PRINCIPLES GUIDING LEAF TEST CASE LITIGATION

AND LAW REFORM CONSULTATIONS

LEAF's legal strategies have evolved continuously throughout its history as a result of knowledge developed in litigating particular cases, consultations and coalition work with other equality-seeking organizations around individual cases (e.g. Seaboyer) or broader legal issues (e.g. reproductive technology, tax reform, pay equity), and developing understanding of of the distinctive dynamics of multiple oppression. The major insight of this history has been growing recognition of the inadequacy of equality theories, strategies or caselaw which fail to address the intersection and specificity of sex, race, class, disability and other indicia of inequality. Underinclusive consultations and legal strategies have almost always yielded a kind of trickle-down equality delivering the greatest benefits to those who least need them, setting a threshold for legal entitlement only the most privileged members of disadvantaged groups can meet and showcasing token changes to create the illusion that through incremental law reform equality has been largely achieved.

LEAF's litigation and other law reform initiatives are governed by a number of principles which seek to avoid token delivery of equality and legitimation of continuing systemic inequalities. Whether adquate timelines and resources are available for consultations and creative research as well as whether LEAF has initiated an equality challenge or is reacting to someone else's attack on equality initiatives, determine how closely LEAF is able to adhere to these principles. It is fair to say, however, LEAF aspires to honour four inter-related principles in all its work.

1. LEAF is reluctant to pursue cases presenting exceptional plaintiffs and/or unusually sympathetic facts to secure legal advances that are of little benefit to most members of the plaintiffs' class or that might harm the interests of other disadvantaged groups. For instance, LEAF would not sponsor an "equality" case by which a highly privileged member of a disadvantaged group sought to dismantle an affirmative action programme benefitting members of her group because she wished to dissociate from the "stigma" of being deemed less qualified than, say, men.

Where the facts of a case (e.g. the complainant's history) are extraordinarily sympathetic or compelling, LEAF is careful to frame its arguments so that less sympathetic plaintiffs suffering the same type of inequality will qualify for the same benefits. For instance, if LEAF is sponsoring the case of an incest survivor challenging legislation which requires plaintiffs to sue within two years of turning eighteen, and if that survivor's history were unusually brutal and horrifying, we would not invite a court to waive the rules only for women who have been that

litigation or other legal or political remedies, how to name and document inequality and the harms it produces among differently situated women or groups, whether to litigate in coalition with other groups, and how certain arguments might be used by unfriendly courts to disentitle those who most need the benefit in question.

When spokespeople for multiply disadvantaged groups express reservations about a legal approach which seems neutral or universally applicable but which fails to accommodate or may misrepresent or discount the particular needs of their communities, LEAF listens and rethinks its original strategy. Precisely such reservations about pursuing lesbian equality under the rubric of "sexual orientation" and about seeking extension of "spousal" or "family" or "dependent" status for lesbian or gay cohabitees have led to the present consultations. What strategies are pursued will have to take account, for instance, of distinctions between lesbian and gay oppression and social priorities, the gender consequences for all women of initiatives which entrench the heterosexual family as standard of entitlement, the class and race assumptions underlying the model of family for which equal protection and benefit is sought, and the degree to which securing family status through litigants who self-present, say, as monogamous, longstanding cohabitees with joint finances etc. may set a threshold for equality which legitimates discriminatory treatment of committed relationships which are non-monogamous or non-sexual or economically independent.

4. LEAF's prominence and visibility in equality litigation has translated into a degree of influence with powerholders when law reform is being addressed. Usually such consultations are framed around impossibly short deadlines, assume a handful of select organizations can speak for all women without meaningful community consultations, and invite participants to endorse quick fix, piecemeal solutions as the best that can be secured given the timeframe, political climate, budget, etc. The agenda is to use the expertise, credibility and privilege of elite organizations to legitimate token change and then to publicly celebrate it as a breakthrough. This form of co-optation is an old game. The carrot is that the select organizations can get public credit for their role in effecting social change and future invitations to exercise political power; the stick is that they will be blamed for an initiative's failure if they do not co-operate and/or will be publicly denounced as too "radical", "unreasonable" or "divisive" to work with.

LEAF strives not to be used this way.

The following is one perspective on some of the issues we should be considering in our discussion of family/spousal benefits. There are many others. It is the goal of the consultations to share our varied perspectives and in so doing get a clearer idea of what we as lesbians want to accomplish when we litigate for family/spousal benefits.

Family/Spousal Benefits

It is too simplistic an assertion to say that lesbians and gays are entitled to family benefits. Few of us would disagree, however, careful thought and reflection is required before we voice our wholehearted agreement. We must consider what "family" means in the context of our particular social and legal structure and from a historical and cultural standpoint. This contextualized meaning of family has, more frequently than not, resulted in an instinctual definition for most of us, that is unfortunately based more on stereotypical assumptions rather than reflections of our true experiences. Consequently, lesbians and gays have gone into court and painted a picture of their lives that is as close to an idealized heterosexual form as possible so as to demonstrate that there is a minimal difference between lesbian and gay couples and heterosexuals. There may be strategic reasons for doing this, but the effect (but for the sex of our partners we are just like you) is the same, and had they been successful we should wonder how many lesbians and gays would really be able to take advantage of the victory. Those whose conceptions and experiences of family are different certainly could not.

