

Gay and Lesbian Legal Issues and HIV/AIDS: Final Report

by John Fisher, Ralf Jürgens, Anne Vassal, Robert Hughes

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Gay and Lesbian Issues and HIV/AIDS: Final Report

by John Fisher, Ralf Jürgens, Anne Vassal, Robert Hughes

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SUMMARY

Why a Project on Gay and Lesbian Legal Issues and HIV/AIDS?

Individuals and organizations consulted during Phase I of the Joint Canadian HIV/AIDS Legal Network and Canadian AIDS Society Project on Legal and Ethical Issues Raised by HIV/AIDS expressed concern about the extent of discrimination and unjust treatment that gay men and lesbians continue to suffer in Canada, and about the link between discrimination and vulnerability to contracting HIV. Among many other things, they were troubled by the refusal of school systems to provide positive education about gay and lesbian sexuality; the reluctance of governments to legally recognize the existence of relationships between two men or two women; and the lack of self-esteem often observed among lesbians and gay men. They pointed out that, while these and other examples of discrimination and stigmatization and of their effect on the lives of gay men and lesbians are problematic in and of themselves, they also have an impact on individuals' ability to protect themselves against contracting HIV.

The individuals and organizations consulted suggested that the Joint Project document how, historically, gay men and lesbians have suffered persistent patterns of discrimination and persecution, and how the HIV/AIDS epidemic has been accompanied by a second epidemic of stigma and discrimination; document how pervasive discrimination against gay men and lesbians remains in the law; show how discrimination impacts on the lives of gay men and lesbians and, in the context of HIV/AIDS, on efforts to prevent the spread of HIV and to care for those living with HIV/AIDS; and make recommendations for legislators, policymakers, and others concerned about how discrimination against gay men and lesbians could be decreased, and prevention and care efforts in the area of HIV/AIDS improved.

What Activities Has the Project Undertaken?

Work started in October 1995, when the Project Manager commissioned a discussion paper to address gay and lesbian legal issues in the context of HIV/AIDS. A draft discussion paper was produced in

March 1996 and three key commentators provided detailed written comments on it. These comments and the draft itself formed the basis of a National Workshop on Gay and Lesbian Legal Issues and HIV/AIDS, held in Montréal in March 1996. In July 1997, *Gay and Lesbian Legal Issues and HIV/AIDS: A Discussion Paper* was published and widely distributed for comment both nationally and internationally. Comments on the *Discussion Paper* were received from both within and outside Canada and have been incorporated into *Gay and Lesbian Legal Issues and HIV/AIDS: Final Report*.

What Does the *Final Report* Contain?

The Final Report

- reviews how, historically, gay men and lesbians have suffered persistent patterns of discrimination and persecution, and how the advent of HIV and AIDS has intensified and extended discrimination against them;
- provides a detailed analysis of how, in 1998, Canadian law treats gay men and lesbians, as well as some examples of discrimination in two other areas, behavioural research and health and social services; and
- assesses the impact of stigma and discrimination in the context of HIV/AIDS.

What Are the Goals of the *Final Report*?

Reflecting the concerns and needs expressed by the individuals and organizations consulted during Phase I of the Joint Project, the goals are

- to document how pervasive discrimination against gay men and lesbians is in many sectors of life and in the law;
- to show how discrimination impacts on the lives of gay men and lesbians and, in the context of HIV/AIDS, on efforts to prevent the spread of HIV and to care for people living with HIV/AIDS; and
- to make recommendations for action that will enable Canada to decrease discrimination against gay men and lesbians and to increase and improve prevention and care efforts in the area of HIV/AIDS.

What Does the *Final Report* Conclude?

The *Report* provides clear evidence of how pervasive discrimination against gay men and lesbians is, and of the impact it has on their daily lives. This discrimination needs to be combated, and the rights of lesbians and gay men protected, first and foremost *because it is right to do so*:

We accord every human being that person's human rights because it is our duty and their right.¹

In addition, the rights and dignity of gay men and lesbians need to be respected in order to better prevent the spread of HIV, and provide better care, support, and treatment to people living with HIV/AIDS.

The *Report* recommends that a variety of measures be undertaken to decrease discrimination against gay men and lesbians, and to increase prevention and care efforts.

What Is the Link between Homophobia and Discrimination against Gay Men and Lesbians and HIV/AIDS?

