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### Canadian Same Sex Relationship Recognition Struggles and the Contradictory Nature of Legal Victories

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# CANADIAN SAME SEX RELATIONSHIP RECOGNITION STRUGGLES AND THE CONTRADICTION NATURE OF LEGAL VICTORIES

BRENDA COSSMAN<sup>1</sup>

In my comments today, I want to pick up on one of the themes running through virtually all of the papers in this symposium—the contradictory nature of law. Legal victories—and defeats—are always fragile, partial and contradictory.<sup>2</sup> The perspective I bring to this theme is a Canadian one, where in the context of gay and lesbian struggles, legal victories now outweigh legal defeats. I will tell a story of these legal victories, which resulted in a much celebrated case in 1999 known as *M v. H.*, in which the Supreme Court of Canada recognized the equality rights of same sex couples, and struck down a law with an opposite sex definition of spouse.<sup>3</sup> This may sound like an unequivocal legal victory for gays and lesbians. But, the story that I want to tell teases out a more complicated understanding of the case, which will illustrate the contradictory nature of legal strategies and legal victories. Legal victories are never only legal victories, just as legal defeats are never only legal defeats.

## GAY AND LESBIAN RIGHTS IN THE SUPREME COURT

Gay men and lesbians have taken their lives to the Supreme Court of Canada four times in the last decade. The first case involved a gay man, Brian Mossop, who challenged his employer's refusal to grant him a bereavement leave to attend his partner's father's funeral, on the ground that he was not a spouse.<sup>4</sup> The case was dismissed by the majority of the Supreme Court on a narrow ground, and as a result, the majority did not address the merits of the case. However, a strong dissenting opinion, by Madame Justice L'Heureux Dube (one of two women on the Court) provided a glimmer of hope. The dissenting opinion is an eloquent, sophisticated discussion of the meaning of families, with a plea to recognizing that real family values would only be furthered by recognizing 'non-traditional' families.

Given the range of human preferences and possibilities, it is not unreasonable to conclude that families may take many forms....It is not anti-family to support protection for non-traditional families. The traditional family is not the only family form and non-traditional family forms may equally advance true family values.<sup>5</sup>

Accordingly, in her dissenting view, Mossop and his partner ought to have been recognized as family.

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<sup>2</sup>JANINE BRODIE ET AL., *THE POLITICS OF ABORTION* 126 (1992) (quoting Shelley Gavigan).

<sup>3</sup>*M. v. H.*, [1999] 2 S.C.R. 3.

<sup>4</sup>*Mossop v. A.-G. Canada*, [1993] 1 S.C.R. 554.

<sup>5</sup>*Id.* at 634.

The second case involved a gay couple who had been together for 42 years.<sup>6</sup> Egan and Nesbitt challenged the federal Government's refusal to grant a spousal pension benefit, on the ground that they were not spouses. This time, the majority of the Court, in a five to four opinion, held that Egan and Nesbitt's equality rights had been violated. The majority held that sexual orientation was a prohibited ground of discrimination under s. 15 of the *Canadian Charter of Rights and Freedoms*<sup>7</sup> even though it was not listed as an enumerated ground. Further, the Court held that the opposite sex definition of spouse in the federal *Old Age Security Act*<sup>8</sup> discriminated on the basis of sexual orientation, and therefore constituted a violation of Egan and Nesbitt's equality rights. However, the majority also held that the violation was a reasonable limit on equality rights, within the meaning of section 1 of the *Charter*.<sup>9</sup> Notably, the decision had an entirely different majority, with one justice—Mr. Justice Sopinka—as the swing vote. Justice Sopinka held that since gays and lesbians were a fairly new equality seeking group, the government needed to be given some latitude in deciding when and how to extend legal protections. And there was also the fact that extending the definition of spouse to include same sex couples in this case would cost the government money, which in these days of fiscal conservatism, courts should be very careful about imposing.

*Egan and Nesbitt* then stands as a legal victory within a loss. For the very first time, the Supreme Court of Canada held that gays and lesbians are protected by the Constitution; that the *Charter* prohibits discrimination on the basis of sexual orientation. But, they were not yet entitled to the legal goodies.

