

# LISTENING TO THE DIALOGUE: AN EXAMINATION OF THE DEGREE OF PUBLIC AND MEDIA ATTENTION PROVIDED TO THE LEGISLATIVE RESPONSES TO COURT DECISIONS INVOLVING EQUALITY RIGHTS AND SEXUAL ORIENTATION

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## I. Introduction

Since the inception of the *Canadian Charter of Rights and Freedoms*,<sup>1</sup> legal and political scholars in Canada have grappled with the theory that judicial review under the *Charter* is part of a dialogue between the courts and the legislatures.<sup>2</sup> According to the dialogue theory, once a court decides that a given statute unjustifiably violates the *Charter*, their ruling invites the relevant legislative body to “devise a response that is properly respectful of the *Charter* values that have been identified by the

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<sup>1</sup> Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c.11 [“*Charter*”].

<sup>2</sup> This dialogue theory was prominently raised by Peter W. Hogg and A. A. Bushell [now Thornton], “The Charter Dialogue between Courts and Legislatures (or Perhaps the Charter of Rights Isn’t Such a Bad Thing After All)” (1997) 35 Osgoode Hall L.J. 75-124. Prominent articles challenging and defending this theory include: C.P. Manfredi & J.B. Kelly, “Six Degrees of Dialogue: A Response to Hogg and Bushell” (1999) 37 Osgoode Hall L.J. 513-527; Peter W. Hogg and A.A. Thornton, “Reply to ‘Six Degrees of Dialogue’” (1999) 37 Osgoode Hall L.J. 529-536; C.P. Manfredi and J.B. Kelly, “Dialogue, Deference and Restraint: Judicial Independence and Trial Procedures” (2001) 64 Sask. L. Rev. 323-346; and J. Murphy, “Dialogic Responses to M v. H: From Compliance to Defiance” (2001) 59(2) U. of T. Faculty Law Review 299-317. See also Kent Roach, *The Supreme Court on Trial: Judicial Activism or Democratic Dialogue* (Chapter 10: “Dialogue Between Courts and Legislatures”) (Toronto, Ontario: Irwin Law Inc., 2001). Not surprisingly, the dialogue characterization has been attractive to the courts: see for example the Supreme Court of Canada’s comments in *Vriend v. Alberta*, [1998] 1 SCR 493 at paras. 138-139 and *R. v. Mills*, [1999] 3 SCR 668 at para. 57.

Court, but which accomplishes the social or economic objectives that the judicial decision has impeded.”<sup>3</sup> Assuming this premise is true, dialogue theory is a compelling answer to the oft rendered populist complaint of judicial activism under the *Charter*. Specifically, the answer provided by the dialogue theory is that, far from tying the hands of elected lawmakers, court decisions that define *Charter* values merely serve as an impetus for legislatures to rethink and reformulate their objectives within the confines of the *Charter*.

The occurrence of a dialogue between the courts and the legislatures in the *Charter* era is, however, much like the proverbial tree falling in the forest: if no one hears it happen, its sound (or indeed the event itself) is largely inconsequential. In other words, assuming that a judicial / legislative dialogue exists, it can only effectively assuage judicial activism concerns if both sides of the dialogue are readily apparent to the Canadian public. So, the question is: if a dialogue has been taking place between the courts and the legislatures on *Charter* matters, has the Canadian public had an equal opportunity to hear both speakers?<sup>4</sup> This paper attempts to answer this question by using the topic of same sex issues under Section 15 of the *Charter* as a case study and comparing empirically<sup>5</sup> the degree to which court decisions and legislative responses on these matters have been reported to the public.

## II. The Research: Process, Parameters, and Raw Data

In order to develop meaningful and manageable empirical data, the research for this paper was conducted within necessarily narrow parameters. Most important, as noted above, all of the research focusses on a single topic: namely, the application of Section 15 of the *Charter* to sexual orientation or “same sex” issues. A single

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<sup>3</sup> Hogg and Bushell, “The Charter Dialogue between Courts and Legislatures”, *ibid.* at para. 7.

<sup>4</sup> The term “dialogue” is utilized in this paper as a convenient way of describing the occurrence of a legislative response following a court’s finding of a *Charter* violation. However, whether “dialogue” is the most appropriate description of this occurrence is tangential to this study’s central concern. (For discussion on this point, see the sources listed in note 3). The single focus of this paper is to determine whether public attention has been drawn equally to the actions of the courts in finding *Charter* violations as to the subsequent reactions of the relevant legislatures, regardless of what label is used to describe this action/reaction process.

<sup>5</sup> As in most social science matters, the gathering of empirical data is somewhat subjective, being greatly affected by the research parameters. Accordingly, in reviewing the data, particular attention should be paid to the research parameters described in Section II of this paper and the attendant footnotes.

subject area was selected as the research focus for this paper in order to simplify the task of gathering and analysing the empirical data. The subject of same sex equality rights was chosen because this topic is politically, religiously, culturally and socially charged: in media terms, same sex rights is a “hot button” topic. Accordingly, this topic can reasonably be expected to provide fertile ground for collecting data regarding media reports of both court decisions and legislative action. This paper does not, however, attempt to analyse or draw any conclusions regarding the issue of same sex rights under the *Charter* per se. Although some of the data collected could be used to assess the legislative reaction to court decisions on same sex matters or to track the development of Canadian law regarding same sex matters, neither of these issues is expressly dealt with in the analysis offered by this study. Therefore, the sole purpose of this paper is to analyse the degree of public attention drawn to court rulings on same-sex issues and legislative responses to those rulings, while using court rulings and legislative action regarding same sex rights under the *Charter* simply as an example.

While focussing on same sex rights under Section 15 of the *Charter*, the research methodology for this paper generally followed a three step process, with the overall research parameters necessarily becoming further narrowed at each step. (A detailed description of the limitations placed on each stage of the data gathering process is set out in the footnotes accompanying this section). First, all of the court decisions dealing with same sex rights under Section 15 of the *Charter* were identified (the “Section 15 Same Sex Cases”).<sup>6</sup> The resulting twenty-one (21) Section 15 Same Sex

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<sup>6</sup> Generally, the Section 15 Same Sex Cases include all Canadian court decisions challenging government action on the basis of a Section 15 *Charter* violation on the grounds of discrimination against same sex couples. As a practical matter, however, the cases are limited to those in which court decisions were handed down between April 17, 1985 (the date Section 15 of the *Charter* took effect) and December 31, 2001. The latter date is not entirely arbitrary, since any cases after January 1, 2002 would be unlikely to result in a legislative response prior to the publication of this paper. With the primary purpose of this paper being to evaluate public awareness of both court rulings and resulting legislative responses, the opportunity for a legislative response to occur is imperative. As a result of the December 31 cut off point, however, some important and recent court rulings on same sex rights do not appear in this study. See for example *Halpern v. Canada (A.G.)*, [2002] O.J. No. 2714 (Ont. S.C.J. Div. Ct.), online: QL (OJ).

Other same sex / Section 15 cases which are not included in this study are cases which were decided by a quasi-judicial body such as a board, tribunal or council. Assuming that court rulings would ordinarily receive the most media attention, only court decisions are included in the data. Further, only cases where the court made a substantive ruling on the *Charter* question are identified because only these decisions ordinarily would be expected to elicit a substantive legislative response. For this reason, cases decided primarily on procedural grounds are excluded. For example, see *Foundation for Equal Families v. Canada (Attorney General)*, [2000] O.J. No. 1995 (Ont. Sup. Ct. Jus.), online: QL(OJ), wherein the court stayed the application for a declaration that named statutes violated Section 15. Also

Cases are listed chronologically in Figure 1 and are listed according to jurisdiction of the challenged legislation or government action in Figure 2.<sup>7</sup> These cases were reviewed to identify the legislation or government action which formed the basis of the Section 15 challenge and to determine which court decisions found unjustified Section 15 violations (the “Violation Cases”). As summarized in Figure 3, unjustified breaches of the equality right were found in seventeen (17) of the twenty-one (21) Section 15 Same Sex Cases.<sup>8</sup> Second, Legislative Responses<sup>9</sup> to the

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excluded are court cases which tangentially raised Section 15 issues but which were not substantively decided by the court on those grounds. See for example: *Douglas v. Canada*, [1993] 1 F.C. 264 (FCTD), wherein the court affirmed a declaratory judgment which formed part of a settlement agreement by the parties involved in the action; *Canada (Attorney General) v. Mossop*, [1993] 1 SCR 554, in which the court confirmed that the *Canadian Human Rights Act* did not prohibit discrimination on the basis of sexual orientation but in which the court did not have to deal with a *Charter* challenge on this basis; *Vogel v. Manitoba*, [1995] M. J. No. 235 (Man. CA), online: QL (MJ), wherein the court directed the case to be reheard by a pension adjudicator on the basis that the intervening ruling in *Egan* clearly established sexual orientation as an analogous ground in Section 15; and *Re A*, [1999] A.J. No. 1349 (Alta. Q.B.), online: QL(AJ), wherein the court held that newly amended legislation was intended to be interpreted as including same sex couples. Similarly, other excluded cases are those which have been filed but not yet heard, which have been heard but not yet ruled upon, which have been filed or heard but discontinued prior to being ruled upon, or which have yielded only interlocutory decisions up to December 31, 2001. Although occasionally the mere filing of a Section 15 action can spur a substantive legislative response, assessing the public awareness of cases which have been filed but not ruled upon is outside of this paper’s primary goal of evaluating the public’s comparative awareness of *Charter* court rulings versus legislative responses to those rulings.