Respecting the rights and dignity of gay and lesbian Canadians is a moral and legal imperative. In addition,

[i]n the context of AIDS, respect for human rights and dignity is not only a moral and legal imperative, but the basis for effective policies. There can no longer be any doubt that respect for human rights saves lives. It is widely recognized that laws and practices that discriminate against people with HIV or AIDS or those considered likely to be at risk of infection [such as gay men], or that in other ways violate human rights, are both morally indefensible and impede effective public health efforts.²

As stated by Justice Michael Kirby,

[t]he most effective strategies that we have so far found to help promote reduction of the spread of HIV involve the adoption of laws and policies which protect the rights of people most at risk of infection. This may seem surprising. It is a paradox. But it is so.³

Examples of how homophobia impacts on government and institutional responses to HIV/AIDS, on HIV prevention, and on the care, support, and treatment of people living with HIV/AIDS include the following:

- because HIV/AIDS has primarily affected gay men and other marginalized populations, governments have been and continue to be less committed to fighting the disease;
- because many school systems remain reluctant to provide positive education about gay and lesbian sexuality, young gay men are more vulnerable to contracting HIV;
- because many workplaces have still not developed and implemented policies explicitly prohibiting discrimination on the basis of HIV status or sexual orientation, gay men are reluctant to disclose their HIV status for fear of being identified as gay as well as HIV-positive, thereby foregoing benefits of support and accommodation in the workplace.
- because many provincial – and, until 1992, also the federal – prisons have refused to make condoms available to prisoners for fear of being seen as "condoning homosexual activity" (a clear example of homophobia), prisoners and their partners outside prison are more vulnerable to contracting HIV;
- because of a fear of being identified as gay, some people may not seek (or may not seek early enough) testing for HIV and care, support and treatment for HIV-related diseases;
- because of discomfort with, avoidance of, or ignorance about homosexuality, there has been insufficient or inappropriate research into same-sex identity and sexual activity in the general population and in gay, bisexual, and lesbian subcultures, thereby hampering efforts to design effective HIV/AIDS education and prevention programs for men who have sex with men and for lesbians; and
- because many still see HIV/AIDS as fundamentally a gay disease, the efforts of non-gay communities to generate their own effective responses to the epidemic have been hampered.

Is the Project Finished Now?

No. The Project will widely distribute the *Final Report* and make it available on the Internet. Funding permitting, it will produce and distribute fact sheets summarizing the Report's most relevant information, targeted at a variety of interested groups; make presentations at national and international conferences about the process leading to the production of the Report and the Report's content and recommendations; undertake other activities aimed at ensuring that the recommendations in the Report will be implemented, including follow-ups with governments, policymakers and others to whom the Report's recommendations are directed; and continue to monitor developments in the area of gay and lesbian legal issues and HIV/AIDS.

For Further Information ...

contact Ralf Jürgens, Project Manager, at (514) 987-3000 ext 8773#; fax: (514) 987-3422; email: ralfj@aidslaw.ca

Further Copies of this *Report* ...

can be retrieved at the website of the Canadian HIV/AIDS Legal Network at www.aidslaw.ca or ordered through the National AIDS Clearinghouse. Tel: (613) 725-3434; fax: (613) 725-9826; email: aid/sida@cpha.ca

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FOOTNOTES

¹ M Kirby. Human Rights and the HIV Paradox. *Lancet* 1996; 348: 1217-1218. Reprinted in *Canadian HIV/AIDS Policy & Law Newsletter* 1997; 3(2/3): 50-52.

² J Hausermann. International Law, Advocacy, and Human Rights in the Context of AIDS. *Pediatric AIDS and HIV Infection: Fetus to Adolescent* 1992; 3(5): 248-250.

³ Supra, note 1.

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INTRODUCTION

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As part of the Joint Project on Legal and Ethical Issues Raised by HIV/AIDS (Joint Project),¹ the Canadian HIV/AIDS Legal Network (Network) and the Canadian AIDS Society (CAS) have undertaken a project on gay and lesbian legal issues and HIV/AIDS. The project was funded by the HIV/AIDS Prevention and Community Action Programs and the AIDS Care, Treatment and Support Program, Health Canada, under the National AIDS Strategy, Phase II.

Background

In the context of AIDS, respect for human rights and dignity is not only a moral and legal imperative, but the basis for effective policies. There can no longer be any doubt that respect for human rights saves lives. It is widely recognized that laws and practices that discriminate against people with HIV or AIDS or those considered likely to be at risk of infection, or that in other ways violate human rights, are both morally indefensible and impede effective public health efforts.²

Individuals and organizations consulted during Phase I of the Joint Project expressed concern about the extent of discrimination and unjust treatment that gay men and lesbians continue to suffer in Canada, and about the link between discrimination and vulnerability to contracting HIV. Among many other things, they were troubled by the refusal of school systems to provide positive education about gay and lesbian sexuality; the reluctance of governments to legally recognize the existence of relationships

between two men or two women; and the lack of self-esteem often observed among lesbians and gay men. They pointed out that, while these and other examples of discrimination and stigmatization and of their effect on the lives of gay men and lesbians are problematic in and of themselves, they also have an impact on individuals' ability to protect themselves against contracting HIV.

