SAME-SEX FAMILY CLASS IMMIGRATION: IS THE DEFINITION OF "SPOUSE" IN CANADA'S *IMMIGRATION REGULATIONS, 1978* UNCONSTITUTIONAL?

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PROLOGUE

> [L]aws outlawing discrimination should serve as more than a source of enforceable rights and protections; they should also provide a basis for shifting prejudicial community attitudes. These only change when a society truly recognises the humanity of the group who have been enduring discrimination and, to my mind, nothing can be more central to a definition of humanity than respect for the importance each of us places upon enduring relationships.[2]
>
> -A. Nicholson, Honourable Chief Justice of the Family Court of Australia

> In the search for the just Canadian equilibrium it was not expected that majority rights and interests would curtsy, endlessly, to minority rights. Neither the framers of the Charter nor its most aggressive proponents ever anticipated it serving so dominant a societal role. While among their other constitutional duties the courts must protect and defend minority interests, that does not endow them with a runaway role in the creation and supply of "helpful" legislation to that end.[3]
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> -McClung J.A., Honourable Justice of the Alberta Court of Appeal

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[2] A. Nicholson, "The Changing Concept of Family: The Significance of Recognition and Protection" (1997) 6 Australasian Gay and Lesbian Law Journal 13 at 13.

[3] *Vriend* v. *Alberta* (1996), 37 Alta. L.R. (3d) 364 at 393 (C.A.).

In May of 1992, the Convention Refugee Determination Division of the Immigration and Refugee Board declared Jacob a convention refugee. He had been successful in convincing the Division that if he were compelled to return to his native Ukraine, he would likely be subjected to various forms of persecution because he was gay. While working at a coffee shop in Toronto, Jacob met Sanjay, a graduate student at the University of Toronto. Jacob and Sanjay began a relationship and, as time passed, realized that they wished to commit to each other as life-partners. However, their bliss was qualified by the fact that Sanjay soon had to return to India to complete his dissertation. As Jacob had attained Canadian citizenship, he was optimistic that he would be able to sponsor his life-partner -- Sanjay -- under the "family class immigration" provisions of Canada's Immigration Act. After all, Canada had been completely tolerant and progressive in handling his refugee claim. Soon Jacob would realize how wrong he was. He would be thrown into a maelstrom of complex and confusing legal terms, and forced to face a homophobia that was more subtle than that which he had experienced in the Ukraine, but no less hurtful.

I. INTRODUCTION/ARGUMENT

Section 3(c) of Canada's *Immigration Act* states that one of the objectives of Canadian immigration law is as follows:

> To facilitate the reunion in Canada of Canadian citizens and permanent residents with their close relatives from abroad.[4]

The idealism which underpins this provision has been the source of inspiration for same-sex couples where one individual is either a citizen or permanent resident of Canada and the other lives abroad, but wishes to be reunited with his/her partner. As U.S. immigration policies become more restrictive, an increasing number of same-sex couples attempt to utilize the family reunification provisions of our immigration law. Indeed, "[s]ince 1992, Canada has been one of seven countries – Australia, Denmark, the Netherlands, New Zealand, Norway, and Sweden are the others – which provide some level of recognition of same-sex couples for immigration purposes."[5]

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[4] R.S.C. 1985, c. I-2.

[5] J. Burbidge, "Oh Canada!" (1997), online: Lesbian and Gay Immigration Rights Task Force <http://www.eskimo.com/~demian/burbidge.html> (date accessed: 28 October 1998) [hereinafter "Oh Canada"].

Despite this seemingly liberal attitude toward same-sex family reunification, the central argument of this article is that the exclusion of same-sex relationships from the definition of "spouse" in section 2(1) of the *Immigration Regulations, 1978*[6] dispels the illusory progressive nature of Canada's treatment of same-sex couple reunification. Furthermore, this article argues that the aforementioned definition violates section 15(1) of the *Canadian Charter of Rights and Freedoms*.[7] Finally, while Canadian immigration law does provide a certain degree of recognition of same-sex couple reunification, these provisions amount to "back-door loopholes," encouraged by the Canadian government to prevent "the courts from establishing precedents on the rights of...same-sex Canadian citizens or permanent residents to sponsor their partners for immigration."[8]

Part II of this article provides a brief historical overview of the relationship between gays and lesbians and Canadian immigration law. Part III orientates the reader to the specific provisions in the *Regulations* which, it is argued, offend the *Charter*, and discusses some of the most salient aspects of a potential *Charter* challenge. Part IV critically explores potential revisions to aspects of the family class immigration provisions that affect same-sex couples. Lastly, Part V provides

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[6] SOR/78-172 [hereinafter *Regulations*].

[7] Part I of *Constitution Act*, 1982, being Schedule B to *Canada Act 1982* (U.K.), 1982, c.11 [hereinafter *Charter*].

[8] "Frequently Asked Questions on Immigration and Intimate Relationships" (1998), online: Smith and Hughes Homepage <http://www.smith-hughes.com/papers/faqs.htm#faq06> (date accessed: 28 October 1998). In January, 1999, former Immigration Minister Lucienne Robillard announced proposed changes to the *Regulations* which called for the "recognition of common-law and same-sex relationships through regulatory changes." See Citizenship and Immigration Canada, *Building on a Strong Foundation for the 21st Century: New Directions for Immigration and Refugee Policy and Legislation* (Ottawa: Minister of Public Works and Government Services, 1998) at 25. This announcement coincided with the massive court challenge launched against the federal government by the Foundation for Equal Families, a gay and lesbian rights group that is seeking changes to fifty-eight federal statutes that discriminate against gays and lesbians. See E. Anderssen, "Ottawa to Enshrine Same-Sex Rights" *The Globe and Mail* (20 January 1999) A1. The *Charter* argument in this article should be perceived, on one hand, as an underlying reason why this "recognition" has been proposed. On the other hand, and most importantly, the *Charter* argument should be seen as an essential litigation tool for Canadian gays and lesbians in the event that these proposed changes do not become law. It should also be noted that in February, 2000, Minister of Justice Anne McLellan introduced an omnibus bill in the House of Commons (*The Modernization of Benefits Act*) that proposes to "amend 68 federal statutes to extend benefits and obligations to same-sex couples on the same basis as common-law opposite sex couples." See "Government of Canada to Amend Legislation to Modernize Benefits and Obligations," online: Department of Justice of Canada <http://canada.justice.gc.ca/en/news/nr/2000/doc_25019.html> (date accessed: 22 March 2000). Although the Bill has passed in the House, and is currently before the Senate, if it becomes law it will not change the *Immigration Act*.

an overview of how current Canadian immigration law is "conducive" to same-sex couple reunification, and attempts to address some of the benefits and detriments of these provisions. Thus, this article provides a critical exploration of the legal world which Jacob and Sanjay have entered.

II. HISTORICAL CONTEXT

Historically, Canadian immigration law has shared a common denominator with other areas of law. It has exemplified the notion that "[t]he heterosexual individual and the heterosexual family are the paradigms upon which Canadian law is based...[and that] Canadian law continues to be based on heterosexist assumptions and continues to privilege heterosexuals ahead of lesbians and gay men."[9] Perhaps the most glaring example of immigration law's contribution to legally sanctioned homophobia is the 1950-1952 amendments to the *Immigration Act*:

> The new *Act* really contained three prohibitions. First, homosexuals could not enter Canada as visitors. Second, they could not come to Canada as immigrants seeking permanent residence. Finally, if a homosexual did enter Canada for any reason, (s)he was subject to deportation under s. 19(2) if a Special Inquiry Officer found that the person in question "practise[d], assist[ed] in the practice of or share[d] in the avails of...homosexualism."[10]

The catalyst for the exclusion of homosexuals from Canada may be perceived as the Canadian government's appropriation of the American notion that gays are security risks (as a means of appeasing U.S. concerns), which blossomed with the beginning of the McCarthy era:

> In 1952 the explicit exclusion of homosexuals was something to which the Canadian Government could refer to show its neighbour that it took seriously its obligations in the area of international security. Somewhat on the defensive as the McCarthy crusade gathered steam in the early 1950s, Canadian officials tried to maintain an

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[9] D.G. Casswell, *Lesbians, Gay Men, and Canadian Law* (Toronto: Emond Montgomery Publications, 1996) at 13. For more on the historical relationship between gays and lesbians and Canadian law, see B. Ryder, "Equality Rights and Sexual Orientation: Confronting Heterosexual Family Privilege" (1990) 9 Can. J. Fam. L. 39; see also G. Kinsman, *The Regulation of Desire: Sexuality in Canada* (Montreal: Black Rose Books, 1987); D. Herman "Are we Family? Lesbian Rights and Women's Liberation" (1990) 28 Osgoode Hall L. J. 789; M. Leopold & W. King, "Compulsory Heterosexuality, Lesbians, and the Law: The Case for Constitutional Protection" (1985) 1 C.J.W.L. 163; P. Girard, "Sexual Orientation as a Human Rights Issue in Canada, 1969-1985" (1986) 10 Dalhousie L.J. 267.

