

Canada



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PROTECTION AGAINST DISCRIMINATION

Canadian Charter of Rights and Freedoms

The Canadian Charter of Rights and Freedoms is part of the Canadian Constitution. Subsection 15(1) of the Charter provides as follows:

Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

In 1989, the Supreme Court of Canada ruled that the list of prohibited grounds of discrimination in Section 15(1) is not exhaustive and that analogous grounds of discrimination are implicitly prohibited by the Charter.¹ Subsequently, lower

courts consistently ruled that "sexual orientation" is an analogous ground of discrimination because lesbians and gay men constitute a discrete and insular minority whose members have historically suffered social and political disadvantage.² The Supreme Court of Canada has yet to rule on whether sexual orientation constitutes an analogous ground of discrimination for the purposes of Section 15(1), but it will do so in a decision that is anticipated in the near future.³ Most legal scholars believe that the Supreme Court will find in favor of lesbians and gay men on this issue, thus confirming that sexual orientation discrimination is prohibited by the Charter.⁴

The Charter does not apply to private relations, but it is nevertheless a very useful tool because it can be used to challenge the constitutional validity of legislation and of government actions. The Charter has been used successfully to advance lesbian rights in Canada. For example, it was used by Michelle Douglas to challenge the Canadian military's anti-gay policy; as a result, lesbians (and gay men) are now entitled to equal participation and equal treatment in the armed forces.⁵

It should be noted, however, that many courts have interpreted the implicit Charter prohibition against sexual orientation discrimination in a manner that restricts the scope of Section 15(1) and fails to prohibit discrimination against same-sex couples.⁶ The Supreme Court of Canada will address this issue in an imminently forthcoming decision.⁷

Human Rights Statutes

Every province and territory in Canada has a human rights law that prohibits discrimination on the basis of enumerated grounds such as religion, race, sex, and disability. The Canadian federal government has a human rights law that similarly prohibits discrimination in areas of federal jurisdiction (e.g. interprovincial transportation, telecommunications, banking). These laws prohibit discrimination in employment and education and in the provision of services. Many of

them prohibit sexual and racial harassment, in addition to various forms of discrimination, but none prohibits harassment on the basis of sexual orientation. Most provinces and territories have recently amended their human rights laws to include sexual orientation in their respective lists of prohibited grounds of discrimination,⁸ but Alberta, Prince Edward Island, Newfoundland, and the Northwest Territories have refused to do so. The Canadian federal government has also failed to amend its law, despite repeated promises to do so over the past decade.

The failure to amend the federal human rights law has

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more symbolic than substantive weight, since the Ontario Court of Appeal ruled in 1992 that the government's failure to prohibit sexual orientation discrimination in the Canadian Human Rights Act (CHRA) violates the Charter equality rights of lesbians and gay men.⁹ Thus the Canadian Human Rights Commission was ordered by the court to treat the CHRA as though sexual orientation were included among the prohibited grounds of discrimination. Similarly, in 1994, the Alberta Court of Queen's Bench ruled that the Alberta Individual's Rights Protection Act must be read as though it contains a prohibition against sexual orientation discrimination.¹⁰ The latter decision is currently being appealed by the Alberta provincial government.

Despite widespread legislative protection against sexual orientation discrimination, anti-lesbian discrimination and harassment remains prevalent in Canada and the human rights laws that are meant to protect lesbians are not

always effective. In particular, prohibitions against sexual orientation discrimination have been narrowly interpreted to deny protection to same-sex couples who suffer discrimination as a result of a failure to recognize and respect their relationships.¹¹

RELATIONSHIP RECOGNITION

Provincial and Federal Legislation

There are hundreds of federal and provincial laws that define the term "spouse" in an exclusively heterosexual manner. Many of these laws confer economic and social benefits upon spouses. Unmarried cohabiting heterosexual couples are included in many, but not all, of these laws. Same-sex couples are excluded from all of these laws. The consequences of their exclusion are severe. For example, lesbian partners are not entitled to succession rights in any province in Canada (i.e., they cannot inherit their partner's property if the partner dies intestate). Similarly, lesbians cannot sponsor their foreign-born partners for the purpose of immigration to Canada.¹²