The time has arrived where critical thinking needs to take place before using the legal system to get family/spousal benefits. Lesbians and gays who are considering litigation should take a look at who they are and acknowledge their true interests. Issues such as race and class determine interest as well as accessibility to the legal system. Constructing legal arguments which if

remember all whom this section protected. It protected disable people, people of colour, women, religious minorities etc. I am not in any way saying that lesbians and gays should not be protected. What I am saying is that we need to be very careful in choosing our legal strategies. We cannot act so as to roll back the small gains that have been made by other disadvantaged and disempowered groups.

We need to remember that in the area of social services poor lesbians on social assistance will likely suffer economically when the definition of spouse changes in the applicable Acts. For example, today, if a lesbian couple lives together and one is on social assistance and the other is not, the government does not consider them spousal and, therefore, no assumtion is made that a relationship of dependancy exists.[1] If the definition of spouse changes, a relationship of dependancy will be attributed to these women and the income one woman receives from social services will be detrimentally affected. There are numerous problems with this. Only one of which is that the assumption of dependancy may not accurately reflect the relationship.

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1. For years, feminists have fought with the government over what has become known as "spouse in the house" policies. Under these policies, if a woman on social assistance lived with a man he was deemed to be her spouse and she was considered dependent upon him. Social services often resort to incredibly intrusive measures in order to determine whether in fact a man was residing with a recipient of social assistance. Women's organization argued that such policies were patriarchal in nature and discriminated against women. They assumed that because a woman chooses to live with a man she is automatically economically dependent upon him, Therefore, the assistance she received could be terminated or reduced. In Ontario, this policy is apparently no longer being applied, however there is no reason to expect that it could not be duplicted in situations where lesbians are living together. Rather that waiting for this type of policy to further disadvantage lesbians we should consider how we want the issue of dependency to be defined in relation to our lives.

example, consider a lesbian who has two partners and is living with one. If she has access to employment benefits which does not discriminate against lesbians and wishes to claim the partner she does not reside with on her benefit plan it is likely that she will be unable to do so. Some plans provide for extension of benefits to lesbian and gays but these plans still have some qualifying phrase such as "holding each other out to the world as spouses". If the eligible lesbian does not choose to "hold out any of her partners as her spouse to the world" then she will not qualify.

I would like to give you one more example. That is the Income Tax Act. There is no doubt that Canada's tax system discriminates against lesbians. Lesbians, as a group, are treated unequally by the tax system and consequently bear a disproportionate burden of tax liability. The main contributor to the disproportionate tax burden on lesbians is Canada's income tax structure.

Imcome taxes are the primary means of taxation in Canada. Legally, all Canadians are regarded as taxpayers regardless of relationships to other individuals. However, an individual's relationship to other members of society is a factor in determining tax liability. Although the Canadian income tax system uses the individual as the basic tax unit, tax liability is also determined on the basis of family and marital status. What constitutes a family is determined by law. For the purposes of taxation the definition of spouse is heterosexual.

Heterosexuals who are married or living common law are provided with tax benefits that are expressly denied to lesbians partners and their families. To the extent that we have access to these credits it is as individuals or as single parents. For example, consider a lesbian with two children living with another lesbian either in a sexual or non sexual relationship. It doesn't matter which. If they share expenses for the children, the lesbian who is not the biological

address the costs to lesbians and gays when this type of strategy is used and subsequently fails. It is also time to take a long hard look at what we will get with family/spousal benefits, what it will cost and who will really be getting benefits. We cannot afford the luxury of believing that there will be no cost or that the cost will not be felt by those who can least afford it.

The following are case summaries of the most recent claims for benefits brought by lesbians and gay men. It is not a critical analysis of the courts reasoning. These cases have been summarized in order to provide background information and to assist with discussion.

North et al v. Matheson (1976) Man.Co.Ct.

Facts:

A gay male couple went through a marriage ceremony and then tried to register their marriage with the Dept. of Vital Statistics. The registrar refused to register the marriage even though North and his partner had complied with all the requirements under the Marriage Act. They had delivered the medical certificate; banns declaring their intention had been published and certified; the ceremony had been performed by an authorized person and in the presence of witnesses; the certificate of marriage had been forwarded to the government for registration. Therefore it was argued that the registrar should exercise his administrative duty and register the marriage.

Decision:

The judge narrowed the issue to that of determining whether on this case there was a marriage. There was no definition of marriage in the legislation but it had been defined judicially. An 1866 English case was cited which stated that; "Marriage has been well said to be something more than a contract, either religious or civil - to be an Institution. It creates mutual rights and obligations, as all contracts do, but beyond that it confers a status. The position or status of husband and wife is a recognized on throughout Christendom." While acknowledging that the essential elements vary across Christendom, the judge was able to ascertain that marriage has a pervading identity and universal basis. That is, it is the voluntary union of a man and woman for life, to the exclusion of all others.

Moving on to canvass various dictionary definitions of marriage, the judge found it self evident that a marriage cereemony did not take place between the two men. Therefore, nothing existed for the registrar to register.