The third case involved a gay school teacher who was fired from his job at a Catholic school because he was gay.<sup>10</sup> Delwin Vriend brought a challenge to the Alberta *Individual Rights Protection Act*,<sup>11</sup> the provincial human rights code analogous to state civil rights codes, for failing to include sexual orientation as a prohibited group of discrimination. Alberta—a very conservative place—was the only province that had not amended its human rights code to include sexual orientation.

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<sup>6</sup>Egan v. Canada, [1995] 2 S.C.R. 513.

<sup>7</sup>Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c.11. [hereinafter the *Charter*] Section 15(1) provides, "Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability."

<sup>8</sup>R.S.C. 1985, c. O-9, s. 2.

<sup>9</sup>Section 1 of the *Charter* provides "The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society". In Canadian constitutional law, any *Charter* challenge proceeds as a two step process. First, the Court must determine if the specified right, such as equality rights under § 15 have been violated. Second, (and only if the answer to the first step is affirmative), the Court must then determine whether this violation is a reasonable limit within the meaning of s. 1. The test for determining whether a violation is a reasonable limit within the meaning of s. 1 was set out by the Supreme Court of Canada in *R. v. Oakes*, [1986] 1 S.C.R. 103.

<sup>10</sup>Vriend v. Alberta, [1998] 1 S.C.R. 493.

<sup>11</sup>R.S.A. 1980, c. I-2.

The Supreme Court of Canada in a virtually unanimous opinion held that the Alberta *Individual Rights Protection Act* violated the s.15 of the *Charter* in its failure to prohibit discrimination on the basis of sexual orientation, and that this was not a reasonable limit on Vriend's equality rights. Moreover, on remedy, the Court was of the view that this was one of those exceptional cases where it was appropriate to read sexual orientation into the *Act*.<sup>12</sup>

This case stands in striking contrast to the various U.S. state laws which have attempted to prohibit anti-discrimination laws, and the constitutional challenges to those laws. Here, the Canadian Supreme Court forced the legislature to adopt an anti-discrimination law. The case represented the first 'real' victory. The Court was unanimous that the Alberta law was discriminatory, and that the discrimination was not a reasonable limit. The overwhelming majority of the Court agreed with the remedy of reading in.<sup>13</sup> *Vriend* would appear then as an unadulterated legal victory. Except that the province of Alberta, and the voices of social conservatism across the country, went apoplectic. In Alberta, politicians, lobbyists and the conservative media demanded that the legislature overrule the Supreme Court.<sup>14</sup> The *Vriend* decision ignited a powerful anti-judicial movement, which charges the courts, and the Supreme Court of Canada in particular, with 'judicial activism'—the idea that courts are inappropriately writing social policy rather than deciding narrow points of law. The critique takes various forms, from more moderate demands for greater transparency and accountability in the appointment of judges, to the extreme voices of moral conservatism demanding constitutional amendments and the abolition of the Supreme Court. The critique of judicial activism has gained tremendous momentum, and has seeped into the mainstream media coverage of major Supreme Court of Canada. While *Vriend* may represent a legal victory, it is a legal victory that has ignited a powerful and ferocious backlash that has rapidly become part of the popular discourse. It is a legal victory which has spawned the seeds of its own potential defeat.

The fourth and final case, *M. v. H.*, involved two women who lived together in a same sex relationship for 10 years. When their relationship broke down, the woman known as M., brought an application for spousal support against H. The governing

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<sup>12</sup>Once a *Charter* inconsistency has been identified, the next step is to determine which remedy is appropriate. The Court may strike down the legislation, sever the offending sections, strike down or sever a provision with a temporary suspension of the declaration of invalidity, read down a provision, or read provisions into the legislation. This last remedy, whereby the Court reads words and/or provisions in the legislation, is referred to as "reading in".

There was one dissenting opinion on the issue of remedy. Mr. Justice Major (from Alberta) was of the view that the Alberta government may prefer to have no human rights code at all, rather than have to include sexual orientation as a prohibited ground, and that this was a choice better left to the legislature.

