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Brief of Intervenor, Women's Legal Education and Action Fund (LEAF), M.v.H.

Laura Spitz
University of New Mexico - School of Law

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Court File No. 25838

IN THE SUPREME COURT OF CANADA
(Appeal from the Court of Appeal of the Province of Ontario)

B E T W E E N:

THE ATTORNEY GENERAL OF ONTARIO

Appellant
(Intervenor)

- and -

M.

Respondent
(Applicant)

- and -

H.

Respondent

- and -

THE WOMEN'S LEGAL EDUCATION AND ACTION FUND

Intervenor

FACTUM OF THE INTERVENOR WOMEN'S LEGAL EDUCATION AND ACTION FUND

WOMEN'S LEGAL EDUCATION & ACTION FUND
415 Yonge Street, Suite 1800
Toronto, ON
M5B 2E7

CAROL ALLEN
Tel: (519)538-9929
Fax: (519)538-9929

Solicitor for the Intervenor
Women's Legal Education and Action Fund

SCOTT & AYLEN
Barristers & Solicitors
Suite 1000
60 Queen Street West
Ottawa, ON K1P 5Y7

CAROLE BROWN
Tel: (613)237-5160
Fax: (613)230-8842

Ottawa Agent for the **Women's Legal Education and Action Fund**

TO: REGISTRAR OF THE SUPREME COURT OF CANADA

AND TO:

MINISTRY OF THE ATTORNEY GENERAL
Constitutional Law Branch
720 Bay Street, 7th Floor
Toronto, ON M5G 2K1

Robert E. Charney/Perter C. Landman

Tel: (416)326-4452
Fax: (416)326-4015

Solicitors for the Appellant
Attorney General for Ontario

BURKE-ROBERTSON
Barristers & Solicitors
70 Gloucester Street
Ottawa, ON K2P 0A2

Robert E. Houston, Q.C.

Tel: (613)236-9665
Fax: (613)235-4430

Ottawa Agents for the Appellant
The Attorney General of Ontario

McMILLAN, BINCH
Barristers & Solicitors
Suite 3500, 200 Bay Street
Royal Bank Plaza, South Tower
Toronto, ON M5J 2J7

Martha A. McCarthy

Tel: (416)865-7216
Fax: (416)865-7048

Solicitor for the Respondent, M.

GOWLING STRATHY & HENDERSON
Barristers & Solicitors
2600 - 160 Elgin Street
P.O.Box 466, Station D
Ottawa, ON K1P 1C3

B. A. Crane, Q.C.

Tel: (613)786-0212
Fax: (613)568-9869

Ottawa Agents for the Respondent, M.

BORDEN & ELLIOT
Barristers & Solicitors
Scotia Plaza, 40 King St. W.
Toronto, ON M5H 3Y4

Christopher D. Bredt/Lorne M. Sossin
Tel: (416)367-6160
Fax: (416)361-7063

Solicitors for the Respondent, H.

BURKE-ROBERTSON
Barristers & Solicitors
70 Gloucester Street
Ottawa, ON K2P 0A2

Robert E. Houston, Q.C.
Tel: (613)236-9665
Fax: (613)235-4430

Ottawa Agents for the Respondent, H.

LERNER & ASSOCIATES
Barristers & Solicitors
130 Adelaide Street
Suite 2400
Toronto, ON M5H 3P5

Peter R. Jervis
Tel: (416)867-3076
Fax: (416)867-9192

Solicitor for the Intervenor
Evangelical Fellowship of Canada

LANG MICHENER
Barristers & Solicitors
50 O'Connor Street
Suite 300
Ottawa, ON K1P 6L2

Eugene Meehan
Tel: (613)232-7171
Fax: (613)231-3191

Ottawa Agents for the Intervenor
Evangelical Fellowship of Canada

STIKEMAN, ELLIOTT
Barristers & Solicitors
Suite 5400, P.O.Box 85
Commerce Court West
Toronto, ON M5L 1B9

David M. Brown
Tel: (416)869-5602
Fax: (416)947-0866

Solicitor for the Intervenor
REAL Women of Canada

STIKEMAN, ELLIOTT
Barristers & Solicitors
40 O'Connor Street
Suite 914
Ottawa, ON K1P 6L2

Mirko Bibic
Tel: (613)234-4555
Fax: (613)230-8877

Ottawa Agents for the Intervenor
REAL Women of Canada

ELLIOTT & KIM
Barristers & Solicitors
Suite 304
150 York Street
Toronto, ON M5H 3S5

R. Douglas Elliott
Tel: (416)362-1989
Fax: (416)362-6204

Solicitorsfor the Intervenor
The Foundation for Equal Families

BLAKE CASSELS & GRAYDON
Barristers & Solicitors
20th Floor, World Exchange Plaza
45 O'Connor Street
Ottawa, ON K1P 1A4

Joanne Van Doorn
Tel: (613)788-2228
Fax: (613)788-2247

Ottawa Agents for the Intervenor
The Foundation for Equal Families

ONTARIO HUMAN RIGHTS COMMISSION
Legal Services Branch
180 Dundas Street West, 8th Floor
Toronto, ON M7A 2R9

BURKE-ROBERTSON
Barristers & Solicitors
70 Gloucester Street
Ottawa, ON K2P 0A2

Joanne D. Rosen
Tel: (416)326-9868

Solicitor for the Intervenor
Ontario Human Rights Commission

Robert E. Houston, Q.C.
Tel: (613)236-9665
Fax: (613)235-4430

Ottawa Agents for the Intervenor
Ontario Human Rights Commission

SACK GOLDBLATT MITCHELL
Barristers & Solicitors
1130-20 Dundas Street West
Toronto, ON M5G 2G8

Cynthia Petersen
Tel: (416)977-6070
Fax: (416)591-7333

Solicitor for the Intervenor, EGALE

NELLIGAN POWER
Barristers & Solicitors
1900-66 Slater Street
Ottawa, ON K1P 5H1

Pam MacEachern
Tel: (613)231-8276
Fax: (613)238-2098

Ottawa Agents for the Intervenor, EGALE

WEIR & FOULDS
Barristers & Solicitors
Exchange Tower, Suite 1600
P.O.Box 480
130 King Street West
Toronto, ON M5X 1J5

