, Iacobucci J. has repeatedly and forcefully emphasized that the analysis of section 15 must be one that enhances its purpose, not one that frustrates it. The purpose of section 15, as emerged from his analysis of previous equality jurisprudence,

“is to prevent the violation of essential human dignity and freedom through the imposition of disadvantage, stereotyping, or political or social prejudice, and to promote a society in which all

\textsuperscript{115} However, as already noted, “the purpose of a law can be framed at almost any level of generality”. See Black, W., & Smith, L., The Equality Rights, in Beaudoin, G., & Mendes, E., (eds.) *The Canadian Charter of Rights and Freedoms*, supra., 20.

\textsuperscript{116} *Egan*, *supra* at 522-3 (paras. 31-101).


\textsuperscript{118} [1999] 1 S.C.R. 497 [hereinafter *Law*].
persons enjoy equal recognition at law as human beings or as members of Canadian society, equally capable and deserving of concern, respect and consideration"\textsuperscript{119}.

This explanation entails a strong support for substantive equality, insofar as not only it prohibits formal distinctions among people, but also it aims at eradicating concrete disadvantage suffered by those historically neglected by the guarantee of the law. Following this double purpose attached to sec. 15, it appears clear that under inclusive legislation may well be scrutinized and, eventually, severed or integrated\textsuperscript{120}. Such reading of the equality clause could almost be construed, with some limitations that will be analyzed \textit{infra}, as a duty to act (directed to the legislature) in favour of those who have enjoyed none or little benefit of the law. Ultimately, substantive equality appears to be understood as a tool necessary for allowing full "personal development"\textsuperscript{121}.

In order to carry out these multiple functions, it is essential that judges analyze carefully the context in which the alleged discrimination takes place. This necessity is extremely evident in Iacobucci’s summary of the Supreme Court of Canada’s interpretation of section 15, where it appears that several members of the court have “focussed upon issues of powerlessness and vulnerability within Canadian society, and emphasized the importance of examining the surrounding social, political, and legal context in order to determine whether discrimination exists within the meaning of s. 15(1)"\textsuperscript{122}. The three-step analysis suggested by the \textit{Law} case to courts dealing with equality issues entails i) the finding of a differential treatment, ii) the finding that such treatment is based on “grounds”, and iii) the finding that it amounts to discrimination.

\textsuperscript{119} \textit{Ibid.}, at para 51.
\textsuperscript{120} \textit{Law, supra}, at para 36: “Sopinka J. noted that an approach which requires proof of an express legislative distinction is not necessarily applicable where a claim of “adverse effects” discrimination is made. In such cases, it is the legislation’s failure to take into account the true characteristic of a disadvantaged person or group within Canadian society (i.e. by treating all persons in a formally identical manner), and not the express drawing of a distinction, which triggers s. 15(1)". Cases that applied this principle are, as discussed \textit{infra}, \textit{Eldridge} and \textit{Vriend}.
\textsuperscript{121} \textit{Law, supra}, at para 43.
The third step appears problematic under several points of view. I will discuss these points in the last chapter, in conjunction with the latest case involving same-sex couples equality claims with regard to marriage rights, EGALE. In fact, I will conclude that the “larger socio-political context” encompasses a type of analysis that aims at assessing the status of same-sex couples in society, which demonstrates that such concept has not been entirely discarded, notwithstanding a lack of attention by scholars and judges.

3.5 Duty to accommodate differences: a tool for challenging underinclusive legislation?

The term “duty to accommodate” usually denotes the capacity of the legal system to reconcile with differences, adapt and adjust in order to ensure equality of results. The duty to accommodate differences, which implies that the uniform application of an apparently neutral rule may have negative effects on particular groups, had been explicitly recognized in Bhinder, in Andrews, and in Christie, in which unintentional discrimination—caused by an apparently neutral requirement—was at stake. Moreover, in Big M Drug Mart, the Court found that equality could require different treatment of individuals and groups. In Oakes, the Supreme Court had already made clear, in more general terms, that a core component of a democratic society is the fostering of equality and social diversity.

After the 1995 trilogy, other equality cases have been decided, which may help in assessing the concept of equality envisioned by the Supreme Court of Canada. In Eldridge v.
British Columbia\textsuperscript{128} and Vriend v. Alberta\textsuperscript{129}, the Court addressed the specific problem of discrimination by omission of protection. They both are remarkable insofar as they concerned the treatment of individual characteristics. Eldridge regarded the failure of a government agency to use its discretion to implement a specific policy providing interpretation for deaf people in the context of health care services. While the B.C. Court of Appeal had found no duty to accommodate such difference\textsuperscript{130}, the Supreme Court overturned the decision. It refuted the presumption that the personal characteristic itself was the cause for the additional burden on the individual, rather than the statute failing to take into account such personal difference. The same duty to accommodate had been found by the Ontario Court of Appeal in Eaton\textsuperscript{131}, where it was stated that sec.15 incorporates a presumption of inclusion that required a school board to place a student with disabilities in a regular classroom\textsuperscript{132}.

There are several ways in which the duty to accommodate may foster equality for same-sex couples. First, it may be helpful in facing the dominant concept of family, which rests on a traditional and narrow definition. The acknowledgment of the existence of different sexualities may require that all of them find a place within the meaning of family, although the end result may well be equal treatment (formally) and not “special treatment”. Second, the concept of accommodation rests on the premise that those groups that are defined as “other” should not carry the costs of existing disadvantage. As the case regarding interpretation services for people with hearing limitations demonstrates, this “anti-dumping” principle may be applied to same-sex couples wishing to have a status \textit{vis a vis} the legal system. Following this construction, the

\textsuperscript{128} [1997] 3 S.C.R. 624 [hereinafter Eldridge].
principle of accommodation provides an answer to the argument that gays and lesbians may not claim equality in the field of family because they are biologically different from what is to be understood as "family" (i.e. not procreative). Following my understanding of "accommodation", however, this consideration may not impose the burdens of a narrow definition to a particular group, i.e. gays and lesbians. On the contrary, in order to ensure that same-sex families be recognized and gays and lesbians may live ordinary lives (equality of results), the law should recognize that they are in some way different (as deaf people are) but that such a characteristic may not be used in order to justify an omission of protection (or a medical services of a lesser quality).

CHAPTER III. Sexual orientation, same-sex couples and equality in the Charter

1. Introduction

The purpose of this chapter is to examine more closely the legal treatment of same-sex couples’ claims under section 15 of the Charter. I begin by making the point that the source of discrimination on the ground of sexual orientation has often been omission, or silence, as in cases such as Haig or Vriend. In Vriend, the argument has been made that the Alberta human rights legislation created a distinction between homosexuals (unprotected under the law) and other disadvantaged groups (protected under the Act). I will explore which arguments courts have deployed in order to ground findings of discrimination when an omission was present, and I will highlight the important conclusion that if an omission was not subject to the Charter, legislation that simply leaves out a group of people rather than expressly mentioning exclusion could not be scrutinized. Furthermore, I will examine how the analysis of discrimination on the ground of sexual orientation should primarily take into account differential treatment between heterosexuals and homosexuals. Also, I will argue how omission of protection has been censored by focusing on its impact on the affected group, rather than the purpose of it.

Next, I will review cases involving same-sex couples’ equality rights, dividing my analysis chronologically. Before the Supreme Court decided Egan in 1995, courts were more inclined in denying that same-sex partners could be defined as “spouses”. I will discuss the arguments proposed to uphold this narrow view, such as the consideration that same-sex couples had nothing to do with neither family nor with spousal relationships (e.g. Layland). I will
examine the debate around the definition of family in the Mossop case and the types of justifications proposed by the dissenting opinion of L’Heureux-Dubé J. for state recognition of spousal relationships. I will also mention some exceptions to the finding that no discrimination existed, citing the reasons that led courts in Veysey and Knodel to accept the claimants’ arguments, where under-inclusion of legislation appeared crucial. Finally, I will examine the decisions of the Supreme Court of Canada in Egan and in M. v. H., and the way in which previous objections to the expansion of the definition of spouse have been set aside. In Egan, the majority recognized that it was not correct to conclude that same-sex couples were not entitled to the claimed benefit because they were not “spouses” in the meaning defined by the impugned legislation. Discrimination has been found by addressing the question of its existence from the perspective of the claimant.

In conclusion, I will begin discussing the Canadian approach of comparing same-sex couples with opposite-sex unmarried couples. I will argue that this process does not involve the right to choose, because the condition of spouse is automatically attached to cohabitation of a certain length, and might be characterized by fragmentation. Although courts may be reluctant to state it explicitly, as in M. v. H., claims for equal rights depend upon how the idea of “conjugal” is understood. In this respect, court challenges may have had positive practical results but, as I discuss in chapter 4, the methodology is subject to a number of critiques.

2. Roots of exclusion

Before the beginning of the process of recognition of sexual minorities, the legal system did not consider sexual orientation as a classification because, allegedly, the individual was not
identified by his or her sexuality. The sexual dimensions of identity were still unexplored and, for this reason, after criminal laws were repealed, the government could contend that no official discrimination existed toward sexual diversities. Although no linear progression has been shown, it was soon to be realized that such a category well existed even in the juridical space, although it was lacking any legal content. The classification was traced by silence and by omission of taking differences into account. As will be argued, most cases regarding same-sex couples, and certainly those related to marriage rights, descend from the common root that the legal order simply, and implicitly, did not consider the existence of such families, which were confined outside the legal order. This silence has generally been interpreted as a prohibition. When such a connection began to be challenged, the exclusion by omission took more express forms. As it has been pointed out, early challenges to marriage laws had the effect of unmasking the “heterosexual-homosexual dichotomies and hierarchies upon which those laws were implicitly constructed”. The result was that of creating a legal category –same-sex couples– later identified as “an abstraction that actually described no one”. Statutes felt the need to clarify that their scope was limited to couples of persons of the opposite-sex. Same-sex couples continued to be considered as de facto phenomena that did not possess any legal relevance. Their diversity was the cause of what has been referred to as a process of “otherization” that reinforced, in a more express way, the exclusion from the legal order.

133 Lahey, K., Are We Persons Yet?, (Toronto: University of Toronto Press, 1999), 10; refers to the rise of ‘sexual orientation’ as an “unprotected jurisprudential space” deliberately used by Courts to deny claims by otherwise “ordinary folks”.

134 Lahey, K., Are We Persons Yet?, supra, 9.

135 Lahey, K., Are We Persons Yet?, supra, 10.

136 Lahey, K., Are We Persons Yet?, supra, 11.
3. Acknowledging discrimination based on sexuality: Haig and Vriend

A turning point in reversing the pattern of exclusion took place in the field of employment discrimination. In 1989 Mr. Birch, a Captain of the Canadian Armed Forces, in reply to an inquiry of his commanding officer, disclosed his homosexuality. Shortly after such disclosure, he was informed that, pursuant to the application of specific policy, he would no longer be considered eligible for promotions, postings or further military career training. In early 1990 he was released from the Forces on medical grounds. The legal issue concerned his impossibility to seek judicial redress of his employer's decision due to the fact that the ground on which he had been discriminated against (sexual orientation) was not listed as a specific ground of discrimination in the Canadian Human Rights Act.

The cause of action concerned the unconstitutionality, under section 15, of this omission. Before the Ontario Court of Appeal, several points were established which need specific analysis. First of all, it was necessary to establish the content of the legal category named "sexual orientation". Under this point of view, the technical issue was whether sexual orientation could be considered a personal characteristic protected by the Constitution; in other terms, an analogous ground. The Court heard evidence from sociologists and anthropologists and recognized that "homosexual persons in Canada are a historically disadvantaged group". As a matter of factual background, the Court also reasoned that "discrimination against homosexual persons has been recognized as a social problem in Canada from the fact that Human Rights Acts and Codes of six jurisdictions include sexual orientation as a prohibited ground of discrimination". However, it must be said that there was no actual conflict on this issue, because the government conceded, as a question of law, that sexual orientation was a ground

analogous to those listed in section 15 of the Constitution, therefore equally deserving freedom from discrimination.\(^{138}\)

As a second and related aspect, the Court of Appeal considered whether a distinction had been drawn by the impugned legislation. Although the government argued that Parliament did not have a discriminatory objective in enacting the Human Rights Act, the Court found that homosexual persons had not been given equal consideration as other groups listed in the Act. The comparison considered by the Court, thus, entailed all other groups protected by the Act, on one side, and homosexual persons, on the other side. The Court held that “the Canadian Human Rights Act withholds benefits or advantages available to other persons alleging discrimination on the enumerated grounds from persons who are and, on the evidence, have historically been, the object of discrimination on analogous grounds.”\(^{139}\) As it has been pointed out, this approach does not acknowledge the true nature of discrimination suffered by gays and lesbians.\(^{140}\) The problem is that the comparison between grounds of discrimination, rather than comparison within the ground, does not take into account that heterosexuals “face no problems as a result of their sexual orientation, whereas lesbians and gays are likely to encounter significant difficulties related to their sexual orientation.”\(^{141}\) In other words, the focus should be on different treatment of different sexual orientations (as a plural), not between sexual orientation and other grounds. In this latter case, sexual orientation is understood, improperly, as ‘homosexuality’ alone. In fact, “the situation is not that gays and lesbians are denied complete protection, but are denied protection in respect of their sexual orientation.”\(^{142}\)

\(^{138}\) Such concession had already been made in Veysey v. Canada (Commissioner of Correctional Services) (1990), 109 N.R. 300 at 304, and in Knodel v. British Columbia (Medical Services Commission) (1991) B.C.L.R. (2nd) 356 (S.C.). As reported below in the text, the Supreme Court seems to have put a final word in Egan.

\(^{139}\) Haig, supra, at 9.


\(^{141}\) Pothier, D., supra, 286.

\(^{142}\) Pothier, D., supra, 285.
The decision of the Court of Appeal ordered sexual orientation to be read in the Act. Such a remedy appears particularly helpful in situations, such as that of sexual orientation, when discrimination results from an omission\(^{143}\). Furthermore, *Haig* has been seen as a remarkable decision because it consolidates all of the elements needed to take into account the particular kind of discrimination faced by gays and lesbians *vis a vis* the legal system. Lahey pointed out at least three of these elements\(^{144}\). First, the existence of a precedent (*Veysey*) that applied the *Andrews* test on equality to issues involving diversities based on sexuality. Second, the acknowledgement that *Andrews* affirmed section 15’s purpose as protecting historically disadvantaged groups, and that such situation suited the condition of sexual minorities. Third, the consideration that the *Andrews* framework shifted the focus from metaphysical suggestions based on an alleged natural (and immutable) form of family, placing it in the actual experience of discrimination of the claimant.

The same problems that arose in *Haig* were addressed in a later decision of the Supreme Court of Canada, *Vriend v. Alberta*\(^{145}\), that I now turn to analyze because of its similarity with *Haig*, both as far as the nature of discrimination (omission) and the remedy (reading in) are concerned. In *Vriend*, the objective of the impugned human rights Act (IRPA) was precisely that of taking into account such peculiar characteristics that contribute to locate the abstract individual within his or her political, cultural, and religious context. Therefore, an omission would be much more evident than in an Act that was facially neutral. In this section I intend to analyze the competing sets of arguments upon which two opposite decisions were handed down, that of the Court of Appeal and that of the Supreme Court.