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looked to caselaw and identified principles which were important in determining whether an agreement to provide maintenance was intended to be contractual. There had to be a "meeting of the minds" and the contractual terms had to be reasonably clear. Both parties must intend that their agreement affects their legal relationship and if one fails to comply it will be considered enforceable by the courts. The test for whether a contract was intended by the parties is objective. That is, after considering all that was said and written between the parties would the ordinary man or woman in similar circumstances have intended to create a legally binding agreement?

Anderson's counsel compared their relationship to that of a married couple. He submitted that they lived together, had sexual relations, were sexually monogamous from 1974 to 1984, had joint possessions and finances, travelled together, designated each other as beneficiaries in their respective wills and made joint investments. The judge found that the comparison was a valid one based on the evidence. Anderson also argued that the children were an extension of their relationship and that Luoma played an integral part in the children's lives. She submitted that both parties had discussed what would happen when the children were born, and, that Luoma agreed to provide maintenance for herself and the children.

Luoma's evidence contradicted Anderson's. Luoma argued that their relationship began to deteriorate after the first year and that Anderson became abusive and threatening. Luoma claimed she did not want children but told Anderson she was free to have them. On the issue of maintenance Luoma submitted that she agreed to provide it for two years following the birth of each child. In return Anderson was to continue doing the housework.

The judge sympathized with Anderson. She impressed him as sincere, forthright and naive. "She was a neophyte in the lesbian world." On the other hand, Luoma was also sincere but not totally forthright. "She was a veteran in the world she invited the plaintiff to enter, having been in at least two other lesbian relationships..."

However, the judge found no contract existed between the parties to provide maintenance. In fact , the judge expressed doubt that any discussions took place on the issue at all. Therefore, there was no intention on the part of the parties to enter into a legally binding contract since maintenance was not discussed. If it had been they would have had more to say about the terms.

5) Is Anderson entitled to a share in Luoma's assets through contract or trust, by reason of their association over the ten years?

The children play no part in this determination. During the ralationship Luoma gave a 50 percent share of the house to Anderson as a gift. Some time later, Anderson gave it back for financial

raised children together and therefore are spouses even if they are of the same sex.

b) that the Ontario Human Rights Code[1] prevails over and renders null and void any provisions of the Ontario Health Insurance Act insofar as the Act precludes a same sex partner from being defined as a spouse dependant.

c) to the extent that the Act precluded coverage to same sex partners the Act and its Regulations were inconsistent with and infringed their rights under ss. 2(d)[2], 7[3], and 15(1)[4] of the Charter.

Decision:

Mr. Justice McRae of the Supreme Court of Ontario did not agree that Andrews and her partner were "spouses". In order to support his conclusion he resorted to 79 statutes in Ontario which used the word "spouse" and found that it always referred to a person of the opposite sex. He even went so far as to look it up in Black's Law Dictionary, The Oxford Dictionary, Jewitts Dictionary of English Law, Random House Dictionary and many more. All confirmed that "spouse" meant opposite sex partners.

He disposed of the Human Rights Code argument by calling it premature since they had not yet exhausted the procedure set out for complaints under the Code. Therefore, he would neither consider the applicability of the Code or interpret Andrews's rights under the Code.

With respect to the ss. 2(d) and 7 Charter arguments, McRae held that "there was no basis to suggest that the manner in which the applicant's OHIP premiums are assessed under the Health Insurance Act affects their freedom of association". He also did not agree that Andrews's liberty to engage in an adult, intimate and consensual relationship with a person of the same sex was

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[1]. The Ontario Human Rights Code provides protection against discrimination on the basis of sexual orientation.

[2]. Everyone has the following fundamental freedoms:
(d) freedom of association

[3]. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

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

In applying the s. 1 test he determined there was a general government objective of the legislation and that was to promote and assist with the establishment and maintenance of families, and, that OHIP recognized this "family objective" through a health insurance scheme which benefitted all Ontario residents and in particular spouses and dependent children in the more "traditional' heterosexual context. In order to make the scheme work effectively and economically an "objective interpretation" was imposed which excluded some persons necessarily. Therefore, the objectives of the legislation were of substantial importance, there was a rational connection between the objective and the means employed and there was a minimum impairment of rights. The government had therefore met the s.1 Charter test of showing that a discriminatory law was reasonably justified.

** The issue in this case was actually moot since Ontario was planning to initiate a new OHIP program where employers were to pay the full cost of premiums.

The Commissioner of The Correctional Service of Canada v. Timothy Veysey (1990) F.C.A.

Facts:

Timothy Veysey was an inmate at Warkworth institution. Prior to being incarcerated he was involved in a homosexual relationship that had lasted over six years. Commissioner's Directives established pursuant to the Penetentiary Act established eligibility and procedure for "private family visits". These directives provided for the exercise of discretion on the part of Commissioner and Deputy Commissioner. The goal of the private family visits program was to maintain the family unit and prepare the inmate to return to life outside the penetentiary. Veysey applied to participate in the program. His application was denied and he filed a grievance. He appealed and was denied at all level of the grievance process ending with the Commissioner. The Commissioner denied Veysey's application stating that the program did not extend to common law partners of the same sex. However, the Commissioner did acknowledge that some important issues were raised which had to be dealt with sometime in the near future.