[10] P. Girard, "From Subversion to Liberation: Homosexuals and the Immigration Act 1952-1977" (1987) 2 Can. J. of L. & Society 1 at 11.

> independent policy but could not totally ignore American demands for tighter security.[11]

The provisions excluding homosexuals from Canada were not abandoned until July 25, 1977, with the passage of the *Immigration Act, 1976*. The 1976 legislation incorporated the recommendations of a Special Joint Committee of the Senate and the House of Commons, which advocated the amendment of the discriminatory provisions, after public consultations in over twenty-one cities and submissions from various gay-rights advocacy groups.

III. *CHARTER* APPLICABILITY

As with many other areas of Canadian jurisprudence, the *Charter* has had a strong impact on how our courts address immigration issues.[12] However, with regard to spousal sponsorship, there has "[never] been a successful action brought against Immigration Canada for violating the *Charter* rights of gays and lesbians in Canada."[13] More precisely, a Canadian court has never heard a section 15 *Charter* challenge of the definition of "spouse" in the *Regulations*.[14] Over a decade ago, Deborah McIntosh called for an amendment to the *Regulations'* definition of "spouse" to facilitate both common-law and same-sex family reunification.[15] At the same time, she acknowledged that the lack of pertinent *Charter* jurisprudence at the

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[11] *Ibid.* at 17.

[12] Professor Donald Casswell identified three primary issues that Canadian courts have explored with regard to the relationship between immigration and refugee law and the *Charter*. The first two issues are intertwined, involving both domestic and extra-territorial *Charter* application. The third addresses who is entitled to standing to address concerns involving the potential unconstitutionality of immigration laws. See Casswell, *supra* note 8 at 562ff. The relevance of these issues to our hypothetical scenario is as follows: Jacob, as the potential Canadian sponsor, would be the individual who has standing to initiate the *Charter* challenge, as it would be argued that his section 15 right to equal benefit of the law is violated. For a discussion of other issues involving the *Charter* and immigration law (for example, media access and immigration inquiries, the jurisdiction of administrative bodies to engage *Charter* issues, unanimous decisions in refugee claims involving prescribed countries and section 15 of the *Charter*), see L. Waldman, *Immigration Law and Practice*, vol. 1, issue 25 (Toronto: Butterworths, 1998) at 2.1-2.82.

[13] J.A. Yogis, R.R. Duplak, & J.R. Trainor, *Sexual Orientation and Canadian Law* (Toronto: Emond Montgomery Publications, 1996) at 98.

[14] That is not to say, however, that such a challenge has never been contemplated. Part V of this article discusses two particular challenges which were initiated, but did not materialize fully, due to the responses of the federal government.

[15] D. McIntosh, "Defining 'Family' – A Comment on the Family Reunification Provisions in the Immigration Act" (1988) 3 J.L. & Social Pol'y 104.

time would provide considerable hardship to any such attempt at legislative change.[16] However, since then there has been a progression of *Charter* jurisprudence that would support a section 15 argument against the definition of "spouse." Nevertheless, the status of the *Regulations* has not changed. Therefore, this article will now examine some of the most salient aspects of such a hypothetical *Charter* challenge.[17]

A) Section 15(1) Analysis

1) Legal Principles

Section 15(1) of the *Charter* states,

> 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, natural or ethnic origin, colour, religion, sex, age or mental or physical disability.[18]

The definition of "spouse" in the *Regulations* is of the utmost significance for the following reason: in order to facilitate the family reunification objective of the *Immigration Act*, individuals who meet specific requirements which qualify them as "sponsors" (discussed later in this article) may sponsor the landing application of someone who fits in the definition of the "family class." As per section 2 of the *Regulations*, such an individual includes the sponsor's spouse. The position of this article is that the section 2(1) definition of the *Regulations* offends section 15(1) of the *Charter* in providing,

> "spouse," with respect to any person, means the party of the opposite sex to whom that person is joined in marriage.[19]

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[16] *Ibid.* at 110-111.

[17] It could also be argued that the definition of "spouse" in the *Regulations* stands in violation of the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6. However, such an argument will not be the focus of this article.

[18] Part I of *Constitution Act*, 1982, being Schedule B to *Canada Act 1982* (U.K.), 1982, c.11.

[19] SOR/78-172. In addition to same-sex couples, the definition of "spouse" in the *Regulations* also excludes common-law couples. While this is an extremely important and contentious issue, it will not be the focus of this article.

A leading Supreme Court of Canada determination on section 15 is *Vriend* v. *Alberta*,[20] which involved the omission of sexual orientation as a prohibited ground of discrimination in the Alberta provincial human rights legislation. In *Vriend*, Cory J. was adamant about the importance of section 15(1):

> The rights enshrined in s. 15(1) of the *Charter* are fundamental to Canada. They reflect the fondest dreams, the highest hopes and finest aspirations of Canadian society...Canada by the broad scope and fundamental fairness of the provisions of s. 15(1) has taken a further step in the recognition of the fundamental importance and the innate dignity of the individual. That it has done so is not only praiseworthy but essential to achieving the magnificent goal of equal dignity for all.[21]

As with *Vriend*, a challenge to the definition of "spouse" in the *Regulations* would not involve a "government actor" debate,[22] as the challenge would involve regulations made pursuant to federal legislation. Thus, the next relevant issue is the substance of a section 15(1) analysis. In *Eldridge* v. *British Columbia (Attorney General)*,[23] La Forest J., delivering the unanimous reasons of the Supreme Court of Canada, noted that the Court has adopted a varying approach to section 15(1). However, he went on to assert that despite this, there has been a general agreement on the basic analytic framework.[24] In *Miron* v. *Trudel*, McLachlin J. summarized this analytic framework — first enunciated in the case of *Andrews* v. *Law Society of British Columbia*[25]— as follows:

> The analysis under s. 15(1) involves two steps. First, the claimant must show a denial of "equal protection" or "equal benefit" of the law, as compared with some other person. Second, the claimant must show that the denial constitutes discrimination. At this second stage, in order for discrimination to be made out, the claimant must show that the denial rests on one of the grounds enumerated in s.

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[20] [1998] 1 S.C.R. 493 [hereinafter *Vriend*].

[21] *Ibid.* at 535.

[22] Section 32(1)(a) of the *Charter* stipulates that the application of the legislation extends to "the Parliament and government of Canada in respect of all matters within the authority of Parliament."

[23] [1997] 3 S.C.R. 624. This case involved a claim that the British Columbia government violated section 15 by not providing funding for sign language interpreters for deaf patients who received medical services.

[24] *Ibid.* at 669.

[25] [1989] 1 S.C.R. 143 [hereinafter *Andrews*].

> 15(1) or an analogous ground and that the unequal treatment is based on the stereotypical application of presumed group or personal characteristics.[26]

The recent Supreme Court of Canada case of *Law* v. *Canada* [27] further elaborated on what exactly constitutes discrimination. As per *Law*, after establishing that there is differential treatment between the claimant and others, and that this differential treatment is based on an enumerated or analogous ground, the following question must be asked:

> Does the differential treatment discriminate, by imposing a burden upon or withholding a benefit from the claimant in a manner which reflects the stereotypical application of presumed group or personal characteristics, or which otherwise has the effect of perpetuating or promoting the view that the individual is less capable or worthy of recognition or value as a human being or as a member of Canadian society, equally deserving of concern, respect, and consideration?[28]

2) Application of Section 15(1) to the Regulations:

In the Ontario Court of Appeal case of *Rosenberg* v. *Canada*,[29] the claimant, Rosenberg, had lived with a female partner for over ten years. She was an employee of the Canadian Union of Public Employees (CUPE), which had a pension plan stipulating that the spouses of plan members were eligible to receive survivor benefits. After amending the definition of "spouse" in its plan to include same-sex partners, CUPE asked Revenue Canada to register the amendment in order to obtain tax deferral advantages. Revenue Canada, however, rejected the amendment because it was not in harmony with the definition of "spouse" in the *Federal Income Tax Act*, which excluded same-sex couples. The Attorney General in *Rosenberg* conceded that the definition of "spouse" violated section 15(1) of the *Charter*, and concentrated its arguments on the section 1 inquiry. Eventually, the Court unanimously held that the definition of "spouse" in the *Income Tax Act* (with regard to registered pension plans) must include same-sex couples.

