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**PEERING INTO THE BEDROOMS OF THE PROVINCE:
AN EXAMINATION OF THE DIFFERENT DEFINITIONS
OF “SPOUSE” IN *THE FAMILY LAW ACT* AND *THE
ONTARIO WORKS ACT, 1997***

TAMARA D. BARCLAY*

RÉSUMÉ

Cet article analyse les définitions du terme « conjoint » présentes dans la *Loi sur le droit de la famille* et dans les règlements pris en application de la *Loi de 1997 sur le programme Ontario au travail*. Après avoir passé en revue le contexte législatif de chaque définition, l'article analyse l'argumentation à laquelle le procureur général de l'Ontario a eu recours récemment lors de deux contestations constitutionnelles relativement à ces définitions : *M. c. H.* (contestation de la définition contenue dans la *Loi sur le droit de la famille*) et *Falkiner c. Directeur, Direction du maintien du revenu, ministère des Services sociaux et communautaires* (contestation de la définition dans la *Loi sur les prestations familiales*, identique en substance à la définition contenue dans la *Loi de 1997 sur le programme Ontario au travail*). Selon l'auteure, les deux définitions de « conjoint » et de nombreux arguments du gouvernement reposent sur une conception fonctionnelle de la famille dans laquelle il est sous-entendu que les rôles assignés à chacun des sexes sont stricts. Comme l'auteure l'indique en faisant référence aux situations factuelles qui sous-tendent ce type de causes, ce concept de famille ne correspond pas aux réalités de la vie quotidienne. Bien que les définitions partagent ce fondement de conception fonctionnelle et certaines caractéristiques (les deux sont hétérosexistes, par exemple), elles diffèrent sur de nombreux points. L'auteure remet en question les arguments proposés par le gouvernement pour défendre ces différences et révèle les incohérences, voire les contradictions, de la position adoptée par le gouvernement dans les deux écrits législatifs.

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INTRODUCTION

Unless we start to make family law connect with how people really live, the law is either largely irrelevant or merely ideology.¹

And so, almost a decade ago, Martha Minow fingered exactly what remains wrong with laws affecting families (still) today. One only needs to look so far as definitions and concepts of spouse for an apt illustration: although there have been many recent debates over, and changes to, the definition of “spouse” – and who is to be included in the definition – the latest editions of Black’s Law Dictionary and the Oxford English Dictionary both steadfastly profess “spouse” to mean, simply and traditionally, a “husband or wife”. Over the last quarter century, Canada has seen numerous challenges to this traditional definition. No longer does the word at law apply only to a man and a woman who are legally married.² Rather, the law also recognizes as spouses opposite-sex couples who live “common-law”, and there is an undeniable movement across Canada towards also recognising cohabiting same-sex couples as “common-law partners”, a category once reserved only for opposite-sex couples.³ With each of these movements away from “tradition” there has been resistance within society: any change to the law has social, financial, and political ramifications attached to it, and changes to who we consider to be a “spouse” or in a “spouse-like” relationship is no different. Many people are wary or downright opposed to change, particularly when it involves something as deep-rooted in society as the institution of family or marriage. However, change is inevitable. Two examples of “spousal changes” in North America are the recent legislative and judicial activity in British Columbia and Hawaii: in 1998, British Columbia became the first jurisdiction in Canada to extend to same-sex couples all the same rights and responsibilities as opposite-sex couples in relation to support, child custody and access;⁴ in 1996, Hawaii became the first jurisdiction in the United

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1. M. Minow, “Redefining Families: Who’s In and Who’s Out?” (1991) 62 *Univ. Colorado Law Rev.* 269 at 271.
 2. The Ontario *Family Law Act*, R.S.O. 1990, c. F-3, for instance, is an example of provincial legislation that currently recognizes, for some purposes, heterosexual cohabiting unmarried couples as “spouses”.
 3. Over the last decade there have been many cases, not all successful, in which the definition of spouse was challenged by gay or lesbian couples. A few of the most recent include: *Rosenberg v. Canada (Attorney General)*, [1998] O.J. No. 1627, 158 D.L.R. (4th) 664 (Ont. C.A.) [where the Court unanimously held that the opposite-sex only pension survivor benefits were discriminatory]; and (1995), 25 O.R. (3d) 612 (Gen. Div.) [where the Court held that if there was discrimination, it was justified under s.1 of the *Charter*]; *Egan v. Canada*, [1995] 2 S.C.R. 513, 124 D.L.R. (4th) 609; *C.E.G. (No. 1) (Re)*, [1995] O.J. No 4072 (Gen. Div., Am. Ct.); *C.E.G. (No. 2) (Re)*, [1995] O.J. No. 4073 (Gen. Div., Fam. Ct.); *Canada (AG) v. Moore*, [1996] F.C.J. No. 1139 (T.D.); *Taylor v. Rossu* (1996), 140 D.L.R. (4th) 562, 191 A.R. 252 (Alta. Q.B.); *Vogel v. Manitoba* (1995), 126 D.L.R. (4th) 72, [1995] 6 W.W.R. 513 (Man C.A.). For the most recent American case on this issue, see *Baker v. State (Vt.)*, Vermont Supreme Court, December 20, 1999 (Unreported), where the Vermont Supreme Court determined that the Vermont marriage laws which prohibit the issuance of marriage licenses to same-sex couples was a violation of Vermont’s Constitution.
 4. See *Family Relations Act*, R.S.B.C. 1996, c.128 as am. by *Family Relations Amendment Act*, 1997

States to recognize same-sex marriages – a decision which resulted in the hasty enactment of federal legislation providing other states with the right to refuse to recognize for legal purposes a same-sex couple married in Hawaii.⁵

Given that who is a spouse strikes at the very heart of family life, it is surprising to see the definition of “spouse” vary from one legislative context to another within a single jurisdiction. Ontario is such a jurisdiction. The provincial *Family Law Act*⁶ and the *Ontario Works Act, 1997*⁷ are examples of such legislation.

My intention is to look critically at the definitions of spouse in the *Family Law Act* and the *Ontario Works Act, 1997*, and explore some of the arguments and policy justifications made by the present provincial government for the current and differing definitions of spouse. More specifically, I will examine how the current provincial government has used recent litigation to advance its functionalist approach to family law and spouses, and to maintain its policy decisions on the different definitions of spouse in the *FLA* and the *OWA*, despite social and family realities that call for change.

The task will be completed in four sections. In section one, I will outline and discuss the current definitions of “spouse” and the legislative history of each definition. In order to illustrate how the definition of “spouse” affects “real life situations”, I intend to use two cases: *M. v. H.*⁸ which challenged the definition of spouse in the *FLA*, and *Falkiner v. Ontario*⁹ which challenged the definition in (what is now) the *OWA*.¹⁰ Section two will outline the facts and ultimate decision in each case, while section three will provide an overview of governmental policies and to what ends they were invoked in these cases. Finally, in section four, I shall critique the policies behind the definitions, ultimately questioning the appropriateness of, and the motivations behind, these inconsistent definitions.

(proclaimed 4 February 1998); and *Family Maintenance Enforcement Act*, R.S.B.C. 1996, c.127 as amended by *Family Maintenance Enforcement Amendment Act, 1997* (proclaimed 4 February 1998).

5. See *Baehr v. Miike*, 80 Haw. 341, 910 P 2d. 112 (1996) (Hawaii S.C.); and the *Defense of Marriage Act*, s.1738C, amending Chapter 115 of title 28 of the United States Code, and s.7 amending Chapter 1 of title 1 of the United States Code.
6. R.S.O., 1990, c.F.3 [hereinafter, “FLA”].
7. S.O. 1997, c. 25, Schedule A [hereinafter, OWA].
8. [1999] 2 S.C.R. 3, 171 D.L.R. (4th) 577 (S.C.C.) [hereinafter, *M. v. H.*, S.C.C. cited to D.L.R.].
9. *Falkiner v. Director, Income Maintenance Branch, Ministry of Community and Social Services et al.* (SARB Decision of the Constitutional Challenge, August 13, 1998) [hereinafter *Falkiner*, SARB].
10. At the time the *Falkiner* challenge began, the legislation dealing with social assistance were the *Family Benefits Act*, R.S.O. 1990, c. F.2 [hereinafter the *FBA*] and the *General Welfare Assistance Act*, R.S.O. 1990, c.G.6 [hereinafter the *GWAA*]. Since this time, however, the *FBA* and the *GWAA* have been repealed and the *Ontario Works Legislation, 1997*, *supra* note 7, enacted in its place. Although many differences exist between the two acts, the wording of the Regulatory definition of spouse for the purposes of support remained, for all practical purposes, the same. Although the *FBA* and the *GWAA* were in force when the *Falkiner* litigation began, for the purposes of this paper I have referred to the *OWA*.

DEFINING "SPOUSE": THE LEGISLATION

The Family Law Act

The predecessor to the *Family Law Act* was the *Family Law Reform Act*.¹¹ This *Act* was first introduced in 1976 by the (then) Attorney General of Ontario, the Hon. R. Roy McMurtry. The *FLRA* was intended to answer the public's demands in the late 1960s and early 1970s to re-organize existing property law upon marriage breakdown, and to change the regulation of the rights and obligations of family members.¹² The objectives of the *FLRA* as stated in the Preamble to the Act included: the desire to encourage and strengthen the role of the family in society; the recognition of the equal position of spouses as individuals within marriage and of marriage as a form of partnership; the desire to provide for the orderly and equitable settlement of the affairs of the spouses upon the breakdown of the partnership; and the desire to provide for other mutual obligations in family relationships, including the equitable sharing by parents of responsibility for their children.¹³ In addition to addressing these concerns with respect to married spouses, the *FLRA* became the first Canadian statute to extend support rights and obligations to unmarried heterosexual couples. While certain rights were reserved for married couples alone, for purposes of support, the *FLRA* broadened the definition of "spouse" and proclaimed a spouse to be a "party to a valid, void or voidable marriage" or either of a man and a woman who had cohabited continuously for at least five years, or a man and a woman who were in a relationship of some permanence where they were the natural parents of a child.¹⁴

The decision to include "common-law" couples in the definition of spouse was controversial: many common-law couples criticized the move, stating that they had chosen not to marry in order to escape the confines and obligations of legal marriage; other members of the public criticized the definition as attacking the traditional family.¹⁵ The provincial government stated publicly that its decision to extend the definition of spouse to non-married [heterosexual] couples was based on the fact that women in common-law relationships, like women in married relationships, tended to become financially dependent on their male partners due to their child-rearing activities and unequal earning power. The Attorney General also explained that the move was an attempt by the government to reduce the increasing demands on the welfare system which had resulted from some men's abandonment of their common-law spouses and the children of these relationships.¹⁶

11. *Family Law Reform Act*, S.O. 1978, c.2, [hereinafter the *FLRA*].

12. The enactment of the *FLRA* followed the controversial Supreme Court of Canada decision in *Murdoch v. Murdoch*, [1975] 1 S.C.R. 423, 41 D.L.R. (3d) 367 (S.C.C.). While the majority of the Supreme Court there held that a resulting trust could not be applied in favour of Mrs. Murdoch in recognition of her contribution to the family ranch, the decision provided a catalyst for reform across Canada.

13. *FLRA*, Preamble.

14. *FLRA*, ss. 1, 14(b).

15. Ontario, Legislative Assembly, *Debates* at 4793 (18 November 1976) (Statement by the Hon. R. McMurtry).

16. *Ibid.*

In March 1986, the *FLRA* was replaced by the *Family Law Act*.¹⁷ Although the *FLA* included only heterosexual couples within its protections and obligations, and continued to distinguish married and non-married couples, among the changes the new *Act* brought to Ontario family law was an amendment to the definition of spouse for the purposes of support. Section 29 of the *FLA* shortened the period of cohabitation required for spousal status from five years to three, and amended the parent stipulation to include men and women who were the adoptive parents of a child. In the same year, the Ontario legislature also amended many other provincial statutes in order to confer the same rights and responsibilities on common-law spouses as applied in respect of married spouses.¹⁸ Among the reasons given by the government for this change was the desire to employ a “uniform definition” of spouse throughout provincial law.¹⁹ Thus, until recently, for the purposes of support, spouse was defined in section 29 as

a spouse as defined in subsection 1(1) [party to a valid, void, or voidable marriage], and in addition includes either of a man and woman who are not married to each other and have cohabited,

- (a) continuously for a period of not less than three years, or
- (b) in a relationship of some permanence, if they are the natural or adoptive parents of a child.²⁰

This definition remained unchanged from the 1986 introduction of the *FLA* until November, 1999. In November, 1999 the current provincial government enacted changes to section 29 of the *FLA*²¹ in response to the Supreme Court’s ruling in *M v. H.* that the definition was an unjustifiable infringement on the rights guaranteed in section 15 of the *Charter*. The legislation, entitled *Amendments Because of the Supreme Court of Canada Decision in M. v. H. Act, 1999*,²² amended section 29 of the *FLA* by adding the following definition:

“same-sex partner” means either of two persons of the same sex who have cohabited,

- (1) continuously for a period of not less than three years, or
- (2) in a relationship of some permanence, if they are the natural or adoptive parents of a child.

As a result of this amendment, same-sex partners will have the same support rights and obligations as common-law spouses.

17. *Family Law Act*, S.O. 1986, c. 4.

18. *M. v. H.*, S.C.C., *supra* note 8, Factum of the Attorney General, para. 23.

19. See above, note 14, and additionally, *M. v. H.*, S.C.C. *supra* note 8 (Factum of the Attorney General, para. 24).

20. *FLA*, s.29.

21. The Act also amended various other statutes in the same manner.

22. S.O. 1999, c.6. The Act received first, second, and third reading on October 27, 1999. It received Royal Assent on October 28, 1999. Those provisions which amended the definition in the *FLA* came into force on November 20, 1999 (thus meeting the six month deadline given by the Supreme Court of Canada). Several other provisions came into force on March 1, 2000.

As might be surmised by the title of the new *Act*, the government did not willingly change the definition. In a News Release from the Ontario Ministry of the Attorney General of October 25, 1999, Attorney General Jim Flaherty stated

[t]his legislation is clearly not part of our agenda. The only reason we are introducing this Bill [Bill 5] is because of the Supreme Court of Canada decision. We would not introduce the legislation otherwise.