Decision:

The Federal Court of Appeal acknowledged that the Directives were not examples of perfect draftmanship. In fact some of the terms used had never, to the knowledge of the court, been used in any other statutory document. For example, the phrase "common law partner". As a result. the novelty of the phrase opened up the door for it to apply to common law partner of the same sex. After recognizing that the term "relative" could be defined as connection

Human Rights Commission. The complaint was based upon family status discrimination. The Tribunal considered the definition of family status and whether that included homosexual relationships. The Tribunal ruled that both the union and the employer had infringed s. 10(b) of the Canadian Human Rights Act by entering into a collective agreement that deprived a class of individuals employment opportunities on a prohibited ground of discrimination. The Tribunal ordered that the the time Mossop took off be designated bereavement leave, that the employer and union each pay Mossop $250 and that the collective agreement be amended so that the definition of common law spouse and immediate family include persons of the same sex who met the definition in all other respects.

Decision:

The Federal Court of Appeal did not agree with the Tribunal's decision. There was disagreement on "peripheral issues such as the definition of father-in-law and whether every employment benefit is to be seen as an employment opportunity. However, the fundamental issue was framed by the Court as whether the Canadian Human Rights Tribunal has erred in interpreting "family status" to include " a homosexual relationship between two individuals".

The Federal Court of Appeal then went on to look at the reasoning behing the Tribunal's decision which had been based on three propositions and concluded that it had difficulty with each one:

a) The Supreme Court of Canada had indicated that a purposive approach was to be taken when interpreting the Canadian Charter of Rights and Freedoms, and human rights codes.

After acknowledging that human rights codes are quasi constitutional, the court briefly explained why the Constitution had to be interpreted in a special way that precluded references to the intentions of its drafters. Because of the inherent difficulties in amending the Constitution and the need for it to reflect the chaanging values in society it was not reasonable to interpret the Constitution based on intentions of the past. Human Rights codes on the other hand are much more easily amendable. Therefore, courts should be wary of adopting a "living tree" approach to discerning new ground of discrimination for proscription or redefining the meaning given to existing grounds. If they do they run the risk of exceeding their constitutional responsibilities and performing the function of Parliament.

b) "family" as it appears in the act is ambiguous.

The Court took great exception to this and asked: "Is it not to be acknowledged that the basic concept signified by the word has always been a group of individuals with common genes, common blood, common ancestors? This basic concept lends itself to various degrees of extensions...and the group referred to today is

After considering the Veysey decision, the Federal Court of Appeal acknowledged that sexual orientation was an analogous ground protected from discrimination under s.15 of the Charter. Therefore, could the Tribunal's decision not be validated by interpreting "family status" in light of the Charter. No, said the Court because the Charter should not be used as "a kind of ipso facto legislative amendment machine requiring its doctrine to be incorporated in the human rights legislation by stretching the meaning of terms beyond their boundaries." Parliament has not made sexual orientation a ground of discrimination prohibited by the Canadian Human Rights Act. Until then, neither Tribunals or courts should preempt the legislative process.

****This case was appealed to the Supreme Court of Canada and will be heard sometime this spring.

Haig and Birch v. Canada (1991) Ont. Gen. Div.

Facts:

Birch was a member of the Canadian Armed Forces. He informed his commanding officer that he was a homosexual. The commanding officer than informed Birch that the policy directives regarding homosexuals in the Armed Forces would apply to him and that this meant effective immediately, he would not qualify for promotions, postings or further military career training. He was released from the Armed Forces on military grounds and subsequently filed a complaint with the Canadian Human Rights Commission claiming discrimination on the basis of sexual orientation. This is not a prohibited ground of discrimination under the Act. Both applicants then invoked ss.15(1) and 24(1)[6] of the Charter and raised the following questions:

1. The jurisdiction of the court to review the constitutional validity of s.3(1) of the Canadian Human Rights Act pursuant to s.1 of the Charter;

2. The jurisdiction of the court to grant ancillary declaratory relief binding on the Respondents;

3. Whether sexual orienttion is an analogous ground of discrimination for the purposes of s.15(1) of the Charter;

4. Whether s.3(1) of the Canadian Human Rights Act is found to contravene s.15(1) of the Charter, s.3(1) of the Act is a

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[6]. 24(1) Anyone whose rights and freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

1988 was no longer eligible for health benefits available through his employment. Knodel applied to get his partner included under his benefit plan as a dependent spouse. This plan was provided as part of the collective agreement between the union and the employer. In 1986-1989 the collective agreement defined common law spouse as opposite sex partners who lived together for over two years. The Medical Services Act Regulations defined dependant as a spouse of child of an eligible person. Knodel met the definition of eligible person. In 1988 the union filed a grievance on behalf of Knodel since he had been denied coverage under the Act for his dependant partner.

Decision:

Knodel argued that the effect of the Regulations is to discriminate against him solely on the basis of his sexual orientation by denying him equal benefit of the law available to heterosexual spouses. He also claimed that the Regulations had a further impact of adversely affecting his dignity and self esteem and perpetuated the homophobia expressed by members in society.