Finally, with two exceptions, only the highest court level of each case falling within the parameters of this study is included in the research. The first exception is *Veysey v. Correctional Services of Canada*, *infra* Fig. 1, wherein the Federal Court of Appeal affirmed the trial court’s decision but without discussing the *Charter* issue. The second exception is *Quebec (Commission des droits de la personne et des droits de la jeunesse) c. Quebec (Procureure generale)*, *infra* Fig. 1, wherein the Court of Appeal reversed on the trial court’s finding of a Section 15 violation but the Court of Appeal decision was not rendered until 2002. In each of these cases, the trial court decision rather than the Appellate ruling is included in the data for this study.

<sup>7</sup> It is interesting to note that none of the cases falling within the research parameters originated in Manitoba, Saskatchewan or any of the three territories.

<sup>8</sup> Note that the Supreme Court of Canada’s decision in *Egan v. Canada*, *infra* Fig. 1, is not included in the list of Violation Cases. Although the *Egan* case is a significant decision on Section 15 Same Sex rights and although a majority of the Supreme Court of Canada found that the *Old Age Security Act* provision at issue in the case did discriminate against same sex couples in violation of Section 15 of the *Charter*, a majority of the Court also found that this violation was justified under Section 1 of the *Charter*.

<sup>9</sup> For the purposes of this paper, Legislative Responses include only legislative changes specifically directed at the statutory provision or government action at issue in a given case. This means that legislative changes inspired by a court ruling but not at issue in the court ruling are excluded from this study. For example, this paper does not identify Alberta’s *Marriage Amendment Act*, S.A. 2000, c. 3

Violation Cases were identified and reviewed to determine what changes, if any, the relevant legislatures made to the challenged law or government action following the court's ruling in each Violation Case. The results of this review are summarized in Figure 4, which shows that eleven (11) of the seventeen (17) Violation Cases gave rise to Legislative Responses.<sup>10</sup> In total, ten (10) different statutes comprise the

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as a Legislative Response to the Supreme Court of Canada's decision in *Vriend v. Alberta*, *infra* Fig. 1, despite the fact that this statute is, at least in part, a reaction to the *Vriend* ruling. This statute is excluded from this study because it does not impact on the legislative provision directly at issue in *Vriend*.

Similarly, while "it is not uncommon for several jurisdictions, in addition to the one directly affected, to enact changes to legislation in response to a successful *Charter* challenge" (Hogg and Thornton, "Reply to 'Six Degrees of Dialogue'", *supra* n. 2 at para. 10), such changes are not treated as Legislative Responses for the purposes of this study. These indirect legislative responses to Violation Cases are excluded because the media attention provided to these legislative actions cannot be directly compared with the media attention provided to a related Violation Case in the same jurisdiction. This rationale provides another basis for excluding Alberta's *Marriage Amendment Act*, *supra*, from this study: namely, that this statute is a reaction not only to the ruling in *Vriend* but also to the ruling in *M v. H*, *infra* Fig. 1, a case originating from Ontario.

Finally, for the purpose of this study, Legislative Responses include only statutory or regulatory changes which were successfully passed. Laws or amendments which were merely proposed, discussed, or introduced as Bills but which were not ultimately passed, are not included. For instance, Alberta's Bill 38, *Constitutional Referendum Amendment Act, 1999*, 3<sup>rd</sup> Session, 24<sup>th</sup> Leg., 1999 (1<sup>st</sup> reading April 29, 1999; 2<sup>nd</sup> reading May 3, 1999; died on Order paper) is excluded despite the fact that this proposal was partially a response to the *Vriend* decision. Further, silence or inaction by the relevant legislature is not considered a Legislative Response in this paper.

The delineation between enacted legislative changes and proposed legislative changes or legislative inaction was made for several reasons. First, the most obvious examples of a dialogue between courts and legislatures (assuming a dialogue exists) must be situations where court rulings are followed by legislative change, even if such change only involves formally implementing the court's decision or remedy. While an argument may be made that legislative silence is a form of Legislative Response, legislative changes which are successfully enacted undoubtedly fall into this category. In any event, this approach to defining a Legislative Response was also used by Hogg and Bushell, "The *Charter* Dialogue Between Courts and Legislatures", *supra* n. 2 at para. 13 who also point out the difficulty of "documenting all of the occasions when *Charter* cases were discussed within government but were not followed by legislative action." Second, dealing only with legislation which has successfully passed provides a concrete concept of a legislative response. Otherwise, the notion of a legislative response becomes considerably less tangible as one wades through reports of proposed legislation, political "puffery", private members bills and ministerial agendas. Finally, although the most appropriate definition of a Legislative Response may be argued (see the sources listed in note 2 for such discussion), the point of this study is to evaluate the public attention given to *Charter* court rulings versus legislative action responding to those rulings. Court decisions and enacted laws provide a clear and reasonable basis for this comparison.

<sup>10</sup> Note that *Vriend v. Alberta*, *infra* Fig. 1, is not included as a case which received a Legislative Response because the legislative decision to amend the challenged law followed the ruling of the Alberta Court of Appeal (which upheld the legislation) and not the ruling of the Supreme Court of Canada (which found a Section 15 *Charter* violation). Relying on the Court of Appeal decision, the amendments did not alter the challenged statutory provision. The challenged legislation was not

Legislative Responses to the eleven (11) Violation Cases, taking into account the fact that a single Ontario statute revised each of the statutes at issue in four (4) Ontario Violation Cases<sup>11</sup> and that two statutes were amended in reaction to each of the decisions in *Rosenberg v. Canada* and *OPSEU v. Ontario*.<sup>12</sup> Third, Canadian Newspaper Reports<sup>13</sup> were reviewed to determine how much public attention was drawn to each Violation Case and Legislative Response. Of course, public attention would also have been drawn to these matters by other media sources, including periodicals and broadcast mediums, however this study focuses on Newspaper Reports as a single tangible, and hopefully representative measure of the degree of publicity provided to each Violation Case and Legislative Response.<sup>14</sup> Figure 5 lists

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amended following the Supreme Court's ruling. See the note on *Vriend* in Fig. 4.

<sup>11</sup> Specifically, *Amendments Because of the Supreme Court of Canada Decision in M v. H Act, 1999*, revised the statutory provisions at issue in *Re CEG, Kane v. Ontario*, *OPSEU v. Ontario* and *M. v. H*. See Fig. 4.

<sup>12</sup> The Legislative Responses to *Rosenberg v. Canada* are the *Public Sector Pension Investment Board Act* and the *Modernization of Benefits and Obligations Act*. The Legislative Responses to *OPSEU v. Ontario* are the *Pension Benefits Statute Law Amendment Act, 1999* and *Amendments Because of the Supreme Court of Canada Decision in M v. H Act, 1999*. See Fig. 4.

<sup>13</sup> For the purpose of this study, only major Canadian newspapers were reviewed. These include the *Globe & Mail*, the *National Post*, and the major daily newspapers of the provinces where the relevant court cases originated (*i.e.*, generally the jurisdictions of the challenged legislation, except in the case of federal legislation). See Appendix A for a complete list of the sources used to identify Newspaper Reports and of the newspapers included in the study.