\(^{143}\) Lahey, K., *Are We Persons Yet?,* supra, 50.

\(^{144}\) Ibid.

The Alberta Court of Appeal stated that the *Charter* could not force the legislature to introduce law reform dealing with morally controversial matters. In the view of McClung J.A., the statute did not draw any distinction between groups of people, nor did it have adverse effects, which resulted in the imposition of burdens, limitations or disadvantages or the denial of benefits or opportunities. The argument was that the statute was not in itself the cause of discrimination, which existed independently from its provisions. In fact, it was said, discriminatory conduct occurred in society, whereas the statute was, in their regard, neutral. This point was reinforced by O'Leary J.A., following whose line of reasoning discrimination did not exist, because the Act was silent with regard to sexual orientation, therefore drew no distinction. McClung J.A. also held that the role of the *Charter* was not to force legislatures to act, but only to review statutes already enacted. In his view the *Charter* should not apply to the case.

On this issue the Supreme Court took a different view. In fact, Cory J., writing for the majority, held that the impugned legislation had been proclaimed; at issue was the alleged under inclusiveness of the Act. Cory J. did not accept the view that the Act could not be challenged "because the challenge centres on the legislature’s failure to extend the protection of a law to a particular group of people. This position assumes that it is only a positive act rather than an omission which may be scrutinized under the *Charter*". Therefore, he concluded that the *Charter* did apply under section 32, and the merits were to be dealt with under section 15. He interpreted section 32(b) of the *Charter* broadly, making the point that since the *Charter* applies "in respect of all matters within the authority of the legislature", then a positive action was not

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147 Ibid., at 40.
148 Ibid., at 413.
149 Supra, note 145, at 412.
Some scholars had noted that, since the Alberta legislature had already acted on the matter (of human rights protection), and evidence suggested that sexual orientation was intentionally given no protection, this would be sufficient to characterize the choice as some kind of “action”\(^\text{151}\). In conclusion, Cory J. stated that:

“If an omission were not subject to the Charter, under inclusive legislation which was worded in such a way as to simply omit one class rather than to explicitly exclude it, would be immune from Charter challenge. If this position was accepted, the form, rather than the substance, of the legislation would determine whether it was open to challenge. This result would be illogical”\(^\text{152}\).

Once it found that the Charter applied, the Court moved on to the analysis of section 15. The case involved specific issues. As it had been noted, “the prospect of using the Charter to challenge a failure to act raises the point (...) of whether the Charter gives rise to positive obligations on governments to act”\(^\text{153}\). As Robert Wintemute has pointed out, albeit with regard to a different case, it becomes crucial to acknowledge that what may seem to be a positive obligation of the State, such as the concession of particular benefits, should be seen, instead, as a negative obligation, that of not discriminating\(^\text{154}\). Following such a view, it appears that a State may not be obliged to confer any benefit, but when it does so, it should avoid discrimination. In Vriend, The Supreme Court held that, in some circumstances, the State might be obliged to remove the obstacles that hinder liberty and dignity of every human being. Cory J. quoted Sopinka J.’s statements in Eaton:

\(^{150}\) Ibid., at 414.

\(^{151}\) Pothier, D., The Sounds of Silence: Charter Application when the Legislature Declines to Speak (1996) 7:4 Const. Forum 116 makes the distinction between “complete and selective silence”; whereas Black, W., Vriend, Rights and Democracy (1996) 7:4 Const. Forum 130 points out that it would make sense to speak of inaction only if the IRPA “had never been enacted”.

\(^{152}\) Ibid., at 414.

\(^{153}\) Pothier, D., The Sounds of Silence: Charter Application when the Legislature Declines to Speak, supra, 117.
...the purpose of section 15(1) of the Charter is not only to prevent discrimination (...) but also to ameliorate the position of groups within Canadian society who have suffered disadvantage by exclusion from mainstream society.

The principal object of certain of the prohibited grounds is the elimination of discrimination by the attribution of untrue characteristics based on stereotypical attitudes relating to immutable conditions such as race or sex...The other equally important objective seeks to take into account the true characteristics of this group which act as headwinds to the enjoyment of society’s benefits and to accommodate them.\textsuperscript{155}

In this context, it was necessary to assess whether the IRPA drew a distinction \textit{prima facie} discriminatory. On this issue the government of Alberta presented three arguments. First, it argued that the IRPA was silent with regard to sexual orientation. Being neutral, it could not make any distinction. Second, it argued that both homosexuals and heterosexuals could claim the protection of the IRPA on the grounds contained within it. Third, it claimed that if any distinction on the basis of sexual orientation was present, it was so because of conduct existent in society, not because of the impugned statute.

The Supreme Court rebutted all three of these arguments. First, it held that a distinction made by law ought not to be express. As had been written, “it is irrelevant that the IRPA sets out a limited list of grounds rather than saying: “No employer shall discriminate on the basis of personal characteristics other than sexual orientation”\textsuperscript{156}. The principle applied is that

\textsuperscript{156} Black, W., \textit{Friend}, Rights and Democracy, \textit{supra}, 130.
discrimination can arise from under inclusive legislation. Relevant authority was found in *Knodel v. British Columbia*\(^{157}\) and *Brooks v. Canada Safeway Ltd.*\(^{158}\).

With regard to the second point—the fact that both heterosexuals and homosexuals may enjoy protection from discrimination on the basis of the listed grounds—the Court held that a distinction existed, and took two shapes. A first distinction was drawn between homosexuals (unprotected under the law) and other disadvantaged groups (protected under the Act), and amounted to a denial of formal equality. A second type was drawn between heterosexuals and homosexuals, because the exclusion of sexual orientation had a disproportionate impact on the latter. This amounted to a lack of substantive equality. The principle found by the S.C.C. was that section 15 protects against adverse effect discrimination, as held in *Eldridge*\(^{159}\) and *Andrews*\(^{160}\). Several authors had also discussed the argument of the Court of Appeal. Pothier concluded that

> "the formal equality, of offering no protection to anyone as regards sexual orientation, becomes the substantive inequality of making only gays and lesbians vulnerable to state-condoned sexual orientation discrimination"\(^{161}\).

Black added, "the fact that some members of the group may coincidentally receive other statutory protection that has nothing to do with the excluded ground does not correct the error"\(^{162}\).


\(^{159}\) Supra, at paras. 60-61.

\(^{160}\) Supra, at 164.


\(^{162}\) Supra, 130.
The third issue referred to by the Court of Appeal was that discrimination, if any, existed in society, independently from the impugned statute. On this aspect, Cory J. made the argument that:

"It is not necessary to find that the legislation creates the discrimination existing in society in order to determine that it creates a potentially discriminatory distinction"\(^{163}\).

The S.C.C. stated that the government's reasoning closely resembled the logic of Bliss, whose conclusions had been forcefully rejected in Brooks:

"There it was held that a longer qualifying period for unemployment benefits relating to pregnancy was not discriminatory because it applied to all pregnant individuals, and that if this category happened only to include women, that was a distinction created by nature, not by law"\(^{164}\).

Moreover, on the same issue, Cory J. concluded that:

"Eldridge also emphatically rejected an argument that under inclusive legislation did not discriminate because the inequality existed independently of the benefit provided by the state"\(^{165}\).

In my view, these findings may be seen as the adoption of a clear principle, following which the costs of diversities cannot be put entirely on the persons affected. In Eldridge the problem referred to the fact that "while in form it is a failure to act, the substantive result is

\(^{163}\) Vriend, supra, at 422.
\(^{164}\) Ibid., at 423.
\(^{165}\) Ibid.
health care with a disparately inferior quality for the deaf\textsuperscript{166}. These conclusions reinforce the view that a lack of consideration for diversities may be not only unjust, but often also discriminatory and, therefore, unconstitutional. This is the conclusion that the Supreme Court of Canada reached in \textit{Vriend}. The importance of this finding rests, \textit{inter alia}, on the consideration that the Court was willing to afford to the impact the omission had on the affected group, rather than the purpose of it. Relevant precedents had clarified that even unintentional discrimination may violate the \textit{Charter}\textsuperscript{167}. The Court highlighted two discriminatory effects suffered by the excluded group. The first refers to a concrete, technical lack of protection, since members of the excluded group do not have access to the guarantee of judicial review with respect to discriminatory conduct of private parties against them. The second effect refers to a subtler paradigm that rests on the symbolic value of the law. Relying on \textit{Haig}, Cory J. stated that "the absence of any legal recourse for discrimination on the ground of sexual orientation perpetuates and even encourages that kind of discrimination"\textsuperscript{168}. Some, as the Alberta government, could be tempted to argue that it is not the role of the law to change attitudes by way of legislative commands. However, this argument conflicts openly with the very existence of anti-discriminatory legislation. In fact, "it cannot be claimed that human rights legislation will help to protect individuals from discrimination, and at the same time contend that an exclusion from the legislation will have no effect"\textsuperscript{169}. Overall, this argument seems to support the view that if, in the context of human rights legislation, a minority group that had been recognized as analogous due to the historical pattern of discrimination and disadvantage was left without protection, such discrimination would be somehow tolerated. With regard to this aspect, Cory J. stated:

\textsuperscript{166} Pothier, D., \textit{supra}, 117.
\textsuperscript{168} \textit{Vriend, supra}, at 427.
“The exclusion sends a message to all Albertans that it is permissible, and perhaps even acceptable, to discriminate against individuals on the basis of their sexual orientation. The effect of that message on gays and lesbians is one whose significance cannot be underestimated. As a practical matter, it tells them that they have no protection from discrimination on the basis of their sexual orientation. Deprived of any legal redress they must accept and live in constant fear of discrimination. These are burdens which are not imposed on heterosexuals.

Perhaps most important is the psychological harm which may ensue from this state of affairs. Fear of discrimination will logically lead to concealment of true identity and this must be harmful to personal confidence and self-esteem. Compounding that effect is the implicit message conveyed by the exclusion, that gays and lesbians, unlike other individuals, are not worthy of protection. This is clearly an example of a distinction which demeans the individual and strengthens and perpetuates the view that gays and lesbians are less worthy of protection as individuals in Canada’s society. The potential harm to the dignity and perceived worth of gay and lesbian individuals constitutes a particularly cruel form of discrimination”170.

In conclusion, Vriend was able to establish that the failure to take into account sexual orientation as a prohibited ground of discrimination did make a distinction and that that distinction was discriminatory. With regard to section 1 analysis, the question that needed to be addressed was whether—in order to find a “pressing and substantial purpose” that could save the statute—the Court should have considered the purpose of the Act as a whole or only of the impugned limitation on the Charter right (the omission). Iacobucci J. concluded that, while the protection of human rights (the purpose of the Act) was certainly a substantial one, the same could not be said for the objective of the omission.

169 Ibid., at 427.
170 Ibid., at 428.
Some authors have argued that the *Vriend* and *Haig* cases may only be considered as partial advancements in eradicating inequalities that permeate the lives of gays and lesbians. These conclusions are drawn upon research that analyzes the scope of the legislation affected by changes, through which it emerges that human rights legislation is not concerned with the legal status of gays and lesbians *vis a vis* the state\(^\text{171}\). Human rights codes are only designed for regulating the conduct of private actors in certain areas of bargaining. Other scholars have pointed out how discrimination caused by under inclusive legislation is likely to be very frequent in issues regarding sexual orientation, but very seldom had cases been framed that way\(^\text{172}\). In my opinion, potentially every case regarding the definition of family is intrinsically under inclusive\(^\text{173}\). The argument could be made whether it be possible to infer that the logic applied in *Vriend* by the Supreme Court would be extended to issues related to the recognition of families.

4. *Family, spouses, and marriage before the Supreme Court of Canada in Egan*

In this section I intend to present a selection of arguments made by claimants in various court challenges, review objections found by courts, and assess how the equality analysis adopted by Canadian courts before the Supreme Court in *Egan*, which I see as a major turning point, did or did not assist in supporting claims of same-sex couples. I will argue that claims made by same-sex couples were aimed at expanding the definition of “spouse” in order to gain a benefit associated with that position. This framing of constitutional litigation in a case-by-case

\(^{171}\) Lahey, *supra*, 336.

\(^{172}\) Pothier, *supra*, 114.

approach has not been able to address comprehensively the lack of full legal personality of gays and lesbians. It only took partial and fragmented views related to the single benefit to be claimed, assumed as the final goal. It has not been able to frame a more general discourse geared around the need for the recognition of a status, rather than a series of benefits. This point will be discussed more thoroughly in the next chapter, where I will look deeper into the function of the concept of status and present some conclusions.

As it has been pointed out, during the 90’s most gay and lesbian movements abandoned some of the radical demands they had brought forward until then, and engaged in a discourse on equality rights, especially geared around relationship recognition. Nowadays, some have suggested that the state should not only tolerate or condone the lives of gays and lesbians, but also celebrate their culture and values. But what was the rights discourse like at its early stage? In 1990, Bruce Ryder wrote an article in which he emphasized the position of subordination suffered by gays and lesbians vis a vis the legal system. His article, while criticizing the “heterosexual presumption” entailed in many pieces of legislation, took into account the relatively new process of enacting anti-discrimination legislation protecting gays and lesbians. He emphasized that the legislatures were showing great concern that protection against discrimination would result in a condonation or promotion of homosexual lifestyle. On this issue, Ryder pointed out that “including a personal characteristic as an enumerated ground in human rights legislation represents a judgment that that characteristic is presumptively unrelated to a person’s merits and capacities”, thus that concern is perfectly justifiable. However, others have remarked that the same human rights codes continued to discriminate formally against gays

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177 Ryder, B., Equality Rights and Sexual Orientation: Confronting Heterosexual Family Privilege, supra, 72.
and lesbians by defining family as a unit composed by partners of the opposite sex, thus limiting the scope of anti-discrimination clauses to individual rights\textsuperscript{178}. Therefore, litigation has been aimed at removing from the laws what was perceived as a “heterosexual privilege” that hindered the possibility of expression of one’s own personality outside a mere private sphere. As it has been pointed out, court cases have attempted to confront what can be considered as a single argument against recognition of same-sex relationships, that takes shape in “definition and tradition, religion and morality, and children and sex”\textsuperscript{179}.