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[26] [1995] 2 S.C.R. 418 at 485 [hereinafter *Miron*].

[27] [1999] 1 S.C.R. 497 [hereinafter *Law*].

[28] *Ibid.* at 549.

[29] (1998), 38 O.R. (3d) 577 [hereinafter *Rosenberg*]. The Attorney General decided not to seek leave to the Supreme Court of Canada to appeal this decision. See J. Ditchburn, "Government Muddled Over Approach to Gay Rights" *Canadian Press Wire Service* (23 June 1998), online: QL (CPN).

Similarly, the definition of "spouse" in the *Regulations* runs afoul of section 15(1). The *Regulations* establish a distinction between potential gay or lesbian claimants and others, which is based on a personal characteristic. Specifically, a dichotomy exists between individuals in same-sex relationships (and heterosexual common-law relationships) and individuals in married heterosexual relationships. This distinction denies the claimant equal benefit of the law as, unlike a married heterosexual individual, he/she would be unable to sponsor his/her partner under the definition of "spouse" in section 2(1) of the *Regulations*.

With respect to the second element of the section 15(1) analysis, the discrimination aspect of the test would be met, as the relevant distinction would be made on the basis of sexual orientation which, as held by the majority of the Supreme Court of Canada in *Egan* v. *Canada*, is an analogous ground under section 15(1).[30] Also, the distinction imposes a burden/disadvantage which is not imposed on others, and is based upon the stereotypical application of presumed group characteristics:

> The definition of "spouse" as someone of the opposite sex reinforces the stereotype that homosexuals cannot and do not form lasting, caring, mutually supportive relationships with economic interdependence in the same manner as heterosexual couples...The discriminatory impact can hardly be deemed to be trivial when the legislation reinforces prejudicial attitudes based on such faulty stereotypes. The effect of the impugned provision is clearly contrary to s. 15's aim of protecting human dignity, and therefore the distinction amounts to discrimination on the basis of sexual orientation.[31]

In *Law*, Iacobucci J. provided an exhaustive list of four " contextual factors which [help] determine whether legislation has the effect of demeaning a claimant's dignity" and thus discriminating.[32] This article argues that, as was the case in *M.* v. *H.*,[33] all four factors militate towards a finding of discrimination in Jacob and Sanjay's situation.

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[30] [1995] 2 S.C.R. 513 [hereinafter *Egan*]. For a discussion of whether such challenges should be made on the ground of sexual orientation or family status, see R. Wintemute, "Sexual Orientation Discrimination as Sex Discrimination: Same-Sex Couples and the *Charter* in *Mossop, Egan* and *Layland*" (1994) 39 McGill L.J. 429 at 436.

[31] *Egan, ibid.* at 604.

[32] *Law, supra* note 26 at 534-541.

[33] [1999] 2 S.C.R. 3 [hereinafter *M.* v. *H.*].

First, with respect to gays and lesbians, a pre-existing disadvantage, stereotyping, prejudice, and vulnerability clearly exists. The definition of "spouse" in the *Regulations* exacerbates these circumstances. Second, Iacobucci J. stated in *Law* that "the mere fact that the impugned legislation takes into account the claimant's traits or circumstances will not necessarily be sufficient to defeat a s. 15(1) claim."[34] However, in this case, the *Regulations* do nothing to take Jacob's situation into account. They simply exclude him from the ability to sponsor Sanjay. Third, as stated in *M.* v. *H.*, "the existence of an ameliorative purpose or effect may help to establish that human dignity is not violated where the person or group that is excluded is more advantaged with respect to circumstances addressed by the legislation."[35] While there is an ameliorative purpose involved — family reunification— gays and lesbians are in no way more advantaged than heterosexuals. They are clearly at a huge disadvantage. Lastly, the interest affected by the definition of "spouse" in the *Regulations* is fundamental. By denying Canadian gays and lesbians the ability to sponsor, and thus be reunited with their partners, the federal government has deprived them of a "basic aspect of full membership in Canadian society" and has implemented "a complete non-recognition of [this] group."[36]

B) Section 1 Analysis:

1) Legal Principles

Section 1 of the *Charter* states,

> 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.[37]

Hence, if Jacob, our claimant, can establish a section 15(1) infringement, the burden would then shift to the government/proponent of the *Regulations* to establish, on a balance of probabilities, that the infringement is justified under section 1 of the

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[34] *Law, supra* note 26 at 551.

[35] *M.* v. *H.*, *supra* note 32 at 56.

[36] *Law, supra* note 26 at 540.

[37] Part I of *Constitution Act*, 1982, being Schedule B to *Canada Act 1982* (U.K.), 1982, c.11.

Charter. The analytic framework for a section 1 analysis was first set out in *R.* v. *Oakes*,[38] and recently restated in *Vriend*:

> A limitation to a constitutional guarantee will be sustained once two conditions are met. First, the objective of the legislation must be pressing and substantial. Second, the means chosen to attain this legislative end must be reasonable and demonstrably justified in a free and democratic society. In order to satisfy the second requirement, three criteria must be satisfied: (1) the rights violation must be rationally connected to the aim of the legislation; (2) the impugned provision must minimally impair the *Charter* guarantee; and (3) there must be a proportionality between the effect of the measure and its objective, so that the attainment of the legislative goal is not outweighed by the abridgment of the right.[39]

2) Application of Section 1 to the Regulations

2(a) Pressing and Substantial Objective

This article argues that the "pressing and substantial objective" aspect of the test in *Oakes* is the most important component of the hypothetical section 1 analysis of the definition of "spouse" in the *Regulations* of the *Immigration Act*. Thus, this aspect will be given primary consideration.[40]

As noted by Justice Abella in *Rosenberg*, section 1 jurisprudence has been less than illuminating with respect to "whether the analytical fulcrum in s. 1 was the objective of the statute or section, or whether it was the objective of the specific infringing limitation within that statute or section."[41] As further noted by Justice Abella, early section 1 decisions rendered by the Supreme Court of Canada (for example in *Oakes* and *Andrews*) appear to stand for the proposition that it is not the overall legislative objective that is to be considered, but rather the objective of the

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[38] [1986] 1 S.C.R. 103 [hereinafter *Oakes*].

[39] *Vriend, supra* note 19 at 554. For comprehensive academic analysis of section 1, see P.W. Hogg, "Section 1 Revisited" (1992) 1. N.J.C.L. 1; E.P. Mendes, "In Search of a Theory of Social Justice; The Supreme Court Reconceives the Oakes Test" (1990) 24 R.J.T. 1; N. Siebrasse, "The Oakes Test: An Old Ghost Impeding Bold New Initiatives" (1991) 23 Ottawa L. Rev. 99; S.R. Peck, "An Analytical Framework for the Application of the *Canadian Charter of Rights and Freedoms*" (1987) 25 Osgoode Hall L.J. 1.

[40] Although it is rare for courts to hold that this aspect of the *Oakes* test has not been met, exceptions do exist. See *R.* v. *Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295 [hereinafter *Big M*]; *Somerville* v. *Canada (Attorney General)* (1996), 184 A.R. 241 (C.A.); *Vriend, supra* note 19.