Our proposed legislation complies with the decision while preserving the traditional values of the family by protecting the definition of spouse in Ontario law.²³

In the Fact Sheet given to the media by the Ontario Government, the Ministry of the Attorney General stated that the amendments will

... [introduce] into the law a new term, "same sex partner", while at the same time protecting the traditional definition of spouse. ... The rights and obligations that are unique to married couples are not being extended to same sex partners. ... The Bill responds to the Supreme Court decision while preserving the traditional value of the family in Ontario. ... The Bill does not alter the traditional meaning of common-law spouses in Ontario law."²⁴

The Ontario Works Act, 1997

The definition of "spouse" for the purposes of the *OWA* has seen numerous changes since its initial enactment. At issue in the *Falkiner* litigation were Regulations that defined a "spouse" as

- (1) (a) a person of the opposite sex to the applicant or recipient who together with the applicant or recipient have declared to the administrator that they are spouses,

23. News Release re Bill 5, October 25, 1999. Quicklaw, database OB99, document 802. Interestingly, in May 1994, the (then) NDP Ontario Government introduced Bill 167 – "The Equality Rights Statute Law Amendment Act, 1994" – which would have extended the definition of spouse in Ontario to include same-sex couples. The controversial Bill followed on the footsteps of a 1993 Ontario Law Reform Commission (OLRC) Report on the rights and responsibilities of cohabitants under the *FLA*. The Report recommended setting up a system of registered domestic partnerships in order to give same-sex couples the same rights and obligations afforded to married persons throughout the *FLA*. While the Law Commission wanted more information about the attitudes and expectations of cohabiting same-sex couples on the issue, the Commission reported that it saw "much merit in treating [same-sex cohabiting couples] in the same way [as opposite-sex cohabiting couples] – so that economic inequalities and exploitation will be minimized in all familial relationships." In writing Bill 167 the provincial government adopted and expanded the OLRC recommendations. The Bill would have redefined "spouse" in 57 Ontario statutes — including the *FLA* — extending the definition so as to include same-sex couples. However, in June 1994, Bill 167 was defeated on a free vote at second reading, by a margin of 68:59. Further, in February, 2000, the Federal Government tabled Bill c-23, the *Modernization of Benefits and Obligations Act*, (First Reading February 11, 2000) in the Commons which, if passed, will change 68 federal statutes (including tax, pension and bankruptcy laws) that mention couples. While "spouse" would still refer only to opposite-sex couples, "common-law partners" would apply equally to both heterosexual and homosexual relationships.

24. News Release re Bill 5, October 25, 1999. Quicklaw, database OB99, document 802.

- (b) a person who is required under a court order or domestic contract to support the applicant or recipient or any of his or her dependants,
 - (c) a person who has an obligation to support the applicant or recipient or any of his or her dependants under section 30 or 31 of the *Family Law Act* whether or not there is a domestic contract or other agreement between the person and the applicant or recipient whereby they purport to waive or release such obligation to support, or
 - (d) subject to subsection (3), a person of the opposite sex to the applicant or recipient who is residing in the same dwelling place as the applicant or recipient if the social and familial aspects of the relationship between the person and the applicant or recipient amount to cohabitation and,
 - (i) the person is providing financial support to the applicant or recipient,
 - (ii) the applicant or recipient is providing financial support to the person, or
 - (iii) the person and the applicant or recipient have a mutual agreement or arrangement regarding their financial affairs.
- (2) For the purposes of the definition of “spouse”, sexual factors shall not be investigated or considered in determining whether or not a person is a spouse.
- (3) For the purpose of clause (d) of the definition of “spouse”, unless the applicant or recipient provides evidence to satisfy the administrator to the contrary, it is presumed that if a person of the opposite sex to the applicant or recipient is residing in the same dwelling place as the applicant or recipient, the person is the spouse of the applicant or recipient.²⁵

Thus, subsection (3) provided that any time two opposite-sex individuals lived together, they were presumed to be spouses from the moment the co-residency began, unless they could “satisfy the administrator to the contrary”.

In the wake of the Supreme Court of Canada’s ruling in *M. v. H.*, the regulations to the *OWA* were amended to create a new category of “same-sex partner”. The above noted definition of “spouse” was also amended to no longer refer simply to “a person” in clauses (b), (c), and (d) but to “a person of the opposite sex to the Applicant or Recipient”. Significantly, the presumption of a spousal relationship upon residing in the same dwelling created by subsection 1(3) was repealed.²⁶

25. O. Reg. 134/98, s. 1(1).

26. O. Reg. 32/00. The *Regulation* amends subsection 1(1) by adding the following definition: “Same-sex partner”, in relation to an applicant or recipient, means,

- (1) a person of the same sex as the applicant or recipient, if the person and the applicant or recipient have together declared to the administrator or to the Director under the *Ontario Disability Support Program Act, 1997* that they are same-sex partners,
- (2) a person of the same sex as the applicant or recipient who is required under a court order or domestic contract to support the applicant or recipient or any of his or her dependants,
- (3) a person of the same sex as the applicant or recipient who has an obligation to support the applicant or recipient or any of his or her dependants under section 30 or 31 of the *Family Law Act*, whether or not there is a domestic contract or other agreement

Like the spousal definition in the *FLA*, the definition of “spouse” in the *OWA Regulations* has been socially and politically charged. As Margaret Hillyard Little and Ian Morrison argue

[t]he history of how the welfare system has treated the definition of “family” and poor women’s relationships with men clearly reflects the entanglement of the issues of economic need and moral worthiness. Throughout the history of this policy the state has always been concerned about how to provide aid to single mothers and yet ensure that the policy did not promote this “deviant family form”.²⁷

In 1920, the first formal state organized social assistance program in Ontario, the *Ontario Mothers’ Allowance Act*, was passed.²⁸ The program allowed a single mother who was a “fit and proper person”, and who was morally deserving and in economic need, to receive government support. The “notion of deservedness was broad, encompassing almost all aspects of a mother’s life including her associations with men.”²⁹ Although the original Act permitted case workers to examine almost every aspect of a recipient’s life, the factors considered were later narrowed to financial honesty and sexual conduct.³⁰

In 1968 *Ontario Mothers’ Allowance Act* was repealed, and the *Family Benefits Act* enacted. While the new Act removed the explicit moral test of “fit and proper” person, women could still only be eligible for assistance if they were single and not living with someone as husband and wife. Hence the “man in the house” or “spouse in the house” rule was born. As a result of this requirement, welfare investigators would go to extraordinary lengths to determine whether a female recipient was sexually involved with a man. As Little and Morrison report, “[t]his zeal to uncover implications of sexual contact suggests that the more overt moralization of the ‘fit and proper person’ standard continued into welfare administration long after its formal repeal.”³¹ The rule also led to much resistance. Those who were opposed to the provision criticised it for being discriminatory against women, arbitrary and capricious, and unfair in its administration at both the delivery level and the appellate level.

between the person and the applicant or recipient whereby they purport to waive or release such obligation to support, or

(4) a person of the same sex as the applicant or recipient who is residing in the same dwelling place as the applicant or recipient, if the social and familial aspects of the relationship between the person and the applicant or recipient amount to cohabitation and,

- (1) the person is providing financial support to the applicant or recipient,
- (2) the applicant or recipient is providing financial support to the person, or
- (3) the person and the applicant or recipient have a mutual agreement or arrangement regarding their financial affairs.

27. M. Hillyard Little and I. Morrison, “‘The Pecker Detectors are Back’: Regulation of the family form in Ontario welfare policy” (1999), 34:2 *Journal of Canadian Studies* 110 at 112 [hereinafter, “Little and Morrison”].

28. S.O. 1920, c. 89.

29. Little and Morrison, *supra* note 27 at 113.

30. *Ibid.* at 114.

31. *Ibid.* at 115.

Additionally critics claimed that by requiring investigations into the cohabitation and financial arrangements of applicants or recipients of social assistance, the definition gave rise to invasions of privacy.³² Recipients protested that the definition be taken seriously, and that benefits “only be removed where a true marriage-like relationship existed in the social, sexual and economic relationship of the man and woman involved, and not just based on any suspicion of sexual contact.”³³ Following the proclamation of the *Charter of Rights and Freedoms*, test cases were launched against the definition of spouse. However, these cases were never argued, for the Ontario government changed the definition.

In 1986, following wide attack of the rule in the media and a thorough investigation by the Social Assistance Review Committee, the government announced that the “spouse in the house” rule would be abolished as of April 1, 1987. The government proceeded to introduce a new regulatory definition of spouse that allowed a sole support parent to remain eligible for public assistance if she resided with a man, so long as the man did not provide economic support for her or her dependent children, accept parental responsibility for the children, nor have a legal obligation to support her or her dependent children.³⁴ Two other significant changes were also introduced by the government. The first was that while economic support, and social and familial elements were to be considered in assessing whether a spousal relationship existed, the Ministry would no longer be permitted to investigate the sexual aspects of the relationship. Second, cohabitational relationships would not be considered to be “spousal” unless the parties had continuously cohabited for a period of not less than three years.³⁵ The Minister in charge of the *Act* and the Attorney General stated that this latter change was an intentional decision by the government in order to provide that the definition of “spouse” in public assistance legislation be in line with the definition in the *FLA*.³⁶

This definition of spouse was in effect until October, 1995. In June, 1995 the current Conservative provincial government took office, and in August, 1995 it announced that changes to the definition of spouse for the purposes of social assistance legislation would be made to the Regulations to the *Family Benefits Act* and the *General Welfare Assistance Act*.³⁷ Specifically, the government announced that increases in the use of

32. For criticisms of the old definitions see: *Report of the Social Assistance Review Committee on the Spouse in the House Rule* (Toronto: Queen’s Printer, 1987); J. Haddad, *Sexism and Social Welfare Policy: The Case of Family Benefits in Ontario* (Toronto: Ontario Institute for Studies in Education, 1995); P. M. Evans, “Divided Citizenship? Gender, Income Security, and the Welfare State” in P. M. Evans and G. R. Wekerle eds., *Women and the Canadian Welfare State: Challenges and Change* (Toronto: University of Toronto Press, 1997).

33. Little and Morrison, *supra* note 27 at 115.

34. Justice Rosenberg, writing in dissent in the Divisional Court’s first decision in *Falkiner*, canvassed the history of social assistance legislation and the definition of spouse: *Falkiner v. Ontario* (1996), 140 D.L.R. (4th) 115, 94 O.A.C. 109 (Ont. Div. Ct.) at 140 [hereinafter, “*Falkiner*, Ont. Div. Ct.”].

35. *Ibid.* per Rosenberg J. commenting on a news release of Community and Social Services Minister, John Sweeney, and the Attorney General, Ian Scott.

36. *Ibid.*

social assistance and the public money being used for that purpose, and the “unfairness” of the definition would result in the three year “grace period”³⁸ afforded to social assistance recipients or applicants being abolished.³⁹ As a result of this change, if the relationship between the applicant/recipient and a person of the opposite sex “amounted to cohabitation” and either one provided support to the other or they had a mutual agreement or arrangement with respect to their financial affairs, they were deemed to be ‘spouses’.⁴⁰

The definitions of spouse in the *FLA* and the *OWA*, and the legislative history of each, have been controversial. While it would be possible to provide a discussion and critique based on an abstract analysis, the definitions and their effects become more poignant when discussed in view of their real life effects. To explore the differences and similarities between the definitions and to critique the underlying policy behind the government’s defence of them, the cases of *M. v. H.* and *Falkiner v. Ontario*, both cases challenging the definition of spouse, provide telling examples.

THE CASES: AN OVERVIEW

M. v. H.

M. and H. are lesbians who lived together in a stable, conjugal, spouse-like relationship for ten years before their separation in September, 1992. The separation was not amicable, and the parties did not divide their personal property or household contents. In October, 1992, M. brought an application for periodic financial support from H., alleging that she had experienced financial difficulties since the separation which were caused by her dependency on H. that was, at least in part, created by the relationship.⁴¹ She also sought, *inter alia*, an order for partition and sale of the parties’ house, and a declaration that she was the beneficial owner of certain land and premises owned by H. The difficulty arose however, because under the *FLA* M. could not claim spousal support; she and H. did not fall under the definition of spouse in section 29 because they were not a “man and a woman.” Furthermore, there was not a separate contract between M. and H. outlining that financial support be provided to one another in the

37. *Supra*, note 10. These *Acts*, together, were the precursors to the *Ontario Works Act, 1997*.

38. So called by the current Ontario government in its Factum filed for the first Divisional Court hearing, *Falkiner*, Ont. Div. Ct. *supra*, note 34 (Factum of the Attorney General at para. 47). Wherever possible, I have attempted to extract the Ontario government’s position and submissions from its most recent factum, filed for the recent hearing before the Ontario Superior Court of Justice [herein-after *Falkiner*, Ont. S.C.J.].

39. It is likely that to some degree the government was reacting to public opinion, and misperception, about the provisions. As Little and Morrison argue, it is unlikely that many members of the public knew about the three-year rule, but were perhaps aware of growing numbers of recipient women living with men, and there were many complaints about this “abuse” which was seen to be “blatant fraud and apparently condoned by the government” (Little and Morrison, *supra* note 27 at 116).

40. For the full text of the definition see the beginning of this section, “The Ontario Works Act, 1997”. As noted earlier, the *FBA* and the *GWAA* were replaced in 1997 by the *OWA*; however, as noted above, the Regulatory definition of spouse remained the same.