4.1 Differences by nature, not by law

The dismantling of this “heterosexual family privilege” was based on the argument that exclusion of gays and lesbians took place as a result of institutionalized heterosexism, which “promotes the idea that there is only one legitimate sexual identity, only one legitimate family form, and thus ensures that all those people living outside these legally and ideologically created norms are constructed as deviant”\textsuperscript{180}. The idea of sexual diversity existing within family units did not penetrate easily in the legal reasoning. In Andrews v. Ontario (Minister of Health), McRae J., in comparing heterosexual couples and a lesbian couple, adopted a concept of formal equality by concluding that “homosexual couples are not similarly situated to heterosexual couples”\textsuperscript{181}. The differentiating factor was identified in the role that heterosexual couples play for procreation and the raising of children. According to such views, the refusal to recognize

\textsuperscript{178} Lahey, K., \textit{Are we persons yet?}, \textit{supra}, 15-16. Ryder, \textit{supra}, 65, also acknowledged the inconsistency between new legislation prohibiting discrimination based on sexual orientation and the Charter on one side, and several other statutes, still permeated by ‘heterosexual privilege’.
\textsuperscript{179} MacDougall, B., The Celebration of Same-Sex Marriage, \textit{supra}, 224.
\textsuperscript{180} Ryder, B., Equality Rights and Sexual Orientation: Confronting Heterosexual Family Privilege, \textit{supra}, 47.
\textsuperscript{181} (1988) 64 O.R. (2\textsuperscript{nd}) 258 (Ont. H. Ct.) at 263.
same-sex couples derives from their biological impossibility to procreate, rather than from intentional exclusion. On the contrary, virtually every author has repeatedly held that capacity to procreate has never been a legal requisite for the validity of marriage. As recently recognized in the U.S. case of Baker v. Vermont\textsuperscript{182}, if the purpose of excluding gays and lesbians from marriage is to protect the connection between the legal institution and procreation, then the rule is both over-inclusive (because it encompasses opposite-sex couples with no children) and under-inclusive (because it excludes same-sex couples with children)\textsuperscript{183}.

The same line of reasoning, based on objections such as tradition and procreation, was also upheld by the Ontario Divisional Court in Layland v. Ontario (Minister of Consumer and Commercial Relations)\textsuperscript{184}, a case regarding judicial review on the refusal of the City of Ottawa to award a marriage license to a couple composed of two men. In the case, the Court was first asked to state whether, in the absence of any legislative definition, the common law of Canada prohibited marriage by persons of the same-sex. Second, it was asked to state whether, were a prohibition to be found, it would infringe section 15 of the Charter because discriminatory on the ground of sexual orientation. As far as the first claim is concerned Southey J., for the majority, cited several pre-Charter precedents that defined marriage as the voluntary union for life of one man and one woman, to the exclusion of all others\textsuperscript{185}. He then concluded that persons of the same sex do not have the capacity to marry one another. As far as the constitutional challenge to this prohibition is concerned, the majority applied Andrews and Turpin in a very suspicious way.

\textsuperscript{183} In a slightly different context (the comparison between unmarried opposite-sex and same-sex partners) Cory J. stated in M. v. H., [1999] 171 D.L.R. (4th) 577 (S.C.C.), at para 54, that legislation allowing former unmarried partners to claim "relief form financial hardship resulting from the breakdown" (para 53) is unrelated to child-rearing.
\textsuperscript{184} (1993) 14 O.R. (3rd) 658 (Div. Ct.).
\textsuperscript{185} Hyde v. Hyde and Woodmansee (1866), L.R. 1 P. & D. 130 at 133.
First, in a very worrying *obiter*, Southey J. claimed to be bound by *Turpin* in examining not only the impugned legislation, but also the socio-political context in which the law operates, and concluded that since same-sex marriage is not accepted by society, no discrimination could be found\(^{186}\). In other words, he would state that since society accepts, perpetrates, or promotes that kind of discrimination, the broad inquiry mandated by *Turpin* under section 15 would allow no remedy for it. This conclusion reaffirms the variety of way in which this extrajuridical element can be understood in the framework of section 15 analysis, as previously discussed. Second, the majority found that, being one of the central purposes of marriage that of having children, the distinction based on homosexuality was not irrelevant to that purpose. As 'natural' as this conclusion might seem, it ultimately has the effect of placing the cost of any distinction entirely on the victim. As stated by Southey J.

The law does not prohibit marriage by homosexuals provided it takes place between persons of the opposite sex. Some homosexuals do marry. The fact that many homosexuals do not choose to marry, because they do not want unions with persons of the opposite sex, is the result of their own preference, not a requirement of the law\(^{187}\).

Later Supreme Court of Canada equality jurisprudence, as seen above, has rejected this approach. As I pointed out in the previous chapter, the Canadian concept of equality entails the idea that the cost of diversities cannot be placed (at least not entirely) on the person deemed to be defined by a personal characteristic\(^{188}\). Various authors have often made a significant comparison with pregnancy discrimination: In *Bliss*, a pre-Charter case, the Supreme Court ultimately justified discrimination against pregnant women by finding that “inequality between

\(^{186}\) Layland, *supra*, at 664.
\(^{188}\) These conclusions were reached in *Eldridge* and *Eaton*. 59
the sexes in this area is not created by legislation but by nature". However, as recognized later in *Brooks*, "it is difficult to conceive that distinctions or discrimination based upon pregnancy could ever be regarded as other than discrimination based upon sex". Bruce Ryder has effectively explained the concept:

"As pregnancy is to sex discrimination, the lack of connection between procreation and sexuality is to sexual orientation discrimination. From a male, heterosexual perspective, both are biological differences that have been used to rationalize and justify disadvantage."

As far as the discourse on equality is concerned, it appears clear that such a situation of exclusion could be legally justified as long as same-sex couples would be considered different from opposite-sex couples, thus could not be treated equally. The formal concept of equality underlies this argument. Greer J., dissenting, addressed also a more methodological question, concerning the relationship between marriage and expansion of the definition of "spouse". Citing various precedents such as *Knodel, Haig, and Leshner*, Greer held that:

"A case-by-case analysis seems to indicate that the courts, in expanding rights and equalities by applying the *Charter* to read out words of legislation which offend the rights of gays and lesbians as protected by the *Charter*, are providing them piece by piece with benefits which would all be granted to them under the umbrella of "marriage", if marriage certificates were issued to them."

This approach, concerned with different techniques of recognition, does not take into account the differences existing in the two models. *Layland* was not concerned with the claim for any particular benefit, but with the denial of a status. This second approach shifts the focus

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from the single position of advantage that may (occasionally) be attached to the status of “spouse”, to the opening up of marriage, viewed in itself as a right and a fundamental freedom (capacity to marry and freedom of choice).

4.2 Relationship between sexual orientation discrimination and family status discrimination

This distinction between cases that brought a constitutional challenge against the definition of “spouse”, and cases that challenged directly the exclusion from marriage, conceptually merge into the need to provide a redefinition of the meaning of “family”. While challenges of the first type have largely succeeded, those of the second are still under way. In the past years, legislation that has recognized families outside marriage defined such categories as “spouse” in a broader way by including unmarried cohabiting couples. However, at that earlier stage, same-sex couples continued to be excluded, expressly or implicitly, from any definition of family, regardless whether it was based on marriage or not. Cases that challenged the definition of spouse as discriminatory under section 15, while still concerned with the meaning of family, had as direct comparison the situation of unmarried opposite-sex couples. The view of those, such as the Federal Court of Appeal in *Egan*\(^{193}\), who assumed that the true challenge of the claimants were in relation to marriage is, thus, incorrect. I will now turn to analyze how the definition of “spouse” as concerning opposite-sex couples only has been challenged.

In *Egan*, the challenger to the definition of “spouse” contained in the impugned pension legislation argued that it discriminated on the basis of sexual orientation. Discrimination on the

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\(^{192}\) *Layland, supra*, at 678.
basis of “sex” was not claimed, although Robert Wintemute has made clear that virtually every case regarding same-sex couples may be viewed as a sex discrimination case\textsuperscript{194}. The Court of Appeal responded to such sexual orientation discrimination claim in a circular manner, holding that the denial of benefits to same-sex couples was not discriminatory, but rather a legitimate distinction. The objects of the law were only conjugal relationships, whereas same-sex couples were not. The distinction was not based on sexual orientation, but on the lack of the required “status”: legislation did not exclude gays and lesbians, it only excluded those who were not spouses, thus justifying the exclusion from the benefit (descending from the definition of spouse) on the basis of non-spousal status\textsuperscript{195}. The underlying assumption, motivated in the above-mentioned terms, was simply that gays and lesbians did not constitute families.

The argument made by the claimant was framed on the basis of sameness. According to comments, “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”\textsuperscript{196}. Relying on \textit{Andrews}, the majority of the Court of Appeal found that the similarly situated test had been rejected, thus no comparison could be made between the claimant and those who enjoyed the benefit. The Court also held that, while \textit{Andrews} defined discrimination in terms of a distinction based on an irrelevant personal characteristic, the difference in the treatment of Mr.Egan (or of his partner) was relevant to the legislative purpose. With regard to this aspect, Robert Wintemute effectively pointed out that the Court misinterpreted \textit{Andrews}, because the relevant characteristic in \textit{Egan} was not “sexual

\textsuperscript{196} Wintemute, R., \textit{supra}, 443.
orientation” but “being a couple”, and sexual orientation is irrelevant for the purpose of establishing whether the benefit is awarded to a couple. He wrote:

“It is this criterion [being in a spousal or couple relationship] 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 (...) is ‘being a same-sex couple’”\(^{197}\).

In other words, claiming a discrimination on the basis of “family status”—a ground that prohibits discrimination between people who have the status of couple and people who don’t—entails the concession that same-sex couples are not a couple, but instead a different type of unit that claims to be treated equally to couples. He pointed out, however, that relationships between people of the same sex do form a couple, indeed, and should claim equal rights on the basis of the fact that they are treated differently than heterosexual couples, thus on the basis of their sexual orientation, not of family status. In conclusion, he made clear that if the benefit is denied to same-sex couples, the ground of discrimination is sexual orientation.

The Supreme Court of Canada had reached this conclusion in *Mossop*\(^{198}\). In this case, that I now turn to analyze, the claimant did not challenge the constitutionality of s.3 of the *Canadian Human Rights Act*\(^{199}\) on the basis of the absence of sexual orientation from the list of prohibited grounds of discrimination, as it could have done since the decision in *Haig* had just been handed down. The claim concerned only the statutory interpretation of the meaning of “family status” as contained in the Act.

\(^{197}\) Wintemute, R., *supra*, 444.


Nevertheless, the *Mossop* case provides a remarkable insight into the debate about ‘what is family’ and the nature of discrimination suffered by same-sex couples. A collective agreement provided for up to four days leave upon the death of a member of an employee’s immediate family. The members of an employee’s “immediate family” specified in the agreement included relatives of a common law spouse of the opposite sex. On these grounds, an employee in a long term relationship with a partner of the same sex was denied paid leave -under the bereavement clause of the collective agreement regulating his position- to attend the funeral of his partner’s father. Mr. Mossop filed a complaint to the Canadian Human Rights Commission, responsible for the administration of the *Canadian Human Rights Act*, alleging that the collective agreement had discriminated against him on the ground of “family status”, and that such conduct was contrary to ss. 7(b), 9(1)(c) and 10(b) of the Act. The Commission found in favor of the claimant. That decision was appealed to the Federal Court of Appeal, which set aside the decision. Mr. Mossop then appealed to the Supreme Court of Canada asserting that the term “family status” should be interpreted as encompassing same-sex couples as well as opposite-sex cohabiting couples. In light of the lack of a constitutional challenge, the Court did not assess the constitutionality of the statute, but only reasoned on the basis of ordinary rules of statutory interpretation.

The majority in *Mossop* relied on parliamentary intent and held that “absent a *Charter* challenge of its constitutionality, when Parliamentary intent is clear, courts and administrative tribunals are not empowered to do anything else but to apply the law”\(^{200}\). Given that Parliament did not intend to afford legal protection to gays and lesbians, Lamer C.J.C. reiterated that the word family must be given the “usual and ordinary sense having regard to [its] content and to the

\(^{200}\) *Mossop, supra* at 673 (per Lamer C.J.C.).
purpose of the statute"\textsuperscript{201}. He concluded that same-sex couples had not reached the status of "family". L'Heureux-Dube' J., dissenting, engaged in a more detailed discussion regarding the definition of family. Attention was given to literature that emphasized the multiplicity of definitions and approaches to the family, to the sociological data that evidenced a wide variety of living arrangements in Canadian society, and to recent legislative reforms that revealed how laws changed to reflect the realities of families. L'Heureux-Dube' J. felt the need to investigate which were the values that justified society’s support of the family. She identified as core value that of "social stability"\textsuperscript{202}; in this respect she noted, on the one hand, that "while many see marriage as an indicator of stability, it appears from the current rate of marriage breakdown that heterosexual union is not an absolute guarantee of stability"\textsuperscript{203}. On the other hand, she also stressed that "it is to be bound by myth to assume that only heterosexual couples are capable of forming loving, caring, stable relationships"\textsuperscript{204}. On the same issue, she subscribed to the view that stable same-sex couples may be valuable to society at large. She then concluded that the definition of family may be understood in broader terms: since Mossop and his partner lived in a "familial relationship", but their family was treated differently from other family relationships, the employer discriminated on the basis of family status. In reaching this result she made use of a ‘functional approach’ in defining family status: Mossop’s relationship has been considered a family because it satisfied a number of functions relevant in what may be deemed to be a family relationship, such as stability, joint residence, economic union, shared housework, emotional and sexual relationships.

In conclusion, the majority of the S. C. C. held that denial of a benefit to a gay couple was not discrimination based on family status, but on sexual orientation. This result, in my view,

\textsuperscript{201} Mossop, supra at 675.
\textsuperscript{202} Mossop, supra at 708 (per L’Heureux-Dube’).
\textsuperscript{203} Mossop, supra at 709.
is at odds with the conclusions of the Court of Appeal in *Egan*, mentioned above, where it was held that exclusion is not based on sexual orientation but on the non-spousal nature of same-sex couples. While this result may be the effect of a different nature of the two cases (*Mossop* was not a constitutional challenge and did not involve an issue of equality, but of statutory interpretation), both of them gave a restrictive definition of “family” while relying on two opposite arguments. Robert Wintemute made the point that the distinction relevant in *Mossop* was not based on family status.205 He made the argument that the question should not be whether or not same-sex couples constitute ‘families’ but whether, whatever definition is adopted in a particular context, the definition may discriminate directly or indirectly on the basis of sexual orientation.

