LESBIAN AND GAY RIGHTS: A TURNING POINT IN THE LAW

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The 1960s and 1970s saw an upsurge in the demands for equality among oppressed peoples and miniorities. We saw a rise in awareness which spawned social growth, such as the Civil Rights Movement in the United States, the Quiet Revolution in Québec, and the rise of feminism throughout the world. Once we entered an age of mass communication, it became difficult to keep people isolated in their differentness, and the world began to change. From this growth in social awareness we are witnessing the emergence of another struggle for equality: the struggle by lesbians and gay men for recognition of their legal and societal rights to the benefits and privileges enjoyed by the heterosexual population.

This issue is somewhat complex because it deals with something which is frowned on as immoral. A significant sector of the population is changing its views; however, many institutions of church and state still regard homosexuality as a moral issue. When dealing with issues of sexual orientation, we are dealing with a population which has, historically, lived in the shadows: stigmatized and isolated.

Because discussions around homosexuality are only now emerging as acceptable, it is wonderful that the Viscount Bennett Lecture and Seminar is dealing with this as a topic for consideration by legal educators and practitioners. This is a credit to Dr. Patricia Hughes who, as holder of the Mary Louise Lynch Chair in Women and Law, has asked us to think about many different issues which have only recently entered the legal lexicon. She has asked us to think about diversity and to challenge male privilege and heterosexism. This seminar will bring into public discussion the kinds of challenges we as lesbians and gay men face on a daily basis. The main obstacle is our invisibility, not only before the law, but in society in general.

My partner and I have attended parenting courses where every couple in the room was treated as a family unit, except us. We have tried to impress on our children's teachers that we are not co-parents but are in fact parents, just like all the other couples in the school. We often receive separate invitations to social events to which we are both invited. We are seated apart while other couples enjoy the same table, or only one of us will be invited to an event where, if we were in a heterosexual marriage, an invitiation would automatically be extended to us both. While it may seem there is an implied recognition of our roles as

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individuals within the relationship, there is, in fact, an almost subconscious discomfort with recognizing us as a spousal unit.

To place this within the legal context, it is necessary to consider how that lack of social recognition extends into the law. There are two assumptions a practitioner should not make when dealing with clients. The first is that everyone is heterosexual and the second is that, if they are not, they will tell you. Instead, there may be some kind of unspoken and mutual understanding that it is nobody's business but their own; however, given that lesbians and gay men have no access to formal, institutionally sanctioned marriage and lack institutional support outside the lesbian and gay community, this can be important information for a practitioner to have. For instance, in dealing with property transactions, it may well be important for lawyers to know a little more about their clients. In the case of a heterosexual couple, if they are married or living common law, there are a number of assumptions about what will happen to the property on the termination of the relationship or the death of one of the spouses. In a heterosexual relationship, if one of the spouses dies without a will, the other has automatic rights of inheritance, as do the couple's children. On divorce or separation, each parent has certain basic rights to custody of the children. Lesbian and gay couples do not have automatic inheritance rights on the death of a partner or the right to a division of property at the end of a relationship. Yet, just like heterosexuals, they are often in spousal relationships which are committed, caring, social and economic partnerships, often with children involved.

Bruce Ryder of Osgoode Hall has made some interesting observations on this situation. He contends that the way in which Canadian legislators and judges have responded to homosexuality can be understood in terms of a compassion/condonation dichotomy: s. 15 of the *Canadian Charter of Rights and Freedoms*[1] guarantees equal rights to lesbians and gays; yet, their relationships do not fall under the definition of spouse, so they are excluded from the privileges inherent in that term.[2] According to Ryder:

> The compassion/condonation discursive framework functions to rationalize heterosexism by placing heterosexual privilege beyond critical examination. Until legal decision-makers are willing to confront and dismantle the legal construction of heterosexual privilege, and abandon the "compassion without condonation" approach, there will be neither freedom nor equality of sexual identity.[3]

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

[2]B. Ryder, "Equality Rights and Sexual Orientation: Confronting Heterosexual Family Privilege" (1990) 9:1 Can. J. Fam. L. 39.

[3]*Ibid.* at 39.

The compassionate approach, he says, is evident in the fact that the majority of Canadians believe that an individual should not be deprived of access to housing, employment and a host of other services solely because of their sexual orientation. On the other hand, the "without condonation" approach is evident in a wide range of overtly discriminatory laws and policies which have been set up to provide exclusive support for heterosexuality.

There are a number of statutes in New Brunswick which include the word spouse (or husband/wife), which is by definition a person of the opposite sex in a married or common law relationship. There are obvious ones, such as the *Family Services Act*[4], but there are also those which might not come to mind so quickly, such as the *Change of Name Act*[5], the *Evidence Act*[6], the *Elections Act*[7] and many others. Gay and lesbian couples are also denied spousal interests in pensions. The recent decision in *Egan* v. *Canada* is an excellent illustration of Professor Ryder's point on the "compassion without condonation" dichotomy.[8] In that case, two men who have been in a relationship for more than forty years applied for the Old Age Security spouse's allowance. Despite meeting all of the criteria, Egan's partner, Nesbit, was denied the allowance because of the opposite gender rule. They fought the case all the way to the Supreme Court of Canada where it was defeated by a slim margin. However, in a somewhat bizarre twist, the Court was unanimous in finding that the laws surrounding the case constituted discrimination based on sexual orientation, which is a violation of s. 15 of the *Charter*.