41. *M. v. H.* (1996), 17 R.F.L. (4th) 365 at 377, 132 D.L.R. (4th) 538 (Ont. Gen. Div.).

event of a separation that the court could independently rule on.⁴² M. thus amended her application in order to include a section 15(1) *Charter* challenge to the definition of spouse in section 29 of the *FLA* on the basis that the definition infringed the equality rights guaranteed by section 15(1) the *Charter*. To back her argument, M. claimed that she and H. had lived together in a relationship that “mirrored an opposite sex common-law relationship”. As opposite-sex common-law relationships are recognized under Part III of the *FLA* (the support provisions), M. claimed so too should same-sex “common-law-type” relationships.⁴³

Supporting M.’s claim that she and H. had lived together as “spouses” was evidence indicating that in many ways M. and H.’s relationship had resembled that of many heterosexual common-law spouses. M. presented evidence that during the relationship, the two women shared almost every aspect of their lives with one another. For instance, while the home they lived in during their relationship had been owned by H. prior to their cohabitation, the two women shared their everyday living expenses. In addition, the women were business partners and accumulated substantial business and personal assets, including business and country properties which allowed them to enjoy an affluent lifestyle and vacation several times a year. In 1985 M. and H. made mutual wills.⁴⁴

Among their business ventures was an advertising business the two women incorporated together and which supplied them with their primary source of income during the relationship. Initially, M. and H. both worked at this company, however over time H. became more involved in the business and M. in domestic tasks, although each woman continued to be an equal shareholder in the company despite M.’s lesser involvement and less direct contribution to the company.⁴⁵

H. opposed M.’s claim. She disputed that she and M. had followed a “common-law type” relationship and argued that support should not be granted. The Attorney General

42. Even if there had existed a private contract between the two women, it is not certain whether a court would uphold it. Section 52(1) of the *FLA* effectively disallows domestic contracts between couples of the same sex. Furthermore, even if the women had set it up to be different from the “formula” generally used for domestic contracts, as Professors Cossman and Ryder point out: “[t]here is a risk that such contracts would be found to violate public policy, in the same way in which marriage contracts, and cohabitation contracts between different-sex couples, were historically seen to violate public policy”: B. Cossman and B. Ryder, *Gay, Lesbian and Unmarried Heterosexual Couples and the Family Law Act: Accommodating a Diversity of Family Forms*, (Research paper prepared for the Ontario Law Reform Commission, June 1993) 9 at 102.

43. *M. v. H.*, *supra* note 41 at 377.

44. *M. v. H.*, S.C.C., *supra* note 8 (Factum of M., para. 3).

45. In many ways M. and H. did have what might be called a “traditional” familial arrangement, and thus one which the provincial government has been willing, even eager, to recognize in opposite-sex couples. That is, H. worked at the business and drew a salary from the parties’ jointly incorporated company; while M. occasionally helped out at the business, she received no financial compensation. Furthermore, M. did the majority of household chores, including all the cooking and most of the laundry. M. also took care of the maintenance of the home and all of the gardening (*M v. H.*, S.C.C., *supra* note 8 (Factum of “M.”, paras. 2–4).

of Ontario intervened in the proceedings in support of H., and eventually claimed that while the provision infringed section 15(1), it was saved under section 1 of the *Charter*.⁴⁶ The Ontario Court, General Division determined in 1996 that the definition unjustifiably infringed section 15(1) of the *Charter*;⁴⁷ in 1997 a 2 to 1 majority of the Ontario Court of Appeal agreed.⁴⁸ Although M. and H. would later settle their dispute privately, the Attorney General of Ontario sought and obtained leave to appeal to the Supreme Court of Canada.

On May 20, 1999 the Supreme Court released its decision which, by an 8 to 1 majority, upheld the decisions of the lower courts that section 29 unjustifiably breached section 15(1).⁴⁹ Specifically, Justices Iacobucci and Cory, writing for the majority, held that the definition of spouse in section 29 of the *FLA* violated the “human dignity of individuals in same-sex relationships” and

[t]he exclusion of same-sex partners from the benefits of the spousal support scheme implies that they are judged to be incapable of forming intimate relationships of economic interdependence, without regard to their actual circumstances.⁵⁰

Further, the Supreme Court held that the infringement could not be justified under section 1, because “there is no rational connection between the objectives of the spousal support provisions and the means chosen to further this objective.⁵¹ As a result of the finding, the Supreme Court declared section 29 to be of no force and effect, but suspended the application of the declaration for six months.

Falkiner v. Ministry of Community and Social Services

The *Falkiner* case involved section 15(1) and section 7 *Charter* challenges to the definition of “spouse” in the then *FBA*. The applicants were four women who were each living with their dependent children and with a man who was not the children’s father. As each of the four applicants had been abused by men before, they were each wary about committing to a relationship, particularly a long-term one. They did not consider their cohabitantes to be their “spouse” and wished to maintain financial independence from them while “trying out” cohabitation in order to assess the relationship. Prior to October, 1995 each of the women was a recipient of social assistance under the former *FBA*. When the new *Regulations* came into effect in October 1995, the women had each been residing with the men in reliance on the prior regulations which had defined “spouse”, *inter alia*, as a person of the opposite sex with whom the applicant or recipient had resided continuously for a period of not less

46. When M. first initiated the claim, the NDP government was in power and intervened in support of M’s claim. However, following the change in government in 1995 from NDP to Conservative, the Attorney General changed its position, removed its previous factum, and filed a new one with its current claims.

47. *Supra* note 41.

48. (1997), 142 D.L.R. (4th) 1, 31 O.R. (3d) 417 (Ont. C.A.), [hereinafter “*M. v. H.*, Ont. C.A.”].

49. *M. v. H.*, S.C.C., *supra* note 8.

50. *Ibid.* at 597.

51. *Ibid.*

than three years. Under the new *Regulations* the man with whom each of the women was living was deemed to be their “spouse” and as a result the women immediately lost the entitlement to receive, in their own right, Family Benefits for themselves and their children. Furthermore, as the definition of “spouse” in the *GWAA* was identical to that in the *FBA*, the applicants were also unable to receive benefits under the *GWAA* as sole support parents.⁵²

The women initially brought an application to the Ontario Court, General Division under the *Judicial Review Procedure Act*⁵³ claiming that the October, 1995 Regulations were *ultra vires* the *FBA*, and additionally, that the Regulations infringed sections 7 and 15(1) of the *Charter*. At the time of the hearing of the application, the applicants had each requested, but had not yet received, a review under section 13(5) of the *FBA* of their termination of their benefits, by the Social Assistance Review Board.

The majority of the Court dismissed the application. Writing for the majority, Mr. Justice Borins held that the impugned *Regulations* were *intra vires* the *FBA* and the *GWAA* because the *Acts* “expressly provide for the definition of eligible classes and persons in need *by regulation*” and therefore, “*Regulations* 409/95 and 410/95 [now *Regulation* 134/98 under the *OWA*] fall squarely within the ambit of authority delegated to the Lieutenant-Governor-in-Council.”⁵⁴ Further, the majority of the court did not consider the section 7 and section 15(1) *Charter* claims. Borins J. held that the challenge was premature because the review of the applicants’ benefits by the SARB had not been completed, and as such, the Court lacked a complete factual record, and in particular a factual finding as to whether the applicants were “spouses”.⁵⁵ In concluding, Justice Borins stated that if the SARB restored the applicants’ benefits, then the

52. Under the legislative scheme as it existed in October, 1995, the applicants and their co-residents may have been entitled to General Welfare Assistance if they and their co-residents fulfilled the eligibility requirements and the co-resident was prepared to join with the applicant and sign the necessary forms. However, each of the applicants was unwilling to do so because of practical and principled reasons: each applicant wished to remain financially independent from men because of her own past experiences; and each applicant believed that the *Regulations* were discriminatory.

53. R.S.O. 1990, c. J.1.

54. *Falkiner*, Ont. Div. Ct., *supra* note 34 at 155 (emphasis in original) as per Rosenberg J. in minority, but adopted by the majority.

55. *Ibid.* at 123. Mr. Justice Rosenberg in a minority decision determined that the applicants’ *Charter* challenges could and should be addressed prior to the decision of the SARB. With respect to section 7, Rosenberg J. found that section 7 was not infringed because there was no evidence that the disallowance of benefits under the *FBA* deprived the recipients of economic rights fundamental to life, liberty, and security of the person. However, Justice Rosenberg did find that the *Regulations* infringed section 15(1) of the *Charter*. This infringement occurred specifically because the *Regulations* discriminated against single mothers on welfare and their children, and additionally, they discriminated generally against women, as women are the vast majority of those who are affected by the impugned *Regulations*. Justice Rosenberg further found that the infringement was not saved by section 1 of the *Charter*: according to Justice Rosenberg, there is no rational connection between co-habitation and support, and the question of co-habitation is irrelevant to need and support (at 164 and 175).

constitutional issue would be moot, however, if SARB did not, the applicants could then appeal to the Divisional Court on any question that was not one of fact alone.⁵⁷

Thus, the *Falkiner* applicants next appeared before the SARB. In August, 1998, the Board, by a 2 to 1 majority, released its decision holding that the Regulations unjustifiably infringed both sections 7 and 15(1) of the *Charter*.⁵⁸ With respect to section 15(1), the majority determined that the definition of spouse discriminated against sole support parents on social assistance.⁵⁹ With respect to section 7, the Board determined that the definition of spouse breached section 7 as it violated the applicants' security of the person by depriving them of their personal autonomy, "including the freedom to co-reside with a person of the opposite sex, their freedom to make decisions about their personal life-styles and intimate relationships and the freedom to choose how best to provide a nurturing environment for their children."⁶⁰ The Board found a further violation of section 7 in that it infringed the applicants' right to be free from state-imposed psychological stress.

They are subject to psychological stress because they are in a constant state of uncertainty and fear, not knowing when they and their co-resident have become "spouses" based on the definition. Psychological stress also arises when they are torn between continuing an arrangement which may be of great psychological and emotional benefit for themselves and their children and the ever-present risk that the arrangement will result in the termination of social assistance.⁶¹

The Board also concluded that these violations of section 7 were contrary to the principles of fundamental justice, as the definition of spouse was overly broad.⁶² Finally, the Board found that the *Charter* breaches could not be saved by section 1. Specifically, the Board held that the means used to achieve the definition's objectives were not rationally connected to its purpose. Further, because the definition of spouse was overbroad, it was contrary to the minimal impairment requirements under section 1, and the principles of fundamental justice required by section 7.⁶³

57. *Ibid.* at 124-5. This case provides a clear example of how a law may be both *intra vires* and unconstitutional at the same time. The division of powers allowed under the *Constitution Act, 1867* provides for the different areas in which the federal and provincial governments may enact laws. The *Charter* provides that any law may be unconstitutional if it does not meet the requirements set out in the *Charter*. Here, the court found that the *Regulations* were *intra vires* the province's power. However, the applicants would have still been successful if the majority of the court had examined the *Charter* issue, and found that sections 15 and 1 were breached.

58. The SARB also considered arguments regarding infringement of section 8 of the *Charter*, argued by the intervenor Canadian Civil Liberties Association. The Board held that it did not have the jurisdiction to consider the intervenor's submissions as the applicants before the Board had not been "searched" themselves, and as the intervenor did not have party status, it could not raise new issues: *Falkiner*, SARB, *supra* note 9 at 54.

59. *Falkiner*, SARB, *supra* note 9 at 33.

60. *Ibid.* at 46.

61. *Ibid.* at 53.

62. *Ibid.*

63. *Ibid.* at 62.

The government appealed the decision to the (now) Ontario Superior Court of Justice. Although the arguments were heard by the Court in the Fall of 1999, no decision has yet been rendered.

THE CASES: THE POLICY AT PLAY

While the courts in *M. v. H.* and *Falkiner* were each working within different statutory parameters, and the source of the support the women sought differed, in each case the definition of “spouse” prevented the applicants from receiving the financial support they sought. One reason why these cases are interesting, controversial, and of particular import, is that while the definition of “spouse” is different in each *Act*, in each case the government argued from a traditional, functionalist approach in order to justify the (differing) definitions of “spouse” in the *Acts* in question.

Before the courts in *M. v. H.*, and before the Superior Court and the SARB tribunal in *Falkiner*, the Ontario government provided extensive submissions in their facta with respect to why any finding of a section 15(1) violation should be saved by section 1. Section 1 of the *Charter* provides that in certain circumstances a discriminatory law may be justified. Specifically it “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.”⁶⁴ In the event that a *Charter* breach is found, the onus of proving that the breach “can be demonstrably justified” lies with the party seeking to uphold the provision, and the submissions generally involve a discussion of the government’s policy decisions with respect to the *Act* in question. As the oral and written arguments presented to the Courts provide many insights into the government’s policy decisions and justifications regarding challenged legislation, it is useful to examine the arguments made by the provincial government in *M. v. H.* and in *Falkiner* and how, if at all, the arguments affected the decisions.⁶⁵

M. v. H.:

When *M.* first initiated her *Charter* challenge to section 29 of the *FLA*, the (then) Attorney General of Ontario intervened in support of her position: Ontario filed affidavit evidence and a factum which argued that section 29 unjustifiably infringed section 15(1), and additionally provided sociological evidence which supported affording same-sex couples the same rights, privileges and benefits currently enjoyed by opposite-sex couples. However, in 1995, following the change in provincial governments and before the case was heard, the current Attorney General removed the original factum it had filed with the court and submitted new arguments now claiming

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

65. In examining the s.1 arguments made by the government in *M. v. H.*, I have relied on the factum filed at the S.C.C. along with any mention by the S.C.C. of the arguments made before it. As noted above, with respect to the government’s arguments in *Falkiner* I have relied on the facta filed for both the hearing before the Ontario Divisional Court, and the Ontario Superior Court of Justice. Additionally, I have made use of any mention by the SARB of the arguments made before it.

that while section 29 of the *FLA* is discriminatory, the breach can be “saved” by section 1.