Knodel's counsel submitted that the definition of spouse in the Regulations was ambiguous. ("spouse" includes a man or woman who, not being married to each other, live together as husband and wife) He suggested that the use of "or" was inappropriate and that "includes" indicated that the definition is not exhaustive. Therefore, same sex couples are not necessarily excluded from the definition. Further, an interpretation of the definition that is consistent with the Charter would include same sex couples in the definition.

Counsel for the government conceeded that discrimination based on sexual orientation contravened the Charter and that the definition of "spouse" was not well drafted. However, it was clearly intended to cover married and common law heterosexual couples. He submitted that the definition did not make a distinction based on sexual orientation but rather made one between spouses and non spouses. Therefore, a same sex couple was not being treated any differently from any other adult couple whose members do not hold themselves out as man or wife but share a household. He also pointed out that in a lesbian or gay couple where neither individuals qualify for premium assistance they have an advantage heterosexuals do not. The medical plan pools the income of heterosexual couples while it does not for same sex couples.

The judge addressed this last argument directly and found that analyzing whether there was a detriment effect or benefit was a useless exercise. The fact is that the dependent discount was not available to lesbian and gay couples. Therefore, a benefit was provided to heterosexuals that was not to lesbians and gays. the judge also noted that spouses are required to live together as husband and wife and that this excluded relationships between siblings or relationships between friends. In addition, the phrase does not require that those in a relationship adopt the role

Egan v Canada [1991] F.C.J. No. 1252 (December 2, 1991 unreported)

Facts:

John Nesbitt and James Egan have lived together since 1948. They shared joint bank accounts, credit cards, co-owned property, and were the beneficiaries in each other's wills. At one point they publically exchanged rings. In September 1986 Egan reached the age of 65. In October of that year he became eligible to receive Old Age Security and Guaranteed Income Supplement benefits. Nesbitt applied by letter in February 1987 on behalf of Egan for spousal allowance pursuant to the Old Age Security Act. The Department of Health and Welfare found him to be ineligible. Nesbitt then applied for spousal allowance naming Egan as his spouse and again was denied. The Old Age Security Act defined spouse as "a person of the opposite sex who is living with that person, having lived with that person for at least one year, if the two persons have publically represented themselves as husband and wife."

Nesbitt and Egan sought:

a) A Declaration that the definition of the word "spouse" in the Old Age Security Act discriminated against them on the basis of sex and sexual orientation contrary to s.15 of the Charter.

b) An Order pursuant to s.24(1) of the Charter amending the Act so as to remove all references, direct or indirect, to gender; or, amending the definition of "spouse" in the Act to include lesbian and gay relationships that are akin to conjugal relationships.

c) An Order pursuant to s 24(1) directing the government to pay benefits dating back to the date of application.

Decision:

Their lawyer argued that in granting a benefit to heterosexual couples which is not granted to homosexual couples, the government created a distinction between these two classes of couples. This distinction is based on the sexual orientation of the lesbian and gay couples. Since the distinction operates so as to exclude same sex couples from the benefit afforded to heterosexual couples, the distinction discriminates on the basis of sexual orientation.

The Respondent (government) raised a preliminary objection that Nesbitt and Egan did not have standing to bring this case on the basis that they had "suffered no adverse effects as a result of the alledged unconstitutionality of the challenged law". This objection was based on the fact that by being treated as single individuals, during the period from July 1987 to April 1990 they received over $6,000 more as single than they would have had they been treated as "spouses." This situation arose because Nesbitt has been ill and received provincial assistance which would have

SEXUAL ORIENTATION

Not surprisingly, the very same issues which have separated lesbians and gays within our political communities play an equally important role in the framing of legal cases aimed at seeking redress for the harm done when lesbians and gays are discriminated against. To be sure, certain discriminatory practices are aimed more against lesbians than gays, and vice versa. The creation of "lesbian" pornography for heterosexual male consumption is an example of one problem that is unique to us as lesbians while police raids of bath houses illustrates a form of anti-gay discrimination. At the same time, there are examples of discriminatory practices which affect both lesbians and gays, but because the allocation of power and resources is distributed along gender lines, either lesbians or gays may suffer disproportionately under a given heterosexist rule or policy. An example of this is the conditioned grant or complete denial of custody rights to lesbian and gay parents. Because it is much more common for mothers to want and to seek custody after the dissolution of a relationship, it follows that the child custody rules dealing with sexual orientation weigh more heavily in the lives of lesbians than gays.

Though the realities of lesbian and gay existence are different, the courts have by and large have been inhospitable to gender specific claims, and have treated all "homosexuals" as an indistinguishable mass. In part, this has been due to the fact that most human rights instruments outlaw specified forms of discrimination, like race, sex and sexual orientation, as if there were no overlap between them. Because of this, the courts have held that lesbians and gays must challenge discriminatory actions against them under the heading of sexual orientation discrimination and not under any otheer head such as sex discrimination. Even where the structure of the law makes it possible to frame cases in a gender specific way, as may be the case with section 15 of the Charter, litigants to date have not done so.