Lesbians and gay men have begun to challenge the constitutional validity of heterosexist definitions of the term "spouse." Only one such case has been successful, and it was a lower court decision that has subsequently been criticized by a higher court.¹³ The Supreme Court of Canada will soon render a decision that will establish an important precedent for same-sex spousal cases involving Charter equality arguments.¹⁴ A gay male couple is challenging the constitutional validity of the Old Age Security Act, which confers a spousal allowance on the opposite-sex spouses of elderly pensioners, provided that certain eligibility criteria are met. The younger of the two gay men qualified for the spousal allowance, but for the fact that he was of the same sex as his partner. When he was denied the allowance, the

couple initiated a lawsuit. Their case has been winding its way through the Canadian court system for almost a decade. The decision of the Supreme Court of Canada is anticipated in 1995. The Court will address whether the Charter prohibits discrimination on the basis of sexual orientation, whether the Act discriminates on the basis of sexual orientation, and whether such discrimination (if it exists) is justifiable under the Charter.¹⁵

Employment Benefits

While very little progress has been made at the legislative level, lesbians and gay men have acquired significant recognition of their relationships in employment contexts. This has largely been due to the bargaining efforts of labor unions. Although many employers and insurers continue to exclude same-sex partners from plans that extend employment benefits to married and unmarried heterosexual spouses, many employers have recently extended their benefits plans to the same-sex partners of their employees. These include some municipal and provincial governments, some universities, some banks, and some large corporations, in addition to smaller employers. The employment benefits that are extended to same-sex partners include such things as insurance for dental care and extended health care. Employers who wish to extend survivor pension benefits to same-sex spouses have encountered difficulty because Canadian law requires the deregistration of any pension plan that extends spousal benefits to same-sex partners (registered pension plans enjoy preferential treatment under federal tax law); the constitutional validity of this aspect of the Income Tax Act is currently being challenged.¹⁶

FAMILY LAW

Relationship Breakdown—Property and Support Issues

Since same-sex spouses are not recognized in any provincial family law legislation, there are no laws to govern the dissolution of lesbian relationships. For lesbian couples, property division and spousal support are not mandated by law. There is, however, a common law doctrine that has been used by lesbians (and gay men) to acquire an equitable interest in property legally owned by their spouses.¹⁷ This doctrine requires that the claimant demonstrate that she made a significant contribution (financial or otherwise) to the acquisition, maintenance, repair and/or improvement of the property in question, such that the property-owning spouse would be unjustly enriched if she were permitted to benefit from the contributions of the non-owning spouse. The non-owning spouse, if successful, can obtain an equitable interest in the property by way of constructive trust; the size of her interest will be proportional to her contributions to the property. Although the doctrine of constructive trust is useful, it does not amount to a guaranteed equal division of property (such as the law mandates for married spouses).

Although unmarried heterosexuals are covered by provincial spousal support legislation (provided that they meet a minimum period of cohabitation requirement), cohabiting same-sex couples are not entitled to support upon the dissolution of their relationships. There is a lesbian in Ontario who is currently challenging the constitutional validity of that province's family law legislation because it does not permit her to seek support from her ex-partner.¹⁸

The issue of child support is more complicated than that of spousal support because the provincial laws are somewhat ambiguous. Provincial laws clearly stipulate that every parent has an obligation to provide support to their needy children. In some provinces, the term "parent" is defined

broadly, such that courts have imposed support obligations on men who, during the course of a relationship with a woman, demonstrate a settled intention to treat her child as a child of their family. Such support obligations have sometimes been imposed notwithstanding that the child's biological father already provides support for the child. A similar obligation could be imposed on a lesbian who has demonstrated a settled intention to treat a partner's child as a child of her family. This is particularly true since the Supreme Court of Canada has stipulated that child support is the child's right, not the custodial parent's right,¹⁹ thus the sex and/or sexual orientation of the child's parents should not deprive the child of their right. However, each province's law is worded differently, which could give rise to differing interpretations. In the only reported case involving a child support claim by a lesbian mother, the judge ruled that it was not possible under the British Columbia family law legislation to seek child support payments from an ex-partner of the same-sex.²⁰

Lesbians are not prohibited from entering into cohabitation agreements and/or separation agreements in order to resolve their support and property issues, but their contracts are not legally recognized as "domestic contracts." In some provinces, domestic contracts can be registered with provincial courts and the support provisions contained therein can be enforced as though they were contained in a court order (i.e., the payor's paycheck can be garnished if necessary). Lesbians who have signed a domestic contract can resort to the standard enforcement procedures that are available to anyone who enters into a valid contract, but they cannot benefit from the family law legislation enacted to facilitate the enforcement of support orders.