The individuals and organizations consulted suggested that the Joint Project document how, historically, gay men and lesbians have suffered persistent patterns of discrimination and persecution, and how the HIV/AIDS epidemic has been accompanied by a second epidemic of stigma and discrimination; document how pervasive discrimination against gay men and lesbians remains in the law; show how discrimination impacts on the lives of gay men and lesbians and, in the context of HIV/AIDS, on efforts to prevent the spread of HIV and to care for those living with HIV/AIDS; and make recommendations for legislators, policy-makers, and others concerned about how discrimination against gay men and lesbians could be decreased and prevention and care efforts in the area of HIV/AIDS improved.

Activities Undertaken

Work started in October 1995. Since then, the Project has, among other things:

- produced a special issue of the *Canadian HIV/AIDS Policy & Law Newsletter* (vol 1, no 4) that focused on gay and lesbian issues and contained summaries and commentaries on a number of court cases that concern the rights of gay men and lesbians in Canada;
- participated in the National Strategic Consultation on Gay/Lesbian/Bisexual Litigation Issues, hosted by the Court Challenges Program of Canada and co-sponsored by Equality for Gay men and Lesbians Everywhere (EGALE);
- sent information about the Project to all CAS members and affiliates and to 600 people and organizations on the EGALÉ mailing list;
- undertaken extensive research on gay and lesbian legal issues and on the impact of stigma and discrimination in the context of HIV/AIDS;
- produced a draft discussion paper, written by Robert Hughes and Kenneth Smith in collaboration with Barbara Findlay, Smith & Hughes, Vancouver, in March 1996;
- asked three "key commentators" (John Fisher, Executive Director,

EGALE, Ottawa; Douglas Elliott, Elliott & Kim, Toronto; and Prof Barry Adams, University of Windsor) to critically review the draft discussion paper and to provide written comments on it;

- organized Canada's first national workshop on gay and lesbian legal issues and HIV/AIDS, held in Montréal in March 1996. At the workshop, 25 participants from across Canada and from a variety of backgrounds (see Appendix C) presented their views and discussed the approach taken in the draft discussion paper. In particular, they analyzed the following questions: How is homophobia impacting on government and institutional responses to HIV/AIDS? What are the implications of homophobia and discrimination on individuals' ability to protect themselves? What are the implications of homophobia and discrimination on care, support and treatment?
- organized a workshop at "Building Bridges: Responding to HIV/AIDS in Ethnocultural and Aboriginal Communities – A National Conference," in Toronto on 8-10 March 1996; and
- presented papers on the "Impact of Discrimination against Gay Men on Transmission of HIV" at the Sixth Annual Canadian Conference on HIV/AIDS Research, in Ottawa on 24 May 1997; and at the 10th Annual British Columbia HIV/AIDS Conference, in Vancouver on 26 October 1997.

The Discussion Paper

As part of the work undertaken by the Project, *Gay and Lesbian Legal Issues and HIV/AIDS: A Discussion Paper*³ was published in July 1997. The Paper is an updated and revised version of the draft discussion paper that formed the basis of the National Workshop on Gay and Lesbian Legal Issues and HIV/AIDS. More than 500 copies of the Paper have been distributed in Canada and internationally to stimulate discussion and to give people and organizations interested in the issues discussed in the Paper an opportunity to provide input into the *Final Report*. As a result, comments on the Paper have been received from a wide variety of individuals and organizations.

The Final Report

The vast majority of respondents to the *Discussion Paper* supported the arguments put forward in the Paper, as well as its conclusions. With only a few exceptions, their comments did not warrant a

significant departure from the content of the *Discussion Paper*. In the *Final Report*, much of the text of the *Discussion Paper*, particularly the analysis of how Canadian law treats gay men and lesbians, has therefore been retained. However, the information has been updated, new material has been incorporated, and what was Part I of the *Discussion Paper* has been completely reorganized. In addition, while the *Discussion Paper* reached only preliminary conclusions, the *Final Report* contains recommendations directed at Canadian federal and provincial legislators, policymakers in various sectors, the school systems, funders of research and researchers themselves, universities, and others.

The *Final Report* begins with a review of how, historically, gay men and lesbians have suffered persistent patterns of discrimination and persecution, and of how the advent of HIV/AIDS has intensified and extended discrimination against them (Chapter 1: Background). The Report then provides a detailed analysis of how, in 1998, Canadian law treats gay men and lesbians (Chapter 2: Gay Men, Lesbians, and the Law). In Chapter 3, the Report assesses the impact of stigma and discrimination in the context of HIV/AIDS (The Impact of Stigma and Discrimination). The Report concludes by emphasizing that discrimination needs to be combatted, and the rights of gay men and lesbians protected, first and foremost because it is right to do so:

We accord every human being that person's human rights because it is our duty and their right.⁴

In addition, the rights and dignity of gay men and lesbians need to be respected in order to better prevent the spread of HIV, and provide better care, support, and treatment to people living with HIV/AIDS (Summary of Recommendations).