In addition to being restricted to stories in selected Canadian newspapers, the Newspaper Reports include only those which appeared within the three days directly prior to or directly following the issuance of the court decision in a Violation Case or the final passage of a Legislative Response. This temporal restriction was imposed on the presumption that a Newspaper Report of a court ruling or a legislative development can reasonably be expected to appear within this time frame. Moreover, this restriction was designed to ensure that the media reports identified dealt with informing the public of the results of Violation Cases and the passage of related Legislative Responses, leaving out reports which discussed same sex issues more generally or which discussed the progress of court actions or legislative reform proposals. More particularly, the Newspaper Reports intentionally exclude: same-sex couple interest stories; letters to the editor; coverage of positions, votes, or policies of a political party made at a convention or as an election pledge or platform; coverage of ministerial announcements of the intention to pursue legislative change or of the introduction or debate of proposed legislative amendments (on the basis that including Newspaper Reports of proposed legislative changes would be inconsistent with the restriction of Legislative Responses to laws which have been enacted: see *supra* note 9); press releases (except as reported in Newspaper Reports falling within the parameters noted above); and results of polls, studies or commission reports.

<sup>14</sup> In restricting the research to a review of Newspaper Reports only, this paper does not attempt to provide a complete picture of public awareness of the Violation Cases and Legislative Responses. Instead, this paper aims to isolate or identify a trend in the degree of public attention generally attracted to these matters. Newspaper Reports provide a measurable basis for observing such a trend.

the Newspaper Reports of the Violation Cases and the Legislative Responses.

Finally, Figure 6 transforms the information from Figure 5 into the numeric data which forms the heart of this study. Specifically, Figure 6 identifies the total number of Newspaper Reports published in Canada regarding all of the Violation Cases (both combined and individually) and regarding all of the Legislative Responses (both combined and individually). Figure 6 also indicates how many of these Newspaper Reports received nation-wide newspaper coverage in either the *Globe & Mail* or the *National Post*.<sup>15</sup>

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<sup>15</sup> In reviewing the data in Figure 6, it is important to remember that this table provides only a quantitative summary of the Newspaper Reports identified in Figure 5. Accordingly, Figure 6 does not provide a substantive evaluation of the Newspaper Reports in terms of length of the articles, depth of coverage in the articles, or placement in the relevant newspapers (e.g. front page versus back section).

**Fig. 1**  
**Chronological Listing of the Section 15 Same Sex Cases <sup>16</sup>**

<i>Andrews et al. v. Ontario (Minister of Health) et al.</i> (1988), 49 D.L.R. (4 <sup>th</sup> ) 584 (Ont. H.C.J.) (QL) [ <i>Andrews v. Ontario</i> ].
<i>Veysey v. Correctional Services of Canada</i> , [1990] 1 F.C. 321 (F.C.T.D.), (aff'd by [1990] F.C.J. No. 468 (F.C.A.) (QL) (without discussion of the <i>Charter</i> issue)) [ <i>Veysey v. Canada</i> ].
<i>Knodel v. British Columbia (Medial Services Commission)</i> , [1991] B.C.J. No. 2588 (B.C. S.C.) (QL), (1991) 58 B.C.L.R. (2d) 356 [ <i>Knodel v. BC</i> ]
<i>Haig v. Canada</i> (1992), 9 O.R. (3d) 495 (Ont. C.A.), rev'g (1991) 5 O.R. (3d) 245 [ <i>Haig v. Canada</i> ].
<i>Layland v. Ontario (Minister of Consumer and Commercial Relations)</i> (1993), 104 D.L.R. (4 <sup>th</sup> ) 214 (Ont. Ct. (Gen. Div. Ct)), leave to appeal granted June 7, 1993; Appeal No. C15711, sub. nom <i>Schoucervou C. et al (formerly Layland) v. Ontario (M.C.C.R.)</i> , dismissed as abandoned 10 April 1997 [ <i>Layland v. Ontario</i> ].
<i>Re K. and B.</i> , [1995] O.J. No. 1425 (Ont. Ct. (Prov. Div.)) (QL), (1995) 125 D.L.R. (4 <sup>th</sup> ) 653 [ <i>Re K. and B.</i> ]
<i>Egan v. Canada</i> , [1995] 2 S.C.R. 513, (1995) 124 D.L.R. (4 <sup>th</sup> ) 609, aff'g (1993) 103 D.L.R. (4 <sup>th</sup> ) 336 (F.C.A.) [ <i>Egan v. Canada</i> ]
<i>Re C.E.G. (No. 1)</i> , [1995] O.J. No. 4072 (Ont. Ct. J.(Gen. Div. Fam. Ct.) (QL); <i>Re C.E.G. (No. 2)</i> , [1995] O.J. No. 4073 (Ont. Ct. J. (Gen. Div. Fam. Ct.)) (QL) [collectively <i>Re CEG</i> ].
<i>Newfoundland and Labrador (Human Rights Commission) v. Newfoundland and Labrador (Minister of Employment and Labour Relations)</i> , [1995] N.J. No. 283 (Nfld. S.C.) (QL), (1995) 127 D.L.R. (4 <sup>th</sup> ) 694 [ <i>Nfld. v. HRC</i> ].
<i>Kane v. Ontario (Attorney-General)</i> , [1997] O.J. No. 3979 (Ont. Ct. J. (Gen. Div.)) (QL) [ <i>Kane v. Ontario</i> ].
<i>Vriend v. Alberta</i> , [1998] 1 S.C.R. 493; rev'g (1996), 132 D.L.R. (4 <sup>th</sup> ) 595 (Alta C.A.), aff'g (1994) 18 Alta L.R. (3d) 286 (Alta. S.C.) [ <i>Vriend v. Alberta</i> ].
<i>R. c. Roy</i> , [1998] A.Q. No. 935 (Qc. C.A.) (QL); (1998) 161 D.L.R. (4 <sup>th</sup> ) 148, rev'g Court of Quebec (Criminal & Penal Division) [ <i>R. c. Roy</i> ].

<sup>16</sup> See *supra* note 6 for the definition of "Section 15 Same Sex Cases."



<p><i>Rosenberg v. Canada (Attorney General)</i>, [1998] O.J. No. 1627 (Ont. C.A.) (QL), (1998) 158 D.L.R. (4<sup>th</sup>) 664, rev'g <i>Canadian Union of Public Employees v. Canada (Attorney General)</i>, [1995] O.J. No. 2531 (Ont. Ct. J.) (QL) [<i>Rosenberg v. Canada</i>].</p>
<p><i>Bleau et Quebec (Commission des droits de la personne et des droits de la jeunesse) c. Quebec (Procureure generale)</i>, [1998] A.Q. No. 3264 (Qc. Sup. Ct. (Civ.)) (QL), rev'd by [2002] J.Q. No. 362 (Qc. C.A.) [<i>Re Bleau</i>].</p>
<p><i>Ontario Public Service Employees Union Pension Plan Trust Fund (Trustees of) v. Ontario Management Board of Cabinet</i>, [1998] O.J. No. 5075 (Ont. Ct. J. (Gen. Div.)) (QL) [<i>OPSEU v. Ontario</i>].</p>
<p><i>M v. H.</i>, [1999] 2 S.C.R. 3, (1999) 171 D.L.R. (4<sup>th</sup>) 577, aff'g (1996) 142 D.L.R. (4<sup>th</sup>) 1 (Ont. C.A.); aff'g (1996) 132 D.L.R. (4<sup>th</sup>) 538 (Ont. Ct. (Gen. Div.)) [<i>M. v. H.</i>].</p>
<p><i>Vincent v. Ontario (Ministry of the Attorney General)</i>, [1999] O.J. No. 4905 (Ont. Sup. Ct. J.) (QL) [<i>Vincent v. Ontario</i>].</p>
<p><i>W.X. v. Y.Z.</i>, [2000] N.B.J. No. 331 (N.B.Q.B.) (QL) [interim order] [<i>W.X. v. Y.Z.</i>].</p>
<p><i>Johnson v. Sand</i>, [2001] A.J. No. 390 (Alta Surr. Ct.) (QL), (2001) A.B.Q.B. 253 [<i>Johnson v. Sand</i>].</p>
<p><i>Re Nova Scotia (Birth Registration No. 1999-02-004200)</i> (sub nom <i>Re M. (S.C.)</i>), [2001] N.S.J. No. 261 (N.S. S.C. (Fam. Div.)) (QL), (2001) 202 D.L.R. (4<sup>th</sup>) 172. [<i>Re Nova Scotia Birth</i>].</p>
<p><i>EGALE Canada Inc. v. Canada (Attorney General)</i>, [2001] B.C.J. No. 1995 (B.C. S.C.) (QL), (2001) 11 W.W.R. 685; <i>Re Canada Marriage Act</i>, [2001] B.C.J. No. 38 (B.C. S.C.) (QL) [currently under appeal][<i>EGALE v. Canada</i>].</p>