Child Custody and Visitation

Canadian courts have ruled that lesbianism is not a bar to custody and some lesbians have, indeed, obtained custody of their children, despite the heterosexist objections of the

children's biological fathers. However, the judges' reasoning in those cases clearly reveals concern for the child's "normal" (read: hetero) sexual development. Thus a lesbian mother's chances of obtaining custody increase dramatically if she is closeted (i.e., if she is "discreet" about her sexuality, if the neighbors do not know that she is a lesbian, if she does not live with a same-sex lover, if she does not belong to lesbian organizations, if she is not "militant" about her sexuality, etc.).²¹ Lesbians who are active members of lesbian communities or who are very open about their sexuality risk losing custody of their children to heterosexual fathers.²²

As between lesbian ex-partners, the issues of custody and visitation have not yet been litigated in Canada. The few cases that have been initiated have been settled out of court. Custody provisions in family law legislation differ somewhat between provinces, but all provisions are supposed to be interpreted in accordance with the "best interests of the child." It should therefore be possible for non-biological lesbian mothers to obtain visitation rights or custody rights after the dissolution of a same-sex relationship, but given the court's discretion in interpreting what constitutes the child's "best interests," it is impossible to predict how such cases will be decided. In Ontario, one legal practitioner has successfully obtained joint custody orders for lesbian and gay couples who co-parent; these orders would presumably survive the dissolution of the parents' relationship.²³

Adoption and Foster Parenting Rights

Individual lesbians are legally permitted to adopt children and to act as foster parents, but some lesbians have experienced heterosexism from children's aid workers and consequently, have not had children placed in their custody or care. The degree of heterosexism appears to vary considerably from region to region.

Lesbian couples cannot adopt children together, since

provincial laws recognize the existence of only one father and one mother for every child.²⁴ A lesbian couple who want to adopt a child must therefore choose which one of them will assume the legally recognized role of mother. The unrecognized mother has no legal rights or obligations vis-à-vis the child, even if she is a de facto parent. The same problem arises when a lesbian wishes to adopt the biological child of her same-sex partner; provincial laws do not permit second parent adoption. In Ontario, a lesbian is currently challenging the constitutional validity of the provincial legislation that prohibits her from adopting her partner's children.²⁵ In Ontario, some lesbian and gay male couples have obtained joint custody orders, which provide the non-biological parent with significant legal rights (e.g., the right to make health care decisions in a medical emergency and the right to accompany the child across international borders).²⁶ These joint custody orders are useful but they do not amount to full legal recognition of the non-biological parent (e.g., the child will not inherit the property of the non-biological parent who dies intestate).

Donor Insemination and Sperm Donors' Rights

Lesbians are legally entitled to equal access to insemination services in any province that has a human rights law that prohibits discrimination on the basis of sexual orientation.²⁷ Some lesbians have nevertheless suffered discrimination from doctors and hospitals that have anti-lesbian policies. Currently, a couple in British Columbia is bringing a human rights complaint against a Vancouver doctor who refused to provide them with frozen sperm from his private sperm bank because they are lesbians.²⁸

Many lesbians who conceive children through alternative insemination do so without seeking the assistance of medical doctors. Private arrangements are common, with either anonymous or known sperm donors. Frequently, agreements are signed with the sperm donor regarding support and visitation issues. The substance of the agreements varies

depending on whether the parties want the sperm donor to be involved in some capacity in the child's life. Although such agreements are becoming common, they have yet to be tested in court; there are not yet any reported cases involving the validity and/or interpretation of such agreements.

Same-Sex Marriage

Same-sex marriage is not permitted in Canada. Currently, two gay men who were refused a license to marry in the province of Ontario are challenging the constitutional validity of the common law principle that prohibits same-sex marriage.²⁹ They lost at trial and their case will be heard by the Ontario Court of Appeal in 1995. The case will likely end up before the Supreme Court of Canada before the end of this century; a victory in the case could permit lesbians and gay men to marry anywhere in Canada (since the validity of marriage falls within federal jurisdiction).