On one level, the lumping together of lesbians and gays is not especially problemmatic since not only do some members of the lesbian and gay community place more emphasis on our commonalities than our differences but also, with respect to certain issues, it is quite true that lesbians and gays share common ground. On a different level, however, the pursuit of "sexual orientation" claims poses some important problems. For one thing, courts in the United States, and increasingly in Canada, have "read down" the scope of protection guaranteed by "sexual orientation" to exclude so called homosexual conduct (ie., sex) and to include so called homosexual orientation (ie., things that homosexuals do or say which are no different that things heterosexuals do or say). Though the courts apply this conduct/orientation distinction as if it were gender neutral, on reflection, it would appear that the very limits placed on "sexless" sexual orientation are deeply gendered.

Remarks made at LEAF Symposium, Sexual Orientation Panel by Carol Allen - February 14 - 16, 1992 - Ottawa

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I HAVE SPENT ALOT OF TIME AGONIZING OVER WHAT TO SAY TODAY. IN FACT - I THOUGHT I HAD JUST ABOUT FIGURED IT OUT - THEN I ARRIVED IN OTTAWA AND ASKED MY FRIEND AND CO PANELIST MARY EATON - WHAT SHE THOUGHT ABOUT THIS WHOLE ISSUE OF FAMILY STATUS. SHE PROMPTLY INFORMED ME IN HER - OH SO UNIQUE AND UNDERSTATED WAY - THAT SHE HAD MADE A NEW OBSERVATION ABOUT THE ISSUE OF FAMILY BENEFITS LITIGATION FOR LESBIANS AND GAYS. SHE SAID THAT IN NORTH AMERICA THERE HAD ONLY BEEN TWO CASES WHERE WE HAVE WON ENTITLEMENT TO BENEFITS AND IN BOTH CASES ONE OF THE LITIGANTS WAS DEAD.

NOW I DON'T KNOW ABOUT YOU, BUT I THINK THIS IS AN INTERESTING AND INSTRUCTIVE OBSERVATION. I HAVE ALWAYS THOUGHT THAT THE PRICE HETEROSEXISM REQUIRES THAT LESBIANS AND GAYS MAKE TO GET ACCESS TO FAMILY STATUS AND BENEFITS WAS TOO HIGH - BUT THIS IS RIDICULOUS.

ANYWAY, I AM HERE TO TALK TO YOU ABOUT FAMILY STATUS FOR LESBIANS. ABOUT THE CHOICES WE HAVE MADE AND THOSE THAT HAVE BEEN MADE FOR US IN FORMULATING THE LITIGATION STRATEGY PLACED BEFORE THE COURTS TODATE. I DO NOT APPROACH THIS TOPIC FROM A THEORETICAL BASIS BUT RATHER FROM MY OWN EXPERIENCES AS A BLACK LESBIAN. THEREFORE, THE DISCUSSION I WANT TO HAVE WITH YOU IS A VERY PERSONAL ONE THAT I HOPE WILL REACH DOWN AND TOUCH YOU FIRST AS LESBIANS HERE IN HEART GUT BEFORE MOVING UP TO YOUR HEAD AND INTO THE REALM OF THEORY.

SO LET ME START BY MAKING A WISH. MY WISH IS THAT I WANT ALL CURRENT ONGOING LITIGATION FOR FAMILY/MARITAL/SPOUSAL STATUS TO STOP - RIGHT NOW. WE AS LESBIANS MUST START TO SERIOUSLY CONSIDER WHETHER IF IT IS FAMILY STATUS WE WANT. DON'T YOU THINK ITS TIME TO LOOK AT EXACTLY WHAT WE MEAN BY THE WORD FAMILY - AND DON'T TELL ME THAT FAMILY FOR US AND FAMILY FOR HETEROSEXUALS IS THE SAME BECAUSE THAT IS SIMPLY NOT TRUE.

LET ME TRY TO CLARIFY FOR YOU THE THE PLACE FROM WHICH I BEGIN WHAT I HAVE TO SAY TODAY ABOUT THE ISSUE OF FAMILY AND FAMILY STATUS FOR LESBIANS. AS A BLACK PERSON GROWING UP IN A WHITE DOMINATED - WHITE SUPREMACIST SOCIETY I HAVE A PARTICULAR EXPERIENCE OF FAMILY WHICH HAS EVERYTHING TO DO WITH MY RACE.

IN THE NORTH AMERICAN CONTEXT (IN THIS I INCLUDE THE CARIBBEAN) THE BLACK FAMILY HAS BEEN A PLACE OF SUPPORT AND STRENGTH AND A SITE OF POLITICAL AND CULTURAL RESISTANCE TO WHITE DOMINATION. NOW WHEN I SPEAK OF THE BLACK FAMILY I DO NOT MEAN TO IMPLY THAT THERE IS ONLY ONE SUCH CONSTRUCT BUT RATHER, IN THE VARIETY OF RELATIONS THAT HAVE COME TO BE CALLED FAMILY BY BLACK PEOPLE THERE IS A COMMON THREAD THAT LINKS THEM TOGETHER. IT IS THAT COMMONALITY THAT I CALL THE BLACK FAMILY. IN ORDER TO GRASP THIS YOU HAVE TO REMEMBER THAT AS SLAVES UNDER WHITE DOMINATION BLACKS WERE NOT PERMITTED THE RIGHT TO BE FAMILY - OR EVEN IN MANY CASES TO KNOW WHO OR WHERE OUR BIOLOGICAL FAMILY WAS LOCATED. WE WERE PROPERTY

OR ARE WE SIMPLY ACCOMODATING OURSELVES TO EXISTING STRUCTURES WITHOUT SUBVERTING THEM? THREE YEARS LATER I DON'T THINK WE ARE MUCH CLOSER TO FINDING THE ANSWERS.