4.3 Expansion in the definition of “spouse” for specific purposes: *Veysey* and *Knodel*

During the years preceding the decision of the Supreme Court of Canada in *Egan* other cases, reflecting the minority opinion during that era, had recognized that the term spouse should encompass same-sex partners as well. In *Veysey*,206 a prison inmate was denied access to the institution’s Visiting Program, which allowed visits of family members to inmates, on the ground that his partner of the same sex could not be considered a member of the family. Family was defined as encompassing wife, husband, common law partners, children, parents, foster-parents brothers, sisters, grandparents and, in special cases, in-laws. The inmate filed an

204 *Mossop*, supra at 709.
205 Wintemute, R., Sexual Orientation Discrimination as Sex Discrimination: Same-Sex Couples and the Charter in *Mossop, Egan* and *Layland*, supra, 441: “the discrimination in *Mossop* was among family relationship of the same kind (couple relationships) according to the sexual orientation of those relationships”.
application for judicial review to the Federal Court, arguing that he had been denied a benefit on the ground of his sexual orientation, which constituted discrimination contrary to section 15 of the Charter. The respondent argued, instead, that there was no common law applicable to relationship of cohabitation between persons of the same-sex: Mr. Veysey could not be visited by his partner not because the latter was of the same-sex, but because he was not his spouse. This point resembles closely the circular argument upheld by the Federal Court of Appeal in Egan. However, in Veysey the trial judge declared the exclusion contrary to section 15 of the Charter, thus discriminatory. The result was reached on the basis of the same principle that, in Layland207, led the majority to the conclusion that same-sex marriage could not take place: the principle laid out in R. v. Turpin, that “in determining whether there is discrimination on grounds relating to the personal characteristics of the individual or group”208 the social, political and legal context must be considered. The broad inquiry evidenced that sexual orientation had been added to human rights codes of several provinces. In determining whether sexual orientation was an analogous ground, the judge considered also characteristics such as immutability209, and a history of victimization and stigmatization caused by prejudice. However, the issue was considerably narrowed down by the Court of Appeal, which did not consider a violation of the Charter, but only interpreted the regulation of the institution as making no prohibition with regard to same-sex partners be allowed in the program (not even under the label “common law partners”, but under that of “affinity”). The broader interpretation was justified only by the

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207 Supra, at 664.
209 In discussing immutability, the trial judge held that “Most of the grounds enumerated in s.15 of the Charter as prohibited grounds of discrimination connote the attribute of immutability, such as race, national or ethnic origin, colour, age. One’s religion may be changed but with some difficulty; sex and mental or physical disability, with even greater difficulty. Presumably, sexual orientation would fit within one of these levels of immutability”. Supra, note 131, at 78.
“special and unusual” nature of the expressions used in a poorly drafted document and by the restrictive context in which the definition took place\textsuperscript{210}.

If the term spouse contained in a statute cannot be interpreted as applying to same-sex couples as well, such definition must be reviewed in light of the values and principles expressed by the \textit{Charter}. As stated by the BC Supreme Court in \textit{Knodel}, “the focus of the inquiry must be on whether this exclusion violates s.15(1) of the \textit{Charter} on the grounds of discrimination based on sexual orientation”\textsuperscript{211}. In that case, the partner of a hospital employee could not benefit from the medical services plan coverage that was available for (heterosexual) dependent spouses. The definition of spouse given by the impugned regulations read as follows: “spouse includes a man or woman who, not being married to each other, live together as man and wife”\textsuperscript{212}. The Court took the view that, while the term spouse had always been interpreted to refer to legally married couples, the phrase “living together as man and wife” could be deemed to be ambiguous. The narrow definition adopted by all relevant precedents should be subject to a review of its constitutionality.

The Court considered crucial the under inclusion of the impugned regulations. The respondent argued that the purpose of the insurance plan was not discriminatory, but “merely under inclusive of the potential risks it could conceivably insure”\textsuperscript{213}. Relying on precedents such as \textit{Brooks v. Canada Safeway Ltd.}\textsuperscript{214} and \textit{Brown v. British Columbia (Minister of Health)}\textsuperscript{215}, the Court held that the \textit{Charter}’s equality provisions do not require the state to wave value judgments on degrees of importance of subject-matters that need legislative action. However, it

\textsuperscript{210} \textit{Veysey} (Fed. C.A.), \textit{supra}, at 303: the Court concluded that “we do not, in this case, have to decide whether or not common law partners of the same sex are common law spouses and we refrain from expressing any view on that issue”.
\textsuperscript{211} \textit{Knodel v. British Columbia (Medical Services Commission)}, (1991) 58 B.C.L.R. (2nd) 356 at 381 (per Rowles J.).
\textsuperscript{212} Section 2.01 of the \textit{Medical Service Act Regulations}, B.C. Reg. 144/68, made pursuant to the provisions of the \textit{Medical Service Act}, R.S.B.C. 1979, c. 255.
\textsuperscript{213} \textit{Knodel, supra}, at 384.
\textsuperscript{214} [1989] 1 S.C.R. 1219.
also held that when the government makes a distinction on the basis of grounds enumerated in section 15 or analogous, the burden imposed on such groups might be constitutionally impermissible. Moreover, as clearly stated in Brooks, discrimination may be found even if the statute carried no intent to discriminate\textsuperscript{216}. In Knodel, the court applied section 15 in a way consistent with Supreme Court jurisprudence on equality, as seen in the previous section. By holding that “the purpose of s. 15(1) is to ensure that individuals falling within its ambit may participate fully in society”, it also concluded that “when the government takes on an obligation and provides a benefit, s.15(1) makes denial of that benefit to other groups questionable”\textsuperscript{217}. Impugned regulations were found to be in violation of section 15 of the Charter.

5. The Supreme Court of Canada’s definition of “spouse” in Egan

Notwithstanding several favourable decisions, the circular reasoning adopted by courts throughout the early nineties appears to be set aside only by the Supreme Court of Canada in Egan, in 1995. However, the Court split sharply on this issue. La Forest J. (Lamer, Gonthier and Major JJ. concurring) upheld the line of reasoning adopted by the Court of Appeal. The main concern was that of defining sharp categories between couples that might be considered important to society, because they have the capacity to procreate and raise children, and other units that do not have the same importance, therefore are irrelevant \textit{vis a vis} the legal system. La Forest argued that only married couples fall within the former category; he also noted that,

\textsuperscript{215} (1990) 42 B.C.L.R.(2\textsuperscript{nd}) 294 (S.C.).
\textsuperscript{216} Brooks, supra, at 1239.
\textsuperscript{217} Knodel, supra, at 387.
occasionally, opposite-sex cohabitants may be deemed to have the same social importance as married couples, and may thus fall into the same category. Same-sex couples, on the contrary, do not have the capacity to procreate, therefore fall into a category that is not related to the “underlying functional values” of the law. The characteristic of the excluded group is relevant to the promotion of those values, therefore the distinction traced by law is not arbitrary\textsuperscript{218}. This conclusion was reached in the framework of an analysis based on the “larger context”: this fact, as in \textit{Layland}, once again highlights the indeterminacy of such an element.

It is important to emphasize that this case was not a case of adverse effect discrimination, but one of direct discrimination. The approach taken by La Forest J. to this problem involves a three-step analysis in light of section 15. As noted in the previous chapter, this approach constitutes a modification of the test laid out in \textit{Andrews}. According to La Forest J.’s words, the most controversial point was “whether the distinction made is relevant”\textsuperscript{219}. In my opinion, it is clear that assessing the relevancy of the distinction with regard to the functional values of the impugned legislation in the context of section 15 analysis entails an assessment of the legal status of same-sex couples with regard to the public relevance that “spouses” should have. In fact, the reasoning proposed traces two categories. One is formed by couples that are relevant for the promotion of those functional values; the other by couples that, being differently situated because of their lack of capacity to procreate, are not relevant for the promotion of those values. Clearly, the test on relevancy permitted La Forest J. to conclude for the uniqueness of heterosexual marriage, on the basis that only heterosexual couples can procreate and care for children. Therefore, the state could legitimately give “special support” to the institution of marriage. This was the underlying value of the impugned law. All of those social units that are considered different from a procreative relation do not fall within the ambit of that law and

cannot claim that their exclusion is discriminatory, because they do not possess that public relevance that only justifies public recognition. I would argue that the same reasons, although articulated without the same degree of fineness, support the decision of the British Columbia Supreme Court in *EGALE*, discussed in the next chapter.

Cory J. (Iacobucci, McLachlin, Sopinka, and L’Herureux-Dube’ JJ. concurring) looked at this issue by adopting different reasoning. The majority agreed that the distinction drawn by s.2 of the *Old Age Security Act* constituted discrimination contrary to section 15 of the *Charter*. On the point at stake, the expansion of the definition of “spouse” (and, ultimately, the recognition of diverse family models in society), Cory J. held that:

“To say that the distinction is between “spouses” and “non-spouses” is to avoid the very issue which is presented by the legislation in this case, namely the definition of a “spouse” (...) The appellants are not challenging the parliamentary decision to confer benefits on spousal as opposed to non-spousal households. What is in dispute is whether, having decided to confer a benefit on common law spouses, the legislation may then employ a definition of “spouse” which discriminates on the basis of sexual orientation”\(^{220}\).

Sexual orientation is the personal characteristic upon which the differential treatment is based, because “only homosexual individuals will form a part of a same-sex common law couples. It is the sexual orientation of the individuals involved which leads to the formation of the homosexual couple. To find otherwise would be as wrong as saying that being pregnant had nothing to do with being female”\(^{221}\). Therefore, Cory J. found it necessary to assess whether sexual orientation was a ground protected by section 15. As mentioned in previous sections,

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\(^{219}\) *Egan, supra*, at 622.

\(^{220}\) *Supra*, at 671.

\(^{221}\) *Supra*, at 672.
lower courts had already reached that conclusion. Cory J. found "significant" the fact that such a result had been reached "in the context both of discrimination against homosexual individuals and of discrimination against homosexual couples"\textsuperscript{222}. The majority of the Court declared in \textit{Egan} that sexual orientation is indeed a ground analogous to those listed in section 15, putting Canada's highest court's \textit{imprimatur} on an issue of primary importance for the acknowledgment of discrimination. The reasons given by Cory J. for this important finding rely entirely on the history of "social, political, and economic disadvantage" suffered by gays and lesbians. Furthermore, the rest of the Court also accepted that sexual orientation should be regarded as an analogous ground, but relied entirely on the argument that such characteristic is "either unchangeable or changeable only at unacceptable personal costs"\textsuperscript{223}. On this issue, it may be recognized that a unanimous court has said the final word.

By stating that a definition of "spouse" limited only to opposite-sex couples is discriminatory, because contrary to section 15 of the \textit{Charter}, the majority of the Court recognized that pejorative treatment based on sexual orientation of individuals is not constitutionally permissible. In addition, and most importantly, it also acknowledged that there may exist a variety of family models, not all based on difference in gender between parties. In allowing a broader definition of "spouse", it recognized that gays and lesbians, because of their sexual orientation, were excluded from a wide range of benefits and protections that took place – through a myriad of statutory and common law provisions- within the regulation of family life. Although in a case of direct discrimination, where only formal equality was involved, the Supreme Court was able to break the predominant circular reasoning following which same-sex couples could not be understood as "spouses" in a legal way because their relationship was not

\textsuperscript{222} \textit{Supra}, at 675-6.
\textsuperscript{223} \textit{Supra}, at 619 (per La Forest J.).
spousal. On the contrary, the Court concluded that the narrow definition of “spouse” discriminated against gay and lesbian individuals and their couples.

It is necessary to investigate further how this important conclusion was reached. First, one might wonder whether the Court adopted a broader definition of what kind of relationship can be considered as “spousal”. As in Mossop, and any other case were the law explicitly traces a distinction based on sexual orientation, the argument of the claimant in Egan tended to emphasize the similarities between the claimants and those who were recipients of the benefit. The majority of the Court did not address this issue directly; Cory J. only stated that “it is not necessary that the evidence demonstrate that a homosexual relationship bears all the features of an ideal heterosexual relationship, for the relationship of many heterosexual couples is sometimes far from ideal”\(^\text{224}\). In this case, the criteria for establishing the existence of a significant relationship was already provided by the law, in terms of one year of cohabitation and public representation as husband and wife. The possibility of relying on criteria already specified by legislation made the job of the court easier, for the only issue involved was whether same-sex couples could fulfill those criteria, without the need to carry any further investigation. This may not be true if the legal system does not provide any definition of “common law spouse”. In my view, this conclusion reinforces the view that the Canadian way toward recognition of same-sex couples is strictly linked to the position of opposite-sex cohabitants.

The finding that the impugned provision discriminated against same-sex couples was also facilitated by another consideration. In fact, Cory J. stated that “it must be remembered that the question as to whether or not there is discrimination should be addressed from the perspective of the person claiming a Charter violation”. It is evident that this approach is admissible only in a system that allows concrete situations of individuals to be analyzed in the judgment, whereas it

\(^{224}\) Supra, at 672.
seems to be less feasible in a system that only provides for an abstract judgment on formal rules, with no parties involved. Having regard to such a background, Cory J. also held:

“This benefit of the law is very significant. Its importance can be seen by considering what the result might be if, for example, the benefit were to be denied to couples because the individuals were of different races or different religions. The public outcry would, I think, be immediate and well merited. Such legislation would clearly infringe s.15(1) because its provisions would indicate that the excluded groups were inferior and less deserving of benefits. Similarly, an Act which denies equal benefits to homosexual couples who live in a loving and stable common law relationship, as a result of their sexual orientation, would appear to equally infringe s.15(1) of the Charter.

In our democratic society, every individual is recognized as important and deserving of respect. Each individual is unique and distinct. Because of the uniqueness of individuals, their tastes will vary indefinitely from matters as prosaic as food and clothing to matters as fundamental as religious belief. Religious belief and the form of worship are personal characteristics. These characteristics may seem extremely peculiar and vastly perplexing to the majority. Yet, so long as the form of worship is not unlawful, it must be not only tolerated but also protected by the Charter. Similarly, individuals, because of their uniqueness, are bound to vary in those personal characteristics which may be manifested by their sexual preferences whether heterosexual or homosexual. So long as those preferences do not infringe any laws, they should be tolerated. In its attempt to prohibit discrimination, the Charter seeks to reinforce the concept that all human beings, however different they may appear to be to the majority, are all equally deserving of concern, respect and consideration”225.

Discrimination was also found on the basis of two other considerations. First, the exclusion of same-sex couples from the definition of “spouse” is contrary to section 15’s

225 Supra, at 669-670.
purpose of “preventing the infringement of essential human dignity”\textsuperscript{226}. In this context, it was also emphasized that “the legislature’s reliance upon stereotypical reasoning may very well be an extremely significant factor in determining whether discrimination exists”\textsuperscript{227}. This leads directly to the second finding, namely that the equal benefit of the law was denied solely because of the belonging to a disadvantaged group protected by the Charter.

In conclusion, the notion of equality as a way of protecting human dignity, and as a concept entailing the equal benefit of the law, appears to be at the root of the important conclusion reached in \textit{Egan}. Ultimately, however, the impugned norm was found, by a majority of the Court, to be justified under section 1. Only the analysis of Sopinka J. explains how such justification takes place. He constructed an argument based on a mix of deference to Parliament and a rather passé “enlightened conservatism”. By stating that the legislature may not be forced to be “proactive” when approving measures of social welfare, it allowed the exercise of wide discretionary powers; this resulted in the conclusion that Parliament may act one step at a time in extending social benefits. This view is joined by the consideration that equality is a linear concept that progressively unfolds over time. By looking at the “history of the legislation”, Sopinka J. remarked that the definition of “spouse” had originally a narrow meaning, entailing only married couples, but had been subsequently amended in order to include opposite-sex cohabitants. Therefore, he concluded that:

“the impugned legislation can be regarded as a substantial step in an incremental approach to include all those who are shown to be in serious need of financial assistance due to the retirement or death of a supporting spouse. It is therefore rationally connected to the objective”\textsuperscript{228}.

\textsuperscript{226} \textit{Supra}, at 676.
\textsuperscript{227} \textit{Ibid}.
\textsuperscript{228} \textit{Supra}, at 655.
As a conclusion, statutes infringing the constitutional right to equality because of their under inclusion must be accepted, since equality for same-sex couples, although laudable, appeared to be a "novel concept"\textsuperscript{229}.