<sup>13</sup>See discussion, *supra* note 12.

<sup>14</sup>Section 33 of the *Charter* includes what is known as the 'notwithstanding clause'. A legislature may invoke s. 33 of the *Charter* when it enacts a law, providing that the law is constitutional notwithstanding the provisions of the *Charter of Rights and Freedoms*. It has only been invoked in very rare circumstances, and is considered to be an exceptional government measure.

family statute—the Ontario *Family Law Act*<sup>15</sup> included spousal support obligations for opposite sex common law couples, but not same sex couples. Section 29 of the Act defined the term “spouse” to also include unmarried opposite sex couples “who had cohabited ...continuously for a period of not less than three years”.<sup>16</sup> M. challenged the constitutionality of the definition of spouse, arguing that the exclusion of same sex couples violated section 15 of the *Charter*. H was joined by the Ontario government, and many right wing organizations who intervened to support the constitutionality of the existing definition of spouse.

M. won. The majority of the Supreme Court of Canada held that the opposite sex definition of spouse discriminated on the basis of sexual orientation, and was not a reasonable limit on equality rights. Justice Cory, writing for the majority on s. 15, held that same sex relationships may be a conjugal within the meaning of s. 29 of the FLA. In his view “same sex couples will often make long, lasting, loving and intimate relationships. The choices they make in the context of those relationships may give rise to the financial dependence of one partner on the other”.<sup>17</sup> Section 29 of the Act violates the human dignity of lesbian and gay couples by promoting the view that they are “less worthy of recognition and protection” and “incapable of forming intimate relationships of economic interdependence as compared to opposite-sex couples.”<sup>18</sup> Further, the exclusion of same sex couples in the Act further “perpetuates the disadvantages suffered by individuals in same-sex relationships and contributes to the erasure of their existence.”<sup>19</sup> The Court therefore concluded that the definition of spouse in s. 29 of the FLA was in violation of s.15 of the *Charter*.

In the s.1 analysis, the majority held that the exclusion of same sex couples was not rationally related to the objectives underlying the spousal support provisions in Part III of the *Family Law Act*. Justice Iacobucci affirmed the objective of the Act as stated by the Ontario Law Reform Commission in its *Report on the Rights and Responsibilities of Cohabitants Under the Family Law Act*,<sup>20</sup> and as adopted by the courts below: “The purpose of the FLA 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).”<sup>21</sup> In terms of the spousal support provisions in Part III of the Act, the Court again adopted the objectives stated by the Ontario Law Reform Commission as “the equitable resolution of economic disputes that arise when intimate relationships between individuals who have been financially interdependent break down” and the alleviation of “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

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<sup>15</sup>R.S.O. 1990, c. F.3.

<sup>16</sup>*Family Law Act*, R.S.O. 1990, F. 3, s. 29.

<sup>17</sup>*M. v. H.*, 2 S.C.R. 3 at para. 58.

<sup>18</sup>*Id.* at para. 73.

<sup>19</sup>*Id.*

<sup>20</sup>Ontario, Law Reform Commission, *Report on the Rights and Responsibilities of Cohabitants Under the Family Law Act*, 43-44 (Toronto: Ministry of the Attorney General 1993).

<sup>21</sup>*M. v. H.*, 2 S.C.R. 3 at para. 85.

provide support to these individuals”.<sup>22</sup> In the Court’s view, both of these objectives would only be furthered if same sex couples were included within the definition of spouse.

On the issue of remedy, the Court declared s.29 to be of no force and effect, with a suspension of the operation of the declaration of invalidity for six months to enable the legislature to consider ways of bringing this provision, and other laws, into conformity with the equality rights in the *Charter*.<sup>23</sup> Unlike in *Vriend*, the Court was of the view that it would be inappropriate to read same sex couples into the Act. Rather, and possibly defensive in the face of the growing judicial activism critique, the Court tossed the issue back to the provincial legislature to fix, though with clear directions that the law needed to be fixed.