J. G. Cowan
Tel: (416)947-5007
Fax: (416)365-1876

Solicitor for the Intevenor
The United Church of Canada

YEGENDORF, BRAZEAU, SELLER, PREHOGAN & WYLLIE
Barristers & Solicitors
Suite 750, 55 Metcalfe Street
Ottawa, ON
K1P 6L5

Ronald Prehogan
Tel: (613)233-2139
Fax: (613)233-8631

Ottawa Agents for the Intervenor
The United Church of Canada

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PART I - THE FACTS

1. The Women's Legal Education and Action Fund ("LEAF") takes no position on the facts.

PART II - THE ISSUES

2. LEAF adopts the statement of the constitutional questions as set forth in the Appellant Attorney General's factum.

PART III - ARGUMENT

A. INTRODUCTION

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3. LEAF submits that the heterosexual definition of spouse in s. 29 of the *Family Law Act* R.S.O. 1990 c. F.3 completely denies lesbians who otherwise meet the threshold criteria to apply for a support award. The effect of this denial violates lesbians' right to equal benefit and protection of the law contrary to s. 15(1) of the *Charter*, and cannot be justified under s. 1 of the *Charter*.

B. THE DEFINITION OF SPOUSE IN SECTION 29 OF THE *FAMILY LAW ACT* DISCRIMINATES AGAINST LESBIANS CONTRARY TO SECTION 15(1) OF THE *CHARTER*.

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I Guarantee of Equality

4. The *Charter* is the supreme law of Canada and, accordingly, statutes must be interpreted and applied in a manner consistent with the fundamental values enshrined within the *Charter*. Where a statute is capable of more than one interpretation, the interpretation which more closely accords with Charter values should be favoured.

> *Slaight Communications Inc. v. Davidson,* [1989] 1 SCR 1038, at p. 1078
> *Hills et al. v. A.G. Canada*, [1988] 1 SCR 513, at p. 558
> *Canada (Attorney General) v. Mossop*, [1993] 1 SCR 544 at pp. 581-82

30

5. Section 15 has been recognized as "the broadest of all *Charter* guarantees". It applies to and supports all other rights guaranteed by the Charter. The four equality guarantees contained in s. 15 extend to both "the formulation and application of the law". Section 15 is to be given a broad and generous interpretation consistent with realizing its fundamental purposes.

> *Andrews v. Law Society of British Columbia,* [1989] 1 SCR 143 at p. 171
> *Hills, supra,* at p. 558

6. In its evolving jurisprudence, this Court has acknowledged the importance of promoting the equality of disadvantaged groups. As Wilson J. (as she then was) stated, "s. 15 is designed to protect those groups who suffer social, political and legal disadvantage in out society." Similarly Lamer C.J. recognized that the purpose of s. 15 is to "remedy or prevent discrimination against groups subject to stereotyping, historical disadvantage and political and social prejudice in Canadian society".

Andrews, supra, (per Wilson J.) at p. 154
R. v. Swain, [1991] 1 SCR 933, per Lamer C.J.
Egan v. Canada, [1995] 2 SCR 513
Miron v. Trudel, [1995] 2 SCR 418 at p. 436

II The Proper Test for Determining Whether There Has Been a s. 15(1) Infringement

7. This Court has recently identified three analytical approaches to the determination as to whether there has been a violation of the equality guarantee provided in s. 15(1). Regardless of the analysis used, LEAF submits that a majority of this Court has rejected importing considerations of relevance into the s. 15 analysis. A focus on relevance invites courts to negate or ignore the discriminatory impact of unconstitutional legislation and increases the opportunity for such legislation to be upheld without having to undergo the more rigorous s. 1 scrutiny where the burden is squarely on Governments to demonstrate that a violation of equality rights is demonstrably justified.

Egan, supra, (per Cory, Sopinka, Iaccobucci, McLaughlin, L'Heureux-Dubé J.J.) at pp. 540-558
Miron, supra, (per McLaughlin, Iaccobucci, Sopinka, Cory, L'Heureux-Dubé J.J.) at pp. 465-477
Benner v. The Secretary of State of Canada, [1997] 1 SCR 358 (per Iaccobucci J.) at pp. 389-393

8. In *Andrews*, this Court rejected as part of the first stage of the s. 15 analysis considerations as to whether distinctions were reasonable in light of stated legislative objectives. In so doing this Court recognized that such considerations would be properly situated under the s. 1 analysis, since determinations as to the reasonableness of legislation requires inquiry into whether state interests outweigh constitutional equality guarantees. Likewise, LEAF submits that a focus on relevance within the first branch of the s. 15(1) analysis as proposed in *Egan* and *Miron* fundamentally undermines the purpose of the equality guarantee and runs counter to the analysis developed in *Andrews* and the majority of subsequent equality cases.

9. LEAF submits that the s. 15 analysis proposed by McLaughlin J. in *Miron* and L'Heureux-Dubé J. in *Egan* and *Miron* places the proper focus in the analysis upon the purpose of the equality

guarantee and the discriminatory impact of the distinction made by the impugned legislation. While the approach taken by each judge in determining the nature and impact of the distinction differs, both analyses proceed within a purposive framework and with regard to the broader, social, political, context within which it is alleged that the s. 15(1) violation occurs. As a result, each analysis is capable of giving substantive meaning to our constitutional equality guarantees and would result in a determination that the definition of spouse in s.29 of the *Family Law Act* violates s.15 on the basis of sexual orientation.

(a) *The Distinction*

10 10. It has been well established by this Court that sexual orientation is an analogous ground upon which discrimination is prohibited within s. 15(1).

Egan, supra, (per Cory J. at p.583-604, per L'Heuruex-Dubé J.) at 540-568

11. LEAF submits that s. 29 of the *Family Law Act* makes a distinction between heterosexual common law relationships and intimate lesbian relationships on the basis of sexual orientation and as a result has a discriminatory effect. The Attorney General of Ontario concedes and LEAF agrees that the *Family Law Act* provides a statutory benefit within the meaning of s. 15(1) and as same sex intimate relationships do not have the statutory right to seek such support, the definition of "spouse" 20 denies a benefit on the basis of sexual orientation. Section 29 of the *Family Law Act* mandates the wholesale exclusion of lesbians from the **right to apply** for spousal support upon breakdown of intimate relationships.