In order to determine whether or not a discriminatory law may be “saved” by section 1 of the *Charter*, the “*Oakes* test” is used.⁶⁶ In addressing the first step of this test in *M. v. H.* – whether there is a pressing and substantial objective to the impugned provision – the government provided an overview of the current legislative provision, and stated that the objectives of section 29 and the spousal support provisions in Part III of the *FLA* are to

remedy the systemic sexual inequality associated with opposite-sex relationships, including the economic dependence of women on men resulting from women taking on primary responsibility for parenting and from gender-based inequality in earning power.⁶⁷

The government noted that the state has a long history of intervening and imposing support obligations on opposite-sex spousal relationships. It argued that these relationships require special treatment because of the one-way economic dependence of one spouse on the other, and because “almost invariably, dependent spouses are women.”⁶⁸ The Attorney General also noted that in deciding to enact legislation providing for support rights and obligations, the Legislature

accepted the conclusion of the Law Reform Commission in 1974–75 that women in spousal relationships tended to become financially dependent on their male partners because of the traditional roles of husband and wife. In enacting Part III of the *FLRA*, the government recognized and addressed the need of such women for spousal support.⁶⁹

The government went on to state that when the Legislature decided to extend the protection of the *FLRA* in 1978 to common-law partners, the objective of the *Act* did not change. Rather, the change reflected the Legislature’s concern that women in common-law relationships were being exploited by their male partners, and that following the breakdown of the relationship many women ended up dependent on public benefits. The government argued that, since the legislative objectives of preventing the exploitation of women by men and of addressing the economic needs of women applied equally to both common-law and married relationships, the support provisions in the *FLRA* were extended to common-law couples.⁷⁰

Two other significant arguments were made by the government in outlining the objective of Part III of the *FLA*. The first was that despite the gender-neutral definition

66. Although it has been refined in more recent cases, the “*Oakes* test”, the standard test all infringements of *Charter* rights and freedoms must meet, was first formulated by former Chief Justice Dickson in *R. v. Oakes*, [1986] 1 S.C.R. 103, 26 D.L.R. (4th) 200.

67. *M. v. H.*, S.C.C., *supra* note 8 (Factum of the Attorney General, para. 49).

68. *Ibid.* at paras. 52, 53.

69. *Ibid.* at para. 54.

70. *Ibid.* at para. 55.

in section 29, the Legislature's central objective was to address the effects of women's economic dependence on men.⁷¹ The second argument made was that the "FLA was not intended to create legal obligations in respect of 'intimate relationships', or to otherwise provide state support for relationships which involve sexual activity – be it opposite-sex or same-sex."⁷² To do this, the government argued, would mean that the FLA "could be judicially extended to a wide variety of interdependent relationships including siblings, friends and others."⁷³ Rather, in describing the second objective of the Act, the Attorney General argued that the state chose to intervene in opposite-sex relationships and to describe them alone as spousal because these are the relationships with the capacity to produce children: "[i]t should be noted that Part III of the FLA imposes an obligation to support children as well as spouses and parents, and that a person can become a "spouse" under s.29 precisely because the person is the parent of a child."⁷⁴

In addressing whether section 29 has a pressing and substantial objective, Justice Iacobucci engaged first in a thorough discussion of the purposes of the Act. He began by examining the Preamble to the Act which, he noted, states

[w]hereas it is desirable to encourage and strengthen the role of the family; and whereas for that purpose it is necessary to recognize the equal position of spouses as individuals within marriage and to recognize marriage as a form of partnership; and whereas in support of such recognition it is necessary to provide in law for the orderly and equitable settlement of the affairs of the spouses upon the breakdown of the partnership, and to provide for other mutual obligations in family relationship, including the equitable sharing by parents of responsibility for their children.⁷⁵

Justice Iacobucci determined that, while insightful, the Preamble provided limited utility. In particular, he found the reference to "marriage" to be "somewhat misleading" given the rights accorded to both married and unmarried couples. He noted too, citing Legislature of Ontario Debates from October, 1977, that "the emphasis on encouraging and strengthening the role of the family is inaccurate as the legislation is actually intended to deal with the breakup of the family."⁷⁶ Instead, Iacobucci J. held that a more complete and accurate statement of the current FLA's objective was reflected by the Ontario Law Reform Commission in its *Report on the Rights and Responsibilities of Cohabitants under the Family Law Act*:

The purpose of the Family Law Act is to provide for the equitable resolution of economic disputes that arise when intimate relationships between individuals who have been financially interdependent break down (Parts I–IV). As well, it ensures

71. *Ibid.* at para. 60.

72. *Ibid.* at para. 63.

73. *Ibid.* at para. 64.

74. *Ibid.* at para. 61.

75. FLA, *supra* note 6, Preamble.

76. *M. v. H.*, S.C.C., *supra* note 8 at 625.

that family members have a means to seek redress when an immediate relative is injured or killed through the negligence of a third party (Part V).⁷⁷

It was this statement which Justice Iacobucci adopted as the general objective or purpose of the *FLA*.

Having made a determination as to the purposes of the Act generally, Justice Iacobucci turned to the support provisions of the Act (Part III of the *FLA*), and in particular, section 29. Justice Iacobucci's analysis here was broken down into two parts: an analysis of the general legislative objective of Part III and section 29; and an analysis of the specific legislative objective for excluding or omitting same-sex couples from these provisions.

After examining the general legislative objective of Part III and section 29, his Lordship was of the view that the first objective of section 29 put forth by the government – remedying the systemic inequality associated with opposite-sex relationships – and the submissions made in support of this stated objective, were “inaccurate”. Iacobucci J. stated

[a]lthough I do not dispute the claim that economically dependent heterosexual women and children are well served by the spousal support provisions in Part III of the *FLA*, in my view, there is insufficient evidence to demonstrate that the protection of these groups informs the fundamental legislative objectives behind this part of the Act.⁷⁸

Iacobucci J. noted that while the OLRC had recognized the financial dependence of many married women upon their husbands, the Commission “encouraged the government to premise support obligations on need and actual dependence rather than on the assumption that wives are inherently dependent upon their husbands for support because of the traditional roles assumed by men and women.”⁷⁹ In response, the *FLRA* introduced a gender-neutral statutory spousal support regime under which a wife or a husband could oblige the other to pay support.⁸⁰

He also took issue with the government's first stated objective in light of Part III of the *FLA*, generally noting that these provisions, which establish the right to receive support, the obligation to provide it, and the factors courts are to consider in determining the amount and duration of support, use gender-neutral language such as “dependant”, “person”, and “spouse” (the latter of which is defined as “either of a man and woman ...”). Justice Iacobucci further noted that in establishing the purposes for an order for support of a spouse, the Act is “silent with respect to the economic vulnerability of heterosexual women, their tendency to take on primary responsibility for parenting, the greater earning capacity of men, and systemic sexual inequality.”⁸¹

77. *Ibid.* In addition, see *Report on the Rights and Responsibilities of Cohabitants under the Family Law Act* (Toronto: Ministry of the Attorney General, 1993) at 43-44.

78. *M. v. H.*, S.C.C., *supra* note 8 at 626.

79. *Ibid.* at 627.

80. *Ibid.* at 626.

Justice Iacobucci further determined that the government's second stated objective of the Act – protecting children and ensuring that the conditions under which they are raised are adequate – was “inconsistent” with the actual terms of the spousal support provisions provided for in Part III of the Act. He stated

[a]lthough the provisions of Part III that deal exclusively with child support clearly reflect these legitimate legislative concerns ... it seems to me that the spousal support provisions do not share the same focus. Part III of the *FLA* imposes spousal support obligations on opposite-sex couples irrespective of whether or not they have children. ... [C]ohabiting opposite-sex partners who are not the parents of a child are expressly included in the s. 29 definition of “spouse” after three years of cohabitation.⁸²

In the result, Justice Iacobucci adopted the objectives of the provisions as identified by Madame Justice Charron in her majority decision at the Ontario Court of Appeal below. Justice Charron had determined that the objectives of the Part III provisions are to provide a means “for the equitable resolution of economic disputes that arise when intimate relationships between individuals who have been financially interdependent break down” and to “alleviate the burden on the public purse by shifting the obligation to provide support for needy persons to those parents and spouses who have the capacity to provide support to these individuals.”⁸³

Having examined the general objectives of Part III generally and section 29 specifically, Justice Iacobucci turned to an examination of the specific legislative objective for excluding or omitting same-sex couples from section 29. His Lordship stated that such a specific consideration is important when dealing with underinclusive legislation, as legislation often “does not simply further one goal, but rather strikes a balance among several goals, some of which may be in tension.”⁸⁴ He warned that if courts do not take into account the omission in construing the objective, it is more likely that the omission will cause the impugned legislation to fail the rational connection step of the section 1 analysis. Iacobucci J. was quick to point out though that the court does not have to find that there is a separate objective being furthered by the omission.

Even if there is no such objective the omission must still be evaluated as part of the means chosen to further the objective of the specific provision in question, under the proportionality analysis. Otherwise the court risks collapsing the two stages of the *Oakes* test (pressing and substantial objective and proportionality) into a general question regarding the reasonableness of the omission.⁸⁵

Here, the government did not argue that a separate objective was furthered by the omission of same-sex couples from the support provisions, but rather relied on its earlier arguments that section 29 captured only opposite-sex couples in order to

81. *Ibid.* at 628.

82. *Ibid.*

83. *Ibid.* at 628-629, and *M. v. H.*, Ont. C.A., *supra* note 48 at 450.

84. *M. v. H.*, S.C.C., *supra* note 8 at 631.

85. *Ibid.*

provide a remedy for the power imbalance that exists in many opposite-sex relationships, and to ensure the protection of the children of such relationships. Given these objectives, the exclusion of same-sex partners from section 29 followed naturally since within the government's paradigm same-sex relationships are not characterized by the power imbalances that mark many opposite-sex relationships, and no concern about protecting children arises. Justice Iacobucci disagreed with both of these justifications, re-stating that he did not believe that the purpose of the *FLA* in general, or Part III in particular, is either to remedy the disadvantages suffered by women in opposite-sex relationships, or primarily to protect children.⁸⁶ As such, neither of these could be the objective for excluding or omitting same-sex partners.

To summarize then, Justice Iacobucci concluded that the impugned provision did have the pressing and substantial objective of providing a means for the equitable resolution of economic disputes that arise when relationships between formerly intimate and financially interdependent individuals break down, and to shift the obligation to provide support from the public purse to needy persons to those parents and spouses who have the capacity to provide support to these individuals. However, this objective was not "plausibly reinterpreted through examining the omission of same-sex spouses".⁸⁷

The government's policy reasons for not extending the definition of "spouse" so as to include same-sex couples are also apparent throughout its arguments with respect to the rational connection and minimal impairment steps of the *Oakes* section 1 analysis. Here the government is required to demonstrate that the effect of the impugned provision is rationally connected to the legislative objective and that it minimally impairs the *Charter* rights in issue. Ontario argued that the exclusion of same-sex couples from the definition of "spouse" in the *FLA* is rationally connected to the objective of spousal support in Part III of the *Act* as the definition imposes support obligations on those relationships which are characterized by gender-based inequality.⁸⁸ In keeping with this, the government argued that the lack of gender-based inequality in earning power, "by definition" experienced by gay and lesbian partners, and the tendency for these relationships to be more egalitarian overall without the assumption of traditional gender-based stereotypes of bread-winner and home-keeper, indicated that the law is rationally connected to the objective and to the exclusion of same-sex couples.⁸⁹ While the government later acknowledged that one-way economic dependence does occasionally occur in gay and lesbian relationships, or that such relationships may be financially interdependent, the government stated that

86. *Ibid.* at 632.

87. *Ibid.* at 633.

88. *M. v. H.*, S.C.C., *supra* note 8 (Factum of the Attorney General of Ontario, at para. 66).

89. *Ibid.* at para. 70. This was argued notwithstanding that the evidence in *M. v. H.* indicated that, in fact, there had been a division of labour along more "traditional gender" lines between the parties, and that by the end of the relationship H. was drawing a salary from the business while M. was not, thus indicating financial dependence. These ideas will be further explored in the next section of this paper.

this was not the aspect of the problem which the legislature viewed as the most serious or pressing or to which it addressed itself in the reforms of 1978 and 1986. Following *Egan* and *McKinney*, the legislature was entitled to focus on the aspect of the problem it viewed as most pressing, and to leave it to future legislatures to address economic dependence in other contexts.⁹⁰

The government took the position that the exclusion of same-sex couples from the definition of “spouse” also met the rational connection test because of the division of opinion within the gay and lesbian community regarding the desirability of being included within a “heterosexual model” of relationships.⁹¹ Furthermore, when combined with the availability of other remedies for individuals in M.’s situation (for instance, property law and equitable remedies), the government argued that the law “is not so overinclusive or underinclusive as to be irrational, and that it is also sufficiently tailored to the objectives of Part III to meet the minimal impairment test.”⁹²

The majority of the Supreme Court of Canada found that the exclusion of same-sex couples from the *FLA* is not rationally connected to the legislative purpose of the *Act*. Justice Iacobucci stated

I concluded above that the dual objectives put forth by the appellant do not reflect the true purposes of the spousal support provisions in Part III of the *FLA* and relied instead on those set out by the court below. Nevertheless, it seems to me that no rational connection exists irrespective of which of the objectives is relied upon for this analysis.

Even if I were to accept that Part III of the *Act* is meant to address the systemic sexual inequality associated with opposite-sex relationships, the required nexus between this objective and the chosen measures is absent in this case. In my view, it defies logic to suggest that a gender-neutral support system is rationally connected to the goal of improving the economic circumstances of heterosexual women upon relationship breakdown. In addition, I can find no evidence to demonstrate that the exclusion of same-sex couples from the spousal support regime of the *FLA* in any way furthers the objective of assisting heterosexual women.⁹³

With respect to the first objective – remedying the systemic inequality associated with opposite-sex relationships – the Court expressed the opinion that the evidence suggesting that same-sex relationships are more economically egalitarian than opposite-sex relationships does not explain why the right to apply for support is limited to heterosexuals. Justice Iacobucci referred to the submissions of LEAF, an intervenor in the hearing, and noted that

the infrequency with which members of same-sex relationships find themselves in circumstances resembling those of many heterosexual women is no different from heterosexual men who, notwithstanding that they tend to benefit from the gender-

90. *Ibid.* at para. 72.

91. *Ibid.* at para. 74.

92. *Ibid.* at para. 76.