6. "Not for all purposes": recognition of same-sex couples in \textit{M. v. H.}

As I have mentioned throughout the course of this chapter, the Canadian approach to the recognition of same-sex couples appears to be highly fragmented and concerned only with the comparison between unmarried couples. Both of these features were confirmed in the most recent equality case concerning same-sex couples, \textit{M. v. H.}\textsuperscript{230}. The statute involved in the case was the Ontario \textit{Family Law Act} (FLA)\textsuperscript{231}. Its particular characteristic was that it contained two different definitions of "spouse". In general, in fact, the statute applied only to married couples. Only a special section of it, part III, concerned with the mutual obligation of support, was extended to opposite-sex unmarried couples.

\textit{M. v. H.} brought a constitutional challenge only to the second definition of "spouse", the one that extended the support obligation to unmarried opposite-sex couples, by arguing that, for the purpose of that particular section, the exclusion of same-sex couples was discriminatory. In the view of the Court, the case was not concerned with two other problems. First, it did not challenge the impossibility of same-sex couples to contract a valid marriage. Second, no

\textsuperscript{229} Several critics to Sopinka's approach may be found in Wintemute, R., Discrimination Against Same-Sex Couples: Sections 15(1) and 1 of the Charter: \textit{Egan v. Canada} (1995) 74 Can. Bar Rev., 682.

\textsuperscript{230} [1999] 171 D.L.R. (4\textsuperscript{th}) 577 (S.C.C.).

\textsuperscript{231} R.S.O. 1990, c. F.3.
argument was presented that same-sex couples ought to be treated as opposite-sex unmarried couples for all purposes.

Section 29, the impugned provision, defined "spouse" as entailing a person married or:

either a man and woman who are not married to each other and have cohabited,

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

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

Section 1(1) defines "cohabit" as "to live together in a conjugal relationship, whether within or outside marriage".

In M. v. H. the Court reached the conclusion that such definition was contrary to section 15 and could not be saved under section 1. Therefore, it was declared of no force and effect. Two points are worth emphasizing. First, this step in the advancement of recognition of same-sex couples is principally based on the previous existence of a broad definition both of "spouse" and of "cohabitation", although not broad enough, the court said. It could be argued that such an approach could not be successful in legal system where the predominance of marriage is still unchallenged. It must be born in mind that, often, critics to recognition of de facto families (or common law marriages) rest on the consideration that encompassing them within the legal system violates the right to autonomy and to free self-determination of the individual. This consideration may well be understood in different terms, as a demonstration that the Canadian way to recognition has nothing to do with the right to choose one's own family status (such as marriage). In fact, the definition of "spouse", as broad as it may be, even if it indirectly entails a comparison between same-sex and married couples, applies automatically to the situations that correspond to the abstract model. There is no right to choose involved, and this is true both for opposite-sex and same-sex couples (where included).
Second, the Court itself recognized the fragmentation caused by a case-by-case approach, based only on the expansion of the definition of spouse. Although only for the purpose of suspending the declaration of unconstitutionality, Iacobucci stated:

I note that declaring s.29 of the FLA 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 s. 29 of the FLA. On this point, I agree with the majority of the Court of Appeal which noted that if left up to the courts, these issues could only be resolved on a case-by-case basis at great cost to private litigants and the public purse. Thus, I believe the legislature ought to be given some latitude in order to address these issues in a more comprehensive fashion\textsuperscript{232}.

Just like Sopinka J.’s reasons in \textit{Egan}, which stated that the legislature should enjoy some discretion in extending social benefits at its own pace, Iacobucci J.’s reasons in \textit{M. v. H.} stated that the legislature may want to act in its own fashion in order to take into account the broader consequences of a change on the body of laws. However, following the latter, the legislature has a constitutional obligation to act, while in the opinion of the former such a duty does not exist. While Sopinka J. was concerned with broad and unexpected consequences of a declaration of unconstitutionality, Iacobucci J. appeared to be more concerned with the fragmented and limited vision that any court has by definition. Therefore, he invited the legislature to take more general action in order to redress the violation of equality rights that, for the first time at the Supreme Court level, had been found with regard to the recognition of same-sex couples.

The Court also realized that its decision had effects on the definition of family, especially with regard to legislative action. At paras. 59 and 60, Cory J. briefly touched upon the definition
of conjugal, but only to conclude that, since the approach in defining such concept must be "flexible", same-sex couples may be included in it. Some authors have criticized this indeterminacy by arguing that "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"\textsuperscript{233}. In conclusion, the Court has reviewed the definition of what may be intended as "spouse", or "conjugal" or "family", and who may take part in it, but it is clear that it is up to the legislature to make choices with regard to the different ways in which recognition may take place.

**Conclusion**

In the quest for same-sex couples' equality rights, it would appear that the role of section 15 of the *Charter*, and the test described in the previous chapter, has been crucial. Although in *Egan* discrimination was saved under s. 1, a majority of judges in the S.C.C., applying section 15 to a case involving the narrow definition of spouse, has found this definition unconstitutional. In *M. v. H.* the majority of the S.C.C. has found that the exclusion of same-sex couples from the definition of spouse did violate section 15. In this chapter I have examined some of the arguments that supported these findings. However, I have also found that one of the important elements of the section 15 test, the consideration of the social context, has been interpreted in conflicting ways. In *Layland*, denial of marriage licence was upheld because an inquiry in the larger social context proved same-sex marriage not to be accepted by current customs. In *Veysey* (trial division), the broad inquiry into the larger context proved that sexual orientation had been

\textsuperscript{232} *M. v. H.*, *supra*, para. 147.
added to human rights codes of several provinces and that a history of victimization existed. This convinced the court that section 15 had been violated. In the next chapter, I will examine the EGALE case, where a BC Supreme Court judge reiterated some incorrect conclusions regarding marriage, using as an argument the larger social context. I will also draw some conclusions on this subject.

Although several authors feared that a discourse on equality could result in an unwanted assimilation into a system that was perceived as dominant and oppressive toward sexual minorities, I believe that the equality jurisprudence has also moved toward the recognition and accommodation of diversities based on sexuality, treated as identity issues, rather than mere obliteration of such differences. Over time, it has been more and more accepted that conjugality is not exclusive of heterosexuality, and that same-sex couples could fit into existing definitions of spouse. In *M. v. H.*, Cory J. did not spend much time on discussing the definition of family, but argued for a flexible approach that could accommodate same-sex couples. However, some authors have pointed out that the functional test aimed at assessing conjugality is outdated, intrusive and vague. This view appears to be at the core of recent law reform proposals that will be discussed in the next chapter. These proposals tend to favour equality and personal autonomy by allowing each individual to designate the relevant relationship.
CHAPTER IV. "For the purposes of this act": reflections on relationship recognition and relevance of status

1. Introduction

The concept of status, originally aimed at distributing the legal capacity on the basis of the belonging to a particular group in society (the free citizens, the married, the noble) has formally lost its relevance because our legal systems are founded upon the principle of equality. However, it can hardly be said that, in many instances, the characteristics just mentioned do not play an important role in representing positions of power. Same-sex couples have been kept out of the legal system for long, deprived of the possibility to substitute to the power of the stronger formal rules of conflict solving. In addition, they have not been able to enjoy the same benefits that heterosexual families enjoyed. In contemporary Canada this situation has radically changed by virtue of several decisions and of legislative reform.

My purpose in this final chapter is that of presenting a critical analysis of discrepancies existing in the various forms of legal regulation of "spousal" relationships. The three available legal frameworks, such as an expanded definition of "spouse", registered partnership, and marriage, each have a different impact on same-sex couples’ legal rights, and on the legal system, that needs to be assessed independently. Today there are a variety of definitions of "spouse", because that mandated by the Supreme Court of Canada (e.g. in Miron, Egan, and M. v. H.) tend to overlap with those offered by different pieces of legislation. As seen in the previous chapters, many of the examined cases aimed at expanding the previous definition of
spouse to same-sex couples: this litigation-based approach has in many instances been successful in gaining practical benefits for same-sex couples. For example, it is generally recognized that when the recognition of cohabitation between unmarried opposite-sex partners took place, it entailed the simultaneous exclusion of same-sex couples. Objections were raised that the growing equality for gays and lesbians could undermine the concept of family. In response, legislatures made it clear that “spouses” could only be a man and a woman. Only through litigation has it been possible to establish the newborn principle that same-sex couples should be considered part of the definition of “spouse” initially coined only with regard to opposite-sex partners. However, as will be argued, the process has been sporadic and intermittent.

This scenario raises several questions. First, in many instances this innovative process has been concerned only with the comparison between same-sex couples and unmarried spouses. Even where omnibus legislation has been enacted, its purpose was that of accommodating same-sex couples into the definition of spouse. This definition, originally reserved for married persons, had been extended to include opposite-sex unmarried partners beginning in the late 1970s. A second option is to extend benefits to all “close personal relationships”. However, a broad understanding of “close personal relationships” may hide the creation of a neutral space aimed at differentiating a wide range of relationships from what is to be considered “family”. This has been the experience of some European countries, where the possibility of registering or stipulating agreements has been open to same-sex couples and to non-conjugal relationships in order to differentiate sharply between the traditional heterosexual family, based on marriage, and

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a variety of relationships that do not form a family. Same-sex couples have been included in the second category (the non-conjugal) rather than the first. This approach appears to me problematic because it is in itself discriminatory. The aspect that I consider more problematic is that, considering the plurality of domestic units also referred to as of "close personal relationships between adults", it is questionable which one of them may obtain public recognition from the State, and how. In some instances the search for neutral language seems to result in a severe lack of meaningfulness. My submission is that while same-sex couples enjoy a constitutional right to equal treatment with respect to "spouses", other non-conjugal relationships would enjoy state benefits as a matter of political opportunity, not of constitutional obligation.

My analysis will take into account recent law reforms at both the provincial and federal levels that tend to afford same-sex couples legal rights by expanding the definition of "spouse" for the purposes of certain Acts, such as Bill C-23 (Modernization of Benefits and Obligations Act 2000) and relevant provincial statutes. In addition, proposals for the adoption of a registered partnership scheme are more and more frequent in Canada, and Nova Scotia has in fact enacted legislation of this type. An analysis of various proposals will, thus, be necessary, and I will present some critiques to relevant recommendations. Finally, court cases challenging the denial of marriage rights to same-sex couples are working their way to higher courts. I will take into account some particular aspects of the first decision on one of these cases, EGALE Canada Inc. et al. v. Att. Gen. of Canada et al., and explain -from the point of view of constitutional law- which aspects in the analysis of section 15 of the Charter (discussed in chapter 2) I consider more problematic for the recognition of the capacity to marry for gays and lesbians.

See s.4 below for a more detailed discussion.

2. Expanding the definition of "spouse": pros and cons

The analysis of cases in the previous two chapters suggests that the Canadian approach to equality for same-sex couples may have some very relevant practical consequences, but is fragmented and lacks a consistent basis in any thorough and organic policy. This may be the result of both an approach based mainly on litigation, which necessarily focuses on narrow issues, and of the unwillingness or inability of lawmakers to take broader questions into account. As Lahey as stated: "when politicians have addressed the legal status of sexual minorities, they have tended to focus their attention not on general concepts of legal personhood, but on the most pressing specific current issues"\(^{240}\).

The point at stake in the cases I have previously analyzed was often the denial of a single benefit. The approach taken by the BC Supreme Court in *Knodel* reflects the fragmentation inherent in a case-by-case approach. In that case, the Court’s premise for engaging in a section 15 analysis was as follows:

"The *Charter* does not dictate that the term “spouse” must, as a matter of law, include in all circumstances all legally married and common law couples who are homosexual or heterosexual. Such a determination is dependent upon a finding by the court that the purpose or effect of a specific law conflicts with a specific provision of the *Charter*"\(^{241}\).

The broader definition of spouse, thus, encompassing both opposite-sex and same-sex partners, is meaningful only for the purpose of the specific act or regulation impugned. This makes clear that the expansion of the definition of spouse to include same-sex couples has no broader effects and that, in certain cases, a narrower definition might be found not to violate equality rights.

Can this predominant approach be sustained? Will courts limit themselves to the expansion of the definition of spouse on an *ad hoc* basis? Will law reforms adopt a narrower or a broader approach? These are some of the questions that have been addressed in Canada. They entail different and sometimes conflicting views about how relationships should be treated by state regulation.

Notwithstanding many critiques, the institution of marriage has historically proven successful, in recognizing the symbolic passage of the individual from the position of “single” to a new role in society. Most notably, it has succeeded as an umbrella framework for conveying a vast array of legal rights and responsibilities to the new social unit, the “family”. In contrast, the last three decades have witnessed the emergence of policies that have tended to disarticulate the concept of family from that of marriage, allowing for greater pluralism of family models. The legal recognition of cohabitation outside marriage has meant that unmarried cohabitants may now claim many of the benefits connected with marriage.

Particularly in the Canadian context, where regulation of unmarried partners is fairly comprehensive, the vast majority of court cases have compared same-sex couples with unmarried partners, not with legally married “spouses”. As Cory J. stated in *M. v. H.* (a case challenging a definition of “spouse” limited to married and opposite-sex cohabitants): “The second definition [of spouse] is found in s.29 [of the FLA], and extends the meaning of
"spouse", but only for certain purposes. Moreover, he continued: "However, married persons have additional rights under the FLA that are denied common law cohabitants, even those who meet the requirements of s. 29. His conclusion was that:

"This appeal has nothing to do with marriage per se. Much of the FLA is devoted solely to regulating the relationship that exists between married persons, or persons who intend to be married. They alone are guaranteed certain property rights that are not extended to any unmarried persons. In some specific instances -such as part III dealing with support obligations- the legislature has seen fit to extend the rights and obligations that arise under the FLA beyond married persons to include certain unmarried persons as well.

A different problem was presented in cases such as Layland and most recently EGALE, where the right to marry in general was at stake, rather than the denial of a particular benefit. With regard to this issue, the Federal Court of Appeal in Mossop held that status is:

"primarily a legal concept which refers to the particular position of a person with respect to his or her rights and limitations as a result of his or her being a member of some legally recognized and regulated group.".

The conclusion was that rights and obligations could only be conferred on those who fit into the "legal" meaning of family, not to social realities not recognized by law. Of all the objections raised to the recognition of same-sex couples, this is the most formalistic but also, in my opinion, the most legally grounded; it does not appear to have been completely overcome.

243 Supra, at para 51.
244 Supra, at para 52.
245 (1990) 71 D.L.R. (4th) 661 at 674 (Fed. C.A.), per Marceau J.A.
As my analysis has shown, court cases have held that the law is discriminatory for same-sex couples insofar as it does not confer a particular claimed benefit, but not because it fails to embrace and bring into the legal system what has always been treated as legally “irrelevant” or “non-existent”. It is a fact that many criticized that “system” on a number of grounds, as seen in the first chapter, and nowadays proposals have been put forward advocating changes, as will be discussed later.