**Fig. 2**  
**Section 15 Same Sex Cases<sup>17</sup> listed by Jurisdiction of Legislation / Government**  
**Action Challenged**

Jurisdiction	Decision Date	Court	Case Name
British Columbia	1991	B.C.S.C.	<i>Knodel v. BC</i>
	2001 (currently under appeal)	B.C.S.C.	<i>EGALE v. Canada</i>
Alberta	1998	S.C.C.	<i>Vriend v. Alberta</i>
	2001	Alta. Surr. Ct.	<i>Johnson v. Sand</i>
Ontario	1988	Ont. H.C.J.	<i>Andrews v. Ontario</i>
	1993	Ont. Ct. (Gen. Div. Ct.)	<i>Layland v. Ontario</i>
	1995	Ont. Ct. (Prov. Div.)	<i>Re K. and B.</i>
	1995	Ont. Ct. J. (Gen. Div. Fam. Ct.)	<i>Re C.E.G.</i>
	1997	Ont. Ct. J. (Gen. Div.)	<i>Kane v. Ontario</i>
	1998	Ont. Ct. J. (Gen. Div.)	<i>OPSEU v. Ontario</i>
	1999	S.C.C.	<i>M v. H.</i>
	1999	Ont. Sup. Ct. J.	<i>Vincent v. Ontario (Ministry of the Attorney General)</i>

<sup>17</sup> See *supra* note 6 for the definition of "Section 15 Same Sex Cases."

Jurisdiction	Decision Date	Court	Case Name
Quebec	1998 (rev'd 2002)	Qc. Sup. Ct. (Civ.)	<i>Re Bleau</i>
Nova Scotia	2001	N.S. S.C. (Fam. Div.)	<i>Re Nova Scotia Birth</i>
New Brunswick	2000	N.B.Q.B.	<i>W.X. v. Y.Z.</i>
Newfoundland	1995	Nfld. S.C.	<i>Nfld. v. HRC</i>
Federal	1990	F.C.T.D.	<i>Veysey v. Canada</i>
	1992	Ont. C.A.	<i>Haig v. Canada</i>
	1995	S.C.C.	<i>Egan v. Canada</i>
	1998	Qc. C.A.	<i>R. c. Roy</i>
	1998	Ont. C.A.	<i>Rosenberg v. Canada</i>

Fig. 3

Statutory Provisions at Issue and Results of Section 15 Same Sex Cases<sup>18</sup>

(Note: Shaded cases are those in which an unjustified violation of Section 15 was found)

Case Name	Date of Judgment	Court	Statutory Provision or Government Action Challenged Under Section 15 of the Charter	Court Ruling
<i>Andrews v. Ontario</i>	March 4, 1988	Ont. H.C.J.	Definition of spouse in <i>Health Insurance Act</i> , R.S.O. 1980, c. 197.	No violation of Section 15.
<i>Veysey v. Canada</i>	Nov. 3, 1989	F.C.T.D.	Decision of commissioner not to allow homosexual partners to participate in the Private Family Visiting Program.	Violation of Section 15; Not justified under Section 1. Remedy: Order issued requiring commissioner to reconsider the application for participation in accordance with Section 15 of the <i>Charter</i> .
<i>Knodel v. BC</i>	Aug. 30, 1991	B.C.S.C.	Definition of spouse in s. 2.01 of the <i>Medical Services Act</i> , R.S.B.C. 1979, c. 255.	Violation of Section 15; Not justified under Section 1. Remedy: Read same sex couples into the definition.

<sup>18</sup> See *supra* note 6 for the definition of "Section 15 Same Sex Cases".

Case Name	Date of Judgment	Court	Statutory Provision or Government Action Challenged Under Section 15 of the Charter	Court Ruling
<i>Haig v. Canada</i>	Aug. 6, 1992	Ont. C.A.	Absence of sexual orientation from list of prescribed grounds in s. 3 of the <i>Canadian Human Rights Act</i> , R.S.C. 1985, c. H-6.	Violation of Section 15; Not justified under Section 1. Remedy: Interpret the statute as though sexual orientation was listed as a prohibited ground.
<i>Layland v. Ontario</i>	Mar. 17, 1993	Ont. Ct. Jus.	Refusal of Ottawa city clerk to issue marriage license to same sex couple pursuant to s. 8(4) of the <i>Marriage Act</i> on the basis of the common law definition of marriage.	No violation of Section 15.
<i>Re K and B</i>	May 24, 1995	Ont. Ct. (Prov. Div.)	Definition of spouse in <i>Child and Family Services Act</i> , R.S.O. 1990, c. C.11, s. 136(1).	Violation of Section 15; Not justified under Section 1. Remedy: Read same sex couples into the definition.
<i>Egan v. Canada</i>	May 25, 1995	S.C.C.	Definition of spouse in <i>Old Age Security Act</i> , R.S.C. 1985, c. O-9.	Violation of Section 15; Justified under Section 1.

Case Name	Date of Judgment	Court	Statutory Provision or Government Action Challenged Under Section 15 of the Charter	Court Ruling
<i>Re CEG</i>	Aug. 17, 1995	Ont. Ct. J. (Gen. Div. Fam. Ct.)	Definition of spouse in <i>Child and Family Services Act</i> , R.S.O. 1990, c. C.11, s. 136(1) & 146(4)(b).	Violation of Section 15; Not justified under Section 1. Remedy: Read same sex couples into the definitions.
<i>Nfld v. HRC</i>	Aug, 23, 1995	Nfld. S.C.	Absence of sexual orientation as a prohibited ground of discrimination in the Newfoundland <i>Human Rights Code</i> , R.S.N. 1990, c. H-14.	Violation of Section 15; Not justified under Section 1. Remedy: Read sexual orientation into the legislation.
<i>Kane v. Ontario</i>	Oct. 1, 1997	Ont. Ct. J. (Gen. Div.)	Definition of spouse in <i>Insurance Act</i> , R.S.O., s. 224(1).	Violation of Section 15; Not justified under Section 1. Remedy: Read same sex couples into the definition.
<i>Vriend v. Alberta</i>	April 2, 1998	S.C.C.	Absence of sexual orientation as a prohibited ground of discrimination in the <i>Individual Rights Protection Act</i> , R.S.A. 1980, c. I-2.	Violation of Section 15; Not justified under Section 1. Remedy: Read sexual orientation into the legislation.
<i>R. c. Roy</i>	April 15, 1998	Qc. C.A.	S. 159 of the <i>Criminal Code</i> , R.S.C. 1985, c. 19 (3 <sup>rd</sup> Supp), s. 3	Violation of Section 15; Not justified under Section 1. Remedy: Law Invalid.

Case Name	Date of Judgment	Court	Statutory Provision or Government Action Challenged Under Section 15 of the Charter	Court Ruling
<i>Rosenberg v. Canada</i>	April 23, 1998	Ont. C.A.	<i>Income Tax Act</i> , R.S.C. 1985 (5 <sup>th</sup> Supp.), s. 252(4) and associated regulations pursuant to which the Dept. of National Revenue refused to register a pension plan including same-sex benefits.	Violation of Section 15; Not justified under Section 1. Remedy: Read same sex couples into the legislation.
<i>Re Bleau</i>	Nov. 13, 1998	Qc. Sup. Ct. (Civ.)	Failure of <i>An Act Respecting the Quebec Pension Plan</i> , R.S.Q., c. R-9, ss. 91 and 91.1, to recognize common law relationships involving two persons of the same sex.	Violation of Section 15; Not justified under Section 1. Remedy: Suspended declaration of invalidity (180 days).
<i>OPSEU v. Ontario</i>	Dec. 8, 1998	Ont. Ct. J. (Gen. Div.)	Definition of spouse in OPSEU Pension Plan and OPSEU Pension Benefits Act 1994.	Violation of Section 15; Not justified under Section 1. Remedy: Read same sex couples into the definition.
<i>M. v. H</i>	May 20, 1999	S.C.C.	Definition of Spouse in Section 29 of the <i>Family Law Act</i> , R.S.O. 1990, c. F-3.	Violation of Section 15; Not justified under Section 1. Remedy: Suspended (6 month) severance of s. 29.