[41] *Rosenberg, supra* note 28 at 583 [emphasis added].

specific impugning provision.[42] However, as argued by Professor Dianne Pothier, in both *Egan* and *Miron*, the Court incorrectly moved away from this approach. In doing so, it incorrectly favoured broad legislative objectives, which were "*completely independent of the prima facie violation.*"[43] The difficulty with framing the objective at such a high level of generality is obvious:

> Starting with the objective of the legislation overall lowers the burden on the government in the second part of the *Oakes* test, where it is obliged to demonstrate that the means chosen to meet that objective are reasonable and proportional. It is easier to justify the reasonableness of the means used when measured against a broad, generally desirable social policy objective. This, in turn, makes equality infringements easier to justify as subordinate to a more generalized and pressing social interest.[44]

Hence, if the objective considered is solely that of the *Immigration Act*, Jacob's potential claim would be severely thwarted. However, such a characterization would be directly contrary to the clarity provided by Iacobucci J. in the *Vriend* decision. Speaking for a unanimous bench on this issue, Iacobucci J. advanced the principle that the pressing and substantial aspect of the *Oakes* test does not focus on the objective of the statute or section, but rather "the analysis must focus upon the objective of the impugned limitation."[45] This statement does not mean, however, that the objective of the limitation should be considered in isolation.[46] As stated by Justice Abella in *Rosenberg*,

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[42] *Ibid.*

[43] D. Pothier, "M'Aider, Mayday: Section 15 of the *Charter* in Distress" (1996) 6 N.J.C.L. 295 at 312 [emphasis in original]. As noted in M.A. McCarthy & J.L. Radbord, "Family Law for Same Sex Couples: Chart(er)ing the Course" (1998) 15:2 Can. J. Fam. L. at 101, see footnote 187,

> The [section 15] cases that have been lost have all failed because Courts have identified general laudatory objectives of the legislation (laudatory from the Court's view at least – privileging heterosexual family units is the most common) and then found that those objectives meet the proportionality test. This amounts to circular reasoning unless the Court also considers how the laudatory purpose is furthered by the exclusion of the group and the purpose of the exclusion itself. The rationality of the Oakes test depends entirely on the articulation of the objective.

[44] *Rosenberg, supra* note 28 at 584 [emphasis added].

[45] *Vriend, supra* note 19 at 555.

[46] *Ibid.*

> This is not to say that the purpose of the legislation, or of the particular section in that legislation containing the impugned provision, is irrelevant, but their relevance is limited to providing a context rather than a focus for the *Oakes* analysis.[47]

In attempting to articulate the objectives of family class immigration, and the *Immigration Act* (in order to provide such a context), section 3(c) of the Act is worth citing again. As per this section, one of the objectives of our immigration law is

> to facilitate the reunion in Canada of citizens and permanent residents with their close relatives from abroad.[48]

This objective is brought to fruition by allowing those who meet particular sponsorship criteria to sponsor the landing application of relatives who fall within the "family class." Hence, the relevant questions could be constructed as follows: what is the objective of excluding individuals in same-sex relationships from the definition of "spouse," so as to prevent Canadians from sponsoring their partners for landing under the family class immigration provisions? Is this objective "pressing and substantial" within the broader context of reuniting family members? To address these questions properly, it is integral to explore the essence of what constitutes "family."

2(a)(i) The Objective with Regard to "Family"

Examining the definition of "spouse" in the *Regulations* in light of the concept of family, the definition advances the position that only legally married heterosexual couples fit within the realm of the family class. Similarly, in both *Miron* and *Egan,* Gonthier J. and La Forest J. situated their analyses in terminology of biological and social realities, and the allegedly inherent heterosexual nature of marriage,

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[47] *Rosenberg, supra* note 28 at 584. This idea was supported by Iaccubucci J. in *Vriend, supra* note 19 at 555.

[48] R.S.C. 1985, c. I-2. In 1986, the importance of this objective was clearly stated by the Standing Committee on Labour, Employment and Immigration: "Family reunification has been, and will continue to be, the cornerstone of Canada's immigration policy. The Committee believes that family reunification is the most important and sensitive aspect of our policy and should continue to be so." See House of Commons, "Minutes of Proceedings and Evidence of the Standing Committee on Labour, Employment and Immigration, Respecting Order of Reference Relating to Family Class Immigration", 1st session, 33rd Parliament 1984-86, Issue No. 68 (11 June 1986) at 6 [hereinafter House of Commons]. It should also be noted that family class immigrants do not have to meet the "points system" selection criteria that independent immigrants do. See D. Galloway, *Immigration Law* (Concord, Ont.: Irwin Law, 1997) at 142. The nature of this system is elaborated on in Part V.

procreation, and child nurturing.[49] The ideologies which form the foundation of the exclusion of same-sex individuals from the definition of "spouse" and support the positions of the aforementioned Justices are both dangerous and disturbing. Such ideologies accept traditional values without questioning the oppressive context in which these values were shaped.[50] They passively accept "the superiority of the heterosexual, married family unit."[51] Rather, if the notion of family is perceived not as a "natural group," but as a social construct, then the propensity to overemphasize the traditional meaning of family is qualified. To give credence to a particular paradigm of "family" neglects that culture "is not a static, unchanging, identifiable body of information...[but] a series of constantly contested and negotiated social practices."[52] Hence, as the culture of our society is a living, breathing entity, varying family forms will be catalyzed by its constant change. A recognition of these varying forms leads to an analysis of the notion of family at a more functional level.

Perhaps the most resounding judicial endorsement of the evolving nature of families and the need for a functional analysis, is the dissenting judgment of L'Heureux-Dubé J. in *Canada (A.G.)* v. *Mossop*:

> Single-parent families, especially mother-led, are prevalent; an increasing number of parents never marry; divorce is common, as is remarriage; significant numbers of families are comprised of a husband and wife with no children at home; lesbians and homosexuals establish long-term and committed relationships...The state focuses on the family as an organizing structure of society...If there is value in encouraging individuals to form stable and emotionally intimate relationships, such relationships can be forged and maintained in a wide variety of family forms...It is the social utility of families that we must recognize, not any one proper form that "the family" must assume; it is the responsibility and community that family creates that is its most important social function and its social value.[53]

In harmony with L'Heureux-Dubé J.'s remarks, it can be said (as was said before the Supreme Court of Canada by counsel for M., in *M.* v. *H.*) that there is a false

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[49] M.A. McCarthy & J.L. Radbord, "Foundations for 15(1)" (1999) 6 Michigan Journal of Gender and Law 261 at 352.

[50] *Ibid.*

[51] *Ibid.*

[52] A. Rao, "The Politics of Gender and Culture in International Human Rights Discourse" in J. Peters & A. Wolper, eds., *Women's Rights, Human Rights: International Feminist Perspectives* (New York: Routledge, 1995) at 172-173.

[53] [1993] 1 S.C.R. 554, at 627-628, 629ff.

dichotomy between the monolithic notion of the heterosexual family and the gay and lesbian "Other:"

> Expert evidence shows that lesbians and gay men form long-term relationships, which involve emotional support, loyalty, love and affection, economic sacrifices, and an expectation of permanence. Many rear children together. As occurs in heterosexual couples, cohabitation in an intimate relationship with a view to spending a lifetime together naturally leads to...cooperation, compromise, and sharing.[54]

Therefore, the objective behind excluding gays and lesbians from the definition of "spouse" is that these relationships do not constitute traditional familial relationships. Thus, they should be excluded from family class immigration provisions to ensure that these provisions are only beneficial to that which the federal government considers "family." However, claimants such as Jacob could advance a more functional and progressive conceptualization of "family." If accepted, this definition would leave the objective far from pressing and substantial. With this conceptualization, it appears the only real purpose of the exclusion is to discriminate against gays and lesbians.[55] As per cases such as *Vriend* and *Big M*, an objective under section 1 of the *Charter* cannot be based on discrimination.[56]

2(a)(ii) Possible Economic Objectives

Setting the objective of excluding same-sex relationships solely within the context of family reunification may be misleading, and not indicative of the higher level of complexity that a section 1 analysis could involve. Specifically, section 3(h) of the *Immigration Act* states that a further objective of immigration law is

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[54] Respondent M.'s Factum on Appeal and Cross-Appeal, in the Supreme Court of Canada, Appeal from the Court of Appeal for the Province of Ontario at 12-13 [unpublished] [hereinafter Respondent M.'s Factum]. This passage could be interpreted as promoting a "sameness" argument, which further points to the complexity of this issue: "there are those who would argue...that the 'family' model is itself conservative, and exclusionary. By adopting the qualities perceived to be held by the idealized heterosexual family, lesbians and gay men simply reinforce and affirm this idealization." See D. Herman, *Rights of Passage: Struggles for Lesbian & Gay Legal Equality* (Toronto: University of Toronto Press, 1994) at 146.

[55] In *M.* v. *H.*, counsel for M. also argued that the objective of the exclusion was nothing more than to discriminate. Respondent M.'s Factum, *ibid.* at 35.

[56] *Vriend, supra* note 19; *Big M, supra* note 39.

> To foster the development of a strong and viable economy and the prosperity of all regions in Canada.[57]

As opposed to the altruistic objective of reuniting families, "[a] more compelling case can be made that the commitment to 'family' in immigration law is in truth ancillary to the dominant economic objectives of the Act."[58] As stated in the Minister of Manpower and Immigration's 1966 *White Paper on Immigration*,

> To remain of positive value...immigration policy must be consistent with national economic policy in general and with national manpower and social policies in particular...[T]here is unlikely to be general support for any immigration policy which appears...to ignore the economic and social facts of life.[59]

The relevant question for our section 1 analysis becomes pecuniary: what are the dominant economic objectives of the legislation/family class immigration provisions? Furthermore, how do these objectives relate to the exclusion of individuals in same-sex relationships from the definition of "spouse" in the *Regulations*?