Attorney General factum at p. 15

12. The Respondent H's argument that the distinction made by the legislation is between heterosexual relationships on the one hand and same sex and other "financially dependent" relationships is erroneous because the distinction is not constitutionally relevant.

30 13. It is not necessary, as the Attorney General and the Respondent H and the Respondent M suggests, that lesbian intimate relationships look "just like" heterosexual common law relationships as a condition to finding a s. 15 violation of lesbian equality rights. Although this issue is addressed more completely in our s. 1 analysis, LEAF submits that for the purposes of s. 15 this Court has clearly stated that similarity of situation is not the measure of entitlement to equality rights.

McKinney v. University of Guelph, [1990] 3 S.C.R. 229, at p. 279

14. It is also not incumbent upon a s. 15 claimant to prove that other possible avenues exist to address or remedy the discriminatory effect of the impugned legislation or that those other avenues are insufficient. The Attorney General and the respondent H's argument that lesbian intimates have alternate remedies to inclusion within s. 29 of the *Family Law Act* is deceptive. LEAF submits that the onus rests with Government under s. 1 to demonstrate that other available avenues are **sufficient** to warrant overriding a constitutionally protected right to equality.

(b) *The Distinction Has a Discriminatory Effect*

15. Parts I. II, and III of the *Family Law Act* provide a comprehensive legislative scheme designed to regulate the breakdown of intimate relationships which meet certain threshold requirements. The definition of spouse contained in s. 29 of the *Family Law Act* restricts the **right to apply** for spousal support exclusively to heterosexuals. It does not provide a guarantee of spousal support upon application. Rather, the *Family Law Act* provides Judges with criteria which is to be applied on a case by case basis in determining eligibility for and quantum of spousal support.

16. Lesbians and gay men have advanced equality claims before this court and before lower courts in Canada seeking inclusion into the legal construct of "family" and all of the subcategories that fall within (eg. "spouse", "marital status", "family status"). Judges have resorted to various interpretive devices which permit a restrictive interpretation of legislation which regulates "family". Judges have justified excluding lesbians and gay men from definitions of "family" to which legal rights, recognition and protection are accorded, on the basis of outdated, monolithic and theoretical definitions which demonstrate a stronger commitment to ensuring that "family" continues to be defined as exclusively heterosexual. Such reasoning undermines the very societal values which the equality provision of the *Charter* and the principles upon which human rights legislation is founded, seek to uphold.

17. This denial of recognition and protection and the concomitant denial of equal respect and consideration challenges the formation of lesbian relationships. Regardless of the presence of children, parental obligations, commitment between the parties, duration, expectations of the parties, and degree of economic interdependence, intimate lesbian relationships are denied legal protection, societal recognition and respect. Such denial sends a clear message to the larger Canadian society that lesbians, lesbian relationships and lesbian families including their children are less worthy, less important and thus not entitled to equal recognition, protection and respect.

18. LEAF submits that the distinction drawn by the legislation is between common law heterosexual relationships and same sex intimate relationships. The distinction is based upon the analogous ground of sexual orientation. It denies lesbians equal benefit and protection of the spousal support provisions of the *Family Law Act* in that lesbians are statutorily denied the right to apply for spousal support regardless of the economic consequences of the relationship upon either party. The distinction has the effect of promoting and perpetuating the view that lesbians are less worthy, less capable and less valuable as human beings and as members of Canadian society and therefore not equally deserving of concern, respect and consideration.

10 **SECTION 1**

C. THE GOVERNMENT HAS NOT MET ITS BURDEN UNDER SECTION 1 OF THE *CHARTER* OF JUSTIFYING THE DISCRIMINATION

19. The burden is on government to show by clear and convincing evidence that a violation of a *Charter* right is "reasonable and demonstrably justified in a free and democratic society". The factors generally relevant to determining whether a violative law meets that standard "remain those set out in *Oakes*." Hence, government's burden is discharged when it demonstrates that the objective
20 behind the offending measure is pressing and substantial, and that the infringement is proportional to that objective. Proportionality, in turn, requires that the limiting measures (i) be "carefully designed, or rationally connected, to the objective"; (ii) "impair the right as little as possible"; and (iii) not generate effects which so "severely trench on individual or group rights that the legislative objective, albeit important, is nevertheless outweighed by the abridgment of rights."

Hunter v. Southam Inc., [1984] 2 S.C.R. 145, at p. 169.
R. v. Oakes, [1986] 1 S.C.R. 103, at pp. 136-140.
R. v. Edwards Books and Art Ltd., [1986] 2 S.C.R. 713, at p. 768.
RJR-MacDonald Inc. v. Canada, [1995] 3 S.C.R. 199, at p. 268.

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20. LEAF urges this Court to hold that the Ontario government has not met its burden of demonstrating that the infringement of lesbians' equality rights occasioned by s. 29 of the *Family Law Act* is justified at all, far less demonstrably justified in a free and democratic society. Notwithstanding Ontario's attempt to skew the s. 1 analysis by mischaracterizing the true purpose behind the support laws, the impugned provision (i) is not rationally connected to its aims, (ii) does not minimally impair the equality rights of lesbians; and (iii) does not produce actual salutary effects which outweigh their actual harms. It is, therefore, unconstitutional.

I Assisting Heterosexual Women Was Only One of The Act's Objectives

21. When a government attempts to justify the infringement of a *Charter* right or freedom, it must show that the objective it sought to achieve was pressing and substantial enough to "warrant overriding a constitutionally protected right or freedom". It is not open to a government to assign to an impugned measure a purpose that seems, in retrospect, to be constitutionally more attractive. Rather, "cogent and persuasive evidence" of the actual purpose of "those who drafted and enacted the legislation at the time" is required before this standard may be satisfied.

R. v. Big M Drug Mart Ltd., [1985] 1 S.C.R. 295, at pp. 335-36, 352.
R. v. Oakes, *supra*, at p. 138.
Rodriguez v. British Columbia (Attorney General), [1993] 3 S.C.R. 519, at p.558.