The problem of invisibility before the law is illustrated by my own family. My partner and I have been together for almost fifteen years. We have three children between the ages of seven to eleven. While they know no other parents besides us, one is biologically hers while the other two are mine. If I chose today to pack up and move to Katmandu with the children I gave birth to, there is nothing my partner could legally do about it. We are not in a legal position to adopt each other's children. We own a home together and, while there are certain laws which recognize and protect our individual rights concerning the property, we are not entitled to the protections heterosexual couples receive under the *Marital Property Act*.[9] Were my partner from another country, despite the length of our relationship, I could not legally sponsor her to enter the country as my spouse.

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[4]S.N.B. 1980, c. F-2.2, s. 1.

[5]S.N.B. 1987, c. C-2.001, s. 4(5).

[6]R.S.N.B. 1973, c. E-11, s. 3-5.

[7]R.S.N.B. 1973, c. E-3, s. 44.

[8][1995] 2 S.C.R. 513.

[9]S.N.B. 1980, c. M-1.1.

While, here in New Brunswick, same-sex spousal benefits are part of the provincial government employee packages in all areas except pensions, there is no legal obligation for a private sector employer to offer the same coverage. During her years as a student at the University of New Brunswick law school, I could not claim my partner as a dependent on my income tax. We would have none of the legal rights afforded a spouse upon reaching old age, or should one of us slip into a coma or die.

It would be possible to continue almost indefinitely with examples of how laws discriminate against same-sex partners. There was a time when these matters were not discussed openly and few cases of discrimination, if any, were brought before the courts. Gay men and lesbians lived and died quietly, accepting our invisibility and remaining content just to be able to hold on to our jobs, our homes and our children. However, that time has all but passed. There are now a number of important cases which have been or are still before the courts. They include *Andrews* v. *Ontario (Minister of Health)*, a case in which a lesbian challenged the ministry on its refusal to extend spousal benefits coverage to her partner and her partner's children.[10] *Carleton University* v. *CUPE Local 2424* involved a couple who challenged the Union under a contract prohibiting discrimination based on sexual orientation in the areas of bereavement leave, tuition fees, pensions, supplementary medical insurance, OHIP, group life insurance, and dental coverage.[11] There was also *Canada (Attorney General)* v. *Mossop* where Brian Mossop, a federal civil servant, was denied bereavement leave on the death of his partner's father.[12] The list goes on and on. When these types of cases go to court, they tend to be drawn out and highly publicized. They are a challenge for practitioners who may have to battle their own discomfort with their clients' sexual orientation as well as that of other members of their profession. However, the time is drawing near when lesbians and gay men will no longer stand outside the walls of heterosexual privilege.

It is also time that the moral dilemma and "subconscious discomfort" that I mentioned earlier were recognized as unfounded. Protection from discrimination does not imply acceptance or approval. For instance, when provincial legislation prohibits discrimination on the basis of marital status, it does not mean that common law marriages are necessarily encouraged or condoned. Similarly, the protection of religious freedom in Canada does not imply support for Buddhism or Islam. All it means is that people are not to be treated differently or discriminated against on these grounds. Nor do anti-discrimination laws imply condonation of criminal acts associated with a certain religion or cultural practice.

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[10](1988), 64 O.R. (2d) 258 (H.C.).

[11](1988), 35 L.A.C. (3d) 96.

[12][1993] 1 S.C.R. 554.

Protection from discrimination on the basis of marital status does not mean that you can marry your daughter or brother. Legislation prohibiting discrimination based on religion does not legalize the practice of female genital mutilation in Canada, nor does protection on the basis of sexual orientation protect pedophiles or anyone else involved in criminal sexual behaviour.

I recently attended the United Nations Fourth World Conference on Women in Beijing on behalf of EGALE (Equality for Gays and Lesbians Everywhere), the national gay and lesbian lobby group. Canada was one of the leading proponents for the inclusion of sexual orientation in the Platform for Action, the document which is to guide countries toward putting an end to discrimination against women in the 21st century.[13] Canada took a strong stand on the need to prevent discrimination based on sexual orientation. I am hopeful that Canada will turn the position it took at Beijing into actual legislation, providing its own country with the kind of human rights legislation it expects of other nations around the world. Once that happens, it is likely other legislation will be amended to include a significant part of the population that still lies outside of its formal protections.

The *Charter* has given the legal profession a lever with which to pry loose the bonds of discrimination which exist within provincial and federal legislation. As the case law against discrimination based on sexual orientation piles up, there is an increasing onus on lawyers to keep informed in order to serve their lesbian and gay clientele with the same respect that is afforded the heterosexual population.

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[13]Fourth World Conference on Women, *Report of the Fourth World Conference on Women*, A/CONF., 1995, UN Doc. E/1995/95-31259 at 4.