93. *M. v. H.*, S.C.C., *supra* note 8 at 634.

based division of labour and inequality of earning power, have as much right to apply for support as their female partner.⁹⁴

Justice Iacobucci also noted that the right to make a claim for support does not automatically translate into a support order.⁹⁵

The majority of the Supreme Court also held that the rational connection test was not met with respect to the second objective argued by the government, namely protecting children and ensuring that the conditions under which they are raised are adequate. Justice Iacobucci stated that even if he accepted that the object of the legislation is the protection of children, the spousal support provisions are both underinclusive and overinclusive in their nature. That is, as opposite-sex couples are entitled to apply for support “irrespective of whether or not they are parents, and regardless of their reproductive capabilities or desires”, the provisions are overinclusive.⁹⁶ Additionally, they are underinclusive given the increasing number of children who are being conceived and raised by gay and lesbian couples. Justice Iacobucci noted that while these numbers are small, if the purpose of the *Act* is indeed to protect children, this goal would be “incompletely achieved by denying some children the benefits that flow from a spousal support award merely because their parents were in a same-sex relationship.”⁹⁷

In concluding that the exclusion of same-sex couples from section 29 is not rationally connected to the dual objectives of the spousal support provisions of the *FLA* identified by the Attorney General, Justice Iacobucci commented on the irony of the omission itself, stating that “the inclusion of same-sex couples in s. 29 of the *FLA* would better achieve the objectives of the legislation while respecting the *Charter* rights of individuals in same-sex relationships.”⁹⁸

As the majority of the Supreme Court determined that the definition of “spouse” in section 29 of the *FLA* failed the *Oakes* test on the basis of no rational connection, it was unnecessary for the Court to address the minimal impairment or deleterious effects branches of the *Oakes* test. However, the Court chose to do so in order to, in Justice Iacobucci’s words, “clarify some fundamental misunderstandings advanced in this appeal.”⁹⁹ For the purposes of this paper, it is of interest to examine the Court’s response to the government’s arguments as to why its policy reasons and objectives for not including same-sex couples within the provisions of the *FLA* met the minimal impairment test.

94. *Ibid.*

95. *Ibid.*

96. *Ibid.* at 635.

97. *Ibid.*

98. *Ibid.* at 636.

99. *Ibid.*

The government argued that because the policy concerns underlying the *FLA* “are of critical importance to society”, allowing the Legislature to incrementally change the *Act* and add new provisions “outweighs any discrimination which may be caused by leaving out persons or relationships to which the government’s central objectives are much less likely to apply.”¹⁰⁰ In keeping with this, the government submitted that Part III of the *FLA*, and section 29 thereof, are relatively recent steps in the province’s approach to spousal support and relied on the argument that the government should be permitted to change and adjust the legislation slowly and in keeping with society’s needs.

Justice Iacobucci disagreed, and instead expressed the view that deference to the Ontario Legislature in this respect is inappropriate in this case. He noted that while the Supreme Court has resorted to such an approach where the impugned legislation involves a balancing of claims of competing groups, such was not the case here.

As no group will be disadvantaged by granting members of same-sex couples access to the spousal support scheme under the *FLA*, the notion of deference to legislative choices in the sense of balancing claims of competing groups has no application to this case.¹⁰¹

Justice Iacobucci also noted that a deferential approach is not warranted simply because some individuals in same-sex relationships, including H. herself, expressed reservations about being treated as “spouses” in the family law scheme. Iacobucci J. noted that requiring unanimity among all members of equality-seeking groups with respect to the desired remedy would make it unlikely that any section 15 claims would survive section 1 scrutiny.¹⁰² Further, deference was not to be accorded simply because the government argued that Part III of the *FLA* and section 29 are steps in an “incremental process of reform of spousal support”. Justice Iacobucci pointed to the Supreme Court of Canada’s decision in *Vriend v. Alberta* wherein the court stated that “government incrementalism, or the notion that government ought to be accorded time to amend discriminatory legislation, is generally an inappropriate justification for *Charter* violations.”¹⁰³ In response to the government’s submissions that the decision to provide equal status to both sexes under the *FLRA*, the extension of the rights and obligations to common-law couples, and the broadening of the definition of “spouse” by reducing the requisite period of cohabitation from five to three years, were all significant evidence of incremental progress towards equality, Justice Iacobucci stated,

I disagree. None of the reforms cited by the appellant has addressed the equal rights and obligations of individuals in same-sex relationships. In fact, there is no evidence of any progress with respect to this group since the inception of the spousal

100. *M. v. H.*, S.C.C., *supra* note 8 (Factum of the Attorney General, at para. 77).

101. *M. v. H.*, S.C.C., *supra* note 8 at 639.

102. *Ibid.*

103. *Ibid.* and referring to *Vriend v. Alberta*, [1998] 1 S.C.R. 493, 156 D.L.R. (4th) 385.

support regime. If the legislature refuses to act so as to evolve towards *Charter* compliance then deference as to the timing of reforms loses its *raison d'être*.¹⁰⁴

Finally, the Supreme Court held that the damaging effects caused by the exclusion of same-sex couples are “numerous and severe”, and thus it “cannot be said that the deleterious effects of the measures are outweighed by the promotion of any laudable legislative goals, nor by the salutary effects of those measures.”¹⁰⁵

Falkiner v. Ministry of Community and Social Services

When the “spouse in the house rule” was abolished in 1987 the government stated that the new definition of “spouse” was formulated in such a way as to be uniform with the definition in the *FLA*. However, since 1995 it would appear that this objective has been deemed no longer necessary. According to the current government’s arguments in the *Falkiner* case, the former three year period was a “grace period”. In the submissions it filed before the Ontario Divisional Court, the government took the position that “whether or not there is a spousal relationship is not based on a fixed time period, but rather a functional test of whether there is evidence of social, familial and economic interdependence” at any time during the co-residency.¹⁰⁶ In both Court proceedings, the government offered various justifications for this new definition throughout its facts including in its discussion of the background of the *Act*. For instance, as a sort of “preliminary justification”, in setting out the history of the *Act*, the government stated that the definition allows case workers to give individual consideration to every co-residency relationship with a person of the opposite sex, in order to determine if the parties are “spousal” and part of a “family unit”.¹⁰⁷ The Attorney General urged that using the family or spousal unit as the benefit unit was a logical and reasoned decision, for

[t]he *FBA* seeks to ensure fair and equitable treatment for all spousal relationships, whether married or unmarried. The definition of “spouse” in the *Regulation* prescribes an individualized, functional test for determining whether the relationship is spousal, based on an assessment of evidence of social, familial and economic interdependence in the relationship. Where a relationship is found to have these characteristics, it is determined to be spousal and it will be treated the same way as a married relationship for the purposes of social assistance entitlement.¹⁰⁸

104. *Ibid.* at 640.

105. *Ibid.* at 641.

106. *Falkiner*, Ont. Div. Ct., *supra* note 34 (Factum of the Attorney General at para. 1). One of the things that is disturbing about the Ontario government’s reversion to the old rule is that the previous definition was specifically formulated with the definition of “spouse” in the *FLA* in mind, and after extensive review of the “spouse in the house” rule. However, the current government ignored the objective of conformity and previous findings of the Social Assistance Review Board, and reverted back to the old definition without any formal inquiry, but rather citing only financial requirements in justification.

107. *Falkiner*, Ont. S.C.J., *supra* note 38 (Factum of the Attorney General at para. 31).

108. *Ibid.* at para. 2.

Further, the government stated,

[t]he rationale for using the family unit is that it recognizes that there is a social, familial and economic interdependence amongst family members. Assets and income are frequently pooled and economies of scale are enjoyed, especially with respect to the joint consumption of goods and services. Where there is a family unit, there may also be more opportunities to work since the couple can share child care responsibilities.¹⁰⁹

Although these introductory statements are helpful in learning the government's policy position with respect to opposite sex social assistant recipient cohabitantes, as in *M v. H.*, the Attorney General's full position may be seen through its section 1 *Charter* analysis of the legislation in question. As its starting point, the government stated that there are two objectives of the impugned legislation, both of which are "pressing and substantial". The first objective offered was the desire to "achieve equity between married couples and couples in common-law relationships that have similar functional characteristics to those who are married".¹¹⁰ The government argued that under the predecessor *Regulation* common-law couples were given an inherently arbitrary three year grace period before they were treated as a family unit. As many common-law couples have strong social, familial and economic interdependence immediately upon living together, the distinction, it was claimed, gave rise to criticisms that common-law couples were given more favourable treatment under the law than married couples were.¹¹¹ The government noted, "while one member of the common-law couple could receive social assistance for three years while living with someone who might have a good income, a married couple could not."¹¹² In response to the applicants' argument that the objective of the predecessor *Regulation* was to bring the definition of "spouse" in the *FBA* in line with the definition found in the *FLA*, the government distinguished the purposes of the two *Acts* from one another, stating in the second proceeding,

[t]he *Family Law Act* definition is particularly relevant to post-breakup private economic arrangements between common-law spouses rather than to the determination of economic interdependence in ongoing relationships. It is based on a uniform, arbitrary, 3 year time limit rather than on an individualized determination of whether a relationship is spousal.¹¹³

And arguing in the first proceeding,

[t]he choice of the three-year period under the predecessor *Regulation* was based on family law support obligations for common-law couples. Family law support obligations, however, are primarily applicable upon breakdown of the relationship, rather than during the currency of the relationship. The definition of common-law spouse for family law purposes is therefore different from the definition of com-

109. *Falkiner*, Ont. Div. Ct., *supra* note 34 (Factum of the Attorney General at para. 17).

110. *Falkiner*, Ont. S.C.J., *supra* note 38 (Factum of the Attorney General at para. 133).

111. *Ibid.* at para. 67.

112. *Ibid.*

113. *Ibid.* at para. 8.

mon-law spouse for social assistance purposes. The former addresses the kind of relationship that should bear an ongoing private support obligation after separation, while the latter addresses the kind of relationship that should be considered a family unit for the receipt of public financial support.¹¹⁴

The government took the position that this first purpose is pressing and substantial as the Supreme Court has recognized the “constitutionally protected right to equal treatment of married couples and those unmarried couples who are functionally similar to married couples”.¹¹⁵

The second objective offered for the new definition was financial in nature and mirrors the current government’s policy of fiscal restraint: the reduction of the cost of social assistance by accessing private resources, and ensuring that public resources are allocated to those “most in need”.¹¹⁶ As background, the government pointed out that social assistance has traditionally been provided as last resort funding for persons in need. However, in recent years, the cost of providing such assistance has been rising as a result of real rates of assistance, decreases in federal contributions, and increases in the percentage of Ontario recipients.¹¹⁷ The government argued that

[o]ne reason for the increase in the number of those on social assistance was the amendment of the definition of spouse in 1987, that resulted in the three year “grace” period in which cohabiting couples were eligible as single persons in the “three year rule”. As of October, 1995, 16% of the total number of sole support parents was directly attributable to the three year rule definition of spouse that came into effect in 1987. As a result of this definition, which increased the number of persons considered single or sole support, the number of sole support parents on social assistance as a percentage of the total population of single parents in Ontario was double the average of the other provinces.¹¹⁸

The government also submitted before the Superior Court that

[o]n the record before the SARB, there were approximately 13,000 social assistance recipients who were affected by the spousal definition. Approximately 6,947 have remained entirely off social assistance, and are therefore being supported by private resources. Approximately 5,000 are now receiving social assistance as a couple. Only about 815 have reapplied for benefits as single or sole support parents. Some of these single re-applicants would have become single because of a natural breakdown of the relationship unrelated to the *Regulation*.

The large proportion of persons who have stayed off social assistance after being determined to be a spouse under the current definition demonstrates that the spousal definition is accurately capturing those couples in which private financial resources

114. *Falkiner*, Ont. Div. Ct., *supra* note 34 (Factum of the Attorney General at para. 46).

115. *Falkiner*, Ont. S.C.J., *supra* note 38 (Factum of the Attorney General at para. 136), relying on *Miron v. Trudel*, [1995] 2 S.C.R. 418, 124 D.L.R. (4th) 693.

116. *Ibid.* at para. 133.

117. *Ibid.* at paras. 72-73.

118. *Ibid.*

are being shared to support both members of the couple. The vast majority of the remaining persons who were determined to have a spouse remained in receipt of social assistance as part of a spousal benefit unit rather than as a single couple.¹¹⁹

In arguing that this second objective was also pressing and substantial, the government relied on the decision in *Ontario (A.G.) v. Pyke*, a 1998 decision of the Ontario Divisional Court which stated

[w]hen the legislation deals with the administration of social assistance to persons in need (c) [the purpose of assessing the need for assistance appropriately by considering the family unit as a whole and the support obligations of others, along with individual requirements] comes into play in ensuring that when an applicant for welfare claims to be in need and entitled to government assistance, he or she is truly in need in the sense that the applicant does not have alternative means of support otherwise available through other legislative mechanisms.¹²⁰

The SARB determined that the government's second objective, saving public money, was established. However, the majority stated that it had difficulty accepting the primary objective, proposed by the Respondents as the "true purpose" of the definition.¹²¹ In the Board's opinion, "common-law spouses" is not a "term of art with a clearly delineated meaning".¹²² The Board stated that it was not persuaded by the government's argument that the purpose of the legislative is to treat "like as like" for in its opinion, not all couples who fall within the ambit of the amended definition of spouse are "equal to" married spouses. In reaching this conclusion, the Board took note of the fact that married and common-law couples are not treated equally as "the amended definition of spouse does not tie spousal status to any obligation to provide financial support."¹²³ Specifically, the SARB stated

[t]he Respondents' own arguments are that private financial resources are to be utilized before resort is had to publicly funded social assistance and that this is part of the reason for amending the spousal definition. Presumably, the reason for treating so-called "common-law spouses" the same as married couples is to ensure that the private financial resources of both spouses in the common-law relationship are called upon to provide support before resorting to social assistance. ...

119. *Ibid.* at paras. 58-59. What is of note about these numbers is that the government had first estimated that 3,820 single parents would lose eligibility as a result of the new definition. However, within the first six months of the change, over 10,000 recipients had been deemed ineligible – 89% of whom were women – and only 800 of those whose assistance was terminated later had it reinstated: *Falkiner Record*, Affidavits of Mary Kardos Burton and Kevin Costante. See also, Little and Morrison, *supra* note 27 at 140 and 142.

120. *Ibid.* at para. 137, and *Ontario (Attorney General) v. Pyke* (1998), 167 D.L.R. (4th) 170 at 186, 1150 O.A.C. 162.

121. *Falkiner*, SARB *supra* note 9 at 56.