22. LEAF submits that, in arguing that the purpose of the impugned measures was to address the "particular vulnerabilities suffered by heterosexual women upon relationship breakdown", the Ontario government cannot meet its burden under s. 1. Although in other circumstances this objective might pass constitutional muster, there is no evidence, far less cogent and persuasive evidence, that this was the single objective the legislature had in mind in enacting Part III. In fact, the legislative history, the terms of the statute itself, and the record of its interpretation all show that the legislature's actual purposes were threefold: (i) to reduce the burden on the public purse by creating a private obligation to provide spousal support; (ii) to impose legal duties on spouses to treat one another in an economically fair fashion upon relationship breakdown and to provide a means through which such disputes could be resolved; and (iii) to assist heterosexual women.

Attorney General's Factum, at p. 20.

(a) Legislative History

23. When first enacted in 1937, family law legislation in Ontario provided that only married women who had been "deserted" by their husbands had the right to apply for spousal support, and then only so long as they conformed to prevailing notions of how a "good wife" should behave: women who had engaged in adultery were automatically disentitled to support, irrespective of their contributions to the marriage, their dependency or their need.

Deserted Wives and Children's Maintenance Act, R.S.O. 1937, c. 211, (as amended by SO 1054 c. 22; 1958 c. 23; 1960 c. 105; 1970 c. 128; 1971 c. 98; 1973 s. 133)

24. In the 1970's, the provincial government began to recognize that the paternalistic notions about women which had undergirded the support laws since their inception no longer comported with

contemporary sensibilities. Whatever justification remained for providing women with the right to apply for spousal support, it could not rest upon antiquated and discriminatory notions about women's proper place. The legislature thus enacted a series of revisions to the support laws designed to remove adultery as a statutory bar to entitlement together with other vestiges of legislated sex inequality.

Family Law Reform Act, S.O. 1975, c. 41.
Family Law Reform Act, S.O. 1978, c. 2.

25. This shift in legislative policy had far less to do with ensuring that the support laws were harmonized with society's changing views about how women's inequality was to be understood and redressed than the Attorney General's history of this statute suggests. The 1975 *Act*, for example, was denounced as "neanderthal" and an "affront to women" because it failed to value fully women's contributions within the domestic context. Likewise, the government's claim that the 1978 *Act* recognized the equality of the sexes was rejected as "spurious" because it did nothing to correct the "basic inequality of the sexes" existing within larger society. Some members of the legislature objected that the legislation betrayed the same "protective" posture toward women for their "own good" that had long defined government policy on family law matters.

See Hansards, June 20, 1975 at p. 3210-11; and November 18, 1976, at p. 750.

26. In any event, it would be a distortion of history to ignore the fact that the legislature's ostensible concern for women's equality was but one of "several basic themes" underlying the legislative initiative of the 1970's. The legislative history reveals that government was also concerned that denying men the right to apply for support was unjustified in light of changing economic realities. Not only had women in general become less economically reliant on their male intimates as a general matter, but individual men too could find themselves dependent upon their female partners for economic support. Indeed, government papers produced at the time noted that the very stereotypes about women's economic vulnerability here invoked by the Attorney General were no longer apposite.

Ministry of the Attorney General of Ontario, *Family Law Reform* (Government Position Paper) 1979 at p. 9.

27. Indeed, one of the primary reasons the government enacted this reform legislation was to insulate the public coffers from the claims of women who, having been left impoverished upon separation or divorce, were increasingly turning to the welfare system for support. The government complained publicly that it had paid out more than $160 million per year in family benefits to such

claimants, and that part of its purpose in enacting legislation which expanded the scope of private law obligations was to lessen this strain upon the public purse.

See Hansards, November 22, 1976, at p. 4898; November 18, 1976, at p. 4793; and November 22, 1976, at p. 4890-91.

28. It was as a result of these shifts in the economic and social spheres that the legislature sought to implement legislation that conferred "no privileges" and imposed "no disability on either men or women as a group", but instead emphasized the "individual situation in each matrimonial dispute." Thus, the overarching aim of the *Act* was to prescribe a "code of economic relations between the spouses upon the severance of that union" to ensure that economic fairness was done.

See Hansards, October 26, 1976, at p. 4102; and October 18, 1977, at p. 901.

(b) The Structure of the Act

29. The multiple aims the legislature sought to achieve in amending the support laws are reflected in the terms of Part III of the *Act*. For example, the specific provisions establishing both the right to receive and the obligation to provide support are cast in entirely sex-neutral terms. An application for an order of support may be made by a "dependant" (s. 33(2)), who is a "person" to whom another owes support obligations (s. 29). Those obligations are borne by "spouses" (s. 30) who, according to the Act's definitions set forth in ss. 29 and 1(1), may be "either of a man and woman".

30. In like manner, the guidelines contained in s. 33(9) to which courts are to refer in determining the amount and duration of support awarded in individual cases make no reference to the systemic inequality of women, the greater earning capacity of men, or the tendency of women in heterosexual relationships to assume primary responsibility for the care and raising of children. Instead, courts are statutorily directed to consider the applicant's assets and means (subss. (a) and (b)), capacity to contribute or provide support (subss. (c) and (d)), age and physical and mental health (subs. (e)), needs (subs. (f)), and ability to become self-supporting (subs. (g))--factors that may be characteristic of women's inequality but are by no means unique to it.

31. Those sections that set forth the purposes which an order of support should serve are also profoundly silent about the "special" needs of heterosexual women. Even in the Preamble, where the Ontario legislature was free to express its intentions in pure policy terms, not a word was spoken about this purported goal. On the contrary, there it is said that the legislature's intent is to recognize spouses as "individuals" and the obligations they owe to one another as "mutual". In fact, nothing

in the statute refers explicitly to "sex", "women", "power" or any of the other "gendered" descriptors deployed throughout the Attorney General's factum.

(c) Application of The Act

32. The sex-neutral structure of statutory support regimes like the *Family Law Act* has led courts to apply their terms in sex-neutral ways. This Court recognized as much in *Moge*, where it specifically addressed and unequivocally rejected the notion that judges should make support assessments as if what is generally true of women's experiences in heterosexual relationships were universally the case. There the Court held that, because such provisions in fact reflect "the diverse dynamics" of intimate relationships, they apply "equally" to both spouses, "regardless of gender".

Moge v. Moge, [1992] 3 S.C.R. 813, at pp. 845-49, 853.