IMMIGRATION LAW

Refugees

In several cases, the Canadian Immigration and Refugee Board has granted refugee status to gay male immigrants because they have suffered persecution on the basis of their sexual orientation in their countries of origin.³⁰ At least one lesbian has similarly been granted refugee status.³¹ These decisions have been made on a case-by-case basis and are not reported in a consistent fashion, thus it is difficult to compile accurate statistics. Some claimants have been denied refugee status in spite of their claims of persecution on the basis of their sexual orientation.³²

Spousal Sponsorship

Same-sex partners are not recognized by federal immigration law. Consequently, lesbians are not permitted to sponsor their partners for the purpose of immigration to

Canada.³³ Some foreign lesbians whose partners live in Canada have successfully obtained permission to immigrate based on compassionate grounds, but these cases have been decided on an ad hoc basis and have depended on the discretion of individual immigration officers. Permission to immigrate has occasionally been granted in the form of a ministerial permit, including one case in which the lesbian couple had initiated a law suit;³⁴ this suggests that the federal government was trying to avoid a Charter challenge to its immigration legislation. The current Minister of Immigration (Sergio Marchi) recently announced that he will no longer issue ministerial permits to lesbians and gay men who are seeking to immigrate to Canada in order to be reunited with their partners.³⁵

CRIMINAL LAW

Sodomy

Lesbian sexual activity is not prohibited by the Canadian Criminal Code.

Censorship

The obscenity provision of the Criminal Code has historically been enforced in a manner that discriminates against lesbians and gay men. Lesbian and gay materials have been targeted by the police in anti-pornography raids; lesbian and gay bookstores and publishers have consequently been subjected to numerous criminal prosecutions.³⁶

In 1992, the Supreme Court of Canada ruled that the criminal obscenity provision constituted a justifiable limit on freedom of expression.³⁷ The Court clarified the manner in which the provision should be interpreted, specifying that obscene materials are censored, not because they offend public morals, but rather because they are perceived to be harmful (particularly to women). Some feminists hailed the Supreme Court's decision as a victory since it defined

obscenity in terms of the harm that it causes to women's pursuit of equality. Many lesbians, however, did not welcome the Supreme Court's decision; they suspected that the new harms-based approach to obscenity would not alter the conduct of the police forces that are entrusted with the enforcement of the Criminal Code. In fact, the first obscenity charge after the Supreme Court decision was laid against a lesbian and gay bookstore for carrying a lesbian magazine.³⁸

Canadian customs officials have the power of prior restraint, which means that they can prevent materials from crossing the border if they believe that the materials violate the obscenity provision in the Criminal Code. This power has frequently been used to delay and seize multiple shipments of materials destined for lesbian and gay bookstores in Canada.³⁹ Little Sisters, a lesbian and gay bookstore in Vancouver, British Columbia, is currently challenging the constitutional validity of the powers bestowed upon Canada customs officials, alleging that the powers have been (ab)used to harass lesbian and gay bookstores and publishers.⁴⁰ The trial in the Little Sisters case ended in December 1994; a decision is expected in 1995.

Hate Propaganda and Hate Crimes

There is a provision in the Criminal Code that prohibits some forms of hate propaganda, but it does not proscribe hate propaganda directed at lesbians and gay men. Attempts to amend the provision in order to include anti-lesbian and anti-gay propaganda have consistently failed.

Lesbians and gay men in Canada are frequently the victims of hate-motivated crimes, including murderous assaults.⁴¹ Currently, the federal government is considering an amendment to the Criminal Code that would enhance the penalties imposed on persons convicted of hate-motivated crimes. The proposed amendment includes hate crimes motivated by the victim's sexual orientation. The inclusion of anti-lesbian and anti-gay offenses in the proposed sen-

tencing bill has generated a lot of controversy and is opposed by some vocal members of the federal government.