First, instead of reuniting those in intimate relationships, the provisions are more concerned with reuniting "economic units of production." Related to this notion is the idea that the admission of spouses under the umbrella of family class immigration is conducive to economic prosperity because it facilitates "social reproduction." That is to say, "the admission of 'family' plays an important part in immigration policy by providing a privatized support system which enables immigrants to engage in sustained economic activity."[60] The exclusion in our

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[57] R.S.C. 1985, c. I-2.

[58] J.C. Hathaway, "Towards a Contextualized System of Family Class Immigration" in J.C. Hathaway, *Report of the National Consultation on Family Class Immigration* (June 1994) at 6 [hereinafter "Towards a Contextualized System"].

[59] *Ibid.* As recognized by Professor Hathway at 7, discussion of the economic objectives which underlie family class immigration policies "has been largely absent from policy debate." Instead, he submits, there has been a general idealization of the humanitarian underpinnings. In contrast, see B. Cheadle, "Proposed Overhaul Would Toughen Immigration Policy" *Canadian Press Wire Service* (6 January 1998), online: QL (CPN):

> Canada should dramatically change immigration policy to more aggressively promote national economic self-interest, says a report released Tuesday by Immigration Minister Lucienne Robillard...The report opens with a swipe at political correctness which it says has stifled debate on immigration policy.

[60] *Ibid.* at 7.

hypothetical analysis would not have a pressing and substantial objective in the context of the social reproduction for two reasons. To begin, it is premised upon the traditional notion of the nuclear family, with a husband at the helm. In such a structure "employers and/or the state benefit from the assignment to the dependent wife of (unremunerated) responsibility for most activities related to social reproduction."[61] A reconceptualized understanding of what constitutes a family may expose the objective of the exclusion as purely discriminatory. Second, and perhaps in the alternative, if a court accepts the broader objective to establish a support system based on dependency,[62] it can be argued that although social reproduction in same-sex relationships may not materialize in the same manner as in certain heterosexual relationships, social reproduction does exist. As stated by Professor Hathaway,

> Social reproduction within these new forms of family (and indeed within the changing "traditional family") may not result from the classic dependency-induced attribution of full responsibility to the wife, but is more typically achieved by the pooling of resources and responsibilities within a relationship of interdependency.[63]

Therefore, the objective of exclusion is not pressing and substantial when related to the broader objective of social reproduction.

A further possible objective of the legislation/family class immigration provisions, which also fits within an economic context, is the reunion of families

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[61] *Ibid.* For a discussion of the relationship between this ideology and society's attitudes towards homosexuality, see J. Keller, "On Becoming a Fag" (1994) 58 Sask. L. Rev. 191. At 197, Keller observes,

> It was no coincidence that society's heightened concern about and the state's increased legislation on homosexual activity occurred during the rise of industrialization and urbanization. With industrialization, the family changed from a productive force to a reproductive force...With reproduction now at the centre of the family, monogamy was preached as the 'proper' form of relationship, partly because of religious beliefs, but also because it was the easiest way to keep women in the home and under control...social roles became more clearly defined, and as sexuality was more closely harnessed ideologically to the reproduction of the population so the social condemnation of homosexuality increased [emphasis added].

[62] In 1986, the Standing Committee on Labour, Employment and Immigration was in favour of policies that encouraged immigration on the basis of "actual dependency." See House of Commons, *supra* note 47 at 14.

[63] "Towards a Contextualized System," *supra* note 57 at 9-10 [emphasis added]. This is not to suggest, however, that no same-sex relationships structure themselves according to a homemaker/bread winner paradigm. As with opposite-sex relationships, gay and lesbian relationships exhibit a great deal of diversity, which further points to the complexity of this issue.

while avoiding the imposition of costs on the state. This objective is manifested in the "undertaking requirement" that accompanies an application to sponsor a family class member. Specifically, if an individual meets the "sponsor" definition in section 2 of the *Regulations*, and the requirements set out in section 5(2),[64] he/she is authorized to sponsor a family class landing application. One of these requirements is that the potential sponsor must give an undertaking, defined in section 2 of the *Regulations* as,

> an undertaking in writing given to the Minister by a person to provide for the essential needs of the member of the family class and the member's dependents for a period of 10 years and to ensure that the member and the member's dependents are not dependent on any payment of a prescribed nature referred to in Schedule VI.[65]

In making reference to Schedule VI, the *Regulations* essentially require the sponsor to ensure that the sponsoree does not make any claims under various social assistance statutes.

Hence, if the broader objective is family reunification with the assignment of costs to the sponsor (not the state), the government could submit that the objective of excluding individuals in same-sex relationships from the definition of "spouse" is pressing and substantial because sponsors often do not comply with their obligations:

> Public confidence in the administration of the family class immigration program has been shaken by the realization that taxpayers have been required to bear the cost of support for a significant number of sponsored family members. This is decidedly not the logic of the program...In practice, the sponsorship agreement system is in tatters. While a reasonable estimate is that 12,000 or so new social welfare claims

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[64] For example, he/she must be a Canadian citizen or permanent resident who is at least nineteen years old, and (with certain exceptions) must be resident in Canada from the time of the application until the sponsoree is granted landing: SOR/78-172.

[65] SOR/78-172. The hypocrisy of the *Regulations* with regard to the definition of the term spouse is striking. For example, as previously noted, individuals in heterosexual common-law relationships are excluded from the definition when it pertains to who constitutes a member of the family class. However, with regard to undertakings/who is responsible for sponsorship obligations, as per section 5(1) (in conjunction with section 5(2)(i)), if the heterosexual common-law partner of a sponsor co-signs a sponsorship undertaking with regard to a potential family class immigrant, then the common-law partner is also responsible. In other words, in such a situation, the definition of "spouse" does extend to heterosexual common-law relationships.

> are made each year by sponsored relatives, almost none of the assistance funds paid out are recoverable from sponsors.[66]

In other words, the government could advance the position that since the objective of not allocating costs to the state has not been fulfilled, it is a pressing and substantial objective not to increase family class immigration (often the most prevalent form of immigration to Canada).[67] The government may achieve this objective by excluding people in same-sex relationships from the definition of "spouse." This position is fallacious for four reasons. First, the exclusion was present before problems with the sponsorship system materialized. Second, why are gay and lesbian relationships singled out for exclusion to meet this objective? A possible response is that they are singled out to alleviate the problem because they are already excluded. However, this rationale begs the question of why they are excluded. While the government could assert that it has also considered making it harder to sponsor parents as landed immigrants, this is of no consequence, as these ideas were never implemented.[68] Third, the Supreme Court of Canada has disapproved of phrasing the objective in terms of saving money.[69] The fourth problem with this potential government argument will be addressed in the following section.

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[66] J.C. Hathaway, "Implementation of a Contextualized System of Family Class Immigration," *supra* note 56 at 14-16 [emphasis in original] [hereinafter "Implementation of a Contextualized System"].

[67] "Towards a Contextualized System," *supra* note 57 at 2.

[68] "Immigration-Rules," *Canadian Press Wire Service* (18 November 1993), online: QL (CPN).

[69] *Singh* v. *Canada (Minister of Employment and Immigration)*, [1985] 1 S.C.R. 177 at 218-219. While this discussion of potential pressing and substantial objective arguments pertains to the exclusion of individuals in same-sex relationships from the definition of "spouse," a potential objective is also the exclusion of common-law relationships. Specifically, in immigration matters there is an incentive to "fake" spousal relationships, which does not exist in other areas. Hence, the government could argue that excluding individuals in common-law relationships by requiring legal proof of a relationship makes such deceptions more difficult. Furthermore, it could be argued that this is pressing and substantial within the broader context of only reuniting "legitimate" or "genuine" families. This is not an infallible argument, as the existence of a technically legal marriage does not necessarily mean there is a relationship that would be considered "genuine." As recognized in section 4(3) of the *Regulations*, the family class does not include spouses who are technically married to Canadian sponsors, if the marriage can be considered a "marriage of convenience": SOR/78-172. As set out in *Horbas* v. *Canada (Minister of Employment and Immigration)*, [1985] 2 F.C. 359 (T.D.), a marriage of convenience exists if the sponsored spouse only entered into the marriage so that he/she could immigrate to Canada, and if he/she did not have an intention to permanently reside with the sponsoring spouse.