#### BEYOND THE VICTORY

The decision in *M v. H.* was ground breaking. For the very first time, the Court recognized the legitimacy of gay and lesbian relationships, and held that those relationships are entitled to legal protection. Within six years, the spirit of the powerful dissent from *Mossop* had become the majority opinion. Compared with the legal struggles in the United States, *M. v. H.* may sound like an unequivocal victory if ever there was one. I do not mean to suggest that the decision is not a victory. Any other result would have been a tremendous set-back for the struggle for the legal recognition of same sex relationships, and gay and lesbians rights more generally. However, it is important to put the decision into a broader framework, including the reactions that it set off. Legal victories are never simply legal victories.

In the aftermath of the decision, while gay men and lesbians and their allies rejoiced, conservatives went into predictable convulsions. As Gwen Landolt, vice-president of R.E.A.L. Women (a conservative women’s organization) pronounced: “They’ve opened the gates to the pack-dogs to attack the traditional family”.<sup>24</sup> Others, like Canada Family Action Coalition and Focus on the Family (social conservative organizations devoted to protecting the “traditional” family) denounced the decision, and demanded that governments immediately overrule it, by invoking the notwithstanding clause.

Within a few days of the decision, the federal government approved a motion by a vote of 216-55, brought by the Reform Party stating that “it is necessary to state that marriage is and should remain the union of one man and one woman to the exclusion of all others”, and that Parliament “will take all necessary steps” within its jurisdiction “to preserve the definition of marriage in Canada.”<sup>25</sup> The motion was entirely symbolic—it has no legal force. To protect the common law definition of marriage from constitutional challenge in the courts, Parliament would have to reproduce the definition in legislation that included a notwithstanding clause. But, symbolic it was. The motion was an unequivocal statement that the institution of marriage was not on the negotiating table. Of course, the very fact that the federal

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<sup>22</sup>*Id.* at para. 93. *See also id.* at para. 106.

<sup>23</sup>*Id.* at paras. 145-47.

<sup>24</sup>Carmen Wittmeier, *Playing House: Politicians Cower as the Supreme Court Overrides the Natural Family Order*, ALBERTA REPORT 21 (1999).

<sup>25</sup>House of Commons Debates, No. 240 (8 June 1999) at 1020.

politicians felt compelled to make this statement meant that marriage was in fact to become the next legal battleground.<sup>26</sup>

The judicial activism critique went into overdrive. Right wing politicians assailed the ruling as anti-democratic. One Reform Party Member of Parliament called the ruling “one of the most outrageous exercises of raw judicial power in the history of modern democracy.”<sup>27</sup> Responsible government itself, he says, is threatened by judicial usurpation of the role of elected legislators.<sup>28</sup> The judicial activism critique was echoed throughout the Canadian mainstream media. In some, it was represented as one amongst a range of diverse opinions about the decision. In others, like the right wing *National Post*, it had become front page news, and the only really legitimate lens through which to view the decision. The Supreme Court of Canada ruling in *M. v. H.* had strengthened the resolve and the momentum of the backlash.

The very same month that the Supreme Court of Canada handed down its historic ruling on same sex rights, a gay bar in Toronto was raided by police, and 36 men were charged with criminal indecency and other criminal offenses. The Bijou was part bar, part gay porn theatre. Gay men had sex there. They had been doing for years, just as they did at the bath houses. While the Supreme Court of Canada recognized and validated a legitimate gay and lesbian legal subject, it was not coincidental that this was a family subject. It was a nice, nuclear, monogamous family unit, which even stayed within fairly traditional gender, if not sex, roles. The new legal subject was not a sexual subject, but a desexualized subject. It was not, absolutely not, the erotically charged subject of the gays bars and bath houses who remain sexual outlaws. It was a highly desexualized subject—a 12 year lesbian relationship that had broken down. M and H clearly weren’t having sex anymore.