Finally, because the respondents to the *Discussion Paper* found the summarized information in appendices A and B of the Paper extremely useful, these appendices have been updated, extended, and regrouped in a new appendix (Appendix A: Additional Resources). Appendices B and C contain, respectively, an updated description of the Project on Legal and Ethical Issues Raised by HIV/AIDS, and a list of people who participated at the National Workshop on Gay and Lesbian Legal Issues and HIV/AIDS or provided "key comments" on the first draft of the *Discussion Paper*.

Goals

Reflecting the concerns and needs expressed by the individuals and organizations consulted during Phase I of the Joint Project, the goals of this component of the Project are

- to document how pervasive discrimination against gay men and lesbians is in many sectors of life and in the law;

- to show how discrimination impacts on the lives of gay men and lesbians and, in the context of HIV/AIDS, on efforts to prevent the spread of HIV and to care for people living with HIV/AIDS; and
- to make recommendations for action that will enable Canada to decrease discrimination against gay men and lesbians and to increase and improve prevention and care efforts in the area of HIV/AIDS.

Next Steps

The Joint Project will widely distribute the *Final Report* and make it available on the Internet. Funding permitting, it will produce and distribute fact sheets summarizing the Report's most relevant information, targeted at a variety of interested groups; make presentations at national and international conferences about the process leading to the production of the Report and the Report's content and recommendations; undertake other activities aimed at ensuring that the recommendations in the Report are implemented, including follow-ups with governments, policymakers and others to whom the Report's recommendations are directed; and continue to monitor developments in the area of gay and lesbian legal issues and HIV/AIDS.

Limitations

For many reasons, the *Final Report* is not comprehensive. Some aspects of HIV-related discrimination have been discussed by other papers or final reports that have been produced by the Joint Project, specifically those on HIV/AIDS and Discrimination⁵ and on Discrimination, HIV/AIDS, and Aboriginal People.⁶ Therefore, while the Report discusses the effect of the advent of AIDS on the treatment of gay men and lesbians and the impact of discrimination on the spread of HIV, the many issues raised by discrimination against people living with HIV/AIDS are addressed in much greater detail in *HIV/AIDS and Discrimination: A Discussion Paper*. Similarly, this Report acknowledges that there are many unique issues affecting Aboriginal people, but these are discussed in *Discrimination, HIV/AIDS, and Aboriginal People: A Discussion Paper* rather than in this Report.

In addition, some of the issues addressed in the Report could have been dealt with in greater detail, but this was not possible for many reasons. Other issues could be dealt with only in passing. In particular, discrimination against bisexual men and women and against transgendered people raises many issues that are similar to those raised by discrimination against gay men and lesbians, as well as many additional and often different issues that could not be dealt with comprehensively in this Report and need to be dealt with in a separate paper. Nevertheless, a discussion of some of the particular problems

that transgendered people encounter, and a recommendation aimed at offering better protection against discrimination to transgendered people, have been included in the Report.⁷

Finally, while many issues – particularly the history of discrimination and the treatment of the law – discussed in this Report have a similar impact on gay men and lesbians, the risks faced by lesbians in the HIV/AIDS epidemic are not the same as those confronting gay men. In some sections of the report, particularly those on "The Advent of AIDS" and on "The Impact of Stigma and Discrimination," the main concern therefore had to be the relationship between gay men, anti-gay discrimination and homophobia and HIV/AIDS. However, the main conclusion of the Report – discrimination against gay men and lesbians continues to be pervasive, and the rights of gay men and lesbians need to be protected, first and foremost because it is right to do so – applies equally to gay men and lesbians. In addition, the Report recognizes that lesbians have been impacted by HIV/AIDS and that there is a lot to say about transmission of HIV within lesbian communities and about how different forms of discrimination have contributed to infection rates. The Report refers to these issues, but, acknowledging the disproportionate impact of AIDS on gay men, deals with them in less detail than with issues pertaining to HIV and gay men.

Caution

It needs to be stressed that – while it is important to address the issue of homophobia and discrimination against gay men and lesbians in the context of HIV/AIDS: preventing discrimination will help prevent the spread of HIV and make better care, support and treatment possible for people living with HIV/AIDS – homophobia and discrimination need to be addressed in their own right. Otherwise, a subtle but strong message could be sent that gay and lesbian identity and sexuality are not important issues in their own right, and that only lesbians' and, in particular, gay men's identity as potential "AIDS victims" has relevance.⁸ This is a challenge for any project addressing the issue of discrimination against gay men and lesbians in the context of HIV/AIDS. In Canada and in many other Western industrialized countries, HIV/AIDS has become inseparable from gay and, to a lesser extent, lesbian life, but there are many other reasons why discrimination against gay men and lesbians should end, regardless of HIV/AIDS.

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FOOTNOTES

¹ For more details, see Appendix B.