2(b) Reasonable and Demonstrably Justified

If the government objective is pressing and substantial under section 1 of the *Charter*, the means chosen to reach this objective must be reasonable and demonstrably justified in a free and democratic society. This assessment involves elements of rational connection, minimal impairment, and proportionality. Part III has identified some of the most salient aspects of a hypothetical *Charter* challenge, which, it is argued, fall under both the section 15(1) analysis, and most importantly, the pressing and substantial component of the section 1 analysis. However, some key aspects of the reasonable and demonstrably justified component will now be briefly outlined, and should be taken into consideration when contemplating such a hypothetical challenge.

With regard to the failure of the sponsorship regime, the concept of rational connection must be considered. Specifically, if the government objective were pressing and substantial, it would not logically follow that restricting same-sex couples from the family class immigration provisions would help to minimize costs to the state. Thus, no rational connection exists between the objective of family reunification while minimizing state costs and the exclusion of gays and lesbians in same-sex relationships. For example, it is unlikely that the government could demonstrate that sponsors in same-sex relationships have defaulted on their sponsorship support obligations to family class members (such as parents and grandparents) more than others. If this could be shown, it does not necessarily follow that individuals in same-sex relationships would also shirk support obligations owed to their partners. Furthermore, instead of the present exclusion, a restructuring of the sponsorship system would achieve the objective more appropriately. In other words, to reach the objective of family class immigration without financial loss to the state, it would seem rational to fix the system, rather than implementing a discriminatory practice to prevent further fiscal loss to the government. Admittedly, this is not easily done – potential remedies such as more rigorous investigation of the sponsor's ability to meet an undertaking, more rigorous enforcement against sponsors on default, requiring the sponsor to pay a performance bond, and granting conditional admission to the sponsoree, all have inherent difficulties. However, one potential remedy might be to utilize more effectively section 108(2) of the *Immigration Act*, which provides for federal-provincial government agreements with respect to immigration policies:

> The jurisdictional concerns said to stymie regular litigation by provinces to recover social welfare payments to sponsorees from their sponsors in accordance with their

> undertaking could be easily resolved by the routine assignment of sponsorship undertakings by the federal government to the province of reception.[70]

Two additional points should be made. First, in further reference to the notion of rational connection, if the broader government objective were to be characterized as promoting only traditional family reunification, excluding same-sex non-traditional families is not a means that is rationally connected to the particular goal. In other words, allowing same-sex spousal reunification in no way affects or discourages traditional family reunification. Second, denying Jacob the chance to be legally reunified with his partner does not minimally impair his section 15(1) right to equal benefit of the law without discrimination. Rather, it is a maximum impairment of his right.

In concluding this *Charter* analysis, it should be noted that much of the Supreme Court of Canada section 15 jurisprudence involves comparator groups of either common-law, opposite-sex and married heterosexual couples, or same-sex and common-law couples. These cases can be seen as establishing the building blocks for a finding of discrimination in cases such as this one, where the comparator groups are same-sex and married couples.

In *Miron*, the Court held that it was unconstitutional to distinguish between common-law and married opposite-sex spouses in the payment of automobile insurance benefits. The Court found that reserving such benefits for legally married spouses violated section 15(1), and that the definition of "spouse" in the Ontario Standard Automobile Policy should be extended to include common-law opposite-sex couples. In *M.* v. *H.*, the comparator groups were same-sex and common-law opposite-sex couples. Section 29 of Ontario's *Family Law Act* extended spousal support rights to the latter group, but not the former. The Court held "that the human dignity of individuals in same-sex relationships [was] violated by the impugned legislation,"[71] and thus that there was a section 15(1) violation which was not saved by section 1.

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[70] J.C. Hathaway, "Report of the National Consultation on the Immigration of Family Members," *supra* note 56 at 6 [hereinafter "Report of the National Consultation"]. For a further examination of possible changes to the sponsorship provisions, see H.D. Greenberg, ed., "Family Sponsorship: Proposed Amendments to *Immigration Regulations, 1978*" (1996) 33 Imm. L. R. (2nd) 12.

[71] *M.* v. *H.*, *supra* note 32 at 58.

Therefore, the Supreme Court of Canada has held that it violates section 15(1) to distinguish between both common-law and married opposite-sex couples, and same-sex and common-law opposite-sex couples, in a discriminatory way. This leads to the logical conclusion that the discriminatory distinction between same-sex and married couples in the *Regulations* also violates section 15(1). Furthermore, it can be argued that confining the definition of "spouse" to those in legally married relationships amounts to adverse effects discrimination against gays and lesbians, who are denied the right to marry. Gays and lesbians are served a double blow — they can only sponsor their partners if they are married, and yet they have no ability to get legally married.

This examination of the most crucial aspects of a section 15 and section 1 *Charter* analysis, demonstrates that the exclusion in question is unconstitutional. Hence, it appears as though one of the objectives of Canadian immigration law is also neglected. Namely, as stated in section 3(f) of the *Immigration Act*, the goal

> to ensure that any person who seeks admission to Canada on either a permanent or temporary basis is subject to standards of admission that do not discriminate in a manner inconsistent with the *Canadian Charter of Rights and Freedoms*.[72]

IV. POTENTIAL REVISIONS/REMEDIES

To reiterate, section 2 of the *Regulations* defines "spouse" as follows:

> the party of the opposite sex to whom that person is joined in marriage.[73]

With regard to the establishment of an appropriate constitutional remedy, it appears that of the choices set out in the leading remedy case of *Schachter* v. *Canada*, "reading in" would be most appropriate.[74]

For example, in the same-sex adoption case of *Re K.*, Ontario's *Child and Family Services Act* permitted joint adoption applications by spouses.[75] However, the legislation used the definition of "spouse" in the provincial *Human Rights Code*, which defined "spouse" as

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[72] R.S.C. 1985, c. I-2.

[73] SOR/78-172.

[74] [1992] 2 S.C.R. 679.

[75] (1995), 23 O.R. (3d) 670 (Ontario Court of Justice, Provincial Division).

> the person to whom a person of the opposite sex is married or with whom the person is living in a conjugal relationship outside marriage.[76]

The Court found this definition unconstitutional, and "read in" the words "of the same or opposite sex" after the words "with whom the person." Similarly, a court could use the "reading in" remedy so that the definition of "spouse" in the *Regulations* becomes "the party of the opposite sex to whom that person is joined in marriage or of the same or opposite sex with whom the person is in a conjugal relationship outside marriage."

However, ideally the legislature will take responsibility, and step-in to rectify the problem. The recent Immigration Legislative Review report recommended to former Citizenship and Immigration Minister Lucienne Robillard that the term "spouse" be redefined to include "a partner in an intimate relationship, including cohabitation of at least one year in duration, with the burden of proof resting on the applicant in either case."[77] In addition to the ambiguity surrounding what constitutes an "intimate relationship," some have argued that the one year cohabitation requirement is also troublesome. While acknowledging the desire to have some sort of objective criteria, non-governmental organizations such as the Lesbian and Gay Immigration Task Force (LEGIT) and Equality for Gays and Lesbians Everywhere (EGALE), have noted that the requirement may exclude many legitimate same-sex relationships. As pointed out by EGALE in its March 1998 response to the Immigration Legislative Review report,

> In some countries, due to prohibitions on same-sex relationships, social taboos, or homophobia, cohabitation is not a realistic option for same-sex couples yet the relationship may still be genuine...if implemented, the cohabitation requirement will benefit mostly same-sex couples from northern western nations where restrictions on same-sex cohabitation are less severe...[Also, f]or many of these couples, the one year cohabitation requirement is simply not an option because they are citizens of different countries and are not likely to be able to remain temporarily in their partner's country for one year.[78]

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[76] *Human Rights Code*, R.S.O. 1990, c. H.19, s. 10.

[77] Immigration Legislative Review, *Not Just Numbers: A Canadian Framework for Future Immigration* (Ottawa: Minister of Public Works and Government Services Canada, 1997) at 44 [hereinafter *Not Just Numbers*].

[78] "EGALE Brief to Immigration Legislative Review Ministerial Consultations," online: EGALE Homepage <http://www.egale.ca/~egale/politics/immigrat.htm> (date accessed: 16 October 1998).