The decision requires that we think about the contradictory implications of inclusion, as a process in which someone else will always be excluded. As Ratna

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<sup>26</sup>In the aftermath of *M v. H.* gay and lesbian activists are now turning their attention to the final frontier—marriage. In this respect, the Canadian struggle for gay and lesbian rights is markedly different from the U.S., where the struggle for relationship recognition has very much been about marriage. In Canada, the existence of ascribed or common law definitions of spouse provided a more obvious target for legal challenges. Gay and lesbian activists demanded that same sex couples be treated the same as unmarried opposite sex couples. But, now in the aftermath of the legislative responses to *M v. H.*, discussed *infra* at , and all unmarried cohabiting couples are treated the same in law regardless of sexual orientation, the focus has shifted to marriage. Challenges are percolating in several provinces. A constitutional challenge was started in Quebec. In 2000, several same sex couples went to City Hall in Toronto, and sought a marriage licence. The City is seeking legal counsel on whether the law now requires that marriage licenses be issued to same sex couples, and is likely going to seek judicial reference. Another challenge is being started by a lesbian couple in British Columbia, where the provincial government has indicated its support for the challenge. For a discussion of the vulnerability of the opposite sex definition of marriage to a *Charter* challenge, see Brenda Cossman & Bruce Ryder, *The Legal Regulation of Adult Personal Relationships: Evaluating Policy Objectives and Legal Options in Federal Legislation*, LAW COMMISSION OF CANADA (2000).

<sup>27</sup>*Supra* note 25.

<sup>28</sup>*Id.*

Kapur writes, “there will always be another other”.<sup>29</sup> In Canada, as elsewhere, sex workers, sadomasochism communities, and other sexually charged subjects remain outlaws—firmly located outside of the law.<sup>30</sup> The inclusion of ‘legitimate’ gay and lesbian subjects into law is precisely such a contradictory process. It is a process in which the margins of acceptability and legitimacy, of white-picket fenceness, is being policed—quite literally. The inclusion of gay and lesbian subjects into law is being regulated at its margins to ensure that the ‘others’—the sexually promiscuous, non-monogamous, public sex aficionados—remain outlaws. Indeed, there is reason to worry that the process of inclusion may have destabilized the gentleman’s agreement that appeared to have prevailed since the stormy days of the bathhouse raids in Toronto in the early 1980s. Despite the continued threat of surveillance, particularly through liquor licensing laws, the moral regulators had grudgingly ceded a space of privacy to the bathhouses. As gay and lesbian family subjects are becoming in-laws, the erotically charged subject is being re-outed in law. While they have long lived in the shadows of outlaw status, these subjects were not quite criminals. These sexualized bodies are now being recast as outlaws, as having transgressed the criminal border.

The uproar in the gay community lead to the charges against the men at the Bijou to be dropped. But, that has not ended this new regulation of the erotic outlaw. Other gay bars where sex has been known to take place are being subject to an intensified regulation. The Barn, another venerable gay institution in the gay ghetto in Toronto—was raided by the Toronto Police in the summer of 2000. The official reason was one of alleged liquor license violations. But, the sexually charged atmosphere is clearly the target. The organizers have been charged with “disorderly conduct” under the *Liquor License Control Act*, and the allegedly disorderly conduct involved the fact that men were dancing in the nude. In September 2000, the Pussy Palace, a special event Women’s Bath House, was raided by the Toronto police, again for alleged liquor license violations. This was only the fourth Women’s Bath House event ever held in Toronto (the organizers rented the space from what was otherwise a men’s bathhouse). Five male police officers raided the premises, wandered the hallways and private rooms for several hours, and ultimately laid six charges of liquor license violations. Once again, three of these charges are for “disorderly conduct”. According the statements made by the police to the press, these disorderly conduct charges are in relation to the allegation that sex was occurring where liquor was being consumed. While the liquor licensing laws provide the police with a sweeping discretionary power to enter and search premises under the auspices of checking for liquor license infractions, the target clearly remains the sexually charged atmosphere. Although the police are repeatedly unable to support or sustain criminal charges, the *Liquor License Control Act* gives them the

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<sup>29</sup>Ratna Kapur, *Law and the Sexual Subaltern: A Comparative Perspective* this volume.