² J Hausermann. International Law, Advocacy, and Human Rights in the Context of AIDS. *Pediatric AIDS and HIV Infection: Fetus to Adolescent* 1992; 3(5): 248-250.

³ A Vassal, J Fisher, R Jürgens, R Hughes. *Gay and Lesbian Legal Issues and HIV/AIDS: A Discussion Paper*. Montréal: Canadian HIV/AIDS Legal Network & Canadian AIDS Society, 1997. The Paper can be retrieved at www.aidslaw.ca

⁴ M Kirby. Human Rights and the HIV Paradox. *Lancet* 1996; 348: 1217-1218. Reprinted in *Canadian HIV/AIDS Policy & Law Newsletter* 1997; 3(2/3): 50-52.

⁵ T de Bruyn. *HIV/AIDS and Discrimination: A Discussion Paper*. Montréal: Canadian HIV/AIDS Legal Network & Canadian AIDS Society, 1998.

⁶ S Matiation. *Discrimination, HIV/AIDS, and Aboriginal People: A Discussion Paper*. Montréal: Canadian HIV/AIDS Legal Network, 1998.

⁷ For a discussion of some of the issues raised for transgendered people, see also D Brady, S Laframboise, b findlay. Transgendered People, Discrimination, and HIV/AIDS. *Canadian HIV/AIDS Policy & Law Newsletter* 1996; 2(3): 6-7; b findlay et al. Finding Our Place: The Transgendered Law Reform Project. Vancouver: The High Risk Project, 449 East Hastings Street, Vancouver, BC V6A 1P5.

⁸ N Toonen. Homophobia and HIV. [Australian] *National AIDS Bulletin* December 1992/January 1993: 35-37 at 36.

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BACKGROUND

[A History of Discrimination](#)

[The Advent of AIDS](#)

[Human Rights and the AIDS Epidemic](#)

This chapter begins with a review of how, historically, gay men and lesbians have suffered persistent patterns of discrimination and persecution (A History of Discrimination). It then shows how the HIV/AIDS epidemic has been accompanied by a second epidemic, an epidemic of stigma and discrimination against those living with or affected by HIV/AIDS, and how the appearance of HIV/AIDS has consolidated prejudices about homosexuality and intensified and extended discrimination against gay men, usually based on assumptions like "All gay men have AIDS and are infectious" or "Gay men are to blame for AIDS."⁹ (The Advent of AIDS). The chapter concludes by pointing out the links between AIDS and human rights, showing that protection of human rights is a necessary component of HIV/AIDS prevention and care, and that health and human rights are inextricably linked (Human Rights and the HIV/AIDS Epidemic).

A History of Discrimination

The historical context of legal and social discrimination against gay men and lesbians is central to an understanding of the interaction between homophobia and HIV/AIDS issues, for when the HIV epidemic started in the early 1980s, governments and policymakers were unequipped to overcome this history of stigmatization and to deal with the gay and lesbian communities in an accepting and responsible manner. Most recently, this has been acknowledged in the report of the Commission of Inquiry on the Blood System in Canada, released on 26 November 1997,¹⁰ which criticizes key decision-makers in the federal bureaucracy and the Canadian Red Cross who "recoiled from responsibility"¹¹ in dealing with the impact of HIV upon gay men and lesbians, and failed to connect with gay and lesbian communities to develop mechanisms to limit the spread of the virus.

General Overview

The historical treatment of gay men and lesbians discloses a human rights record of which governments cannot be proud. To this day, gay men and lesbians are called unnatural, and their relationships are not seen as traditional – although they have been forming relationships for as long as heterosexuals have. Gay men and lesbians have been put to death, sent to prison, and subjected to extortion and to socially accepted harassment.¹² At the beginning of the twentieth century, lesbians were condemned as witches, and summarily executed. Gay men faced similar policies of extermination.

During the Second World War the attempt to eliminate gay men and lesbians reached an apogee. Hundreds of thousands were sent to the Nazi concentration camps. In a recent Supreme Court case, the Canadian Jewish Congress detailed some of the history of discrimination shared by Jews and gay men and lesbians:¹³

During the period of the Holocaust, when over six million Jews perished in history's most extreme example of state-sanctioned and administered racial persecution, homosexuals were also the targets of discrimination in Nazi Germany. Homosexuals were vilified, imprisoned, tortured in concentration and labour camps, and used for "medical" experiments by a regime resolved to eliminate them. Sexual relations between Jews and Germans were outlawed by the now infamous "Nuremberg Laws", punishable by death, and sexual relations between males were outlawed by Paragraph 175 of the Criminal Code, often leading to confinement in concentration camps. As Jews were identified by their Nazi persecutors with yellow Stars of David, homosexual prisoners of concentration camps were stigmatized with pink triangles.