122. *Ibid.* Specifically the SARB noted that under the *Income Tax Act* [R.S.C. 1985, c.1 (5th Supp.)] couples who have co-resided for one year are common-law spouses for income tax purposes, while legal support obligations under the *FLA* requires three years where the couple does not have a child.

123. *Falkiner*, SARB *supra* note 9 at 57.

In other words, the purpose is to require “common-law spouses” to financially support each other in the same way that married couples are required to support each other financially. The difficulty is that the amended definition of spouse does not tie spousal status to any obligation to provide financial support.¹²⁴

The SARB went on to state that it had difficulty understanding why the new definition removed the “three year rule” from the previous definition if the primary objective was, as the government contended, to treat “equal” relationships equally. As the new definition removed the connection with a legal support obligation, the Board found that “spouses under this definition [are] significantly different from married spouses ... [and] does not support the government’s argument that the purpose was to treat all ‘spouses’ the same way.”¹²⁵

Before going on to consider whether the objective established was “pressing and substantial”, the Board examined what it determined to be a third objective: funding of last resort.¹²⁶ Stating that it was prepared to consider this an objective of the definition, the Board noted, “[p]eople in financial need are required to exhaust other government financial assistance and private support obligations before they resort to social assistance.”¹²⁷

Having determined that the government’s first stated objective of equality between married and non-married couples did not actually exist, there was no need for the Board to determine whether this “non-objective” met the test of pressing and substantial. Further, with respect to the second objective stated by the government, the Board agreed with the applicants that a concern for cost savings is not a pressing and substantial concern that could nullify *Charter* rights. However, the Board did determine that the “second alternative objective”, as stated by the Board itself, is a pressing and substantial concern, as governments must allocate finite financial resources among competing programs, and thus “must maintain control on spending and ensure that public funds are spent responsibly.” Having thus determined that there did exist a pressing and substantial objective to the impugned provision, the Board turned to examine the second step of the *Oakes* test: whether the means chosen are rationally connected to the objective found.

One sees that the Ontario government’s functional approach to the family is also apparent in its submissions with respect to this second step. Again, the Attorney General argued that a “functional test that considers economic, social and familial factors is appropriate in order to determine whether a spousal relationship [and presumably family unit] exists.”¹²⁸ The government submitted that

124. *Ibid.*

125. *Ibid.*

126. *Ibid.*

127. *Ibid.*

128. *Falkiner*, Ont. S.C.J., *supra* note 38 (Factum of the Attorney General at para. 139).

[t]he use of a family unit as the benefit unit for social assistance purposes is not in dispute in these proceedings. It ensures that resources available to the family unit are exhausted before social assistance is provided and consequently, that government resources are directed to those who are truly in need.¹²⁹

The government argued that the family unit cannot be exclusively confined to the realm of married couples because this would fail to recognize the growth of common-law relationships. In doing so, the Attorney General down-played the stated desires of some of the applicants to merely cohabit with, rather than marry, their male companions and thus “test out” a new relationship before making more permanent commitments. The applicants argued that the Regulatory definition, by identifying the recipient and her co-resident as common-law spouses and a “family unit” immediately upon cohabitation, did not allow them as social assistance beneficiaries to try out a new relationship the way that heterosexual, non-social assistance beneficiaries may, and thus, an unjustifiable distinction was made. In response, the government relied on some studies which have indicated that cohabitation is not a prerequisite to relationship formation, nor a good indicator of relationship stability or longevity.¹³⁰

The government also argued that the wording of the definition is rationally connected to the objective of ensuring that financial need is appropriately assessed by first taking into account available private resources. The Attorney General took the position that

[t]he definition requires an individualized finding of spousal factors, including a finding that the couple is economically interdependent. The finding of economic interdependence ... ensures that the definition is capturing those relationships in which private resources of each member of the relationship are in fact being made available to the other.¹³¹

The government argued that the means used to achieve the objective are rationally connected to this objective as the “vast majority of sole support parents who ceased to be eligible as single persons from the date of the *Regulation* have either accessed the private resources available to them, and remained off social assistance, or have requalified with their spouse as a couple.”¹³²

129. *Ibid.* at para. 10.

130. *Ibid.* at para. 56. The problem with the government’s response, however, is that it contradicts its own arguments: if cohabitation is not a good indicator of relationship stability or duration, then it should also not be treated as an (immediate) equivalent to a “family”, as families do suggest a certain amount of relationship stability, duration, and commitment. The other difficulty with the government’s response is that it skirts the issue and ignores the fact that other Ontario couples are allowed to, and do, “try out” relationships before committing to marriage.

131. *Ibid.* at para. 141.

132. *Ibid.* at para. 142. It should be noted that the government did not poll those who have “remained off social assistance” in order to determine how they are surviving without it. Given the increasing number of homeless persons, one cannot, it is submitted, assume that all those who were found to be ineligible have “accessed private resources”.

The SARB disagreed. Having ruled out the government's two stated objectives, the SARB examined only the second alternative objective of "last resort". It determined that

... since the proposed alternate purpose of the definition is to ensure that private financial support is accessed before resorting to social assistance, logically, the definition should relate to private support obligations. In other words, a person co-residing with someone of the opposite sex should not be ineligible for assistance based on the definition, unless there is a private support obligation and therefore, a private financial resource to which the person can turn, instead of public assistance.¹³³

The majority of the SARB was of the view that the removal of the three year rule, which had "previously tied the former definition of spouse to a private legal support obligation", was an irrational approach "to achieving what the Board ... proposed as the alternative secondary objective of the definition."¹³⁴ In its opinion, waiting to see if the co-resident would provide financial support to a sole support parent and her children if social assistance were withdrawn "seems to be throwing the sole support parent into the water and waiting to see if she will sink, or if the co-resident will throw out a financial life line."¹³⁵ The SARB noted

[t]he Respondents appear to be saying that a sole support parent can be cut off benefits based on s. 1(1)(d), not because financial support is available nor because the co-resident is legally obligated to provide support, but because there may be a "likelihood" that the co-resident will volunteer to financially support the sole support parent and her children.¹³⁶

The Board held that a "mere likelihood" of financial support is not a rational basis for denying a sole support parent and her children the basic means of subsistence.¹³⁷ It also noted that

... the threshold for a finding of "financial interdependence" is low; far lower than true financial support. The Board is of the opinion that the definition, at best, may capture relationships where there is "some possibility" that some amount of financial support might be given at least for some time. At worst, it captures relationships where no financial support was intended to be assumed nor would any support be given.¹³⁸

Similar to the Supreme Court in *M. v. H.*, having determined that there was no pressing and substantial objective to the regulatory definition that was rationally connected to the means used to achieve the objective, the Board was not obliged to go on and

133. *Falkiner* (SARB), *supra* note 9 at 59.

134. *Ibid.*

135. *Ibid.*

136. *Ibid.*

137. *Ibid.*

138. *Ibid.*

consider the minimal impairment branch of the *Oakes* test. However, the Board chose to consider the government's submissions with respect to this last step, and for the purposes of this paper, those submissions are very telling.

Before the SARB, the government proposed a modified *Oakes* test of "reasonableness", and thus did not directly argue minimal impairment. Rather, the government simply contended that the definition of "spousal unit" in terms of economic, social and familial characteristics was "reasonable", and provided no further explanation. Further, they appeared to equate "spousal unit" with "family benefit unit", and argued that the "family unit" or "family benefit unit" is the appropriate one for social assistance. Finally, the government argued that the "test" for "spousal unit" in the *Regulations* has been endorsed by the judiciary, academics, and some of the witnesses before the SARB.¹³⁹

At the hearing before the Ontario Superior Court, the Attorney General resorted to a more traditional justification using the familiar *Oakes* test. The government submitted that the measure was "carefully tailored" in order to ensure that recipients' rights were minimally impaired. Further, it argued that the determination of co-residents as spouses is based on the individuals themselves and the presence of various factors: "[T]here is no arbitrary distinction based on, for example, the length of time of the relationship, or whether the parties are married or not."¹⁴⁰ Such an assessment, it was argued, "avoids using presumed group characteristics and stereotypes and provides a carefully tailored "marker" based on individual circumstances."¹⁴¹ To this end, the government relied on the decision of Madame Justice L'Heureux-Dubé in *Canada (A.G.) v. Mossop* wherein she stated that a "functional approach offers distinct advantages over a more formalistic approach which systematically excludes all but a specific form of relationship."¹⁴²

The Attorney General also relied on the Supreme Court's decision in *Miron v. Trudel* to argue that the applicants' rights were minimally impaired.¹⁴³ In *Miron v. Trudel*, the Court determined that financial interdependence is a key factor in determining whether a couple should be considered to be spouses for the purposes of receiving an accident benefit. The government submitted that social assistance, like the accident benefits at issue in *Miron v. Trudel*, is intended to provide day-to-day income support to a couple in an ongoing relationship.¹⁴⁴ The government submitted that "'economic interdependence' is equally a relevant factor in the context of social assistance" in determining spousal status as it was in *Miron v. Trudel*, and argued that with respect to each of the applicants there was "significant evidence of economic interdependence"¹⁴⁵

139. *Ibid.* at 60.

140. *Falkiner*, Ont. S.C.J., *supra* note 38 (Factum of the Attorney General at para. 144).

141. *Ibid.*

142. *Ibid.* citing *Canada (A.G.) v. Mossop*, [1993] 1 S.C.R. 554 at 638-639, 100 D.L.R. (4th) 658.

143. *Supra*, note 114.

144. *Falkiner*, Ont. S.C.J., *supra* note 38 (Factum of the Attorney General at para. 145).

145. *Ibid.* at paras. 145 and 146.

Further, the government argued that the *FLA* or the former three year “grace” period should not be considered in assessing whether the Regulatory definition of spouse met the test for minimal impairment. The government stated that there is “no constitutional requirement on the government to use the same definition of spouse in all provincial legislations” and further, that there are “fundamental differences between the purposes of the definition of spouse in the *Family Law Act* and the definition in social assistance legislation.”¹⁴⁶ Here the government argued that while in theory the *FLA* places spousal support obligations on couples during the currency of their relationship, in practice, the support provisions are aimed specifically at defining those obligations that should be imposed on the breakdown of a relationship. “Couples in intact relationships”, the government argued, “are willingly financially interdependent, or else the relationship breaks up. People in ongoing relationships do not turn to the *Family Law Act* to regulate their economic interrelationship.”¹⁴⁷ Finally, the government relied again on its argument that the grace period puts unmarried couples in a better position than married couples, as the latter are assessed as a unit from the date marriage.¹⁴⁸

While it is difficult to speculate on how the SARB would have responded, and how the Ontario Superior Court of Justice will respond to the government’s more traditional minimal impairment arguments, it is worth noting that the SARB was “not persuaded that there has been general acceptance by the judiciary, academics and witnesses of the specific test set out in s. 1(1)(d) of the *Regulation*”.¹⁴⁹ The SARB noted that while economic interdependence, and the social and familial dimensions of the relationship, were accepted as valid factors by witnesses and experts on both sides, there was disagreement as to whether these were sufficient. Further, the Board stated that in its view, there was “no evidence of a broad acceptance of what ‘economic interdependence’ means nor how much interdependence is ‘non-trivial’”. The Board is not satisfied that there is a general acceptance that the impugned definition is ‘reasonable’.”¹⁵⁰ Further, the SARB held that the government failed to address the question of whether the definition impaired the women’s section 15 rights “as little as reasonably possible”, part of its burden under section 1.¹⁵¹

The SARB did consider the traditional *Oakes* test itself, and determined that the impugned provision did not satisfy it. Specifically, the Board found that as the definition of “spouse” catches co-residing couples who expressly do not intend to be spouses, where they would not otherwise be considered spouses in the province and

145. *Ibid.* at paras. 145 and 146.

146. *Ibid.* at paras. 147-148.

147. *Ibid.* at paras. 148-149.

148. *Ibid.* at para. 151.

149. *Falkiner*, SARB, *supra* note 9 at 60.

150. *Ibid.*

151. *Ibid.*

where there is a lack of any financial support obligation between them, the definition was “overly broad”.¹⁵² In its opinion

[t]he Board finds that the definition of spouse in s. 1(1)(d) would capture as spouse, persons who have no legal obligation to provide support to the sole support parent and her children, and therefore, it is overly broad. A definition of spouse that is more tailored to capture only those couples where there is a legal support obligation could, for example, incorporate a three year rule. The three year rule would bring the definition of spouse in line with the legal support obligations in the *Family Law Act*.¹⁵³

The SARB also determined that the definition failed the rational connection branch of the *Oakes* test because

[t]he rights of sole support parents on social assistance to personal autonomy in the choice of their living arrangements and their personal and intimate relationships is impaired in situations where there is no legal obligation on the co-residents to financially support each other. This is not a minimal impairment of the equality rights of sole support parents on social assistance.¹⁵⁴

With respect to whether the section 7 violation due to overbreadth could be saved by section 1, the SARB relied on the decision of Mr. Justice Cory in *R. v. Heywood*, where he stated

[i]n a case where the violation of the principles of fundamental justice is as a result of overbreadth, it is even more difficult to see how the limit can be justified. Overbroad legislation which infringes s. 7 of the *Charter* would appear to be incapable of passing the minimal impairment branch of the s. 1 analysis.¹⁵⁵

Thus, the SARB held that the section 15 and section 7 violations could not be saved by section 1.

POLICY DISCUSSION AND CRITIQUE

As alluded to earlier, at the base of these decisions is not simply the issue of whether the parties in each case were in a “spousal relationship”. Rather, the deeper issues in each case revolve around who we are willing, and want, to recognize as “spouses”, for what purposes we are willing to recognize them as spouses, and finally, to what extent we are willing to accept the changing realities of families today. Perhaps the most frustrating aspects about the differing spousal definitions in the *FLA* and the *OWA* are the extent to which they are inconsistent with one another, and the extent to which the government is willing to go to justify the “reasons” for the differences. In each case, the office of the Attorney General, representing the government of Ontario, gave arguments as to why the definition of “spouse” in each *Act* was justified. While

152. *Ibid.* at 61.