IN FACT, I WANT TO ADD SOME QUESTIONS OF MY OWN. WHAT DOES OR COULD LESBIAN FAMILY LOOK LIKE? DOES THE WORD ITSELF ADEQUATELY DESCRIBE WHAT WE ARE AND MEAN TO EACH OTHER? IF THERE IS SUCH A THING AS A LESBIAN FAMILY - WHAT ROLE DOES IT PLAY IN OUR SURVIVAL AS LESBIANS? CAN IT SERVE AS A SITE OF RESISTANCE TO COMPULSORY HETEROSEXUALITY? WHAT ARE WE REALLY TALKING ABOUT WHEN WE ASSERT THE RIGHT TO FAMILY STATUS IN LAW? WELL WE HAD BETTER START TO FIGURE OUT ANSWERS TO SOME OF THESE QUESTION QUICKLY BECAUSE GAY MEN ARE OUT THERE LITIGATING FOR FAMILY STATUS - SEEMINGLY ON OUR BEHALF - WITHOUT OUR PERMISSION - AT LEAST WITHOUT MINE. IN MY OPINION IT IS CRITICAL THAT WE ANSWER THESE QUESTIONS BEFORE GOING INTO THE COURTS.

I KNOW FOR A FACT THAT WHAT FAMILY OR FAMILY STATUS MEANS TO ME AS A BLACK LESBIAN FEMINIST IS NOT REFLECTED IN ANY OF THE CASES CURRENTLY BEING LITIGATED ON MY BEHALF. I KNOW OF NO CASE WHICH LOOKS AT THE INTERSECTION OF RACE, SEX, AND LESBIAN IDENTITY AND HOW THESE OPERATE IN THE CONTEXT OF FAMILY. ABSENT IN THE CASE LAW IS ANY REFERENCE TO THE ECONOMIC DISADVANTAGE OF LESBIANS BECAUSE OF SEX INEQUALITY IN THE WORKPLACE. WE EARN LESS BECAUSE WE ARE WOMEN AND LESS STILL BECAUSE WE ARE BLACK WOMEN OR IMMIGRANT WOMEN. WE HAVE ACCESS TO FEWER BENEFITS. IF ONE OF US IS LUCKY ENOUGH TO HAVE EMPLOYMENT BENEFITS WE'RE NOT ALLOWED TO SHARE IT WITH OUR PARTNERS OR WITH ANOTHER LESBIAN WHO NEEDS IT.

WHAT I DO SEE ARE LEGAL ARGUMENTS THAT HAVE CONSTRUCTED OUR LIVES BASED UPON A HETEROSEXUAL NORM AND WHICH HAVE BOUGHT INTO A TRADITIONAL HETEROSEXIST VALUE SYSTEM. ARGUMENTS HAVE BEEN MADE THAT LESBIANS AND GAYS SHOULD HAVE FAMILY/SPOUSAL/MARITAL STATUS BECAUSE WE ARE SEXUALLY MONOGAMOUS, LIVE TOGETHER, TAKE VACATIONS TOGETHER, SHARE BANK ACCOUNTS, OWN PROPERTY TOGETHER AND ARE GENERALLY EMOTIONALLY SUPPORTIVE.

NOW I AM NOT SAYING THAT THERE IS ANYTHING WRONG WITH DOING THESE THINGS. MANY LESBIANS DO AND THAT'S GREAT. BUT I THINK WE HAVE TO LOOK AT WHY WE MAKE CHOICES TO PLACE EVIDENCE BEFORE THE COURTS ABOUT THOSE ASPECTS OF OUR LIVES THAT MOST CLOSELY RESEMBLES ACCEPTABLE HETEROSEXIST NOTIONS OF FAMILY VALUES AND FAMILY STRUCTURE. I THINK IT IS ABSOLUTELY A MISTAKE WHEN WE ARGUE FOR SPOUSAL STATUS FOR THOSE LESBIAN AND GAY RELATIONSHIPS THAT ARE AKIN TO CONJUGAL HETEROSEXUAL RELATIONSHIPS. ARGUMENTS FRAMED IN THIS WAY LEAD ME TO THINK THAT WE ARE FORGETTING THAT HETEROSEXISM IS THE PROBLEM AND THAT THE CONSISTENT REFUSAL OF COURTS TO EXTEND FAMILY STATUS TO US HAS EVERYTHING TO DO WITH THE FACT THAT WE ARE NOT HETEROSEXUAL.