33. What *Moge* recognized in theory, the courts applying the terms of Part III on a daily basis appreciate full well: dependencies can and do develop in intimate relationships for reasons that cannot--or cannot only--be traced to the imbalances of power traditionally understood to be a social product of sex difference. The law reports are replete with instances in which judges have granted support awards under the *Family Law Act* to male claimants whether or not they have suffered any economic hardship, individuals who maintain separate residences, and even individuals in polygamous relationships.

Hough v. Hough (1996), 25 R.F.L. (4th) O.C.J. (Gen. Div.)
Cuzzocrea v. Swain (1995), R.F.L. (4th) O.C.J. (Gen. Div.)
Bredin v. Hamilton (1005), O.J. No. 3963 O.C.J. (Gen. Div.)
Parish v. Parish (1993), 6 R.F.L. (3rd) 117 O.C.J. (Gen. Div.)
Thauvette v. Mylon (1996), 23 R.F.L. (4th) O.C.J. (Gen. Div.)
Basi v. Bhaliwal (1992), B.C.J. No. 1814 (B.C. Prov. Ct.)

34. In the face of all this, it is difficult to fathom how Appellants can possibly contend that the legislature really only meant to address the "economic dependence of women resulting from their primary role in parenting and unequal earning power" (AG's Factum p. 43), particularly when the Attorney General's own Law Reform Commission considered this exact claim and rejected it as untrue. Indeed, the Commission displayed far more respect for the historical record of the multiple aims behind this legislation when it described the purpose of support in the following way: "to provide for the equitable resolution of economic disputes that arise when intimate relationships between individuals who have been financially interdependent break down".

Ontario Law Reform Commission, *Report on the Rights and Responsibilities of Cohabitants Under the Family Law Act* (1993) at pp. 43-4, 45 (hereinafter "OLRC Report").

II Part III of the FLA is Not Rationally Connected to Its Purposes

35. Rational connection is to be established through reason, logic or common sense. Scientific evidence is of probative value in demonstrating this, but it is by no means dispositive or determinative.

RJR-McDonald, supra, at p. 290.

36. LEAF submits that there is no rational connection between the purposes that Part III of the *Act* was meant to achieve and the means selected by the legislature to accomplish them. Reason, logic, common sense and the available social scientific evidence all demonstrate that the objectives of Ontario's support system are not served by restricting the right to apply for support to heterosexuals alone.

37. As a matter of simple reason and common sense, for example, it is plain that the required logical nexus between intention and mechanism is not present here. If the legislation were meant to address the special economic circumstances of heterosexual women upon relationship breakdown, it is incongruous that it did so by creating a system of support that is both gender-neutral on its face and as applied. The irrationality of this legislation is equally plain when its terms are measured against the other objectives which the record indicates the government sought to achieve. There is little sense in attempting to reduce the strain on the public assistance system by creating a private right for support that is only available to a limited segment of the population of potential welfare claimants, or to establish a legal framework designed to ensure that intimates deal with each other in an economically fair fashion when they break up while imposing the obligation to do so on only some.

38. The fact that same-sex couples may have children more infrequently than heterosexual couples does not alter this. Heterosexual couples enjoy the right to apply for support irrespective of their reproductive capabilities and regardless of their status as parents. Indeed, the statute itself makes plain that recognizing a spouse's economic contribution to the relationship, enabling a spouse to become self-sufficient, relieving any hardship remaining after the couple's property has been divided between them, *and* ensuring that the economic burden of child support is shared equitably *all* should be considered when making a support award. To the extent the support laws are concerned with the welfare of children, it is counterproductive to deny the children the benefits which flow from an award of spousal support simply because their parents are not heterosexual.

Moge v. Moge, *supra*, at p. 851-52.
Family Law Act, S.O. 1990, c. F.3, s. 33(8).

39. Nor do the findings of certain studies concerning the dynamics of same-sex relationships explain why only heterosexuals should be entitled to apply for support. All these studies show is that same-sex relationships are not "typically" characterized by economic dependence, and "tend" to be more egalitarian overall, ostensibly because the division of labour within them is "rarely" made along traditional gender lines. The infrequency with which members of same-sex couples find themselves in situations akin to those of many heterosexual women is thus no different from heterosexual men who--notwithstanding the fact that they generally profit from the gendered division of labour–are entitled to support when their individual circumstances warrant.

40. It is no answer to these irrationalities to suggest, as the Attorney General does, that inequities between same-sex partners are, by definition, not premised on "gender-based inequality in earning power". To the degree the statute is concerned with sex inequality, it "does nothing significant at all about the basic inequality of the sexes which exists in our society". To imply otherwise is to engage in the very manoeuvers which this Court has repeatedly declared inappropriate: "it is not open to government to assert *post facto* a purpose which did not animate the legislation in the first place."

Hansard, November 18, 1976, at p. 4821.
Irwin Toy Ltd. v. Quebec (Attorney General), *supra*, at p. 984.

41. Moreover, the notion that sex inequality accounts for the few instances where heterosexual men become dependent on their female spouses is absurd. It is women who overwhelmingly bear the brunt of performing household labour, who spend more time tending to the needs of children, whose work in the public sphere is underpaid, and whose work in the private sphere is undervalued. Men are the beneficiaries of this system, not its victims. Male economic dependency upon women may be a result of other sorts of systemic inequalities played out on an individual basis, but this occurs in spite of their sex, not because of it.

42. Indeed, to insist that sex is solely responsible for the imbalances of economic power that arise between heterosexual intimates is to engage in the kind of reductionism this Court has recently cautioned against. Inequality in contemporary society is the product of a confluence of many sources of systemic disadvantage, including racism, sexism, lesbianism and so forth. It is a fiction to maintain that differences apart from, in addition to, or in combination with sex have no impact on the way couples arrange their economic affairs while together, or on their relative economic positions once their relationships end. While some of these "differences" may be individual or idiosyncratic,

many of them partake of the same systemic quality as sex and produce the same sort of systemic disadvantage.

Mossop, supra, at pp. 645-646.

43. In sum, LEAF submits that this is a classic case of legislative under-inclusion which cannot be explained on the basis of reason, logic or common sense and which, consequently, is unjustified under the Constitution.

III The Definition of Spouse Does Not Impair The Equality Rights of Lesbians As Minimally As Possible

44. It is incumbent upon government, when it acts in a way that impairs constitutional rights, to do so in a manner that impairs those rights "as minimally as possible." If reasonable means are available by which it can achieve its goals without infringing constitutional rights, it must choose those means over others.