Lesbians were branded as asocials and forced to wear black triangles in Nazi concentration camps. During the decades that followed the end of the War, homosexuality continued to be considered a crime, and in most countries in the world, including Western countries, was punishable by imprisonment. Even today, many countries and states maintain criminal prohibitions on same-sex sexual activity. Many of them – including Algeria, Chile, Cyprus, Ecuador, Guyana, India, Iran, Jamaica, Kenya, Lebanon, Mauritius, Morocco, Rumania, Sri Lanka, Sudan, Tanzania, Togo, Trinidad and Tobago, Tunisia, many States in the United States, and Zambia – are also signatories to international human rights documents.¹⁴

Penalties vary widely, from countries where the law is not strictly enforced, to those in which sanctions include whipping, life imprisonment and death. The embassy of Iran, a country that maintains the death penalty for homosexuality, has stated that "homosexuality in Iran, treated according to the Islamic law, is a sin in the eyes of God and a crime for society."¹⁵

Many other governments refuse to acknowledge that homosexuality even exists, or maintain discriminatory ages of consent. As one embassy reported: "The practice of homosexuality does not exist in Congo."¹⁶

Medicine and several other scientific disciplines have also not been without prejudice when it comes to sexual orientation. Over time, they have skewed our knowledge about homosexuality and often contributed to discrimination. In particular, many research projects have attempted to find the "cause" of homosexuality. These projects, the emphasis of which has been on pathological aspects, have concentrated on homosexuality as deviance in relation to a heterosexual norm and have put forward several reasons for this, including hormonal, genetic, sociobiological and psychological differences. Their goal has been to identify and correct differences in homosexuals or bisexuals, and they have sometimes led to experimental treatments such as lobotomy, aversion therapy, and institutionalization, in an attempt to "cure" homosexuality.

It was only in 1973 that the American Psychiatric Association eliminated homosexuality from its list of mental illnesses, followed much later, in 1993, by the World Health Organization. However, even today some research projects, although fewer in number, continue to take the approach that homosexuality can or should be cured.

The Situation in Canada

The experience of homophobia and heterosexism is inextricably a part of being gay, lesbian or bisexual in this country [Canada]. To be gay, lesbian or bisexual is to be discriminated against, both by other individuals and by institutions. To be gay or lesbian is to be defined as "other," "sick," "deviant," "abnormal," "criminal."¹⁷

Gay men and lesbians in Canada have suffered persistent patterns of discrimination and persecution. They have been treated as mentally ill and subjected to conversion therapies, including electroshock treatment. They have been targeted by discriminatory laws, such as an immigration law that prohibited their entry into Canada and subjected those who were immigrants to the threat of deportation (1952-1977), and a penal law that criminalized certain forms of gay male sexual expression and rendered gay men vulnerable to indefinite incarceration as "dangerous sexual offenders" (1892-1969). They have been excluded from certain aspects of public life. During the 1960s, for example, countless gay and lesbian witch hunts were initiated by the federal government in an attempt to purge the federal public sector of homosexuals. The Royal Canadian Mounted Police conducted investigations of thousands of federal employees in an attempt to identify those who were homosexual, for the purpose of dismissing them from their employment. As a result, approximately 150 homosexual federal civil servants resigned or were dismissed from their employment without just cause. The government paid a Carleton University

psychologist \$5000 to come up with a device to identify homosexuals. One such test required suspected homosexuals to hold a bag of heat-sensitive crystals while the investigator uttered words such as "circus" and "banana."¹⁸

Until recently, gay men and lesbians were not permitted to participate openly in the Armed Forces. They have faced discrimination in the private sector, in areas such as employment and housing, and only recently have been afforded the protection of most provincial and federal human rights acts against such discrimination. They have been targeted by hate-motivated crimes, and, on many occasions, deprived of adequate police protection. Verbal harassment and anti-gay and anti-lesbian violence, including murderous assaults, continue to be commonplace.

Gay men and lesbians have been subjected to numerous damaging stereotypes. Gay men have often been characterized as sexual predators and child molesters, while lesbians have been rendered invisible, dismissed as asexual and depicted as unfit parents.

Same-sex relationships have been devalued and treated as unworthy of recognition and respect. Numerous federal and provincial statutes, in areas such as taxation, succession, immigration, and family law, recognize only heterosexual relationships. Such statutes marginalize the individual partners in same-sex relationships, stigmatize their children, and undermine the effective functioning of their family units, by refusing to recognize the relationship between children and their de facto lesbian and gay parents for the purposes of succession, refusing to permit lesbians and gay men to sponsor their foreign-born partners for the purposes of immigration, etc.

Gay and lesbian history has been obscured through the erasure of historical references to homosexuality and lesbianism. Contemporary references to gay and lesbian sexualities in popular culture are increasing, but such references often do not accurately reflect gay and lesbian experience and sometimes even reinforce pejorative stereotypes about gay men and lesbians.