Case Name	Date of Judgment	Court	Statutory Provision or Government Action Challenged Under Section 15 of the Charter	Court Ruling
<i>Vincent v. Ontario</i>	Dec. 20, 1999	Ont. Sup. Ct. J.	Failure of <i>Ontario Human Rights Code</i> , R.S.O. 1990, c. H.19 to apply to same sex relationships.	Violation of Section 15; Not justified under Section 1. Remedy: Read same sex couples into the definition.
<i>W.X. v. Y.Z.</i>	Aug. 9, 2000	N.B.Q.B	Definition of spouse in s. 1 and s. 112(3) of the <i>Family Services Act</i> , S.N. B. 1983, c. 16.	Violation of Section 15; Not justified under Section 1. Remedy: Interim Order granted to applicants allowing for Act to apply to the same sex relationship.
<i>Johnson v. Sand</i>	April 2, 2001 / additional reasons April 17, 2001	Alta. Surr. Ct.	Definition of spouse in <i>Intestate Succession Act</i> , R.S.A. 1980, c. I-9, ss. 3 and 4.	Violation of Section 15; Not justified under Section 1. Remedy: Suspended declaration of invalidity.



Case Name	Date of Judgment	Court	Statutory Provision or Government Action Challenged Under Section 15 of the Charter	Court Ruling
<i>Re Nova Scotia Birth</i>	June 28, 2001	N.S.S.C. (Fam. Div.)	Failure of <i>Children and Family Services Act</i> , S.N.S. 1990, c. 5, ss 72 and 80 to apply to same sex couples.	Violation of Section 15; Not justified under Section 1. Remedy: Sever statutory references to married partners and read in words common law partner (which include same-sex partners under the <i>Law Reform (2000) Act</i> , S.N.S. 2000, c. 29.)
<i>EGALE v. Canada</i>	Oct. 2, 2001	B.C.S.C.	Refusal of B.C. Director of Vital Statistics to issue marriage license to same sex couple.	No violation of Section 15.

**Fig. 4**  
**Legislative Responses<sup>19</sup> to Violation Cases<sup>20</sup>**  
 (Note: Shaded cases are those which received a Legislative Response)

Case Name	Violating Legislation or Government Action	Court Imposed Remedy	Legislative Response
<i>Veysey v. Canada</i>	Decision of commissioner not to allow homosexual partners to participate in the Private Family Visiting Program.	Order issued requiring commissioner to reconsider the application for participation in accordance with Section 15 of the <i>Charter</i> .	None.
<i>Knodel v. BC</i>	Definition of spouse in s. 2.01 of the <i>Medical Services Act</i> , R.S.B.C. 1979, c. 255.	Read same sex couples into the definition.	<i>Definition of Spouse Amendment Act</i> , 2000, S.B.C. 1000, c. 24, s. 26 amending <i>Medicare Protection Act</i> , R.S.B. 1996, c. 286 (the successor legislation to the <i>Medical Services Act</i> ) to define spouse as including a "marriage like relationship between persons of the same gender."

<sup>19</sup> See *supra* note 9 for the definition of "Legislative Response".

<sup>20</sup> As indicated in the text in Part II, "Violation Cases" are the Section 15 Same Sex Cases in which the relevant courts found an unjustified violation of Section 15 (that is, a violation which was not saved under Section 1 of the *Charter*).

Case Name	Violating Legislation or Government Action	Court Imposed Remedy	Legislative Response
<i>Haig v. Canada</i>	Absence of sexual orientation from list of prescribed grounds in s. 3 of the <i>Canadian Human Rights Act</i> , R.S.C. 1985, c. H-6.	Interpret the statute as though sexual orientation was listed as a prohibited ground.	<i>Canadian Human Rights Act</i> , R.S.C. 1985, c.H-6 (ss. 2, 3(1), as amended by S.C. 1996, c. 14 expressly including sexual orientation as a prohibited ground of discrimination.
<i>Re K and B</i>	Definition of spouse in <i>Child and Family Services Act</i> , R.S.O. 1990, c. C.11, s. 136(1).	Read same sex couples into the definition.	None.  (Not included in <i>Amendments Because of the Supreme Court of Canada Decision in M. v. H Act</i> , 1999).
<i>Re CEG</i>	Definition of spouse in <i>Child and Family Services Act</i> , R.S.O. 1990, c. C.11, s. 136(1) & 146(4)(b).	Read same sex couples into the definitions.	<i>Amendments Because of the Supreme Court of Canada Decision in M. v. H. Act</i> , 1999, S.O. 1999, c. 6, s. 6 amends s. 146(4)(c) of the <i>Child and Family Services Act</i> to allow application for adoption "by any other individuals that the court may allow, having regard to the best interests of the child" but the definition of spouse is unchanged.

Case Name	Violating Legislation or Government Action	Court Imposed Remedy	Legislative Response
<i>Nfld. v. HRC.</i>	Absence of sexual orientation as a prohibited ground of discrimination in the Newfoundland <i>Human Rights Code</i> , R.S.N. 1990, c. H-14.	Read sexual orientation into the legislation.	<i>An Act to Amend the Human Rights Code</i> , S.N. 1997, c. 18, s. 2 amends the <i>Human Rights Code</i> , R.S.N. 1990, c. H-14, ss 6-9, 12 to include sexual orientation as a prohibited ground of discrimination.
<i>Kane v. Ontario</i>	Definition of spouse in <i>Insurance Act</i> , R.S.O., s. 224(1).	Read same sex couples into the definition.	<i>Amendments Because of the Supreme Court of Canada Decision in M. v. H. Act, 1999</i> , S.O. 1999, c. 6, s. 31(4) amends the <i>Insurance Act</i> to include a same sex partner.
<i>Vriend v. Alberta</i>	Absence of sexual orientation as a prohibited ground of discrimination in the <i>Individual Rights Protection Act</i> , R.S.A. 1980, c. I-2.	Read sexual orientation into the legislation.	None.  Note: Following the Alberta Court of Appeal ruling in 1996 finding no violation of the <i>Charter</i> , the province passed the <i>Individual's Rights Protection Amendment Act</i> , S.A. 1996, c. 25 which renamed the IRPA as the <i>Human Rights, Citizenship and Multiculturalism Act</i> but did not expressly add sexual orientation as a prohibited ground of discrimination.

Case Name	Violating Legislation or Government Action	Court Imposed Remedy	Legislative Response
<i>R. c. Roy</i>	S. 159 of the <i>Criminal Code</i> , R.S.C. 1985, c. 19 (3 <sup>rd</sup> Supp), s. 3	Law invalid.	None.
<i>Rosenberg v. Canada</i>	<i>Income Tax Act</i> , R.S.C. 1985 (5 <sup>th</sup> Supp.), s. 252(4) and associated regulations pursuant to which the Dept. of National Revenue to refuse to register a pension plan including same-sex benefits.	Read same sex couples into the legislation.	<i>Public Sector Pension Investment Board Act</i> , S.C. 1999, c.34, s. 53 amends the <i>Public Service Superannuation Act</i> to remove reference to opposite sex couples.  <i>Modernization of Benefits and Obligations Act</i> , S.C. 2000, c. 12, ss.141 and 142 amends the <i>Income Tax Act</i> to include same-sex beneficiaries in pension issues.
<i>Re Bleau</i>	Failure of <i>An Act Respecting the Quebec Pension Plan</i> , R.S.Q., c. R-9, ss. 91 and 91.1 to recognize common law relationships involving two persons of the same sex.	Suspended declaration of invalidity (180 days). Read the section in accordance with the <i>Charter</i> as including same sex couples.	<i>An Act to Amend Various Legislative Provisions Concerning de facto Spouses</i> , 1999, c. 14 ss. 16 & 17 amends <i>An Act Respecting the Quebec Pension Plan</i> to recognize same sex couples.