EGALE suggests that if the cohabitation requirement is implemented, a broad/ expansive judicial interpretation should be applied, which would be in harmony with certain family law interpretations of the term "cohabit." However, ideally the group suggests that the term cohabit be abandoned in favour of the words "maintaining a spousal relationship."[79] Professor Hathaway agrees that instead of creating a new sponsorship category for same-sex couples, a more straightforward answer would be to amend the existing definition. In general, while Hathaway does not discount the possible merits of a cohabitation requirement, if same-sex couples cannot meet this requirement, he suggests that the sponsor and sponsoree should be able to establish that they are both "emotionally and economically interdependent."[80]

This article argues that the cohabitation requirement is not overly problematic. In the spousal support case of *Molodowich* v. *Pettinen*,[81] the Court recognized the similar nature of the terms "cohabit" and "conjugal," and expressed the generally accepted features of these terms. For example, shared shelter, sexual and personal behaviour, services, social activities, societal perceptions, economic support, and children.[82] Although shared living arrangements were included in the Court's characterization, as stated by the Supreme Court of Canada in *M.* v. *H.*, *Molodowich* "recognized that these elements may be present in varying degrees and not all are necessary."[83] Thus, it seems that Professor Hathaway's suggestion of "emotional and economic interdependency" is not an alternative to cohabitation, but rather an element of it.

To determine what immigration officers should look for with respect to evidence of cohabitation as manifested by emotional and economic interdependency, it is useful to consider other jurisdictions which have provisions for same-sex family class immigration. For example, the Australia "Procedures Advice Manual" lists factors such as "public recognition of an ongoing domestic relationship...each spouse's knowledge of the other's personal circumstances and background...the existence of shared responsibilities within the family unit...[and] sharing of income,

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[79] *Ibid.*

[80] "Report of the National Consultation," *supra* note 69 at 4-5.

[81] (1980), 17 R.F.L. (2d) 376 (Ont. Dist. Ct.) [hereinafter *Molodowich*].

[82] *Ibid.* at 380-382.

[83] *M.* v. *H.*, *supra* note 32 at 50-51.

financial assets and liabilities."[84] Similarly, in New Zealand, authorities are instructed to consider a number of factors:

> [P]hotos of the couple, letters between the couple, proof of shared accommodation (e.g. joint mortgages or joint tenancy agreement or rent book), proof of shared income (e.g. bank statements showing any transfer of funds from one partner's account to the other's), proof of shared bank accounts (e.g. statement or bank books showing joint accounts are held), and any evidence of public or family recognition of the relationship (e.g. letters addressed to the couple).[85]

Admittedly, for such a definition to work, immigration officers would be required to take a holistic approach to the relationships evaluated. Hence, further education and training would be required: "[i]mmigration officers are not psychologists or anthropologists, yet in a sense the rules require them to act these parts."[86]

V. AVOIDING THE SPOUSE DEFINITION

Despite the restrictive definition of "spouse" in the *Regulations*, in certain ways Canadian immigration law is conducive to same-sex couple reunification. This article will now explore options available to Sanjay and Jacob outside of a section 15(1) *Charter* challenge.

A) Reunification Options

1. Immigration as an Independent

The *Immigration Manual* is clear that neither individuals involved in same-sex or common-law relationships are included within the definition of spouse. However, it suggests that individuals in these types of relationships can be considered as independent immigrants.[87] As Sanjay would not likely fit within the sphere of the Business Immigration Program, he could apply under the "skilled worker" provisions of the independent immigrant class.[88] After obtaining an application form from a Canadian consulate or embassy, Sanjay would soon be evaluated under the "points system," "according to which points are allocated to the applicant under a

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[84] "Implementation of a Contextualized System," *supra* note 65 at 7-8 [emphasis in original].

[85] *Ibid.* at 8.

[86] *Ibid.* at 9.

[87] *Immigration Manual*, OP-1, "General Procedural Guidelines" at 4.2.2.

[88] Generally, independent immigration is governed by sections 8-11 and Schedule 1 of the *Regulations*.

variety of headings with a view to identifying his or her capacity to become successfully established in Canada."[89]

2. Humanitarian and Compassionate Considerations

The *Immigration Manual* advises that in a same-sex sponsorship situation, "where compassionate or humanitarian considerations exist, the partner should submit an independent application directly to the appropriate visa office."[90] The manual further states, "[h]umanitarian and compassionate grounds exist when unusual, undeserved or disproportionate hardship would be caused to the person seeking consideration if he or she had to leave Canada."[91]

3. Residual Discretion

Section 11(3) of the *Regulations* entitles a visa officer to issue a visa to an individual who does not receive the required 70 points, if "in his opinion, there are good reasons why the number of units of assessment awarded do not reflect the chances of the particular immigrant and his dependants of becoming successfully established in Canada."[92]

B) Analysis

In 1994, the Immigration Department issued a telex to Canadian consulates and embassies explicitly instructing all visa officers to process same-sex family class immigration applications within the framework of one or more of the three mentioned "options."[93] Within one year of the issuance of the telex, an estimated sixty-two gay and lesbian Canadians were reunited with their partners under one of

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[89] Galloway, *supra* note 47 at 153. As per Schedule I of the *Regulations*, the headings under which the applicant is assessed are as follows: education, education and training, experience, occupational factors, arranged employment or designated occupation, a demographic factor, age, knowledge of English and French, and personal suitability. See SOR/78-172. Each heading carries a maximum number of points that can be awarded, and the applicant is required to reach at least 70 points.

[90] *Immigration Manual*, IP-1, *Processing Undertakings in Canada* at 3.3.

[91] *Immigration Manual*, IE-9, at 9.07. The manual also cites factors such as "family dependency" as examples of what would fall under humanitarian and compassionate grounds.

[92] SOR/78-172.

[93] For a reproduction of this telex, see "Processing of Same Sex and Common Law Cases," online: LEGIT Homepage <http://www.ncf.carleton.ca/ip/social.services/legit/immigrate.faq> (date accessed: 4 October 1998).

the three provisions.[94] While this article concedes that this allowance of same-sex couple reunification is positive, it argues that the government's objectives in promoting these options were far from altruistic. Specifically, in encouraging visa officers to use these three alternatives, the government has essentially provided itself with a mechanism to avoid the launching of a potentially successful *Charter* challenge, "thus avoiding the possibility of 'adverse' *Charter* jurisprudence."[95]

This argument is exemplified by two particular case scenarios. In Part III it was mentioned that, to date, a section 15 *Charter* challenge to the definition of "spouse" in the *Regulations* has not been heard by a Canadian court. However, that is not to say that such a challenge has never been contemplated. In January of 1992, Christine Morrissey (the current Co-Chair of LEGIT) commenced proceedings for such a section 15 challenge in the Federal Court of Canada. As a remedy, Morrissey requested that the Court either interpret the definition of "spouse" to include gay and lesbian partners, or read gay and lesbian partners into the *Regulations*. Morrissey, who had Canadian citizenship, applied to sponsor her partner of fourteen years, Bridget Coll. Coll had joint Irish and U.S. citizenship. Before Morrissey's application, Coll had been informed by the Immigration Department that she did not meet the necessary criteria of an independent immigrant. Subsequent to this decision, the Department refused to process Morrissey's sponsorship application.[96] However, after Morrissey commenced a section 15 challenge Coll's situation changed:

> a lawyer for the Department of Justice asked that Bridget apply for permanent residency to have an application to accompany Christine's sponsorship application, suggesting that this was simply for formal purposes connected with the lawsuit. But much more was underway. The application was handled personally by the Canadian Consul General in Seattle. Bridget, the former rejectee, was given permanent residency. Even the standard interview was waived. Canada was prepared to buy off this challenge to the status quo.[97]

In a second case, Andrea Underwood, a Canadian citizen, applied in 1991 to sponsor her partner Anna Carrot. Carrot was a British citizen who was in Canada,

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[94] Casswell, *supra* note 8 at 572.

[95] *Ibid.* at 564.

[96] *Ibid.* at 569.