Gay and lesbian invisibility is reinforced by the fact that many gay men and lesbians are forced to conceal their sexual identities, fearing discrimination, harassment and violence if they come out. The enforced invisibility of gay and lesbian sexualities and relationships contributes to the misconception that heterosexuality is natural and normal, whereas lesbianism and male homosexuality are deviant. This contributes to the oppression of gay men and lesbians not only because it fuels social prejudice against them, but also because many of them, particularly youth, internalize the message that they are not normal. Consequently, many suffer insecurity, anxiety and shame, and lack the role models needed to develop fulfilling relationships.

The Advent of AIDS

In recent years, no disease has created so much anguish and fascination as AIDS, mixing together as it does age-old fears and taboos about epidemics, homosexuality and death.¹⁹

It was in this social and political climate that HIV/AIDS first made its presence felt. HIV/AIDS wrought havoc in communities that were being constructed. Gay men, who were just beginning to make claims for their communities and to create social structures, saw their recent and fragile freedoms being limited. Within a few years, gay communities were being decimated. In many cities in North America and Western Europe, AIDS became the leading cause of death among men aged 20 to 49.²⁰

Arguably, the advent of HIV/AIDS may also have had some positive side effects: many AIDS service organizations have been successful in gaining public legitimacy and governmental support and have served as safe places where gay men and lesbians can be out in their workplace and serve the gay, lesbian and bisexual communities; and, to some extent, AIDS service organizations have operated as advocacy groups with respect to gay and lesbian health-care and human rights issues. In addition, some have argued that the AIDS epidemic has fostered the maturation of gay and lesbian communities and provided models of care and support that were previously nonexistent. They have pointed out that gay and lesbian communities have generated generous financial support and volunteer efforts for AIDS causes and have suggested that public attitudes about homosexuality may have changed for the better, due at least in part to respect for how gay men and lesbians have responded to the challenge of AIDS.

However, overall, the impact of the epidemic has been devastating. This section of the Report shows that, in Canada, HIV/AIDS has affected gay men more than any other group of the population (Epidemiology).

The section then discusses how, since the beginning of the HIV/AIDS epidemic, there has been a second epidemic, an epidemic of stigma and discrimination directed at those living with HIV/AIDS and at those associated, in the public mind, with HIV/AIDS. The section shows how stigma and discrimination on the basis of HIV/AIDS reinforce discrimination on the basis of sexual orientation and other grounds – one cannot "talk about discrimination based on HIV or AIDS without talking about many other forms of discrimination," particularly against gay men, drug users, women, prostitutes and, generally, the poor and marginalized.²¹ In effect, "all people with HIV ... encounter homophobia and homophobic discrimination."²² The section then provides a definition of HIV/AIDS-related discrimination and shows how the epidemic of stigma and discrimination has affected the lives not only of people living with HIV/AIDS, but also of their lovers, families, and caregivers. The section concludes that, in 1998, stigma and discrimination against people with, or affected by, HIV/AIDS continue to be pervasive (The Second Epidemic: Stigma and Discrimination).

The section focuses on gay men because of the disparate impact HIV/AIDS has had on them. Doing otherwise would be a futile and counterproductive exercise in political correctness and would only reinforce what gay men have been witnessing since the late 1980s – the shift in attention from gay men to other populations, with less and less funding and efforts devoted to fighting the epidemic among gay

men, while the epidemic continues to disproportionately affect them. Clearly, the advent of HIV/AIDS has affected lesbians to a lesser extent than gay men and the risks faced by lesbians in the HIV/AIDS epidemic are clearly not the same as those confronting gay men. In this section, the main concern therefore had to be on the relationship between the advent of AIDS and reinforced stigma and anti-gay discrimination. However, this does not mean that lesbians have not been impacted by HIV/AIDS. There are HIV-positive lesbians, but knowledge about transmission from woman to woman is still limited. Interventions directed specifically at lesbians in the context of HIV have been rare. In addition, the lives of many lesbians have been very much impacted by HIV/AIDS. To mention only a few examples: they have cared for people with HIV/AIDS, mourned the deaths of many of their friends; joined gay men in the fight against AIDS – a fight that drained much of the energy of many gay men and lesbians who were previously, and often separately, engaged in the fight for the right to love the partner of one's choice and for sexual freedom; and health issues concerning them, such as breast cancer, have received relatively little attention, in part because of the focus on AIDS in gay and lesbian communities.