Legislation has progressively included same-sex couples within the definition of family but has mirrored the judicial methodology, adopting a fragmented approach, dealing only with specific issues and only for the purposes of that law. British Columbia is an excellent example of this approach. In the province, law reform in this area has been discontinuous, sporadic and intermittent. In 1992, as a consequence of the decision given by the BC Supreme Court in *Knodel*, the legislature amended existing medical services legislation to accommodate same-sex couples. In 1993 legislation was enacted to allow a person to make decisions in lieu of his or her incapacitated same-sex partner, and to be nominated as his or her proxy in the event of incapacitation. In 1996 the rule regarding adoption were reformed. In 1997 there was a wave of reforms that brought same-sex couples within the language of statutes dealing with family relations, in 1998 public sector pension plans incorporated same-sex couples. In 1999 same-sex partners were included in all private pension plans provided by employers to their

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249 *Adoption Act*, R.S.B.C. 1996, c.5, ss. 5 and 29.
employees\textsuperscript{252}, in estates administration legislation\textsuperscript{253} and in provisions related to variation of wills\textsuperscript{254}.

The definitions adopted by these pieces of legislation are sometimes different from one another. With regard particularly to family relations law, in the \textit{Family Relations Act} the definition reads as follows:

"Spouse" [includes] a person who...lived with another person in a marriage-like relationship for a period of at least 2 years ... and, for the purposes of this Act, the marriage-like relationship may be between persons of the same gender\textsuperscript{255}.

Other definitions explicitly acknowledge the possibility of (foreign) same-sex marriage, by stating that:

"Spouse" with respect to another person means a resident who is married to or is living in a marriage-like relationship with the other person and, for the purposes of this definition, the marriage or marriage-like relationship may be between persons of the same gender\textsuperscript{256}.

Pursuant to provisions of the \textit{Family Relations Act}, same-sex and opposite-sex unmarried couples will be treated as married spouses with respect to custody of and access to children, child support, and spousal support, whereas as far as property or pension division is concerned

\textsuperscript{253} Estate Administration Act, R.S.B.C. 1996, c.122 as amended by the Definition of Spouse Amendment Act 1999, S.B.C. 1999, c. 29, s.4.
\textsuperscript{254} Wills Variation Act, R.S.B.C. 1996, c. 490, as amended by the Definition of Spouse Amendment Act, 1999, supra, s.17.
\textsuperscript{255} R.S.B.C. 1996, c.128, s.1, as amended by Family Relations Amendment Act, 1997, S.B.C. 1997, c.20, s.1.
\textsuperscript{256} Medicare Protection Act, R.S.B.C. 1996, c. 286, s.1.
unmarried partners will have to specifically agree that the relevant provisions of the act will apply.

With regard to the process outlined above, I would like to emphasise the following points. In BC it took nearly a decade to achieve legal recognition of same-sex relationships. Often legislative action followed decisions that mandated accommodation of same-sex couples in the particular area scrutinized by courts. Following this approach, nothing prevents the legislature from refusing recognition to same-sex couples in fields not “covered” by judicial decisions, which do in fact create a safer scenario when a binding favourable order is issued, but also leave unprotected scenarios not yet litigated. There is no guarantee that additional litigation will not be necessary in the future. A further complication is that those deemed to be spouses under the provisions mentioned above are not prevented from marrying under the British Columbia's *Marriage Act*\(^{257}\). With regard to marriage laws, individuals involved in common-law relationship are therefore still considered to be single, leaving their status ambiguous.

But provincial legislatures have acted in a variety of ways. In 1999 Quebec introduced *omnibus* legislation that amended the legal definition of *conjoint de fait* to include same-sex couples\(^{258}\). The statute amended 28 provincial acts concerning insurance, welfare, public and private pensions, labour market, immigration, and other areas. Even if *omnibus* legislation reduces the nature of the sporadic action, its purpose is still the expansion of the definition of spouse premised on unmarried heterosexual cohabitants. It does not create a system of celebration or registration so as to allow same-sex couples to express an autonomous choice with respect to their legal status. Moreover, the model suffers from the restrictions that flow from the partial recognition that unmarried partners enjoy.

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257 R.S.B.C. 1996, c.282, s.16.
Federal legislation enacted in 2000, the *Modernization of Benefits and Obligations Act*, reformed several dozen federal statutes, attempting to bring uniformity to the treatment of same-sex couples, as compared with unmarried opposite-sex couples. This Act introduces in legislation the expression “common-law partner”: a person living in a marriage-like relationship with another person, regardless of their sex, for at least one year (in BC the FRA requires two years of cohabitation). The effects of this Act appear to be far-reaching as far as federal statutes are concerned. This type of legislation reiterates the Canadian approach to equality for same-sex couples, based on a functional definition of family and of “marriage-like” relationships. However, it does not take sufficiently into account the value of autonomy, because its application is subject only to duration of the marriage-like relationship. The scope of the law seems to be comprehensive, and would probably satisfy the necessity for a thorough recognition of conjugal relationships; however, unlike marriage (or registered partnership) it does not allow a personal choice of individuals involved, because the application of the law is automatic after one year.

In addition, the Act contains a definition of marriage as an institution referring exclusively to the union of one man and one woman, and could be criticized under this point of view.

3. Beyond Conjugality

In January 2002 the Law Commission of Canada made public its report “*Beyond Conjugality*”\(^{259}\), which presents the conclusions of a long period of study regarding “close personal adult relationships”. This research found its starting point in the need for “framing
policies that recognize and support personal adult relationships. The aim, therefore, was that of understanding the current role of state regulation _vis a vis_ personal relationships between adults, and of recommending appropriate law reforms. As its title immediately suggests, the report extended its analysis to such relations of dependency or significance that may arise in a variety of situations, assuming that not only what is currently, though variably, understood as “family” should be the object of state regulation. The Commission expressed this concept by focussing on the relevancy of _status_, recommending on more than one occasion that, where possible, governmental benefits should not depend on the relationship status of the beneficiary.

Diversity appears as the key word: conjugal relationships, including same-sex couples, are juxtaposed to “non-conjugal households” (adults living alone, lone-parent families, adults living together and families of friends - often referred to as “economic families”), and to relationships between persons with disabilities and their caregivers. As far as “conjugal” relationships are concerned, recent census data showed, as several authors and judicial decisions have recognized, that one of the major shifts of the last two decades has been the growth of households not sanctioned by marriage. As previously discussed, while initially the process of legal recognition encompassed only opposite-sex cohabitants, it has progressively embraced same-sex couples as well. The report of the Law Commission of Canada builds on this scenario by expanding such findings in order to reach further conclusions. Quite radically, it

259 Law Commission of Canada, _Beyond Conjugality_ (Ottawa, 2001), available on line at www.lcc.gc.ca  
260 Ibid., at 7.  
is the view of the Commission that, as a matter of law reform, various kinds of relationships, other than "conjugal" ones, could enjoy some of the benefits provided by the state:

"instead of simply arguing that some relationships that are currently excluded (such as non-conjugal relationships) should be included, we are of the view that it is time to fundamentally rethink the way in which governments have relied on relational status in allocating rights and responsibilities"264.

3.1 The report's methodology

In the attempt to understand whether, and how, a variety of state benefits could be afforded to a larger array of relationships, the Commission adopted the following methodology:

1) determining whether the objectives of the law are legitimate;
2) assessing whether protection of relationship are relevant state objectives in particular areas of law;
3) clarifying when it would be possible to let the individual designate the relevant relationship;
4) otherwise, assessing the most appropriate way to include a variety of relationships in the scope of the law.

The purposes of adopting such a methodology might be identified in the need for assessing, in the first place, whether the state truly has a valid interest in treating persons differently according to their relationship status. Clearly, such methodology appears efficient in the analysis of single pieces of legislation. Such an approach may only test the effectiveness of regulation in particular areas of law, one by one; it does not appear to be designed in order to

264 Law Commission of Canada, supra, p.29.
construct any general principle. It may well be that in certain realms the existence of a relationship will be deemed to be relevant, whereas in others it will be considered superfluous.

In addition, the Commission has undertaken the task of analyzing whether it would be possible to allow individuals themselves to designate the relationships that are most important to them and ought to be included. Like the approach of “individualization”, this approach “has the advantage of reducing government reliance on relationship status as defined by the government”\textsuperscript{265}. Such approach appears to be aimed at avoiding the dangers of an essentialist definition of family, by taking into account the problems of discrimination based on family status that arose in past cases, such as Mossop\textsuperscript{266}. In that case, the issue was what could be considered “family”, and who should be able to define it\textsuperscript{267}. It is my view that the Commission has attempted here to put forward some solutions with regard to this aspect. The debate near the definition of family had at its core the inclusion and accommodation of gay and lesbian couples in the legal definition of family, through the comparison with unmarried cohabitants or even married spouses. But the report goes further insofar as it refers to the possibility of looking at relationships in two different ways, no longer focussed on “conjugality” per se. One of them would be to “focus on the functional attributes of a relationship”\textsuperscript{268}. In fact, the Commission took the view that “the existence of sexual relations within a relationship...is not relevant to legitimate state objective”\textsuperscript{269}. Rather, issues such as \textbf{emotional intimacy, economic interdependency} and \textbf{shared residence} would be appropriate functional attributes to be considered in the redefinition of relationships relevant to state policies. The primary feature of this approach is that it would not abandon a uniform definition of the entity entitled to state

\textsuperscript{265} Law Commission of Canada, \textit{supra}, p.32.
\textsuperscript{266} (1993) 100 D.L.R. (4th) 658.
\textsuperscript{267} See Freeman, Defining Family in Mossop v. DSS: the Challenge of Anti-Essentialism and Interactive Discrimination for Human Rights Litigation (1994) 44 U.T.L.J. 441.
\textsuperscript{268} Law Commission of Canada, \textit{supra}, p.34.
\textsuperscript{269} \textit{Ibid.},
benefits, though it would radically change the criteria that underpin its application. The second suggested adjustment could be that of “tailoring definitions to particular statutes”. This recommendation appears to be aimed at capturing the diversity of personal relationship, therefore enhancing the attainment of greater equality and coherence by adopting “different definitions that precisely identify the functional attributes of relationships that are relevant to the different objectives of particular laws”.

4. The case for registered partnership

The report analyzed extensively the role of registered partnership schemes, which offer the advantage of recognizing and supporting a broader range of personal relationships. In the view of the Commission, in fact, a registration could be made available both to opposite-sex and same-sex conjugal couples, and to non-conjugal couples as well. For the Commission, the attractiveness of such a scheme lies in the fact that it would, unlike the “ascription” of spousal status, preserve the value of autonomy, because legal benefits and obligations would operate only in presence of an individual’s choice.

The report cited examples from several European countries that have adopted a registered partnership scheme and presented various paradigms. In my opinion, this model avoids the methodological criticism I expressed above, because it respects the choice of individuals to have

270 Ibid.
their relationship recognized. However, it has been criticized insofar as it creates a lesser status than marriage. In fact, the registered partnership model has historically developed as a way to foster equality for same-sex couples without completely jeopardizing the traditional concept of "family" and marriage. This doctrine of "separate but equal" has been widely criticized\(^{273}\), although the report doesn't echo such considerations. Second, envisaging a scheme that encompasses both conjugal and non-conjugal couples as well would make sense from the point of view of the constitutional obligation of equal treatment regardless of sexual orientation only if marriage was abolished or it was simultaneously open to same-sex couples as well. Grouping same-sex couples together with non-conjugal relationships in the same scheme (registration), without at the same time radically reforming the rules on marriage, would only reinforce the stereotype that family is based on heterosexuality, and all other relationships may eventually be afforded some financial benefits through some alternative scheme but do not share the same privileged nature.

The Northern European model of registered partnership does create a new status that refers only to "spousal", or "conjugal" or "marriage-like" relationships, irreducible to any other position in society. It enriches the spectrum of possibilities that the State deploys in order to publicly sanction conjugal relationships, therefore it closely reproduces the features of marriage: no unilateral dissolution, rights and responsibilities strictly provided by law, etc. The same approach has been followed in Vermont\(^{274}\). These schemes are open to same-sex couples only (except in The Netherlands). The fact that registered partnership schemes adopt a model similar to marriage (celebration, right and obligations defined by law, rules for dissolution, etc.) has

\(^{272}\) Supra, p.117.
been considered as a way to foster equality. However, the residual differences and the creation of a separate status did not satisfy many. In fact, in The Netherlands the lower chamber of Parliament called on the government to open up marriage to same-sex couples even after the registered partnership act had already been in force for some time\textsuperscript{275}, and the opening up of marriage has been approved\textsuperscript{276}.

As an example of the theoretical similarity between registered partnership and marriage, one could consider the possibility for registered partners to marry (a different person). The general solution adopted in Northern European acts has been that of forbidding marriage by persons already registered, because the two frameworks are considered to be incompatible and an overlap could jeopardize monogamy. This particular issue is more than a mere technicality, because it gives shape and content to the order of relations in society. Only countries that have adopted a much weaker version of registered partnership (Belgium) or a different approach based on contract law (France) have allowed parties to celebrate marriage without the need to file a prior application for dissolution of their contract. In my view, these models did not create a new legal institution that provided a legal status, because they only admitted two parties, living together for a variety of reasons, to stipulate agreements to regulate their \textit{vie commune}. It is important to keep in mind that in civil law systems contracts must respond to economic rationales and must concern rights and responsibilities over which the parties have control. Courts have not been willing to enforce contracts that deal with family matters where the public aspect is considered predominant: e.g. pre-nuptial agreements are considered void because they might jeopardize support entitlements provided for by law, that a private agreement could not

\textsuperscript{275} Kamerstukken II, 1997/98, 22 700, n. 26.
\textsuperscript{276} Act 21 December 2000, Staatsblad 2001, n. 9 e 10, in force since 1 April 2001.
override. Although some scholars have argued for the validity of contracts between cohabitants, specific legislative action was needed in order to guide the courts to a uniform approach and, most importantly, to attach public benefits to such private agreements. The French example, thus, appears of a hybrid nature insofar as it states that the *Pacte civil de solidarité* (PACS) is a contract for regulating certain material aspects of a *vie commune*, not necessarily “conjugal”, but it also attaches to it some consequences valid *erga omnes*.

Carl Stychin has written an illuminating article regarding the climate and issues surrounding the adoption of the PACS in France, summarizing some of the arguments put forward by conservative opponents of the PACS. One source of criticism was that the PACS was covertly presented as a contract, but consisted in fact of a form of “gay marriage”. While I do not agree with this conclusion, I would argue that some of the points raised to demonstrate it could be of some value. Stychin summarizes them in the following way:

"If the PACS is the legal recognition of a contractual relationship (unlike the status of marriage), then what justification can be put forward for restricting its availability: why is it limited to ‘duos’ and not available to groups of more than two individuals who wish to share a common life? Why not open the PACS to family members -such as siblings- who may live jointly? For opponents, these restrictions cannot be justified if the PACS is constructed as the recognition of a social reality and the public enforcement of a private contractual arrangement...Rather, the PACS appears instead to constitute a legally recognized status, based upon and resembling the institution of marriage. Thus, one cannot form a PACS with a close family member and one cannot belong to more than one PACS at the same time."