R. v. Oakes, *supra*, at p. 139.
Eldridge v. British Columbia (Attorney General), [1997] S.C.J. No. 86 at pp. 52-59.

45. LEAF urges this Court to reject Appellant's contention that it has met its burden under this branch of the proportionality analysis. Extending the right to apply for support to lesbians would not thwart the realization of any of the threefold goals behind the *Act* and in fact would positively advance some of them. Even assuming that extending the support provisions to same-sex couples would conflict with the statute's underlying goals, the impairment of lesbians' equality rights engendered by the government's denial of the bare right to apply for support is substantial: without access to Part III of the *Act*, lesbians are left with common law and equitable remedies of dubious application and limited scope. This situation is particularly problematic in an era when state economic support for individuals--including lesbians--is being eroded.

(a) Deference Is Not Appropriate

46. LEAF submits that this is not a case where the impugned provisions should be measured against the more deferential standard first articulated in *Irwin Toy*. When the governments of this country constitutionally enshrined the guarantee of equality embodied in s. 15, they took on the responsibility of legislating in a manner that ensured equality, even in arenas with which they previously may have had the "privilege" of being unfamiliar. Having embraced equality as a constitutional right and goal, it is no longer open to government twelve years after the fact to justify discriminatory legislation on the basis that they failed to educate themselves about those who are

different from some presumed norm. That, however, is precisely what the Ontario government is attempting to do in this case.

47. In *Irwin Toy*, and, in fact, in every case cited by the Appellants where the more lenient standard of review under the minimal impairment branch of the proportionality analysis has been applied, the government was faced with the claims of competing groups whose agendas were antithetical to one another and whose demands, perforce, could not be mutually accommodated.

Irwin Toy, supra, at p. 990.
McKinney, supra, at p. 309.
Dagenais v. Canadian Broadcasting Corp., [1994] 3 S.C.R. 835, at pp. 887-890.

48. The situation in the present case could not be more different. Here, lesbian reservations about the risks of assimilation posed by inclusion as "spouses" within the existing family law system have been voiced by members of the same constitutionally relevant group whose interests are coextensive: to the degree that differences of opinion exist, they turn on how best to promote lesbians' equality interests in an unequal society, not whether to promote them at all. Moreover, had Ontario engaged in this debate in a meaningful way, it would have discovered that lesbians' different views could be accommodated without sacrificing the aims of the legislation or jeopardizing the interests of its dominant beneficiaries.

49. Some lesbians have raised concerns, inherent in any discussion concerning the scope of familial obligations, about the privatizing effects of inclusion within the *Family Law Act*: the more that private remedies for economic disadvantage are created for some, the less responsibility the government may accept for the economic well-being of all individuals. However, in the current era of economic retrenchment by government, these concerns may be somewhat moot. In any case, few such lesbians would advocate outright exclusion of lesbians from the *Act* on these grounds.

Susan Boyd, "Best Friends or Spouses? Privatization and the Recognition of Lesbian Relationships in *M. v. H.*" (1996), 13 Can. J. Fam. L. 321, at pp. 335-39.
See also Martha Minow, "All In The Family & In All Families: Membership, Loving and Owing" (1993), 95 W. Va. L. Rev. 275, at p. 308.

50. Other lesbians have resisted inclusion within the *Family Law Act* for fear that they will be compelled to present their relationships as if they were just like heterosexual ones in order to take advantage of its provisions. Those whose relationships least resemble heterosexual ones, so the argument goes, will thus be unfairly deprived of the Act's protections and suffer the compounded indignity of being stigmatized as too different to deserve law's basic rights and remedies. This

concern, however, rests upon a misunderstanding of the different proof requirements between a constitutional equality challenge to the *Act* and its everyday application in individual cases.

> Brenda Cossman and Bruce 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, at pp. 135-39.
> Nancy Polikoff, "We Will Get What We Ask For: Why Legalizing Gay and Lesbian Marriage Will Not 'Dismantle the Legal Structure of Gender in Every Marriage'" (1993), 79 Va. L. Rev. 1535, at p. 1546.
> Paula Ettelbrick, "Since When Is Marriage a Path to Liberation?", in Suzanne Sherman (ed.), *Lesbian and Gay Marriage* (1992) 20, at p. 21.

51. Early in the history of s. 15 litigation in this country, it was widely believed that litigants were effectively compelled to fashion their claims according to the similarly situated model of equality in order to attract the courts' sympathy, and ultimately, their constitutional approval. Most cases in which lesbians and gays sought inclusion within extant statutory regimes therefore emphasized that "homosexual" relationships are indistinguishable from "heterosexual" ones in terms of commitment, longevity, fidelity, dependence or interdependence, and so on. Given this Court's repeated assertions that similarity of situation is not the measure of entitlement to equality rights under s. 15, there is simply no need for lesbian litigants to portray their intimate relationships--as the Respondent M. has done (at p.12-13) as if they were "just like" their heterosexual counterparts in order to challenge their exclusion from legislation like the *Family Law Act*.

> Mary Eaton, "Lesbians, Gays and the Struggle for Equality Rights: Reversing the Progressive Hypothesis" (1994), 17 Dal. L.J. p. 130, at pp. 173-76.
> Peter Rusk, "Same Sex Spousal Benefits and the Evolving Conception of Family" (1993), 52 U. of T. Fac. L. Rev. 170, at p. 196.
> Didi Herman, "Are We Family?: Lesbian Rights and Women's Liberation" (1990), 28 Osgoode Hall L. J. 789, at p. 794-97.
> *Andrews, supra*, at p.165-168
> *McKinney, supra,* at p.279

52. More to the point, this concern misperceives what an applicant for spousal support would be required to show in order to apply for spousal support. Without the constitutionally offensive words, ss. 1(1) and 29 of the *Act* require only that an applicant for support show that he or she had cohabited continuously for a period of not less than three years or in a relationship of some permanence if they are the natural or adoptive parents of a child. There is nothing in these basic statutory requirements that would compel a lesbian applicant to present her relationship to the court as if, but for the sex of her partner, it was "just like" heterosexual ones.

53. By the same token, there is nothing inherently "heterosexual" about the guidelines to which courts are to refer in determining the amount and duration of support to award in individual cases.