Case Name	Violating Legislation or Government Action	Court Imposed Remedy	Legislative Response
<i>OPSEU v. Ontario</i>	Definition of spouse in OPSEU Pension Plan and OPSEU Pension Benefits Act 1994.	Read same sex couples into the definition.	<p><i>Amendments Because of the Supreme Court of Canada Decision in M. v. H. Act, 1999, S.O. 1999, c. 6, s. 53 amends the Pension Benefits Act to recognize same-sex couples.</i></p> <p><i>Pension Benefits Statute Law Amendment Act, 1999, S.O. 1999, c. 15 further amends the Pension Benefits Act to recognize same-sex couples.</i></p>
<i>M. v. H</i>	Definition of Spouse in Section 29 of the <i>Family Law Act</i> , R.S.O. 1990, c. F-3.	Suspended (6 month) severance of s. 29.	<p><i>Amendments Because of the Supreme Court of Canada Decision in M. v. H. Act, 1999, S.O. 1999, c. 6, s.25(2) amends the Family Law Act to include same-sex couples.</i></p>
<i>Vincent v. Ontario</i>	Failure of <i>Ontario Human Rights Code</i> , R.S.O. 1990, c. H.19 to apply to same sex relationships.	Read same sex couples into the definition.	None.

Case Name	Violating Legislation or Government Action	Court Imposed Remedy	Legislative Response
<i>W.X. v. Y.Z.</i>	Definition of spouse in s. 1 and s. 112(3) of the <i>Family Services Act</i> , S.N. B. 1983, c. 16.	Interim Order granted to applicants allowing for Act to apply to the same sex relationship.	<i>An Act to Amend the Family Services Act</i> , S.N.B. 2000, c. 59, ss. 1 and 112(3) amends the <i>Family Services Act</i> to include same sex couples.
<i>Johnson v. Sand</i>	Definition of spouse in <i>Intestate Succession Act</i> , R.S.A. 1980, c. 1-9, ss. 3 and 4.	Suspended declaration of invalidity.	<i>Intestate Succession Amendment Act, 2002</i> , S.A. 2002, c. 16, s. 2 amends the <i>Intestate Succession Act</i> to recognize same sex couples.
<i>Re NS Birth</i>	Failure of <i>Children and Family Services Act</i> , S.N.S. 1990, c. 5, ss 72 and 80 to apply to same sex couples.	Sever statutory references to married partners and read in words "common law partner" (which include same-sex partners under the <i>Law Reform (2000) Act</i> , S.N.S. 2000, c. 29.)	None.

**Fig. 5  
Newspaper Reports<sup>21</sup> on Violation Cases<sup>22</sup> and Legislative Responses<sup>23</sup>**

Case Name	Newspaper Reports of Court Ruling	Newspaper Reports of Direct Legislative Responses
<i>Knodel v. BC</i>	None	None
<i>Haig v. Canada</i>	<p>* "Ontario court uses power to 'read in' words not law: judges effectively add sexual orientation to list of grounds in human rights code" (GM, 8 Aug. 1992) A1,A5</p> <p>* "Metro's 300,000 gays, lesbians struggle for respect" (TS, 8 Aug. 1992) A1, A10</p> <p>* "Court victory 'opens door' in battle for gay rights: lawyers" (MG, 7 Aug. 1992) B1</p> <p>* "Rights act discriminates against gays, court rules" (GM, 7 Aug. 1992) A4</p> <p>* "Rights law ruled unfair to lesbians, gays" (TS, 7 Aug. 1992) A1</p> <p>* "Ontario court rules rights act discriminatory" (VS, 7 Aug. 1992) A4</p> <p>* "Gays win Ontario court victory" (WFP, 7 Aug. 1992) A5</p> <p>* "Gays win court victory: human rights act pronounced unconstitutional" (CH, 7 Aug. 1992) B5.</p>	<p>* "MP's consider limits on gay rights bill" (FP (National ), 8 May 1996) 2</p>

<sup>21</sup> See *supra* note 13 for the definition of "Newspaper Reports." See also Appendix A for a listing of the full names of the newspapers abbreviated in this table.

<sup>22</sup> See *supra* note 20.

<sup>23</sup> See *supra* note 9 for the definition of "Legislative Response."



Case Name	Newspaper Reports of Court Ruling	Newspaper Reports of Direct Legislative Responses
<i>Re CEG</i>	None	See Newspaper Reports re <i>M v. H</i> . Legislative Response
<i>Commission v. Nfld.</i>	None	* "Newfoundland extends protection to gays" (VS, 10 December 1997) A10
<i>Kane v. Ontario</i>	* "Act violates homosexual rights, court says" (GM A1, OC A1, GZ A10, 3 Oct. 1997)	See Newspaper Reports re <i>M v. H</i> . Legislative Response
<i>Rosenberg v. Canada</i>	* "Ontario ruling benefits gays" (GM A3, OC A1, MG A6, TS A1, 24 April 1998)  * J. Saunders, "Ottawa can't block benefits to gay survivors, judge rules" (GM, 24 April 1998)	* S. Thorne, "Pension bill sparks dissent among Liberals" (TS, 25 May 99)  * "Same-sex pension bill passes" (TS, 26 May 99)  * "Liberal Backbenchers Rebel" (OC A3, 12 April 2000)
<i>Bleau c. Commission</i>	None.	None.
<i>OPSEU v. Ontario</i>	* P. Gombu, "Court rules same-sex couples have pension rights" (TS, 10 Dec. 1998)	See <i>M. v. H</i> . Legislative Response.
<i>M v. H</i>	* "Gay rights ruling could affect law across Canada" (CH, EJ, OC, MG, 19 May 1999)  * "Landmark ruling on lesbian's claim due tomorrow: high court challenge could force revision of dozens of laws" (NP, 19 May 1999) A9  * T. MacCharles, "Same-sex ruling may force hand in elections" (TS, 20 May 1999)  * J. Ibbitson, "Harris says he will abide by high court's same-sex ruling" (NP, 21 May 1999)	* "Tories set to move on same-sex legislation" (TS, 25 Oct. 1999)  * "Supreme bias" (NP, 25 Oct. 1999) A15  * "Ontario extends legal rights to same-sex couples" (NP, 26 Oct. 1999) A5  * "W. McCann, "Ontario grudgingly passes gay-rights bill" (GM, 28 Oct. 1999) A7  * "Ontario passes legislation granting same-sex rights" (MG, 28 Oct. 1999)

Case Name	Newspaper Reports of Court Ruling	Newspaper Reports of Direct Legislative Responses
<p><i>M v. H</i> [continued]</p>	<ul style="list-style-type: none"> <li>* "The word 'spouse' has been redefined; Court rules for equal, fair treatment" (EJ, 21 May 1999)</li> <li>* "Landmark judgment on gay rights" (TS, 21 May 1999)</li> <li>* "A spouse is a spouse regardless of gender" (GM, 21 May 1999) A16</li> <li>* M. Gibb-Clark, "Same-sex ruling may force change in benefit plan" (GM, 21 May 1999)</li> <li>* S.J. Green, "Toronto's gay community euphoric over court's ruling" (TS, 21 May 1999)</li> <li>* "Gays win big legal fight: Top court backs rights for same-sex couples" (MG, 21 May 1999)</li> <li>* "Victory for gay activists" (TS, 21 May 1999)</li> <li>* "Gays applaud same-sex decision" (OC, CH, 21 May 1999)</li> <li>* "Alta. eyes ruling on gay rights; Province weighs its options as court extends spousal status" (EJ, 21 May 1999)</li> <li>* "Human dignity is violated by the definition: excerpts from yesterday's judgment" (TS, 21 May 1999)</li> <li>* "What was said: court strikes down definition of spouse" (EJ, 21 May 1999)</li> <li>* "Avoid notwithstanding clause, critics say" (EJ, 22 May 1999)</li> </ul>	<p>[see previous page]</p>

Case Name	Newspaper Reports of Court Ruling	Newspaper Reports of Direct Legislative Responses
<i>W.X. v. Y.Z.</i>	None.	None.
<i>Johnson v. Sand</i>	* "Gays deserve equal estate rights - court" (EJ, CH, 3 April 2001)  * "Charter case prompts Alberta to review laws affecting gays" (NP, 3 April 2001)	* K. Cryderman, "Gay man's quest became a major court challenge" (EJ, 8 May 2002)  * J. Mahoney, "Alberta to protect same-sex rights" (GM A7, 8 May 2002)

Figure 6  
Number of Newspaper Reports<sup>24</sup> of Violation Cases<sup>25</sup> & Legislative Responses<sup>26</sup>

Case Name	Court Level	Total No. of Newspaper Reports of the Violation Case	No. of National Newspaper Reports of the Violation Case	Total No. of Newspaper Reports of the Legislative Response	Total No. of National Newspaper Reports of the Legislative Response
<i>Knodel v. BC</i>	B.C.S.C.	0	0	0	0
<i>Haig v. Canada</i>	Ont. C.A.	8	2	1	1
<i>Re CEG</i>	Ont. Ct. J. (Gen. Div. Fam. Ct.)	0	0	See <i>M v. H.</i>	See <i>M. v. H.</i>

<sup>24</sup> See *supra* note 13 for the definition of "Newspaper Reports".