153. *Ibid.*

154. *Ibid.*

155. *Ibid.* at 62, and *R. v. Heywood*, [1994] 3 S.C.R. 761, 120 D.L.R. (4th) 348 at 391.

there was no change in provincial government between the hearing of the two cases, in each case the government submitted arguments to the courts that not only effectively contradicted one another and the government's own stated objectives for the legislation in question, but in each case also relied on "tradition" to espouse two significantly different definitions of the requirements for becoming, or being assumed to be, a spouse.¹⁵⁶

In both *M. v. H.* and *Falkiner v. Ontario*, the government used a functionalist approach to justify the definition of spouse in the legislation in question. In the context of family law this approach examines what the institution of a "family", and its component spouses, do. This approach assumes that a spouse has a certain role, place, and perhaps consequence, in society, and that it is the goal of the law to address and answer to these understandings. For the historical functionalist the family is a support unit, both emotional and financial, within which the husband and wife are assigned particular traditional societal roles: head of household and breadwinner, and homemaker and nurturer. The problem with litigators, in this case the government, arguing through this approach is illustrated in these cases: families, family law, and all of the components traditionally associated with them, are currently developing, changing, being challenged and consequently becoming redefined. In today's realm of family law there is simply not a complete, monolithic, or clear agreement as to what a spouse is and what that person's role is as a spouse. Furthermore, a functionalist approach to law and policy justification is often criticised on the basis that the goals or roles for society are not always coherent or consistent. As Katherine O'Donovan points out – and as the cases amply illustrate – "different pieces of legislation send different messages because of conflicting aims."¹⁵⁷

In the *M. v. H.* litigation "spouse" was defined in the *FLA* and by the government as opposite-sex couples who are legally married or living common law. One sees the functionalist approach to families in the arguments of the Attorney General who submitted that the role or obligation of spouses is to perpetuate the family unit through procreation, and to provide support for one another and for any resulting children. The government argued that while gender-neutral, the purpose of Part III of the *Act* is to ensure that private support will be provided to "vulnerable, financially dependent women" in the event of a breakdown in the relationship in order to ensure that the women did not end up dependent on public benefits. While the Attorney General stressed that it was not the Legislature's intention that legal rights and obligations would arise in all economically interdependent relationships, the reality is that if the

156. What is also frustrating about the government's arguments in each case are the inconsistencies specifically within the s.1 *Charter* justifications. In each case the Ontario government used policy arguments to justify the definition of spouse in the particular legislation at issue. However, as we have seen, while arguing about family life in each case, the "policy" is different in each. Should the provincial governments be required to have one policy only about "family" (for example)? It is submitted that they should. However, this is a discussion for another day, and for the purposes of this paper, what follows is a more general look at the inconsistencies and contradictions in the arguments presented by the Ontario government.

157. K. Donovan, *Family Law Matters* (London, England: Pluto Press, 1993) at 20.

Supreme Court had reversed the Ontario Court of Appeal's decision, women (and men) in same-sex relationships, upon the break-up of their relationships, would be unable to legally rely on their former partners for financial support. Many would have no option but to turn to the public purse.¹⁵⁸ One sees through *M. v. H.* that the government on the one hand was trying to cut back on welfare expenditures by creating a system in the *FLA* of private support for former opposite-sex couples, while on the other, was giving other individuals – gay and lesbian individuals specifically – no alternative except to turn to social assistance programs. Two observations may be made about the government's arguments. The first is that by not including same-sex couples in those whom the *FLA* both protects and assigns responsibilities and obligations to, the government was refusing to consider any family other than the "traditional" one of husband and wife, either with or without children. The second observation, leaving aside the recent change in the *OWA Regulations* to include same-sex partners, is that, ironically, if such individuals had taken in a same-sex roommate to help with expenses, or had decided to "try-out" a relationship and cohabit with someone of the same sex in a spouse-like relationship, any social assistance benefits they received under the *OWA* would have continued. Given that the *OWA* definition was broadened in order to prevent many people from collecting social assistance, and that one of the objectives for the definition given by the Attorney General for the *FLA* provisions was to ensure that women did not turn to public means of support, one would think that a fiscally driven government would not have to be court ordered to include same-sex couples within the definition of "spouse" in each *Act*, but would rather have changed the definitions without hesitation, in order to ensure that more people would fall under the realm of eligibility for private support.¹⁵⁹ Instead, the *M. v. H.* litigation provides an apt illustration of the extent to which the current Ontario government was willing to hide behind a definition and philosophy of "spouse" that by only including heterosexual couples – despite the reality of a growing number of cohabiting gay and lesbian couples – is at odds with how some families really live.

This lack of reality is illustrated by taking a second look at M.'s situation. If all references to the parties being women were deleted from the arguments, it is possible that one could read the case and not know that the parties were in a lesbian relationship. In every way but for the fact that she was involved in a same-sex relationship, M. met the criteria for support that the government claimed was considered when the definition of "spouse" was extended to opposite-sex common-law couples: M. was in a "traditional" role of "primary home-maker" while H. worked outside the home and

158. While it is not possible to accurately assess the total population currently living in same-sex relationships (as many gay and lesbians do not live openly gay or lesbian lives), given the increasing litigation on "sexual orientation" and for same-sex support and benefit rights, the government's contention that the numbers of these relationships are too insignificant to legislate for, and that no former same-sex partners will find themselves on social assistance following a relationship breakdown, is yet another example of the lack of reality in the current government's policy directions.

159. It is interesting to note that British Columbia has recently extended the definition of "spouse" in its social assistance legislation to include same-sex couples: *British Columbia Benefits (Income Assistance Act)*, B.C. Reg. 75/97, deposited March 13/97 O.C. 291/97 effective March 31, 1997.

was the “breadwinner” for the couple; M. did not earn a salary from the business that she and H. started together; the initial start-up capital for the business came from M.’s and H.’s own savings; and when the relationship ended, M. was effectively unemployed and without any savings of her own. With these facts in mind, one sees that the problem with the policy justification and approach of the government in this case is rooted in the functionalist theory of the family and definition of “spouse” that the government stands firmly behind. While M. met the criteria of a financially vulnerable and dependant woman who performed a gender traditional role in a “spouse-like” relationship, the government was steadfast in its position that family and spouses, and the consequences associated with being part of a family or being a spouse, are only found in the traditional, heterosexual family: at base, to the Ontario government, a family is two spouses, with or without children, living together; a spouse is either of a man or a woman, a husband or a wife; and spouses support one another (although generally the husband is assumed to be supporting the wife), either through personal desire, or legal obligation.

This historical functionalist approach to “family” is well depicted in Mr. Justice Finlayson’s dissenting opinion in *M. v. H.* at the Ontario Court of Appeal, by Mr. Justice Gonthier’s dissenting opinion in *M. v. H.*, and, as noted above, in the government’s response to the Supreme Court decision. In adopting the Attorney General’s arguments, Justice Gonthier, like Mr. Justice Finlayson dissenting at the Ontario Court of Appeal, looked at the history of the *Act*, and concentrated on the “traditional” family and the roles associated with it: procreation, and generally, wife as secondary bread-winner and as dependent.¹⁶⁰ Yet, to recognize the need for support following the breakdown of an interdependent or fully dependent opposite-sex relationship but deny someone support for the sole reason that they were involved in a relationship which was not in the original *Act*’s considerations, is not only unrealistic given the changing face and realities of present society, but, as noted above, is ironically at odds with the government’s fiscal policies argued in *Falkiner*.

The government’s steadfast functionalist approach to families and spouses was demonstrated again in the amendments made as a result of the Supreme Court decision in *M. v. H.* It is noteworthy that the definition of “spouse” was not extended to include same-sex partners in the way the Court suggested it should be. Rather, section 29 of the *FLA* and the *Regulations* to the *OWA* were amended by adding a definition of “same-sex partner”.¹⁶¹ In so doing, the government has maintained its refusal to recognize gay and lesbian couples as “spousal” in the same way that opposite-sex common-law couples are so recognized.

The problem with using a functionalist approach in order to justify the definition of “spouse” as heterosexual only is that even in its traditional form the definition no longer meets the reality of today’s society. While it may be argued that spouses still do have a role in society, it is questionable whether there is a role that can be identified

160. *M. v. H.*, S.C.C., *supra* note 8 at 654-655.

161. For the revisions to the regulations to the *OWA* to include “same-sex partner” see *supra* note 26.

as “the” role. For instance, many individuals no longer define their family as the traditional nuclear one; in the majority of households, both spouses work outside the home; many opposite-sex couples, often through deliberate choice, do not have children; many women no longer find themselves financially dependent on their former husbands, particularly if the couple did not have any children; and some men find that they are in need of support from their former wives.¹⁶²

What is also problematic about the government’s arguments is its plea for judicial deference to the Legislature’s right to amend the *FLA* how and when it sees fit, and its primary reliance on the 1974-75 conclusions of the Law Reform Commission. As noted above, the 1974-75 LRC Report concluded that women are financially dependent on men. The Report thus urged that provisions for support were needed in the event of relationship breakdown. What is disturbing about the use of the Report in today’s context is the government’s unwillingness to look beyond its wording – now a quarter of a century old – and apply it to today’s realities. It is true that in our society women carry the burden of poverty, that many women are financially dependent on men, and that the majority of women experience a decrease in material well-being upon relationship breakdown.¹⁶³ However, it may also be true that the feminization of poverty is not restricted to heterosexual women. Relationship breakdown is not a heterosexual-only phenomenon; gay and lesbian relationships also end. What is also disturbing about the Ontario government’s position is its argument that the spousal support provisions in the *FLA* are “recent” and that when enacted, it was for future Legislatures to decide how and when to change the provisions in keeping with the needs of society.¹⁶⁴ In fact, the *FLRA* first recognized common-law spouses when it was enacted over twenty years ago, while the last change to the definition of “spouse” occurred fourteen years ago when the *FLA* was enacted. Thus, the question which lingers after the government’s arguments is: “which ‘future’ Legislature?” By requiring the Ontario government to recognize these realities, and also the reality that many same-sex couples differ from many opposite-sex couples only by their gender, and thus may need, and have a right to, support, the Supreme Court has forced the government to move the law forward and, in Martha Minow’s words, to “connect with how people really live”.

In the *Falkiner* litigation the government also argued an historical, functionalist approach to justify the definition of “spouse”. Here, the role of the family, and consequently of the spouses, was again described as a source of support for its members, with primary reliance on the husband to provide support for the family, only this time solely for the period that the relationship continued. As in the *M. v. H.*

162. On this last point, perhaps the most infamous case is *Hough v. Hough* (1996), 25 R.F.L. (4th) 319, 30 O.R. (3d) 725 (Ont. Gen. Div.). Although the issue of “need” was questionable, the fact remains that the court ordered Mrs. Hough to pay spousal support to Mr. Hough.

163. In *Moge v. Moge*, Justice L’Heureux-Dubé, writing for the majority of the S.C.C., took judicial notice of these realities facing Canadian women today [*Moge v. Moge*, [1992] 3 S.C.R. 813, 99 D.L.R. (4th) 456 (hereinafter, *Moge*)].

164. *M. v. H.*, S.C.C., *supra* note 8 (Factum of the Attorney General at para. 72).

litigation, the functionalist approach argued by the Attorney General here also assumed that a family is comprised of a cohabiting husband and a wife and thus opposite-sex co-residents are a family unit and are responsible for supporting each other. While the pre-1995 definition of "spouse" had been formulated in such a way as to be uniform with the *FLA* definition, the definition at issue in the *Falkiner* litigation considered as spousal all opposite-sex co-residents whose relationship was one of "cohabitation", if financial support was given by either "spouse" to the other, or if the "spouses" had a "mutual agreement" as to finances. In keeping with its functionalist arguments, the government argued before the SARB and the Court that the family unit is the logical and reasonable unit for the purposes of determining eligibility for social assistance, given that this unit is the "underlying building block of our society" and as it is the family's function and role to support its members.¹⁶⁵ As noted, the government justified the change away from the *FLA* definition by taking the position that the three-year "grace period" created an arbitrary and discriminatory distinction between common-law and married couples. Further, the Attorney General argued that the objectives of the *FLA* and the *OWA* are incompatible because the *FLA* provides for support after relationship breakdown and the *OWA* provides for support during the relationship. Leaving aside for a moment the issue of a "grace period", the government's distinction between the *FLA* and the *OWA* is, at best, misleading. As Madame Justice Charron (writing for the majority at the Ontario Court of Appeal in *M. v. H.*) pointed out, section 30 of the *FLA* provides that "[e]very spouse has an obligation to provide for himself or herself and for the other spouse, in accordance with need, to the extent that he or she is capable of doing so."¹⁶⁶ Thus, the obligation imposed on married and common-law couples under the *FLA* to provide support for oneself and for one's spouse arises not only upon break-up, but rather is a continuing obligation throughout the course of the relationship.

Justice Charron's explanation of the support provisions in her *M. v. H.* decision shows the inconsistency with the government's justification for the spousal definition at issue in *Falkiner*. In each case, a functionalist argument was used, yet in the *FLA*, there was an assumption and requirement of support, and common-law spouses were defined as three-year, opposite-sex cohabitantes; in the *OWA* there was an assumption of support, but common-law spouses were defined as opposite-sex cohabitantes of any length of time. As noted above, the definition of "spouse" in the *FLA* assumed that couples need time to form spousal relationships and that there should be a certain length of time before the parties are entitled to the rights and obligations of married couples. However, under the *Regulations* to the *OWA* at issue in *Falkiner*, the rights and the obligations of spouses were assigned from the moment that an opposite-sex couple began residing together. What is perhaps most frustrating about this is that, while a woman cohabiting with a man would be ineligible for social assistance because of the "support" she was assumed to be receiving from her "spouse", should this relationship end before the couple resided together for three years, the "wife" would be unable to

165. *Falkiner*, Factum of the Attorney General, at para. 17.