<sup>30</sup>For a general discussion of the construction of these identities as marginal and outlaws see MICHAEL WARNER, *THE TROUBLE WITH NORMAL: SEX, POLITICS AND THE ETHICS OF QUEER LIFE* (1999); BRENDA COSSMAN ET AL., *BAD ATTITUDE/S ON TRIAL: PORNOGRAPHY, FEMINISM AND THE BUTLER DECISION* (1997); Gayle Rubin, *Thinking Sex: Notes for a Radical Theory of the Politics of Sexuality*, in *PLEASURE AND DANGER: EXPLORING FEMALE SEXUALITY* (Carole S. Vance ed., 1984); Anne McClintock, *Maid to Order: Commerical Fetishism and Gender Power*, 37 *SOCIAL TEXT* 87 (1993).



power to intensify their moral regulation.<sup>31</sup> And the moral regulators can hide behind the legal inclusion of legitimate gay and lesbian subjects. This is no longer about homophobia or discrimination against gay men, they can say. Look at those nice gay men over there, with their nice homes and dogs, who pay property taxes and invest in the stock market—we don't discriminate against them. We are just concerned with those who refuse to respect the Law, those who do not assimilate, those who insist on flaunting their sexuality. Flaunting 'it'—if 'it' is sex—still makes you an outlaw.

In evaluating the contradictory nature of the victory, it is also important to consider what same sex couples have won. In *M v. H.*, gay men and lesbians have won the right to sue each other when their relationships break down. Indeed, they have won the right to behave every bit as badly as straight couples when their relationships breakdown. It is absolutely no coincidence that the first major legal victory in the recognition of same sex relationships involved spousal support, or alimony. It was not a case that involved benefits from the government. It was not a case that involved benefits from employers. It was the perfect case for these days of 'fiscal responsibility'. It was equality that would not cost the government any money. In fact, it was equality that would actually help save the government money, by privatizing support obligations.

The result of the ruling is the expansion of the scope of spousal support obligations to include a whole new set of relationships. Individuals within same sex relationships now fall within the realm of 'family' members who will be expected to provide support for one another both during the relationship, and after the relationship breaks down. Indeed, the Court itself placed considerable emphasis on the goal of "reducing the strain on the public purse" by "shifting the financial burden away from the government and on to those partners with the capacity to provide support for dependent spouses."<sup>32</sup> The ruling is consistent with the agenda of fiscal responsibility—of expanding the private support obligations of individual family members, and thereby reducing the demands on the state. It is no coincidence that the very first same sex relationship victory is one that fits within the agenda of fiscal conservatism, the privatization of support obligations, and the demise of the welfare state.

#### THE LEGISLATIVE RESPONSE

Somewhat surprisingly, the Ontario provincial government responded more cautiously to the decision. Although the Government is a very conservative one (one of the most socially and fiscally conservative seen in recent years) the response to the decision was decidedly measured. Premier Harris stated that although he did not personally agree with the decision, there were no further avenues of appeal, and that his government would abide by the ruling.<sup>33</sup> Within six months, the Government introduced a law (known as Bill 5) to amend the common law definitions of spouse in 67 pieces of legislation to include same sex couples. The law was entitled *An Act*

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<sup>31</sup>For a discussion of similar trend of moral regulation in the United States, see WARNER, *supra* note 30.

<sup>32</sup>*M v. H.*, 2 S.C.R. 3 at para. 98.

<sup>33</sup>*Ontario will abide by a high court ruling on the definition of 'spouse'*, CANADIAN PRESS, May 20, 1999.

to Amend Certain Statutes Because of the Supreme Court Canada Decision in *M v. H.*<sup>34</sup> In a clever piece of marketing, the Ontario government told the public that it did not want to pass this law. MPP Smitherman, among others, has observed, they may as well have called it ‘the devil made me do it act’. In introducing the Bill, the Attorney General Flaherty clearly stated “This legislation is clearly not part of our agenda.”<sup>35</sup> He emphasized that “The only reason we are introducing this Bill is because of the Supreme Court of Canada decision. We would not introduce the legislation otherwise.”<sup>36</sup>