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277 In application of s. 160 of the Italian Civil Code, which reads: “Spouses shall not depart neither from their rights nor from their responsibilities provided by law as a consequence of marriage” see, in the sense mentioned in the text, decisions of the Supreme Court *Cass. civ.*, sez. 1, 18/02/2000, No. 1810, in *Mass.*, 2000; *Cass.civ.*, 14/06/2000, No. 8109.
I believe that these arguments contain an element of soundness. This debate seems to be of some usefulness because it emphasises the relevance of the debate around “what is family” I alluded to in the first chapter. French opponents of the PACS, as well as opponents of legal recognition of same-sex couples elsewhere, motivate their position by claiming that:

“the rights and responsibilities associated with the heterosexual married couple justify the special status and privileges it is accorded. It promotes the public good and the survival of the Republic, and thus serves a special social function”\textsuperscript{279}.

My understanding is that the PACS was meant to be very different, but due to violent parliamentary opposition, has assumed in conclusion a peculiar form that refuses rational encapsulation. It is a hybrid scheme that did not satisfy either advocates or opponents. First, if it was meant to be recognition of same-sex families, this element has been wiped out by allowing any two persons to stipulate the agreement. In fact, as Stychin reports, some components of the Senate committee had forcefully advised that the PACS had to be open to same-sex couples only, so that the concept of family and that of other kinds of partnerships would not be confounded\textsuperscript{280}. If this was the purpose, it is clear that it fell short of any recognition of equal rights. Second, as mentioned above, if it was not meant to acknowledge the status of gays and lesbians within the family and the community, it is unclear why it contains certain provisions so similar to the impediments to marriage.

\textsuperscript{278} Stychin, C., Civil Solidarity or Fragmented Identities? The Politics of Sexuality and Citizenship in France (2001) 10 Soc. & Leg. Studies 358.
\textsuperscript{279} Ibid., p. 359.
\textsuperscript{280} Ibid., p. 362.
5. The case for same-sex marriage

The main concern highlighted by the debate (briefly summarized in chapter one) seemed to be the necessity to avoid the pitfalls of an essentialist approach to family, and the dangers of assimilation. Gays and lesbians form different families than straight people, which may be families of “friends” or couple relationships based on different values. Focussing on specific issues, claiming rights with relation to a particular area of need, has certainly had the effect of gaining better legal treatment without facing in its entirety the risk of assimilating same-sex couples into the realm of the traditional nuclear, monogamous family.

Also, the progressive legal assimilation of unmarried cohabitants to married spouses has certainly de-emphasized the relevance of the legal concept of spousal status. As it has been stated:

"When marriages can be readily dissolved, divorce is common and the roles and responsibilities of the spouses are a matter of acute controversy it is hard to argue that there is a qualitative difference between marriage and cohabitation" 281.

While today there is certainly less emphasis on the concept of status, this does not convince me that the legal system is not based on stronger and weaker statuses. It appears difficult to enucleate a discourse on status that does not fall back on conservative arguments, such as the relevancy of the spousal relationship to the public good or universality of the law. Today, as the report of the Law Commission testifies, there seems to be a need for tailoring solutions on a variety of needs, almost on a case-to-case basis. I believe it would be interesting

281 MacDougall, D., supra, at 316.
to investigate whether it would be possible to ground it on arguments that do not assume conservative stances.

One of the reasons why the concept of status may still find relevance is exemplified by a case decided by the European Court of Justice, *Grant v. South-West Trains Ltd*282, an employment case where the employee claimed that the EEC’s anti-discrimination legislation (on the ground of “sex”) had been violated by her employer’s refusal to accord her same-sex partner the spousal benefits generally recognized to spouses and common-law partners. The Court, discharging the conclusions of the Attorney General, found no discrimination, concluding that Mrs. Grant was not in a position to claim discrimination because she was not engaged in a couple relationship of the kind targeted by the benefits regulations. As mentioned above in the discussion of *Mossop*, this summarizes a common denominator of many arguments against same-sex couples: they cannot claim legal protection because they do not possess any relevance *vis a vis* the legal system. They pertain solely to the sociological realm, such as relationships of friendship. By emphasizing that family and marriage are for procreation and the raising of children, opponents have tried to exclude same-sex couples from the realm of legal relevance by claiming that they do not share the same position in society: the former are publicly relevant because of the functions they perform, the latter are just as irrelevant as the relationships between friends or between a person and his or her pet.

These arguments need to be countered on the same field, that of the lack of status. The argument is in addition to that of lack of equality. Lack of capacity is a human right violation in itself. To deny gays and lesbians a place within the concept of family reinforces the ancient concept of status aimed at distributing legal capacity on the basis of the belonging to a particular category (such as aristocracy, land owners, etc.). Several Italian scholars have emphasized that, notwithstanding the constitutional protection of equality, “status and the lack’ or limitations of

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legal capacity to act (...) may perform the function of assigning a disadvantaged position to certain groups of people"\textsuperscript{283}. In the field of family law there has traditionally been a shifting but omnipresent relationship between the private and the public domain. This becomes relevant because marriage has always been understood as more than a contract by virtue of the legal incidents attached to it by the state in acknowledgement of the public relevance assigned to the traditional family.

Legal capacity of the individual, in the public realm, has been defined as a tool aimed at "legitimizing the claims of persons entitled to certain performances of the authorities"\textsuperscript{284}. An argument could be made by linking the concepts of status and legal capacity. The diminished capacity, because of a lack of status, may be a violation of constitutionally protected human rights. The value of personal autonomy regains its centrality, in the end, because marriage laws and the denial of status are ultimately connected to the most personal dimensions of the human being, vital personal rights (see \textit{Baker v. Vermont}) that imply "an act of will encompassing, mainly, the emotional sphere and rapport of intimate relationships of the individual"\textsuperscript{285}.

In conclusion, my point is that the concept of legal capacity through its connections to public law, may support a claim that the denial of marriage results in ignoring the legal personhood of the individual and an illegitimate denial of legal status. The object of the infringement is not the single benefit provided by state programs, but recognition as a "person" entitled to exercise his or her legal capacity and stimulate public activity as far the public dimension of marriage. One of these public activities is the recognition of relationship status through celebration.

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\textsuperscript{284} Lavagna, \textit{Capacità di diritto pubblico}, Enciclopedia del diritto, VI, 1960, at 99.
As mentioned in chapter 1, the debate about equality for gays and lesbians in the family has been, mainly although not only, supported by claims based on equal rights. From the beginning it appeared clear that the "traditional family" enjoyed a privileged place in the social and legal realms, from which same-sex couples were excluded\(^{286}\). It was, and still is, this exclusion that has underpinned many contributions coming from different actors: judges, scholars, militants, and others. I believe it is important to acknowledge how the emphasis has been on demonstrating how such exclusion violates the fundamental rights of gays and lesbians entrenched in the Charter, particularly equality rights. It has been argued, and over time increasingly accepted by courts, that the differential treatment of same-sex couples amounts to discrimination within the meaning of section 15 of the Charter because it imposes a burden or withholds a benefit:

"in a manner which reflects the stereotypical application of presumed group or personal characteristics, or which otherwise has the effect of perpetuating or promoting the view that the individual is less capable or worthy of recognition or value as a human being or as a member of Canadian society, equally deserving of concern, respect, and consideration"\(^{287}\).

The finding of constitutionally unacceptable discrimination led to the conclusion that, for many purposes, equal treatment for all couples regardless of the sex or sexual orientation of the parties is a constitutional obligation, precisely because discrimination based on sex or sexual orientation (enumerated or analogous grounds) is forbidden by the Charter. Could it equally be stated that all relationships in general enjoy a constitutional right to equal treatment with regard to marriage?


I believe the report of the Law Commission does not go that far. Therefore, it appears to me narrower than it would appear initially. In fact, though it refers repeatedly to equality, nevertheless it does not suggest that the adoption of its recommendations, briefly examined above, should be viewed as a constitutional duty. Moreover, although it does envision the abolition of marriage as a whole and its substitution with a different system, it does not recommend such a step at this stage. The scholar is therefore confronted both with a methodological and a substantive question. From the methodological point of view, it is important to draw a line between a discourse focussed on constitutional rights, which encompasses essentially the position of same-sex couples, and a narrower discourse which appears to be driven more by considerations of (political and social) opportunity, rather than obligations. Financial and other support of relations of interdependency fall into the second class. From the substantive point of view, it then becomes a matter of finding the instruments that better satisfy both these goals, answering the question of how the legislatures should recognize same-sex couples’ right to equal treatment, on one hand, and other domestic units’ need for assistance and support, on the other.

With regard to this type of analysis, the report provides some illuminating findings. In the first place, it is worth noting that one of the recommendations opening marriage to gays and lesbians. Such a recommendation appears peculiar if compared with the tone of the report: in a document aimed at downplaying considerably the relevance of relationship status, we find an implicit validation of such concept through its expansion to individuals previously excluded. Such contradictory assessments may find a partial reconciliation if the methodological distinction outlined above is acknowledged. In fact, while on the one hand policy considerations may suggest that relationships other than conjugal ones should be supported in some way, on the
other, as long as the current system is in force, there is no justification for the exclusion of same-sex partners from the institution of marriage.

6. Marriage, equality analysis and relevance of status

The opening up of marriage is an issue currently litigated in Canadian courts. What directions might future marriage cases follow? An analysis of the latest case regarding marriage rights, *EGALE*, will be helpful both for assessing possible developments and for presenting some conclusions with regard to this thesis. In fact, I will now recall the framework for the analysis of section 15 of the *Charter* discussed in the previous chapters and apply some of my findings to the question of status. I will conclude that Canadian courts in general, and Pitfield J. in particular, are just as concerned with the concept of status as civil law courts; they may not acknowledge it overtly, but when they apply the portion of equality analysis that refers to the “larger social context”, they in fact tend to assess the status of the claimant in his or her community and in society at large, therefore reiterating the relevance of the concept, which scholars should take into account.

As seen in previous chapters, the Supreme Court of Canada has, on several occasions, laid out guidelines for interpreting the equality guarantee in section 15 of the *Charter*. In particular, it has been made clear that sexual orientation has no relation with the capacity to form a stable and caring spousal relationship. Presently, however, the degree of equality enjoyed by same-sex couples falls short of marriage rights. In this final part it is my aim to show that a particular feature of the type of analysis adopted for section 15 of the *Charter*, the “contextual
approach", may be a problematic aspect (though not the only one) in assessing same-sex couples’ equality claims with regard to marital status. While this reference to the socio-political and historical context seems to have fostered a more progressive attitude toward equality, there is doubt whether it is entirely convincing. First, any assessment of the "spirit of the people" is hardly demonstrable but, rather, highly discretionary. Second, there is no guarantee that any discrimination in the law will be considered inappropriate through an assessment of the social or socio-political conscience. The reference to a contextual approach made in Turpin might not enhance equality if the distinction made founds its "relevance" on a *communis opinio* such as preconceptions and prejudices existing in society (albeit the Supreme Court of Canada often stated that equality is meant to combat their discriminatory impact). As far as same-sex couples are concerned, thus, the concept of status could operate to deny access to marriage, because their unaccepted position in society would justify, under s.1, any finding of discrimination.

6.1 The "context" in EGALE Canada Inc et al. v. Att. Gen. of Canada et. al.

The latest case involving same-sex couples’ right to marry provides an unedifying example of my thesis. A number of couples had requested the British Columbia Director of Vital Statistics to issue a marriage licence. Their applications were refused on the basis that the common law definition of marriage did not recognize the capacity to marry persons of the same sex. Therefore, they applied, together with EGALE (the national advocacy group of gays and lesbians in Canada) to the BC Supreme Court for judicial review of the refusal. Their cause of action was based on the argument that the marriage of two persons of the same sex was prohibited neither at common law nor by statute. In the event that such a prohibition did exist,
their petition sought a declaration that the prohibition infringed several sections of the *Charter*, including section 15.

Mr. Justice Pitfield dismissed the petitions stating that under Canadian common law, "marriage is a legal relationship between two persons of opposite sex. The legal relationship does not extend to same-sex couples," He added that neither courts nor Parliament could change this situation without a constitutional amendment. With regard to the alleged violation of sec.15, he stated that the exclusion of gays and lesbians from marriage did violate their equality rights, but that such an infringement was a reasonable and demonstrably justified limit in a free and democratic society, and thus saved by sec.1 of the *Charter*. I will not go into great detail as far as Pitfield J.'s interpretation of the common law is concerned: indeed, several of his arguments were well known and have been commented on before. I will concentrate on his analysis of section 15 of the *Charter*.

To begin with, since certain interpretations of the "contextual approach" might be misleading, it is appropriate to examine how Pitfield J. employed this element in the *EGALE* case. For example, he stated that "the importance of the essential character of marriage to Canadian society is a matter of common sense, understanding and observation." This passage, in its simplicity, reveals the perspective from which the "larger context" is viewed; a perspective debatable insofar as it considers the socio-political context in relation to the values underlying the impugned law, and not in relation to the condition of the claimant with respect to the rest of society considered in its historical and material dynamics. The interpretation of sec.15 in this case appears problematic under more than one aspect, especially in its relation to the sec.1

analysis. In fact, although a violation of sec.15 had been found, Pitfield J. was able to reiterate, in the course of his sec.1 analysis, a consideration that should have been dealt with under sec. 15, such as:

“The core distinction between same-sex and opposite-sex relationships is so material in the Canadian context that no means exist by which to equate same-sex relationships to marriage while at the same time preserving the fundamental importance of marriage to the community”\(^{291}\).

This dictum seems to reveal that equality rights of gays and lesbians were not considered as central as the need for the “community” to preserve its social institutions, a need that, allegedly, could be protected by relying on the “Canadian context”. If discrimination had already been found, an inquiry on a (suspect) concept such as “similarity” between the claimant(s) and others appears out of place.

Moreover, the justifications for upholding the impugned law under section 1 are obscure. The analytical framework for section 1 has been summarized, among other decisions, by the case M. v. H. where Iacobucci J. quoted the words of Dickson C.J. in Oakes:

“The Court must be guided by the values and principles essential to a free and democratic society which I believe embody, to name but a few, respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society”\(^{292}\).

Pitfield J., on the other hand, stated quite clearly that:

\(^{291}\) Ibid., at para 211.
“Quite apart from the kind of analysis approved by the Supreme Court of Canada in *Oakes* and *Thomson*, the limitation [of the petitioner’s right] is justified by the Constitution itself. There is no doubt that its framers and the Parliament of England knew and comprehended the nature of marriage in 1867.”

It is a cherished feature of democracy that various people may propose different interpretations of the values that are meaningful to them or that should be meaningful to the society they live in. What is worrying, though, is that the current framework of analysis of the equality clause has not entirely clarified how the “larger socio-political context” should be used in order to promote certain values rather than others. Judges of the Supreme Court have often gone out of their way in describing the kind of society that the *Charter*, and sec.15 in particular, has tried to shape, describing in quite detailed terms its purposes and the features of values that underpin it. However, the “contextual approach” entailed in sec.15 analysis has in the *EGALE* decision sheltered values that do not exactly correspond with those envisioned by the Supreme Court of Canada’s jurisprudence. With respect to this, Pitfield J. affirmed that: “I do not understand the law to be that the *Charter* can be used to alter the head of power under s.91(26) [of the Constitution] so as to make marriage something it was not.”