POSTSCRIPT

In May 1995, an Ontario provincial court judge ruled that the province's law on second-parent adoption was unconstitutional. As a result, four lesbian mothers were permitted to adopt their partner's biological children. Also in May 1995, the Supreme Court of Canada released its decision in the Egan case (discussed above). The Court ruled unanimously that sexual orientation is an analogous ground of discrimination under Section 15 of the Charter. Five judges ruled that the denial of a spousal pension to same-sex partners constitutes discrimination on the basis of sexual orientation and that the Old Age Security Act therefore violates Section 15 of the Charter. Only four judges ruled that the law was not discriminatory. The gay male couple nevertheless lost their case because one of the five judges who held that the law was discriminatory ruled that the discrimination was justified under Section 1 of the Charter.

NOTES

I thank Jan Cheney for her research assistance. This paper was completed on February 1, 1995. For information on subsequent legal developments, I can be contacted at: Sack Goldblatt Mitchell, 20 Dundas Street West, Suite 1130, Toronto, Ontario, M5G 2G8, Canada.

1 *Andrews v. Law Society of B.C.*, [1989] 1 S.C.R. 143.

2 See, for example, *Veysey v. Correctional Services of Canada*, (1990) 1 F.C. 321; *Brown v. B.C. (Minister of Health)* (1990), 42 B.C.L.R. (2d) 294 (B.C.S.C.); *Knodel v. B.C. (Medical Services Commission)*, (1991) 58 B.C.L.R. (2d) 356 (S.C.); *Douglas v. Canada*, [1992] 58 F.T.R. 147; *Haig v. Canada* (1992), 9 O.R. (3d) 495 (C.A.); *Layland v. Ontario*, [1993] 14 O.R. (3d) 658 (Div. Ct.); and *Vriend v. Alberta*, [1994] 152 A.R. 1 (Q.B.).

- 3 *Egan v. Canada* (1991), 87 D.L.R. (4th) 320 (F.C.T.D.), aff'd [1993] 3 F.C. 401 (C.A.). This case was appealed to the Supreme Court of Canada; oral arguments were made on November 1, 1994 and a decision is anticipated in 1995. See text accompanying notes 15 and 16, *infra*.
- 4 The Canadian federal government has, however, adopted the position that Section 15(1) of the Charter prohibits sexual orientation discrimination in only limited circumstances. See the *Factum* of the Attorney General of Canada in *Layland*, *supra* note 2, and the *Factum* of the Attorney General of Canada submitted to the Supreme Court of Canada in *Egan*, *supra* note 3 (on file with the author).
- 5 *Douglas*, *supra* note 3.
- 6 See *Egan*, *supra* note 4 and *Layland*, *supra* note 3. There are three cases in which Section 15(1) of the Charter was held to protect gay couples against discrimination: *Knodel*, *supra* note 2, *Leshner v. Ontario* (1992), 16 C.H.R.R. D/184 (Ont. Bd. Inq.), and *Clinton v. Ontario Blue Cross* (1993), 18 C.H.R.R. D/377 (Ont. Bd. Inq.). *Clinton* was reversed on appeal, [1994] O.J. No.903 (Gen. Div.) (Q.L.). *Knodel* was not appealed, but it was criticized by the Federal Court of Appeal in *Egan*. *Leshner* was also not appealed, but it is only a Commission decision and therefore carries little weight as a legal precedent. See also text accompanying note 12, *infra*.
- 7 *Egan*, *supra* note 3. See also text accompanying notes 15 and 16, *infra*.
- 8 See, for example, An Act to Amend the Saskatchewan Human Rights Code, S.S. 1993, c.61, Sections 4, 5(1), 6(1)(2), 7(1), 8, 9, 10(1), 11(1)(2)(3)(4), 12, 13, 14, 15, and 18.
- 9 *Haig*, *supra* note 3.
- 10 *Vriend*, *supra* note 3.
- 11 See *Vogel v. Manitoba* (1992), 16 C.H.R.R. D/233 (Man. Bd. Adj.), aff'd, [1992] 90 D.L.R. (4th) 84 (Man. Q.B.).
- 12 See text accompanying notes 34-36, *infra*.
- 13 *Knodel*, *supra* note 3.
- 14 See *Egan*, *supra* note 4.
- 15 Section 1 of the Charter permits the imposition of "reasonable limits" on constitutional rights if the limits are "demonstrably justifiable in a free and democratic society."
- 16 *CUPE v. Canada*, Court File No. 79885\94, Ontario Court General Division.
- 17 See, for example, *Anderson v. Luoma* (1986), 50 R.F.L. (2d)