AFTER THINKING ABOUT ALL THIS AND GETTING A COLOSSAL HEADACHE I FIND IT SOOTHING TO LOOK BACK AT THE REALITY OF MY LIFE AS A BLACK

I KNOW OUR REALITIES ALTER TRADITIONAL ACCEPTED DEFINITIONS OF FAMILY AND I KNOW THAT MANY IF NOT MOST OF YOU AGREE WITH ME. IF IN THE END WE WANT TO CLAIM FAMILY STATUS WE DO OURSELVES A GREAT SISSERVICE IF WE DO NOT AT LEAST TRY TO GET IT ON OUR TERMS. LIKE MY BLACK FAMILY, I SEE MY LESBIAN FAMILY AS A SITE OF RESISTANCE, SUPPORT AND REAFFIRMATION, AND WE, (THAT IS THE COLLECTIVE WE) SHOULD NOT ALLOW THE FORCES OF COMPULSORY HETEROSEXUALITY OR WHITE SUPREMACY TO USE LAW TO MAKE OUR FAMILY ANY LESS.

DRAFT

ARGUMENT: DISCRIMINATION BECAUSE OF HOMOSEXUALITY IS DISCRIMINATION BECAUSE OF SEX

A. SEXUALITY PARTLY DEFINES GENDER IN SOCIETY.

1. Gender means being a man or a woman in a given society.

2. Sexuality is a significant dimension along which gender is defined and expressed in social life. Much of the social meaning of being a man is learned and lived through sexual congress with women and all the social institutions that anticipate, organize, channel, and support it. Much of the social meaning of being a woman is similarly learned and lived in and as receptivity and responsiveness to male sexual initiative. Manhood and womanhood are partly built on how and with whom, and according to whose interests, one has sex.

3. Traditional heterosexual intercourse, in this light, is less simply a biological act of reproduction and more a cardinal social act of gender definition, one that defines its participants as women and men in society.

4. Many of the social rules and roles that comprise gender are specifically sexual ones. Principal among them are those stereotypes of masculinity and femininity that portray the male as acting, the female as acted upon, the man as superior, the woman as inferior, self-interested pursuit as masculine, deference to male pursuits or being pursued as feminine. In part because such male/female sexual relations are replicated in other social arenas such as the family, the workplace and the political arena, much of one's gender identity, as well as the adequacy of one's perceived conformity with the social requirements of gender, are rooted in these ascribed meanings and the experiences they produce.

5. Ideologically, these norms and mores are typically attributed to nature, specifically to biological sex, rather than to society.

6. Many of the social lines of difference between women and men are thus drawn through heterosexuality as a social experience and institution. Heterosexuality is also regarded as natural rather than social.

B. SEXUALITY PARTICIPATES IN GENDER INEQUALITY IN UNEQUAL SOCIETIES.

12. A lesbian, for these purposes, is a woman whose sexual and affectional identification, expression, or affirmation centres on women. That of gay men centres on men. In a larger sense, the terms gay men and lesbian refer to the sexual choices, politics, culture, and community of men and women who consider the fact that they have sex with members of their own gender group, and the defining centrality of such individuals in their lives, to be a major or central component of their identity.

13. The practice of this choice has myriad consequences and implications in societies of gender inequality in which sexuality has been defined and practised through, and under conditions of, a gender hierarchy.

14. Lesbian existence calls into question the place sexual intercourse with men, and the projected availability for sexual access by men, has in defining what a woman is. The politics of lesbianism resists the definition of women by relation to male sexuality and, more broadly, to male primacy or male approval. Many women who resist sex inequality resist this subordination in a variety of ways. Indeed, women who pursue sex equality, who dissent from being defined as second class, are often branded as lesbians, whether they are or not. In this sense, the degree of discrimination a society permits against lesbians is a measure of the degree of its opposition to the pursuit of women's equality.

15. A gay man embodies the possibility that a man could be sexually acted upon and penetrated, in violation of male sexual inviolability, a cardinal tenet of gender hierarchy. That male sexual aggression could be directed at a biological male vitiates the biological basis upon which gender inequality ideologically rests. With the visibility of gay men, a primal act of social inferiority -- being sexually penetrated and used -- can no longer be used to define the female as such.

16. The challenging impact of affirmed homosexuality on traditional heterosexual roles and meanings in societies of gender inequality perhaps explains the unsettled to violent response it can provoke, particularly among men. This response is the content of homophobia.

D. TO IMPOSE HETEROSEXUALITY IS TO IMPOSE GENDER INEQUALITY.

17. In the simplest sense, any time a lesbian or gay man is discriminated against because of homosexuality, he or she is discriminated against because of gender. But for their sex, or the sex of their sexual partner, they would be heterosexual, and not be so treated.

24. Prohibition on discrimination against lesbians and gays, then, promotes sex equality between women and men in a way that operates differently between lesbians as women and gays as men. The challenge to gender hierarchy posed by gay male existence resides in the way gay sexuality fundamentally undermines the norm of maleness as sexual inviolability and of femaleness as the natural and sole target of male sexual aggression. By contrast, lesbian existence challenges not just the sexual hierarchy defined by heterosexual relations, but the broader social incidents of women's subordination to men. Existing in intimate opposition to male sexual and social definition and approval, and affirming the value of women as women, rather than as men's subordinates, lesbian existence challenges the entire fabric of sex inequality, hence the disadvantage of women as women.

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