<sup>25</sup> See *supra* note 20.

<sup>26</sup> See *supra* note 9 for the definition of "Legislative Response".

Case Name	Court Level	Total No. of Newspaper Reports of the Violation Case	No. of National Newspaper Reports of the Violation Case	Total No. of Newspaper Reports of the Legislative Response	Total No. of National Newspaper Reports of the Legislative Response
<i>Nfld. v. HRC.</i>	Nfld. S.C	0	0	1	0
<i>Kane v. Ontario</i>	Ont. Ct. J. (Gen. Div.)	1 [3]*	1	See <i>M v. H</i>	See <i>M v. H</i>
<i>Rosenberg v. Canada</i>	Ont. C.A.	2 [5]*	2	3	0
<i>Re Bleau</i>	Qc. Sup. Ct. (Civ.)	0	0	0	0
<i>OPSEU v. Ontario</i>	Ont. Ct. J. (Gen. Div.)	1	0	See <i>M. v. H</i>	See <i>M. v. H</i>
<i>M v. H</i>	S.C.C.	17 [21]*	4	5	3
<i>W.X. v. Y.Z.</i>	N.B.Q.B.	0	0	0	0
<i>Johnson v. Sand</i>	Alta. Surr. Ct.	2 [3]*	1	2	1
<b>TOTALS</b>		<b>31 [40]*</b>	<b>10</b>	<b>12</b>	<b>5</b>

\* Numbers in square brackets represent the total number of Newspaper Reports, including duplicated articles. Unbracketed numbers refer to original articles only, without counting duplicated articles as separate Newspaper Reports.

### III. Analysis of the Data: Is Public Attention Being Drawn Equally to Court Rulings of Section 15 *Charter* Violations on Same Sex Issues and to the Legislative Responses to These Rulings?

Although Figure 6 reduces the information collected for this study into numerical data, the inherent social science nature of the research and the necessarily narrow research parameters<sup>27</sup> prohibits a strictly scientific analysis of these numbers in terms of determining exactly how much public attention has been drawn to court rulings and legislative responses on Section 15 *Charter* violations in same sex cases. As already noted,<sup>28</sup> these numbers do not recognize variances in the depth of coverage provided by the Newspaper Reports or in the prominence given to the Newspaper Reports within the relevant newspapers. Furthermore, these numbers do not take into account the degree of public interest in or acceptance of same sex issues at the time the Violation Cases were decided or the Legislative Responses were reported, both of which may affect the willingness of newspapers to publish articles on these matters. Even if the nature of the data did lend itself to purely scientific analysis, the final sample size of only eleven Violation Cases would be of questionable scientific value. Empirical analysis of the data is complicated further by the fact that four (4) of the Legislative Responses are included in one statute which was passed following the Supreme Court of Canada's decision in *M v. H*.<sup>29</sup> The degree of media attention provided to these Legislative Responses is undoubtedly impacted by the degree of media attention given to the *M v. H* case itself. While such influences preclude a purely scientific analysis of the data in Table 6, however, the research does give rise to several useful observations regarding the degree to which Newspaper Reports have drawn public attention to the Violation Cases as compared to the Legislative Responses.

Looking at the total number of Newspaper Reports for all of the Violation Cases and all of the Legislative Responses, the data indicates that Violation Cases have received approximately three times as much newspaper coverage as the Legislative Responses. The Violation Cases have been the subject of thirty-one (31) original Newspaper Reports (forty (40) if multiple publications are counted) while Legislative Responses have been the subject of only twelve (12) Newspaper Reports. By further restricting the analysis to Newspaper Reports appearing in either the

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<sup>27</sup> See Part II of this paper and the attendant footnotes.

<sup>28</sup> *Supra* note 15.

<sup>29</sup> See *supra* note 11.

*Globe & Mail* or the *National Post*, the data indicates that Violations Cases have received approximately double the newspaper coverage received by the Legislative Responses (ten (10) Newspaper Reports of Violation Cases compared to five (5) Newspaper Reports of Legislative Responses).

Of course, simply looking at the data on a case by case basis, the difference in newspaper reports on Violation Cases and Legislative Responses is not so striking in every instance. In particular, the number of Newspaper Reports for both the court ruling and the Legislative Response is very low with respect to most Violation Cases decided by the lower level courts.<sup>30</sup> In three (3) of the Violation Cases decided by lower courts, no newspaper coverage was provided with respect to either the court ruling or the Legislative Response.<sup>31</sup> In other cases decided by lower courts, the discrepancy in the number of Newspaper Reports of Violation Cases versus Legislative Responses was minimal (a difference of one or two Newspaper Reports)<sup>32</sup> or non-existent (the court ruling and the Legislative Response received equal attention).<sup>33</sup>

In contrast, the number of Newspaper Reports of both Violation Cases and Legislative Responses is significant with respect to Violation Cases decided by an Appellate court or by the Supreme Court of Canada. As indicated by Figure 6, the three cases which fall into this category are *Rosenberg v. Canada*, *Haig v. Canada*, and *M v. H*. Of these, *Rosenberg* received the least press, and no obvious distinction is apparent when comparing the amount of respective newspaper coverage provided to the Violation Case and the Legislative Response. The court ruling was reported in two (2) original Newspaper Reports (five (5) if multiple publications are counted) and the Legislative Response was covered in three (3) Newspaper Reports. Slightly more media coverage arose from *Haig v. Canada*, and a significant discrepancy is apparent between the coverage of the Violation Case and the coverage of the Legislative Response. Specifically, the court ruling was covered in eight (8) original

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<sup>30</sup> The exceptions, of course, are *Re CEG, Kane v. Ontario* and *OPSEU v. Ontario*, the three Ontario lower court Violation Cases which did not receive legislative responses until the Ontario government passed omnibus legislation following the Supreme Court of Canada's decision in *M v. H*. See *supra* note 11. The number of Newspaper Reports associated with these Legislative Responses are attributable in large part to the fact that the legislative amendments were part of a broad-based legislative reaction to the *M v. H* decision.

<sup>31</sup> See *Knodel v. BC, Re Bleau*, and *W.X. v. Y.Z.*, *supra* Figure 6.

<sup>32</sup> See *Nfld. v. HRC*, *supra* Figure 6.

<sup>33</sup> See *Johnson v. Sand*, *supra* Figure 6.

Newspaper Reports, while the Legislative Response was covered in only one (1) original Newspaper Report. Finally, the highest number of Newspaper Reports arose from the *M. v. H.* case as did the greatest imbalance in reporting the court ruling versus the Legislative Response. There were seventeen (17) original Newspaper Reports on the court ruling (twenty-one (21) if duplicate reports are counted) and five (5) Newspaper Reports on the Legislative Response.

Therefore, two general trends are apparent from the data: first, the higher the level of court deciding the case, the more newspaper coverage the matter received, both in terms of the Violation Case and the Legislative Response. In particular, the Supreme Court of Canada ruling and the associated Legislative Response received the greatest amount of newspaper coverage by far, an occurrence which is not particularly surprising given the legal importance of Supreme Court decisions. Second, and more surprisingly, the more newspaper coverage provided to a Violation Case, the greater the discrepancy between the number of Newspaper Reports of the Violation Case and the number of Newspaper Reports of the Legislative Response. Wide publication of a Violation Case has simply not been matched in publication of the attendant Legislative Response. Accordingly, it appears that, even where Newspaper Reports have drawn public attention to Violation Cases, Newspaper Reports have not drawn equal public attention to the Legislative Responses.