As Professor Minow has observed, the "risk of dependency is real for each of us", whatever our sexual identification. However, given that even facially neutral laws (including those contained within family law legislation) have been historically applied to gay men and lesbians in a discriminatory manner, lesbians have cause to worry that judges accustomed to dealing with the particular dynamics that tend to develop between heterosexual women and men may be ill-prepared to deal with relationships with which they have no familiarity and may, as a result, fall back on unsupported presuppositions about what lesbian relationships are like or should be. Still, the concern that the substantive provisions of Part III will be interpreted to reflect presumed characteristics about heterosexual relationships which are ill-suited to lesbian relationships is not something which the government is entitled to rely upon to justify what it has done here.

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Minow, 95 W. Va. L. Rev. at p. 310.
Margaret Leopold and Wendy King, "Compulsory Heterosexuality, Lesbians, and the Law: The Case for Constitutional Protection" (1985), 1 C.J.W.L. 163, at pp. 170-76.

54. Since *Slaight Communications*, it has been well settled that adjudicators exercising a statutory grant of discretionary power like that contained in s. 33(9) of the *Act* must do so in accordance with *Charter* values, including those underlying s. 15. Those who fail to abide by their constitutional obligation to do so by exercising their discretion in a discriminatory fashion commit an error of law reversible upon review. Government is not entitled to presume otherwise, far less to justify
20 discriminatory legislation on this basis.

Slaight Communications, *supra*, at p. 1078.
Dagenais, *supra*, at p. 911.
Eldridge, *supra*.

55. In any event, those lesbians who truly believe that judges will not act impartially or who, for reasons of their own, wish to govern their relationships by standards different than those set out in the *Act*, would have the option of taking advantage of the contracting out provisions of the *Act*. The purpose of these provisions is to allow couples the freedom to determine the contours of their
30 relationships without undue interference by government. As long as lesbians are permitted to make their own agreements pursuant to such provisions--and the judges called upon to review them do so in a way that is mindful of lesbian specificity--there is no reason why the fear of assimilation need necessarily become a reality.

56. In summary, LEAF submits that government should not be permitted to exploit the differences of political opinion that exist between members of equality-seeking groups to excuse its own unconstitutional inaction. To allow government to insist that such groups present a uniform front before it will take any steps to redress discrimination against them or otherwise promote their

equality interests, is to hold disempowered groups to a standard which is impossible to meet as a practical matter. In addition, given government's established record of legislating in the face of sometimes vehement opposition--for example, extension of support rights to heterosexual, common-law relationships has always been controversial--its insistence that lesbians and gays reach consensus before any of them can pursue support claims under the *Act* seems plainly discriminatory as well.

> Winifred Holland, "Introduction", in Winifred H. Holland and Barbro E. Stalbecker-Poutney (eds.), *Cohabitation: The Law in Canada* (looseleaf)

(b) The Available Non-Statutory Remedies Are Inadequate

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57. The standard of minimal impairment applicable in this case requires that the legislature choose the means that is least restrictive of the equality rights of lesbians commensurate with achieving the purposes behind the legislation. LEAF submits that the remedies available under the law of contract and the relief available under the equitable doctrine of unjust enrichment do not constitute reasonable alternatives to access to the statutory support regime contained in the Act. Without the right to apply for support under Part III, therefore, the rights of lesbians have not been "minimally impaired" and the infringing measure must be declared unconstitutional.

58. With respect to the law of contracts, for example, it was clear at the time the *Act* was enacted
20 that domestic contracts were not enforceable at common law because the courts considered cohabitation or sexual services to be inadequate consideration. Where the courts have enforced domestic contracts between same-sex couples, they have tended to do so where the agreement resembles a business affair more than a love affair: "Only if the partners' agreement does not reference their romantic relationship--as long as they are willing to be closeted--will it be enforced as a contract."

> *Hansard*, November 23, 1976, at pp. 4950-51.
> *Fender v. St. John Mildmay* [1937], 3 All E.R. 402 (H.L.).
> OLRC Report, *supra*, at p. 33.
> 30 *Seward v. Mentrup*, 622 NE.2d 756 (Ohio Ct. App. 1993), at p. 758.
> *Jones v. Daley*, 176 Cal. Rptr. 130 (Ct. App. 1981), at p. 134.
> Martha M. Ertman, "Contractual Purgatory for Sexual Marginorities: Not Heaven, But Not Hell Either" (1996), 73 Denv. U. L. Rev. 1107, at p. 1139.

59. Whether or not that position has changed, it remains the case that traditional common law doctrines governing review of such agreements are not particularly well-suited to the domestic context: such rules do not go far enough to preclude enforcement of a contract which is the result of an imbalance in bargaining power between intimates, or is otherwise unfair or inconsistent with public policy. Recognizing this, the legislature enacted a series of provisions now contained in Part

IV of the *Act* (entitled "Domestic Contracts") that deem such contracts to be valid and empower the courts to review them against a set of standards uniquely tailored to the domestic context.

Hansard, November 23, 1976, at pp. 4950-51.

60. Equitable remedies are no better suited to deal fully and fairly with economic disputes arising between intimates on relationship breakdown. Although an action for unjust enrichment may be founded on indirect or non-financial contributions to the acquisition, maintenance, or preservation of an asset held in the name of the other spouse, it requires the applicant to demonstrate personal deprivation, his or her spouse's corresponding enrichment, and the absence of a juristic reason for that enrichment. The circumstances in which an award for *quantum meruit* damages or a constructive trust may be made are thus far narrower than those in which a support award may be made. Moreover, the imposition of a constructive trust is in fact a division of property, and the *Act* clearly recognizes that entitlement to property division is in addition to, and not in lieu of, entitlement to support. Indeed, s. 33(8) of the *Act* specifically provides that support awards may be made to remedy any financial hardship remaining after a couple's property has been distributed between them. In sum, support awards are broader and more flexible than, and driven by objectives independent of, remedies available for unjust enrichment.

Peter v. Beblow, [1993] 1 S.C.R. 980.
OLRC Report, *supra*, at pp. 10-11.

61. When the Ontario legislature enacted Part III, it did so in part because the remedies available under the law of contract and the law of trusts had proved inadequate to meet the needs of those left in a vulnerable economic position upon relationship breakdown. The costs of pursuing these remedies are notoriously high and legal aid may not be available to those who cannot otherwise afford to pursue them. In addition, because neither can be obtained on an interim basis, even those who have the economic wherewithal to commence a suit asserting such claims are often left financially drained by the time their claims are resolved.