But, notwithstanding its grudging attitude, the law did everything that the Supreme Court ruling required in letter and spirit. It changed the definition not only in s.29 of the *Family Law Act*, but it also changed 66 other definitions. Same sex couples are now, under Ontario law, treated exactly the same as unmarried opposite sex couples, with one exception. Same sex couples are not called “spouses”. They are called “common law partners”.<sup>37</sup> The Bill introduced this new term into the existing ascribed definitions of spouse. While the term is different, the content of the definition is the same, that is, both spouse and partner are defined as people who “live together in a conjugal relationship”. But, spouse involves a man and a woman, and partner involves any two individuals.

The reason for not calling same sex couples ‘spouses’ was as political as the title of the Act. The Ontario Government was attempting to appease its ‘family values’ constituency, by defending the traditional definition of spouse. The Attorney General, in introducing the legislation, made this agenda very clear. “Our proposed legislation complies with the decision while preserving the traditional values of the family by protecting the definition of spouse in Ontario law”.<sup>38</sup> Flaherty was emphatic that the new law would not in any way affect marriage or the traditional definition of spouse. “It is important for members to be aware of that fundamental in this debate, that marriage is not affected by this bill. Marriage, as members know, involves a man and a woman in Ontario. We have preserved in the bill the traditional definition of ‘spouse’ and ‘marital status’”<sup>39</sup>

In law, the distinction between the two terms makes no difference. Both unmarried opposite sex couples and same sex couples are entitled to the same rights and responsibilities. There continues to be some distinctions between the rights and responsibilities of these couples, and married couples. For example, the division of property on relationship breakdown continues to be limited exclusively to married couples.<sup>40</sup> As a result, same sex couples, who remain unable to marry, have no

<sup>34</sup>S.O. 1999, c. 6.

<sup>35</sup>Government of Ontario Press Release, *Ontario protects traditional definition of spouse in legislation necessary because of Supreme Court of Canada decision in M.v.H.*, October 25, 1999. Also located at <http://www.newswire.ca/government/ontario/english/release/October1999/25/c7058.html>.

<sup>36</sup>*Id.*

<sup>37</sup>See An Act to Amend certain statutes because of the Supreme Court of Canada decision in *M.v.H.*, 2 S.C.R. 3.

<sup>38</sup>Ontario Attorney General, 1999.

<sup>39</sup>Hansard, 1st session, 37th Parliament, Wed 27 Oct. 1999.

<sup>40</sup>*Family Law Act*, R.S.O., 1990, s. 1 (1) (1990) (Can.).

access to this legal regime. However, it is important to keep in mind that the challenge in *M v. H* was a challenge to the ascribed or common law definition of spouse. It was never a challenge to the opposite sex definition of marriage. Measured against this initial challenge, the legislative amendments ought to be seen as huge victory. Not only was the definition of spouse in the spousal support provisions amended, but all ascribed definitions were amended. Same sex couples are now entitled not only to sue each when their relationship ends, but are also entitled to the range of other rights and responsibilities accorded to cohabiting heterosexual couples under provincial law.

Some voices within the gay and lesbian community have turned this victory into defeat. Under the rallying cry “separate but equal”, some gay and lesbian rights activists denounced the new law for refusing to recognize same sex couples as spouses. Indeed, M. brought an application asking that the Supreme Court of Canada review the new law. She argued that the new law failed to comply with the Court’s ruling in *M v. H.*, and that the law was itself discriminatory. From a purely technical point of view, there was some merit to the claim. The refusal to recognize same sex couples as spouses was quite clearly animated by a discriminatory sensibility. It would not be beyond the pale to establish that the exclusion of same sex couples from the definition of spouse was a violation of the equality rights provisions in section 15 of the Charter. In turning to the s. 1 analysis of whether the violation is a reasonable limit on those equality rights, one of the crucial steps involves interrogating the objective of the legislation.<sup>41</sup> The objective must be pressing and substantial.<sup>42</sup> The objective of the exclusion must also be legitimate.<sup>43</sup> This is where the exclusion of gays and lesbians from the definition of spouse could run into some difficulty. The objective of the exclusion was quite explicitly to continue to give preferential status to the opposite sex definition of spouse. But, preferring one status over another violates s. 15 of the *Charter*, and the Court has suggested that it cannot be a legitimate objective. In an early constitutional case, the Supreme Court held that the purpose of Sunday closing laws was to compel observance of the Christian Sabbath.<sup>44</sup> The Court held that preferring Christianity was not a legitimate objective because it undermined the right to equality on the basis of the religion. Similarly, it may be argued that the promotion of marriage and the traditional definition of spouse as an opposite sex institution may not be a legitimate objective precisely because it is based on a denial of the equality rights of same sex couples.