If, however, one considers only Newspaper Reports in Canada's two national papers (the *Globe & Mail* and the *National Post*), the discrepancy in reporting court rulings versus Legislative Responses is not nearly as apparent, even with respect to the Appellate and Supreme Court of Canada decisions. As indicated in Figures 5 and 6, the court ruling in *M. v. H.* was reported four (4) times in the national papers (twice in the *Globe & Mail* and twice in the *National Post*) while the Legislative Response was reported three (3) times in these papers (twice in the *National Post* and once in the *Globe & Mail*). With respect to the *Haig* case, Figures 5 and 6 show two Newspaper Reports of the court ruling in national papers (both in the *Globe & Mail*) and one such reporting of the Legislative Response (in the *National Post*). Finally, the court ruling in *Rosenberg* was reported in twice in national papers (both in the *Globe & Mail*), with no such Newspaper Reports of the Legislative Response. This data suggests a positive correlation whereas, when one of the national papers reports a Violation Case, similar coverage of the Legislative Response has generally

occurred.<sup>34</sup>

#### IV. Possible Explanations for the Demonstrated Trends

The remaining challenge presented by the data is to explain why the Legislative Responses are generally under-reported as compared to the Violation Cases, at least in terms of higher level court cases. One explanation is that the Legislative Responses to date have generally mirrored the court rulings and remedies and therefore have been less worthy of note than the Violation Cases themselves. This explanation suggests that, at least from the media's perspective, the Legislative Response is really a non-event because the legislature hasn't added to or changed the state of the law as determined by the court. Another explanation is that the Legislative Responses actually received more newspaper coverage than is apparent from the data in this study because the newspapers covered the Legislative Response at the time it was proposed or debated as opposed to the time it was passed.<sup>35</sup> Finally, another rationale is that the Violation Cases were worthy of newspaper coverage because they identify an important and relatively new occurrence in the development of our law: namely, the decisions of courts to overrule legislation which conflicts with *Charter* values. By contrast, legislative action is not worth reporting because the activity of elected representatives changing or passing laws is an expected occurrence and is not new in the *Charter* era.

It is impossible to determine with any degree of certainty which, if any, of the above arguments explains the discrepancy of newspaper coverage of Violation Cases versus Legislative Responses. In fact, any of these arguments alone or in combination may provide the true explanation behind the trends noted in the data.<sup>36</sup> However, the problem is that all of these arguments raise a typical chicken and egg dilemma. The arguments all suggest that Legislative Responses have not been reported because these reactions are somehow not important in the *Charter* era. In fact, these reactions may be popularly viewed as unimportant or insignificant

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<sup>34</sup> To the extent that the national coverage was not always provided by the same newspaper and to the extent that each national paper has a different readership, public attention still may not be evenly drawn to the Violation Cases and the Legislative Responses.

<sup>35</sup> In fact, in conducting the research necessary to generate the data for this study, it was noted that more newspaper coverage was typically devoted to the progress of court cases and Legislative Responses than to court decisions and legislative enactments.

<sup>36</sup> Except that none of these arguments satisfactorily explains why the national newspapers appears to have provided relatively even reporting of the Violation Cases and the Legislative Responses.



precisely because they are unreported. Accordingly, the arguments outlined above all illustrate, rather than resolve, the essential problem in the relative under-reporting of the Legislative Responses.

Whether or not one views the Legislative Responses as part of a *Charter* dialogue between the courts and the legislatures, each Legislative Response is indicative of a legislative choice by our elected representatives. The popular criticism of the *Charter* as a tool of judicial activism is based on the notion that the *Charter* and the *Charter* rulings of Canadian courts remove, replace or decrease the lawmaking power of the legislatures. In order for the merits of this criticism to be intelligently debated by the public, the lawmaking activities of the legislatures must be brought to the public's attention. The appropriateness, desirability, or impact of a Legislative Response cannot be assessed until the public is made aware of the existence of the response, even if that response is to agree with or follow the ruling of a court. In short, the public is not in a position to criticize the nature of the dialogue or exchange between the courts and the legislatures under the *Charter* until the public is aware of the occurrence of this dialogue or exchange. Moreover, reporting only the progress of court cases or proposed legislation does not provide an accurate picture of what the courts and the legislatures have actually done, but only of what they might do.

## V. Conclusion: Coming to the Forest

Using Newspaper Reports of Section 15 Same Sex *Charter* cases as an example, the focus of this research study set out to determine whether the Canadian public has been equally informed about the respective roles played by the courts and by the legislatures in resolving legislative conflicts with *Charter* values. With the exception of newspaper coverage in papers with nation-wide circulation, the data obtained indicates that newspaper coverage of Violation Cases has been more frequent than newspaper coverage of Legislative Responses. Rather distressingly, this trend is particularly notable with respect to high level court decisions, suggesting that the Canadian public may receive a particularly skewed view of the activities of the Supreme Court of Canada and the attendant activities of the legislatures. In short, the public has been hearing the words of the court but not the corresponding words of the legislatures. While the data in the parameters of this study does not assess the extent of public criticism of judicial activism with respect to the cases reviewed, it is reasonable to suspect that such criticism is most pronounced when the public is not informed of Legislative Responses to court decisions. In order for any exchange between the courts and the legislatures to be of value and in order for the value of

any such exchange to be reasonably assessed by the public, both sides of the exchange must be reported. The public must be informed of whatever dialogue is taking place between the courts and the legislatures.<sup>37</sup> Efforts must be made to bring the public to the forest to hear the trees fall.

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<sup>37</sup> The information and comments contained in this study are not intended to be a critique of the media *per se*. The point is simply that, at least with regard to the narrow topic of same sex rulings under Section 15 of the *Charter*, the activities of the legislatures in responding to *Charter* decisions are not being adequately communicated to the public, particularly in comparison to the communication of court decisions on the same *Charter* matters. Whether by the popular media or via other forums, more thorough communication of the activities of the legislators in responding to *Charter* decisions is required, particularly when the public is increasingly being called upon to make important decisions about institutional change in the *Charter* era (for example, the prospect of electing judges or Senate members).

## APPENDIX A

### *Specific Databases Utilized to Locate Newspaper Reports:*

- Quicklaw, database PDND
- Westlaw, including databases GLOBEMAIL, NATLPOST, NORTH, and CANADAP
- Canadian Newsdisc and Electric Library Canada Plus, licensed databases accessed through Edmonton Public Library at <<http://www.epl.ca/EPLVirtualResources.cfm>>
- <[http://tos.scdsb.on.ca/Library\\_Newspapers.htm](http://tos.scdsb.on.ca/Library_Newspapers.htm)>
- The Toronto Star Archives at <<http://www.thestar.com/static/archives/search.htm>>
- <<http://www.datalounge.com/cgi-bin/datalounge/issues/record?record=1-3>>
- Yahoo News Canada <[http://ca.fullcoverage.yahoo.com/fc/Canada/Gay\\_Rights/news\\_stories\\_1.html](http://ca.fullcoverage.yahoo.com/fc/Canada/Gay_Rights/news_stories_1.html)>

Note: General internet search engines were also used

### *Search Terms used:*

- same-sex
- same-sex + rights + legislation
- same-sex + law
- same-sex + adoption
- same-sex + equality + Charter
- same-sex + Vriend

Note: Searches were also done using names of the Section 15 Same Sex Cases and the Legislative Responses.

### *Newspapers Reviewed and Abbreviations of Same:*

- National Post (NP)
- Globe & Mail (GM)
- Financial Post (FP)(became part of the National Post October 27, 1998)
- Victoria Times Colonist (1998-) (VT)
- Vancouver Sun (VS)

- Edmonton Journal (EJ)
- Calgary Herald (CH)
- Saskatoon Star-Phoenix (1994 to April, 2002) (SSP)
- Winnipeg Free Press (WFP)
- Montreal Gazette (MG)
- Toronto Star (up to June 2000) (TS)
- Hamilton Spectator (up to July 1999)
- Ottawa Citizen (OC)
- Halifax Daily News (HDN)
- St. John's Telegram (1998-) (SJT)
- Charlottetown Guardian (1998-) (CG)

Note: Newspaper Reports in the Planet Sun family of newspapers were not included.

Only one edition of each paper is included (newspaper reports in early editions or weekly editions were not included).

## **FORUM**

**The Coming of Age of the *Charter***