166. *FLA*, s.30, and *M. v. H.*, Ont. C.A., *supra* note 48 at 148-9.

claim support from her “husband” under the *FLA* provisions. Although considered to be a spouse in one piece of provincial legislation for purposes of financial support, she would not qualify as a spouse and have access to financial support under another piece of provincial legislation. The situation remains much the same in the aftermath of the amendments to the *FLA* and the *Regulations* to the *OWA* introduced as a consequence of the Supreme Court of Canada’s ruling in *M. v. H.* As noted earlier, the presumption of a spousal relationship immediately upon sharing a dwelling that was introduced in 1995 has now been repealed. But this by no means eliminates the inconsistency between the two statutory regimes. The social, familial and financial aspects of the relationship continue as the test for spousal relationships; there is simply no longer an automatic presumption at law. The changes will also mean, of course, that now gay and lesbian couples will be caught in the contradiction. While there may be cases where it is appropriate to define the same term slightly differently in different pieces of legislation, it is submitted that where the legislation affects families, whether directly or indirectly, consistent rather than contradictory meanings not only meet the requirements of common sense, but may also make the legislation less open to easy attack on constitutional grounds.¹⁶⁷

The same reluctance to embrace reality results in internal inconsistencies in the *Falkiner* decision. One of the main objectives argued by the government for the definition of spouse in the *OWA Regulations* is to cut back on the financial support being paid out each year through social assistance. To do this, the government originally broadened the definition of “spouse” to include virtually every opposite-sex, co-residing couple with the intention of having these “spouses” support one another. However, as noted in *Falkiner*, such actions often backfire: specifically, the women often end the relationship or seek other housing, and go back to receiving social assistance. Thus, the goal of fiscal savings is not met.

What is inconsistent with the government’s actions here is that the previous definition of “spouse” may be more conducive to women forming true, desired spousal relationships (remembering that the *Falkiner* applicants did not desire to have or consider their co-habitee a spouse) and thus becoming ineligible for benefits as sole-support parents under the *OWA*. Single women and single mothers are among the poorest groups in the country; the feminization of poverty is now firmly entrenched in Canadian society.¹⁶⁸ As a result of this many women share accommodations, food, child-caring expenses, and transportation means with friends in order to save expenses. In fact, living with another person was one recommendation made by the current Ontario government in 1995 as a means of coping with the massive rate

167. I am not suggesting here that consistency equals constitutionality. A three year or a zero year “grace period” in *each* Act may or may not be constitutional. However, in situations such as these which affect so many individuals and are thus perhaps more noticeable and more controversial, consistency between the two Acts might have made the legislation less vulnerable to such an obvious s.15 *Charter* attack.

168. In *Moge*, Madam Justice L’Heureux-Dubé examined extensive social science evidence and concluded: “[i]n Canada the feminization of poverty is an entrenched social phenomenon. Between 1971 and 1986 the percentage of poor women found among all women in the country more than doubled”: *Moge*, *supra* note 162 at 482.

cuts.¹⁶⁹ Additionally, many women may rely on male friends to sign or co-sign leases and loans as many landlords and banks are unwilling to rent or lend money to single women or mothers on social assistance. Unfortunately, if the man becomes a roommate, even if the roommates are not financially inter-dependent, they will still be caught by the definition of “spouse” if they are cohabiting and have a mutual agreement with respect to their finances.¹⁷⁰ This is problematic for many reasons, not least because

it is hard to imagine that two people sharing accommodation will not have some financial arrangement and accordingly ... these three categories [in the *Regulations*] appear to cover any two people of the opposite sex [now also same sex] living together. ... The plain words of the section “mutual agreement or arrangement regarding their financial affairs” would apply to any two persons sharing a residence.¹⁷¹

As the traditional family of the functionalist approach argued by the government consists of a male and a female sharing quarters and splitting expenses, for the purposes of the *OWA* at the time of the litigation, any opposite-sex living arrangement was assumed to be spousal.¹⁷² However, as discussed above and as illustrated by the applicants in the *Falkiner* case, this is not necessarily the case in all situations. The women in the *Falkiner* litigation asserted that each was living with their male co-resident on a trial basis. Studies indicate that if these women form long-term relationships with their male co-residents their standard of living will increase,¹⁷³ and the government’s desire to get individuals off of the public purse will be met. However, if the new definitions have the effect of preventing women from entering into relationships for fear that their benefits will be discontinued, the government’s objective will have failed.

Another reality in today’s society that the functionalist approach is at odds with is that co-residents often do not financially support the women with whom they live. Indeed, the fact that co-residency often does not mean financial support was one of the factors which led the Nova Scotia Supreme Court to rule that the Nova Scotia “man in the house” rule was unjustifiably discriminatory. In *Rehberg* Justice Kelly noted

[t]he man-in-the-house rule reflects a paradigm where a male residing with a recipient single mother was assumed to be responsible for the care of her and her family. This assumption, based on a patriarchal model of a family, is now significantly out

169. *Falkiner*, Ont. Div. Ct., *supra* note 34 at 151-52 per Rosenberg J.

170. Ironically, one sees here that the legislative prohibition precluding investigation into the sexual relationships between the “spouses” makes it harder for the recipient to rebut the spousal presumption.

171. *Falkiner*, Ont. Div. Ct., *supra* note 34 at 142-43 per Rosenberg J.

172. What is interesting in part about the 1995 definition is the unspoken assumption of a sexual relationship between the co-residents. While the requirement of a conjugal relationship has not been present in the definition of spouse since 1987, the assumption is still there as evidenced by the government’s insistence that co-residents of any time-length are “common-law” and by the government’s comparison of the co-residents to married couples.

173. Again, this phenomenon was noted by Justice L’Heureux-Dubé in *Moge*, *supra* note 162.

of touch with a current model of the family as perceived in most family and divorce legislation and legal authority.¹⁷⁴

By taking the position in *Falkiner* it has, the government missed this point; it is unable to step out of the paradigm and see past the historical, functional approach to the assumptions of the roles and responsibilities of opposite-sex co-residents. As Katherine O'Donovan points out, such a narrow approach of functionalism to the roles of family members has been widely criticised. Functionalism as a moral theory she notes, "is sexist in its beliefs and assumptions. Social stability is emphasised, with rules and norms internalised, and women's role defined in certain terms."¹⁷⁵

Finally, employing a functionalist approach to justify the definition of spouse ignores the reality that many couples decide to move in together precisely because they do not yet know if they are compatible as partners or spouses, and because dating alone often does not provide a fair assessment. In *Rehberg*, Justice Kelly accepted the evidence of expert witnesses about the importance of this trial period and stated that

the opportunity for a man to interact with the single mother and her children in the stresses of their normal home environment, is an extremely important opportunity for a single mother to assess the suitability of a male friend for a long-term relationship. [S]tep-parenting is one of the most difficult kinds of relationships to develop and cohabitation would give all parties involved, the single mother, her male friend, and the children an opportunity to assess if an appropriate long-term relationship could develop. [A] conventional dating relationship in such circumstances is usually artificial and inadequate to assess the potential for a healthy relationship for all parties.¹⁷⁶

In *Falkiner*, the applicants all expressed the desire to try out the relationship they were in, before making a decision on whether or not they wanted to commit to a long-term serious relationship. This wish was not frivolous: the women had each been abused by men in the past, and each woman was worried about the compatibility between herself, her children, and the male friend.¹⁷⁷ However, the traditional approach to the family as argued by the government in this case, and the government's desire to treat cohabiting opposite-sex persons equally to married couples does not conceive of co-habitational try-out periods. Rather, it perceives conventional dating, followed by

174. *R. v. Rehberg* (1994), 111 D.L.R. (4th) 336, 127 N.S.R. (2d) 331 (N.S.S.C.), at 351 (hereinafter, "*Rehberg*"). Notice of Appeal filed in the Nova Scotia Court of Appeal, Court File number CAC 02977. What is ironic about this decision is that Justice Kelly used the Ontario pre-1995 definition of "spouse" as an example of a system that had effectively moved away from the discriminatory practise of the "spouse in the house" rule (at 353).

175. *Supra* note 156 at 20.

176. *Rehberg*, *supra* note 173 at 353.

177. As Little and Morrison note, "The prevalence of violence in the lives of low income single mothers is not often fully acknowledged", *supra* note 27 at footnote 60. K. Rodgers has noted that approximately half of all Canadian women have been the victim of a serious assault and the statistics are even higher for women with lower incomes: K. Rodgers, "Wife Assault: The Findings of a National Survey," *Juristat*, No. 9, Vol. 14, 1994, reporting on the 1993 Statistics Canada *Violence Against Women Survey*.

co-habitation, as an indication of a long-term relationship. Functionalism assumes that when co-habitation begins certain roles are taken on. However, today's relationships are not always able to be pigeon-holed into roles, particularly when these roles include assumptions of support obligations. Further, the difficulty with the government's "objective" of equality is that it begs the question. As Little and Morrison point out, to be able to treat these individuals the same as married couples, "one must first be able to say what defines a married couple ... [unfortunately] the only common characteristic of married couple is that they are married."¹⁷⁸ Little and Morrison go on to note

[t]he fundamental paradox of the new definition [1995] ... is that it can only claim to be treating "common-law" couples the same as married couples by ignoring the profound ambiguity in the very areas it has chosen to make the comparisons. Married couples – and those people defined as spouses in clauses (a) to (c) of the definition – either have voluntarily chosen to pool finances or have a mutual support obligation imposed by law. People who fall within clause (d) have no legal support obligation to each other. ... Although the government has argued vigorously that the 1995 changes replaced an "arbitrary" rule with a "functional" definition of what it means to be a couple, in fact its functional definition can only operate by deliberately ignoring this divergence.¹⁷⁹

CONCLUSION

It has now been over twenty years since former Prime Minister Pierre Trudeau declared that the state has no business in the bedrooms of the Nation. However, despite this proclamation, the government does in fact have a say in, and continues to affect, our most intimate relations. While homosexuality is no longer a criminal offence, and common-law couples are now legally recognized and protected, by deciding who is and is not a "spouse", the Ontario government is indeed peering into the bedrooms of its constituents and making moral decisions on the public's behalf. These decisions, ironically, are often to the detriment of everyone involved, including the government.

The cases of *M. v. H.* and *Falkiner v. Ontario* and the laws that the parties challenged, clearly demonstrate the downside of the government's intervention, or its lack thereof. By broadening the definition of "spouse" in the *Regulations* to the *OWA* in 1995, the Ontario government argues that it has "caught" thousands of people and has saved millions of dollars previously "given out" through social assistance programs in the province. However, most of those caught are women, often single mothers, who are struggling to make ends meet. Although the definition of "spouse" in the *Regulations* is gender neutral on its face, as Little and Morrison point out, "its impact is felt disproportionately by low income mothers seeking assistance as sole support parents."¹⁸⁰ In fact, over 90 per cent of sole support parent families receiving social

178. Little and Morrison, *supra* note 27 at 134.

179. *Ibid.* at 25.

180. *Ibid.* at 4.

assistance in Ontario are headed by women.¹⁸¹ The definition unwarrantably made many ineligible for assistance because their “spouse” – an opposite-sex co-resident – was deemed to be responsible for financially assisting them. While this objective might be worthy on its face the reality, as the *Falkiner* case demonstrates, is that many of the co-residents do not financially assist *OWA* recipients, and many women are choosing either to end their co-residencies, or simply not to enter them at all. The ramifications of the government’s lack of intervention is aptly illustrated in the *M. v. H.* decision. By refusing to broaden the definition of “spouse” in the *FLA* until ordered to do so by the Supreme Court, the provincial government barred all gays and lesbians from being legally entitled to support from their former partners, and thus not only put off the political “hot potato” of homosexual relationships and gay and lesbian rights but also potentially forced many former same-sex partners to turn to the social assistance programs for support.¹⁸²

In each of these cases, and with each of these *Acts*, a moral choice has indubitably been made. Among the priorities of the current provincial government are fiscal restraint and cutbacks. Welfare recipients are an easy target for many people particularly when they are portrayed, as the government did in the *Falkiner* litigation, as freeloaders or as not needing support because of other available and familial means of assistance. Additionally, while sexual orientation may now be recognized as a prohibited ground of discrimination under the *Charter* and in (most) Human Rights Codes across Canada, many people, and additionally the current Ontario government, remain uneasy with the legal recognition of same-sex relations. The problem with the government’s approaches to these issues is the inconsistencies within them. As illustrated above, the provincial government argued for two different definitions of “spouse” in two different statutes in order to meet its own policy objectives: fiscal restraint, and traditional, heterosexual, family life. As also illustrated above, on closer examination the differing definitions simply cannot be supported in light of the government’s stated objectives: in each *Act* the definitions and the objectives for them internally collapse upon themselves.

181. *Ibid.*

182. “Hot potato” is a particularly interesting phrase to use in the context of the current, Conservative government. Martha A. McCarthy, M.’s lawyer, used it during her submissions to the S.C.C. in order to describe the actions of the current government and its desire to side-step the issues surrounding homosexuality and sexual orientation. Ms. McCarthy noted that throughout the government’s s.1 arguments, the Attorney General pleaded for judicial deference to the Legislature in order to incrementally change the protections afforded and those recognized in the *FLA*. However, during the government’s s.24(1) remedy submission, the Attorney General requested that if the S.C.C. found that s.29 of the *FLA* unjustifiably infringed s.15(1) of the *Charter*, that the Court read “sexual orientation” into the *Act*. This inconsistency and request, Ms. McCarthy suggested, was a further indicator of the government’s desire to not address the issue of sexual orientation and family law. The government would rather be “forced” to read sexual orientation into the *Act*, than to be seen as willingly doing the same [Submissions of Martha A. McCarthy, S.C.C. Appeal of *M. v. H.*, heard March 18, 1998. It should be noted that this is a paraphrase and interpretation by the author of Ms. McCarthy’s submissions to the Court and her responses to the questions asked of her. It is not meant to be and should not be taken as a direct quote of Ms. McCarthy’s submissions].

In both *M. v. H.* and *Falkiner v. Ontario*, the government's arguments in support of the definitions at issue may be seen as classically functionalist. While there are many benefits to 'traditional' family life, and while families and their components do indeed continue to play roles in society, it is highly questionable whether there is one role of the family or one definition of who is a spouse that can be reconciled with the realities of today's changing world. In light of the evolving nature of families in our society today, governments must respect, adapt and change when legislating in this area of profound importance in each of our lives. To do so is to make family law truly "connect" with how we live. To deny these realities is to engage in obstinate deception.