That’s the technical argument. The political and strategic arguments weigh in a very different direction. Bill 5 was a victory—a huge victory. The distinction between spouses and partners, although undoubtedly animated by the Government’s need to appease its family values constituency, makes no difference in law. Moreover, the application entirely ignored the broader debate about the appropriate role of courts, and their relationship with the legislatures that has unfolded around these Supreme Court rulings. The critique of judicial activism is changing, in subtle

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<sup>41</sup>See *Oakes*, 1 S.C.R. 103.

<sup>42</sup>*Id.*

<sup>43</sup>See *Vriend*, 1 S.C.R. 493 at paras. 109-11.

<sup>44</sup>*R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295.

and not so subtle ways, the legal environment in which equality rights will be contested. In its ruling in *M. v. H.*, the Supreme Court of Canada was very careful and deliberate in leaving the remedy to the legislature. It refused to read same sex couples into the legislation. While the ruling was a bold one, it was nonetheless a ruling shaped in part by the critique of judicial activism.<sup>45</sup> The Court was trying to find a way to negotiate through this new landmine, while minimizing the kind of controversy generated by its ruling in *Vriend*. A crucial part of this negotiation was leaving the remedy to the legislatures. M's application for a rehearing appeared oblivious to this careful negotiation. The Court was extremely unlikely to wade back in to this explosive terrain, given that the Ontario government had responded by amending 67 of its laws.

The Supreme Court of Canada dismissed the application for rehearing (with costs). The imposition of costs sent a strong message: don't waste our time with frivolous applications. Don't try to force us back onto this explosive terrain. We have ruled. And the legislature has responded in kind. End of story. The application for rehearing should be a warning to equality activists. Know when to call it quits. Know when to call a victory a victory, and move on. This misguided adventure not only cost the applicant a lot of money, but it also managed to turn a huge legislative victory into a partial defeat.

#### CONCLUSION

The ruling in *M v. H.* is a victory. But, like all legal victories, it is fragile (witness the backlash), it is partial (see who is still outside), and it is contradictory (consider what has been won). The law that followed the ruling is also a victory, but it too is one that it is contradictory. Gays and lesbians are partners, leaving the spousal fight for another day. The legislature has clearly signaled its growing frustration with the courts. The failed application for review created a partial defeat where there had victory. Legal victories are, then, never just legal victories. Legal victories are always many things at once. I do not say this to disparage or denounce the role of law. I do not in any way mean to suggest that gay men and lesbians, and other marginalized group, should not be fighting these cases. We should and we do. Rather, my point is that we must equip ourselves with an understanding of what we can and should reasonably expect from law. We need to equip ourselves to go right back to the drawing board when we think that we have won a case, to figure out what we have also lost. Conversely, we have to go straight back to the same drawing board when we think we have lost, and figure out what we have won. This is not a choice about engaging with law. This is not a choice about whether or not we should go to Court. More often than not, it's the only game in town. We have to stay in the game. But, we must also continue to complicate our strategies. While we claim victory in our media sound bites, we must remain vigilant in considering the broad and contradictory implications of whatever we've just won. The contradictions are always there, simmering beneath the surface. It is our responsibility to grapple with them, before they come back to haunt us.

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<sup>45</sup>Brenda Cossman & Bruce Ryder, *M. v. H.: Time to Clean Up Your Acts*, 10 CONSTITUTIONAL FORUM 1 (1999).