[97] LEGIT, "Taking the Next Step: A Brief to the Honourable Sergio Marchi, Minister of Immigration" (12 November 1993) [unpublished] [emphasis added] [hereinafter LEGIT].

and had been living with Underwood for approximately eight years. The government responded to Underwood's application by issuing a deportation order against Carrot in 1992.[98] Underwood and Carrot then commenced a section 15 challenge to the definition of "spouse" in the Federal Court. In LEGIT's 1993 brief to then Immigration Minister Sergio Marchi, it stated, "[f]or some reason the system was not prepared to buy off this second challenge."[99] However, LEGIT was wrong – the government eventually did "buy off" this challenge. Although the initial refused application requested that humanitarian and compassionate grounds be considered, after the Federal Court proceeding was commenced "the Department of Immigration agreed to process Carrot['s]...landed immigrant application...favourably on humanitarian and compassionate grounds."[100]

These two cases demonstrate the tribulations that same-sex couples undergo to have their applications recognized. Furthermore, they show the commitment of the federal government to sidestepping the constitutionality of the definition of "spouse" in the *Regulations*. In an interview that I conducted with Christine Morrissey's lawyer, Robert Hughes, he stated that the government's "back door approach to same-sex relationships" is insulting, commenting further that "[m]any people are unaware that it is even possible for same-sex partners to receive consideration on the basis of the relationship because of the lack of information provided by Citizenship and Immigration."[101]

The options available to same-sex couples, to avoid the restrictive definition of "spouse," are also problematic because they are highly discretionary: "in immigration, there is no such thing as 'can't.' It is all 'won't.' There are so many exceptions, and powers to except, that there are no hard and fast rules."[102] For example, the section 11(3) residual discretion provision of the *Regulations* is a double-edged sword, as it permits visa officers to deny visas to potential immigrants who meet the 70 point threshold. Such a denial will occur if the total points are not indicative of the applicant's potential of successfully establishing him/herself in

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[98] Casswell, *supra* note 8 at 570.

[99] LEGIT, *supra* note 96.

[100] P. Flather, "Gay Yukon Couple Continues Fight" *Canadian Press Wire Service* (12 October 1994), online: QL (CPN).

[101] Electronic mail interview with Mr. Robert Hughes (17 November 1998) [unpublished].

[102] D. Matas, *Canadian Immigration Law* (Ottawa: Canadian Bar Association, 1986) at 67.

Canada.[103] However, the notion of discretion goes far beyond what is legislated, and often extends into the realm of arbitrariness:

> Canada now allows the immigration of same-sex partners, but under the worst possible set of procedures. There are no rules. There are no appeals. There are no rights. There is no assurance of consistency of decision making by the program managers and visa officers in the various embassies and consulates. There is no openness, no transparency, no publicity. If someone goes into an embassy or consulate in Paris or Atlanta are they likely to get accurate information about the possibilities of a Canadian sponsoring their lesbian or gay partner? Or will they get a standard form document which indicates that they do not qualify for family class sponsorship; a document which explains nothing about what can occur on "humanitarian" grounds.[104]

This type of difficulty led Robert Hughes, in one case, to advise his clients to file their application through the Canadian embassy in South Africa because "the Visa Manager who had originally drafted the 1994 telex on humanitarian and compassionate grounds was based in Pretoria. The hope was that this office would view a linked same-sex couple's application in the best possible light."[105] Certainly such situations do not come close to meeting the Immigration Legislative Review report's assertion that "transparency, fairness and equality of treatment...must be enshrined in law."[106] The fundamental importance of immigration or visa officers' decisions should not be minimized, as courts are not keen on reversing such an officer's use of discretion. As stated by the Federal Court of Appeal in *Shah* v. *Minister of Employment and Immigration*, the standard for being granted judicial review with regard to decisions concerning humanitarian and compassionate relief is not low: "the applicant must show that the decision-maker erred in law, proceeded on some wrong or improper principle or acted in bad faith."[107]

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[103] SOR/78-172. It can be argued that the Supreme Court of Canada's affirmation of the Federal Court, Trial Division's decision in *Chen* v. *Canada*, [1995] 1 S.C.R. 725 could be beneficial to gay or lesbian applicants because it rejects the notion that "moral turpitude" (which a visa officer may consider homosexuality or lesbianism to fall under) can be considered under section 11(3). However, only considering successful economic establishment precludes the applicant from the option of arguing that he/she should be granted an immigrant visa under section 11(3) because of a close emotional connection with his/her spouse. Hence, such an argument can only be made under humanitarian and compassionate grounds, which leaves the gay or lesbian applicant with fewer options.

[104] LEGIT, *supra* note 96.

[105] "Oh Canada," *supra* note 4.

[106] *Not Just Numbers, supra* note 76 at 43.

[107] (1994), 170 N.R. 238 at 240.

Lastly, not being included in the definition of "spouse," but being admitted under one of the three "alternative options," could potentially be beneficial to those in same-sex relationships. Specifically, the partner who already resides in Canada would not be required to commit to the sponsorship obligations that he/she would be obliged to adhere to under the family class immigration provisions. Admittedly, a sponsor's obligation (under section 5(2)(f) of the *Regulations*) to establish that his/her income is above the "low income cut-off" is often waived under particular criteria set-out in section 6(3) of the *Regulations*.[108] However, this exception does not absolve the sponsor from his/her other obligations. Thus, for example, under the three alternative options the partner already in Canada would not have to file an undertaking to be financially responsible for his/her partner[109] or be excluded from reuniting with his/her partner because of bankruptcy.[110] Whether these potential benefits would be of much importance to a same-sex couple is debatable, largely depending on the couple's particular set of circumstances.

VI. CONCLUDING REMARKS

Though Jacob and Sanjay are fictional, composite characters, the legal dilemma that they face is by no means uncommon. Certainly this article has not meant to paint a bleak picture for Canadian gays and lesbians who wish to be reunited with their partners. As noted, options for same-sex family class immigration in Canada do exist and may even carry particular advantages. In fact, the very existence of such provisions puts Canada within an elite class of nations.[111]

There is, however, no logical reason to settle for a system that is not equitable and just. The benefits extended to same-sex couples with respect to family class immigration should by no means obscure the detriments. This article has not attempted to conduct a fully comprehensive and nuanced section 15(1) *Charter* challenge to the definition of the term "spouse" in the *Immigration Regulations*. However, it has identified some of the most salient aspects of such a challenge, and has concluding that it is perfectly reasonable to expect a Canadian court to find the

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[108] SOR/78-172.

[109] SOR/78-172, section 5(2)(b).

[110] SOR/78-172, section 5(2)(e).

[111] For an overview of same-sex family reunification policies in Australia, Denmark, the Netherlands, New Zealand, Norway, and Sweden, see J.D. Wilets, "International Human Rights Law and Sexual Orientation" (1994) 18 Hastings Int'l & Comp. L. Rev. 1 at 104-105.

definition in question unconstitutional. Whether such a challenge is actually litigated is an entirely different matter. As shown by the cases of Christine Morrissey and Andrea Underwood, the government has gone out of its way to avoid having the issue heard in court. Instead of guaranteeing gays and lesbians their constitutional right, the government has opted for a highly discretionary, inconsistent system which is insulting, as it "process[es] lesbians and gays through the back door instead of recognizing [them] openly as members of the family class."[112]

Perhaps one of the most disheartening aspects of the federal government's refusal to recognize gays and lesbians as family class members, is that this refusal exists in a time when various Canadian laws are changing to reflect the reality of same-sex relationships:

> Several provinces have already begun to amend their legislation. Since 1997, British Columbia has amended numerous statutes, including six core statutes, to add same-sex couples. In June 1999, Quebec amended 28 statutes and 11 regulations to grant same-sex couples the same benefits and obligations that are available to opposite-sex common-law couples. And in October 1999, to comply with the Supreme Court decision in *M.* v. *H.*, Ontario passed omnibus legislation to bring 67 statutes into compliance with the ruling.[113]

In light of these arguments, the federal government should definitively act to change the definition of "spouse" in the *Regulations* of the *Immigration Act*, to avoid an inevitable judicial declaration of the definition's unconstitutionality. Most importantly, the government must fully recognize the value and importance of all close human relationships involving both economic and emotional interdependency.

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[112] "Lesbian/Gay Groups Appear at Immigration Consultation," online: EGALE Homepage <http://www.egale.ca/~egale/pressrel/980311.htm> (date accessed: 16 October 1998).

[113] Government of Canada, Backgrounder, "Modernization of Benefits and Obligations" (11 February 2000). It should be noted that whether or not the Ontario statutes have been brought into compliance with the *M.* v. *H.* ruling is a matter of debate. M. is currently in the process of bringing a motion for rehearing before the Supreme Court of Canada. M.'s argument is that the Ontario government has created a "separate but equal" regime, rather than amending the unconstitutional definition of "spouse." See "M. to Seek a Rehearing before the Supreme Court of Canada" and "Letter to the Honourable Jim Flaherty, Attorney General Advising that M. will be Seeking a Rehearing," online: McMillan Binch Homepage <http://www.mcbinch.com> (date accessed: 22 March 2000).