62. The inadequacy of the common law and equitable remedies as alternatives to support are particularly pronounced for lesbians. As women, lesbians are subjected to sex-based discrimination in the labour market. Both lesbians and heterosexual women thus tend to be less financially secure than men, especially those men who suffer no systemic disadvantage on any of s. 15's enumerated or analogous grounds. It is particularly ironic, therefore, that the government would attempt to justify

its exclusion of lesbian women from Part III on the basis that they can always take advantage of the very remedies it recognized were inadequate to meet the needs of heterosexual women.

(c) *The Harm to Lesbians Done By Excluding Them From Part III Is Not Outweighed By Protection Granted To Heterosexual Woman and Men*

63. To survive constitutional review, there "must be a proportionality between the deleterious effects of the measures which are responsible for limiting the rights or freedoms in question and the objective, and there must be a proportionality between the deleterious and salutary effects of the measures."

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Dagenais, supra, at p. 889 (emphasis in original).

64. In LEAF's submission, the harms engendered by this legislation are not clearly outweighed by its actual beneficial effects. The injury done to those who have been excluded from Part III because they are engaged in lesbian and gay relationships could hardly be more pronounced: not only must they suffer the indignity of having their relationships denigrated as unimportant, inconsequential or worse, sick and depraved, denying them the right to even apply for support leaves same-sex couples with no alternative but to attempt to resolve their economic affairs under the costly and inadequate rubrics of contract and trust.

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65. This complete and utter denial of any meaningful right of redress cannot be justified where--as here--the statute has not achieved what it set out to do. As the Attorney General's own statistics show (AG's Factum at p. 21-25), the statute has failed to ensure that women are adequately compensated for their work by the men with whom they have had intimate relationships.

66. It is no answer to any of this to claim that the legislature was engaged in a process of incremental reform and should not be forced to embrace too much change too quickly. In 1982 when the *Charter* was promulgated, the legislature was granted a grace period of three years (pursuant to s.32(2)) to bring its laws into conformity with the equality guarantee contained in s. 15(1). During

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that entire time--and the thirteen years that have elapsed since then--Ontario never undertook a thorough examination of whether restricting the reach of each of the numerous statutes compiled in the Appendix to the Attorney General's Factum to those in heterosexual relationships could be justified in light of their specific purposes.

67. Bill 167 is not an exception to this abdication by the Ontario government of its constitutional responsibilities; it is an illustration of it. There is nothing "incremental" about an attempt to effect

a wholesale transformation of existing law through the introduction of an omnibus bill doomed to fail early on in the legislative process. Indeed, any claim that this Bill proves that the government sought a gradual extension of support law to same-sex couples is conclusively belied by the fact that the bill did not attract *any* discussion of the desirability or ramifications of extending the support laws to same-sex couples, let alone deliberation of the inequities of restricting the support laws to heterosexuals or the justifications for them.

> *See Hansards*, May 19, 1994, at pp. 6453-54: June 1, 1994, at pp. 6572-88; June 2, 1994, at pp. 6623-42; June 6, 1994, at pp. 6663-78; and June 9, 1994, at pp. 6791-810

68. By the same token, the concern that extending the support laws to those engaged in lesbian or gay relationships will result in an endless stream of challenges to the restrictive spousal definitions in the *Family Law Act* and other legislation does not withstand scrutiny. Only those individuals whose exclusion infringes a *Charter* guaranteed right or freedom can launch the kind of challenges that Ontario apparently fears. Even if the government were faced with numerous *Charter* challenges to a statute, that can surely be no justification for its unconstitutionality. If the numbers of potential claims prove to be large, that may indicate that the legislation--which government is obligated to defend against the standards of s. 1-- is fundamentally constitutionally unsound.

69. For all of these reasons, LEAF submits that the harm to lesbians and gay men engendered by their exclusion from Part III of the *Act* is not outweighed by either the limited benefits the legislation actually confers on heterosexuals or by the aims the government claims it meant to achieve in enacting the statute in its present form.

D. THE ONLY APPROPRIATE REMEDY IS TO TEMPORARILY SUSPEND STRIKING THE OFFENDING LANGUAGE FROM THE STATUTE

70. Although s. 29 of the *Family Law Act* discriminates against lesbians and gay men contrary to s. 15 for reasons that are neither reasonable nor demonstrably justified, it would be inappropriate, in LEAF's submission, simply to sever the offending portions of that section. Without the impugned words, s. 29 would allow lesbians and gays who meet the other requirements of the section--marriage or cohabitation for three years or in a relationship of some permanence if they are natural or adoptive parents--to apply for support and obtain it in appropriate circumstances. That remedy, however, would impose an obligation on those engaged in a lesbian or gay relationship to provide support without allowing them to take advantage of the domestic contract provisions contained in the Act. As demonstrated above, this problem is more than one of formal inequality between those in heterosexual and same-sex relationships: lesbians' and gays' right to equality is violated in a

substantive sense so long as they are denied the right to define for themselves the contours of their relationships and the obligations they feel they owe to one another. Accordingly, LEAF urges this Court to suspend striking down the unconstitutional portion of s. 29 of the *Act* for a period of six months to allow the legislature to make the necessary amendments to the relevant provisions of Part

PART IV - ORDER REQUESTED

71. Wherefore, LEAF begs this Court to issue an order:

i. declaring that the definition of spouse in s.29 of the *Family Law Act*, R.S.O. 1990, c.F.3 infringes s. 15(1) of the *Canadian Charter of Rights and Freedoms*;

ii. declaring the infringement is not demonstrably justified in a free and democratic society pursuant to s. 1 of the *Charter*;

iii. declaring that the words "either of a man and woman" contained in s.29 of the *Family Law Act* are of no force or effect pursuant to s.52 of the *Charter* and that the words "two persons" be substituted therefor; and

iv. suspending the declaration of invalidity in paragraph (iii) above for a period of six months from the date of this Order to enable the Legislature of the Province of Ontario to bring the provisions set forth in Part IV of the *Family Law Act* into conformity with this judgment.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

March 12, 1998

Jennifer Koss for Carol Allen

Carol A. Allen

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