The BC Supreme Court’s reference to the social context, under sec.1 analysis, revisits considerations that could best have been made under the section 15 analysis. Most importantly, Pitfield J’s decision highlights its function as an avenue for introducing in the judgment supposed “objective” elements that should guide the court in assessing equality claims:

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*293* *EGALE*, *supra*, at para 199.

“Same-sex and opposite-sex relationships are, at their core, demonstrably different. They cannot be equated except by changing the deep-rooted social and legal relationship around which Canadian society has evolved and continues to evolve.”

It appears by this interpretation that section 1 requires just an assessment of a “demonstrable difference” between the claimant and its tertium comparationis in order to find that an infringement of a Charter right might be justified. In addition, the larger context reappears as a paradigm of excellence in light of which the claimant should be required to show perfect coincidence. In my opinion, the fatal flaw in this reasoning is that Pitfield J. confounded reality with legal constructions, the “is” with the “ought”. It is evident that equality is a concept that entails a comparison between terms that are not factually equal, expressing the ideal (and the obligation) that notwithstanding existing differences people ought to be treated as if they were equal. His fundamental misapplication appears to be grounded in the larger social context, and this is the source of my criticism toward this element of equality analysis, as it stands.

In my view, it appears evident that both in Andrews and in Turpin the need for considering the larger social context was aimed at a thorough assessment of the position of some classes of individuals in society. Wilson J. in Andrews intended such contextual approach strictly linked with the “grounds” upon which a differential treatment must be based in order to amount to discrimination contrary to sec.15:

“I would conclude therefore that non-citizens fall into an analogous category to those specifically enumerated in s.15. I emphasize, moreover, that this is a determination which is not to be made only in the context of the law which is subject to challenge but rather in the context of the place of the group in the entire social, political and legal fabric of our society.”

295 Ibid., at para 214.
296 Andrews, supra, at 32 D.L.R.
More recently, however, this initial approach was revisited. In Law, Iacobucci J. repeatedly and forcefully emphasized the need to consider discrimination from the perspective of the claimant, because the analysis of section 15 must be one that enhances its purposes, not one that frustrates them. In order to achieve the multiple purposes of sec. 15, it is essential that judges analyze carefully the context in which the alleged discrimination takes place. This necessity is evident in Iacobucci’s summary of the Supreme Court of Canada’s interpretation of section 15, where several members of the Court:

“focused upon issues of powerlessness and vulnerability within Canadian society, and emphasized the importance of examining the surrounding social, political, and legal context in order to determine whether discrimination exists within the meaning of s. 15(1)”

The three-step analysis suggested by the Law case to courts dealing with equality issues entails i) the finding of differential treatment, ii) the finding that such treatment is based on “grounds”, and iii) the finding that it amounts to discrimination. In Iacobucci J.’s words, there are at least two ways of assessing the existence of discrimination within the meaning of section 15: “the focus of the discrimination inquiry is both subjective and objective”. While the subjective criterion refers to the perception of the claimant, the objective element requires more attention here. It permits to establish discrimination “by considering the larger context of the legislation in question, and society’s past and present treatment of the claimant”. The need for a contextual approach has been explained in Law as follows:

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297 Summarized by Iacobucci J. in Law, supra, at para 51.
298 Ibid.
299 Law, supra, at para 59.
The objective component means that it is not sufficient, in order to ground a s.15 (1) claim, for a claimant simply to assert, without more, that his or her dignity has been adversely affected by a law. The "without more" is critical. It is fairly evident that it serves the purpose of excluding the claims of people who are not able to show anything more than a personal feeling or conviction about their treatment, claims that would be deemed manifestly ill-founded at a preliminary inquiry or which patently erred in their interpretations of law. Iacobucci J. hastens to clarify that in assessing differential treatment it is necessary to imagine whether the "reasonable person", the abstract model of conduct, would be diminished in his or her dignity. The four "contextual factors" identified by Iacobucci J. are aimed at grounding an eventual finding of discrimination in objective and autonomous de facto situations, in order to counterbalance the subjective approach (the perception of the claimant).

Although designed for such purpose, there are no indications, in the Court's analysis, of an appreciation of the necessity to limit features of the "objective" test, which could frustrate the purpose of sec.15. The contextual factors complement the requirement that differential treatment must be based on "grounds". As far as marriage rights claims are concerned, however, the problematic aspect of such factors is that, in name of "objectivity", they may be used to uphold existing prejudices and stereotypes, and a discriminatory use of the concept of status. In fact, there is some evidence that the "larger socio-political context" has been at times understood as a vacuum where any given observer may look for a particular value-judgment that could support an a priori assessment of the matter considered in the abstract. On the contrary, the contextual

\[300\] Ibid., emphasis added.
\[301\] Ibid.
approach is meant to help locate the person in his or her social and historical environment in order to rule out cursory claims based on merely subjective considerations.

This point has not been touched upon by the S.C.C. and will need further clarification. The relevance of the contextual approach has been viewed from a very unbalanced perspective, i.e. that of a court potentially flooded by equality claims, trying to put limits to "subjectivity" and to deliver considered judgments in delicate circumstances. In *Law*, Iacobucci J. stated that in more straightforward cases:

"it may be sufficient for the court simply to take judicial notice of pre-existing disadvantage experienced by the claimant or by the group of which the claimant is a member in order for such s.15 (1) claim to be made out. In other cases, it will be necessary to refer to one or more other contextual factors. In every case, though, a court's central concern will be whether a violation of human dignity has been established, in light of the historical, social, political, and legal context of the claim."

However, I believe that "objectivity" should also be construed more carefully, to prevent its corruption as a method of justifying existing inequalities for reasons such as 'people accept it', 'the community is founded upon it' or 'faith in God permits or mandates it'.

**Conclusion**

My conclusion is that although the concept of family status may appear obsolete in light of a fragmented, postmodern society, it is still an important component for assessing the position of individuals in society and *vis a vis* the legal system. In this context, the concept of legal status
could be understood as the sum of rights and duties pertaining to an individual with regard to his or her position in society or in the family. It seems to me that this concept encompasses, to a certain extent, what Canadian authors call “public rights”, insofar as the legal status is understood as a way to grant public acknowledgment to the position of the individual in the family. The discourse of individual rights has been based mainly on the value of equality, but has sometimes failed to take into deeper consideration the interconnections existing in the system between the concept of “person” and “capacity”.

The use of what I call an “interpretive method” (the expansion of the definition of spouse) may enhance to a certain extent the equality of same-sex couples, and protect the weaker partner from exploitation, but does not provide full legal personality for gays and lesbians because of the fragmentation it involves. I conclude that the denial of any status in the family, through marriage, perpetuates the detrimental position of gays and lesbians in society because it distributes legal capacity on the basis of belonging to a particular category.

On the contrary, the recent BC case of *EGALE* demonstrates how marriage rights may still be withheld despite section 15 of the *Chartier*. The framework of analysis regarding section 15 mandates the assessment of the larger social context. However, without proper guidelines, there is no evidence that sources of inequalities will be eliminated once the context for assessing discrimination for the purpose of sec.15 is no longer the “pure rationality of the legal system”, but rather the concrete dynamics of life. This conclusion reinforces my view that the concept of status might still considered by courts because is entailed in the section 15 test, and its propensity to examine the position of the claimant in society. This concept has led them to rule that the position of same-sex couples is so different from that of opposite-sex couples that any discrimination may be justified. In other words, views that entail a selective allocation of rights

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302 *Law, supra*, at para 83.
(based on sexual orientation) are reinforced by assessing the position of same-sex couples, under the "contextual approach" of s.15, through the lens of prejudice existing in society.
CHAPTER V. CONCLUSION

In Canada and elsewhere, some gay and lesbian advocacy groups and sympathetic scholars or judges have focused on the importance of gaining equality before and under the law. Many efforts, especially through litigation, were directed toward the creation of legal arguments that could enhance this equality. Through its emphasis on substantive equality, section 15 of the Charter has certainly facilitated the process of recognition of the worth and dignity of gays and lesbians and their families. The Supreme Court of Canada has been able to state it clearly in M. v. H., a groundbreaking case for same-sex couples. In fact, several elements employed in the section 15 analysis reinforced this conclusion. Rejection of a “similarly situated test”, need to consider discrimination from the perspective of the claimant, and duty to accommodate differences are signs of an open, pluralistic, multicultural concept of equality. Under this point of view, the Supreme Court of Canada has held repeatedly that the purpose of the guarantee of equality in the Charter is to help historically disadvantaged groups in society, and counteract phenomena of exclusion, subordination and disadvantage. These conclusions constitute a distinct character of Canadian discourse on equality. The Supreme Court of Canada chose an approach that rejects the manipulability of more formalistic concepts of equality based on a greater level of deference to the legislature. Instead, it chose a model that allows the direct scrutiny of the impact of the law on the lives of members of disadvantaged groups. A formal concept of equality has an advantage: it may be used to censor any differential treatment, as long as a similar position with the tertium comparationis and the irrationality of the distinction are proved. On the contrary, substantive equality may help in removing differential treatments.
based on certain grounds of discrimination. The process of comparison assumes different boundaries: in the former case the position of the claimant is tested against the situation regulated by the impugned law, whereas in the latter it is tested against the rest of society.

In fact, the section 15 test employed by Canadian courts when assessing equality claims encompasses the so-called “contextual approach”. The emphasis on the effect of the distinction on the affected individual or group allows the discussion, the review and the judicial redress of concrete conditions of life of many people in Canada. This view, strongly based on the analysis of the larger socio-political context and disadvantage, allows Canadian courts to express a judgment on the fairness of particular legislative choices that touch upon prohibited grounds of discrimination. It is not surprising, therefore, that some have argued that the courts’ central concern is to decide whether the distinction is socially justifiable. All of these considerations have direct consequences on the situation of same-sex couples. In fact, -together with some of the traits mentioned above- the emphasis on the right to “equal consideration and respect”, the emphasis on “human dignity”, and the need to foster “personal development” have allowed the finding that sexual orientation has nothing to do with the capacity to form loving and lasting relationships. In this respect, sexual orientation has been considered as an immutable characteristic that has been at the root of a history of prejudice and disadvantage, and that falls within the grounds of discrimination protected by the Charter.

The first conclusion, thus, is that same-sex couples have been considered “family”. The use of a contextual approach in the framework of substantive equality has ensured the attainment of the purpose of section 15. However, it is vulnerable to the difficulty and the dangers of assessing the spirit of the people, the communis opinio that could, ultimately, justify or reject differential legal treatment on certain classes of people. This criticism brings back the perils of manipulability that have been associated with formal equality. Because there is no longer a
normative definition of the comparator, there might be more leeway for judicial discretion. As far as same-sex couples’ right to marry is concerned, I have discussed a case (EGALE) that, although not particularly authoritative, highlights the likelihood of the corruption of the contextual approach. The judge upheld the denial of marriage rights in light of existing societal beliefs and customs, and tradition (in light of the meaning attributed to the word marriage by the Constitution Act, 1867). The case does not contain a sound constitutional analysis and will probably be overruled, but it is to be taken into account. After all, it is not surprising that gays and lesbians are among the few classes of people still subject to such a penetrating control in their lives by moral judgements and the pervasiveness of what is believed to be the traditional customs of society.

I also discussed the methodology employed in the Canadian context in order to reach equality for same-sex couples. Because of the framing of Charter cases, it has been established that same-sex partners should be treated equally to unmarried opposite-sex cohabitants. In this realm, the second characteristic of the Canadian approach comes into play. In fact, since the late 1970s, unmarried cohabitants have been brought into the system of family law. The way chosen has been that of expanding the definition of “spouse”. By the mid- and late 1990, when same-sex couples first succeeded in their challenges to this definition, considerable parts of family law and of the welfare system included unmarried cohabitants. The value underpinning the ascription of spousal status to unmarried cohabitants is the prevention of exploitation. The most common strategy to date has been to remain within this system of recognition, based on ascription of spousal status to common law partners.

This approach is remarkably different from the avenue followed in European countries, where equality has been identified in access to an institution that, although named differently from marriage and separate from it, is based on the choice to celebrate a public commitment in
the eyes of the law. Registered partnerships schemes, therefore, have been framed as close to marriage as possible, mirroring the same impediments, the requisite of monogamy, of being single before entering, and others. To elaborate, it has been forbidden to registered partners to marry a different person without filing a prior application for dissolution of their union. This might be explained by emphasizing that the system resembles a celebration and entails the recognition of a status, incompatible with the married status precisely because it is similar to it. These schemes are almost exclusively available to same-sex couples (except in The Netherlands), which again emphasis their nature as substitutes for marriage. Of course, they have been criticized precisely because they have been the instrument for avoiding the opening up of marriage to same-sex couples, although they almost completely resemble it.

On the contrary, other countries have adopted weaker schemes (such as France and Belgium), not based on the recognition of a status but merely concerned with the material aspect of a vie commune. They have allowed parties to one of these schemes to marry without any need to formally terminate the union. The schemes are not intended as substitutes for marriage, totally equivalent to it, but as instruments able to capture a variety of living-together arrangements. These might encompass situations that are not generally thought of as a “family”. In Europe, even these minor schemes are still based on a voluntary contractual choice of the individuals involved. Of course, they are subject to the problem of discrimination regarding marriage.

In accordance with these concepts, Vermont has enacted legislation aimed at creating a civil union status for same-sex couples, with all the legal incidents of marriage. Simultaneously, that State has enacted a Reciprocal Beneficiaries law in order to protect the position of certain forms of living-together not characterized by conjugal life. Only individuals related by blood or adoption may be eligible, and it is necessary to issue a specific declaration to the designated
official. The kinds of benefits provided to reciprocal beneficiaries are basically limited to health related issues. Interestingly, the formal relationship will end automatically upon the celebration of marriage or civil union.

A model based on ascription seems the preferred one in some Australian states. In Canada, the ascription model seems so widespread that it has been suggested that it be available for the purposes of property and support legislation to any two persons living together with emotional and economic interdependence. Regarding these situations, no reference is made to separation and divorce law, parental responsibility, or succession law. If the recommendations were to be adopted, these matters would, in my view, remain strictly in the realm of "family" law.

In addition, there have been several proposals for registered partnership schemes, and one province has acted accordingly, limiting it to conjugal couples. Proposals for registered partnership schemes have made clear that they should not be a substitute for same-sex marriage, but rather a way to remedy to a wide variety of situations of economic interdependency when close relationships between adults are at stake. In my opinion, these views of registered partnership schemes appear tied to the Canadian deconstructions of the concept of married status and "family", and should be adopted only in conjunction with the opening up of marriage to same-sex couples. This would avoid forcing same-sex couples to be identified with a variety of living arrangements that do not necessarily represent the same expectations and commitment of family relations, and would further avoid reinforcing the stereotype that family is based on heterosexuality.