Epidemiology

Men Who Have Sex with Men

As of 30 June 1997, 72.5 percent (10,943) of the total number of AIDS cases (15,101) reported to Health Canada were attributed to men who have sex with men. An additional 4.3 percent (655) were attributed to the combined category of men who have sex with men and use injection drugs. The annual number of AIDS cases attributed to men who have sex with men leveled off from 1992 to 1994 and has decreased since then, but remains very high.²³

Data on AIDS cases provide a picture of HIV infection approximately ten years old. To estimate more recent trends in HIV infection, Health Canada relies on data on HIV testing, HIV prevalence and incidence, and risk behaviour among men who have sex with men. The data suggest that the rate of infection among men who have sex with men has been decreasing since the mid 1980s.²⁴ However, until very recently, by far the highest number of new HIV infections still occurred among men who have sex with men. In addition, while new cases of infections among gay men slowly declined as a percentage of the total number of new cases of infections, at the end of the 1980s there appears to have been a resurgence of HIV infection among younger men who have sex with men.²⁵ The rate of infection in a cohort of gay and bisexual men in Vancouver between the ages of 18 and 30 was 3.1 percent as of December 1996, twice as high as the authors of the study expected.²⁶

Generally, it has been estimated that between 10 and 20 percent of men who have sex with men may be living with HIV.²⁷ In a survey of 5000 gay and bisexual men interviewed in gay venues in 1991, 12 percent reported they were HIV-positive.²⁸

Discrimination against gay and bisexual men has itself affected the extent and reliability of data on HIV infection in this population, contributing to the paucity of studies in cohorts of gay and bisexual men, the reluctance of gay and bisexual men to identify themselves as such, and uncertainty as to the total number of gay and bisexual men in Canada.

Although several studies of cohorts of gay men have been carried out from the onset of the epidemic in Canada,²⁹ most epidemiological research has been undertaken in populations less affected by HIV than gay men – populations better known by those traditionally carrying out research and by those who commissioned the research. One may ask why this has been the case: was it a reflection of the (lack of) concern of public health authorities (for gay men), of a lack of interest on the part of researchers, or of other reasons? Another factor that may influence the reliability of data on HIV infection is that some gay and bisexual men are reluctant to identify themselves as such and to disclose their sexual orientation to public health authorities, fearing stigma and discrimination. Other men may have sex with men but not identify themselves as gay or bisexual.³⁰ Finally, epidemiological estimates of the prevalence of HIV infection are that much more uncertain because the denominator, namely the number of gay men, is a matter of controversy. Estimates of this number are still based on a study carried out during the late 1940s on a sample of more than 5000 people in which 10 percent of the men and 4 percent of the women defined themselves as exclusively gay or lesbian.³¹ In contrast, in a recent French study of more than 20,000 people, only 4.1 percent of men and 2.6 percent of women admitted to having had sex with a person of the same sex at some time in their life. The difficulties of undertaking research in this area are obvious.³² In a context in which marginalization is still rampant – and France is no exception – how could men who have sex with men and have female partners define themselves without fear as bisexual, over the telephone, at suppertime! In addition, how can a telephone study such as that undertaken in France provide information on young people, drug users, the homeless, male sex-trade workers – in short, men defined as being "at risk" of contracting and transmitting HIV infection – precisely the men who may have sex with men and on whom no information is available. The danger of studies that underestimate the prevalence of homosexual behaviour is that they may lead to insufficient resources being made available to prevent the transmission of HIV infection among men who have sex with men.

Lesbians

A major problem, and arguably a sign of discrimination, is that lesbians have largely been ignored in the HIV/AIDS epidemic. Lesbian sex has been absent from most discussions of AIDS since the epidemic began, and the subject of whether lesbians are at risk or not is quite controversial. Making the situation even more difficult to evaluate, there are four myths surrounding lesbians: they don't prostitute, they don't use injection drugs, they don't have sex with men, and they don't get AIDS.³³ The general opinion, therefore, is that they are not at risk, "that lesbianism is the safest sex around."³⁴

One reason for the controversy is that there is very little data to substantiate whether lesbians are at risk or not. A 1992 US article talks about four cases of woman-to-woman transmission that had been

reported by doctors to mainstream medical journals. The cases were said to have involved women who reported oral sex with an HIV-positive woman as the only possible route of infection.³⁵ The same article cites an observational database study undertaken by the US Centers for Disease Control (CDC) of patients at 27 community-based clinics that included 287 female HIV cases. Among the female cases, researchers suggested that seven could be cases of woman-to-woman transmission.³⁶ Reports by community health projects in several cities in the United States also contend that some of their clients had no risk factor aside from lesbian sex. However, some suggest that cases of woman-to-woman transmission have not been properly documented and argue that lesbian sexual transmission is virtually non-existent. They point out other significant risk factors in the cases attributed to woman-to-woman transmission and say that it is impossible to depend on patients to truthfully disclose how they were exposed to HIV: "An out lesbian might find it easier to talk about sexual behavior than a drug or alcohol history; she might be unwilling to talk about heterosexual contacts; she could have memory blackouts from drug or alcohol use."³⁷

What we do know is that there are HIV-positive lesbians. For example, in a study that analyzed 9,717 AIDS cases of adult women from 1980 to 1989, 79 of the women said that they had had sex exclusively with women since 1977; however, of that group, 75 were injection drug users and 4 had received blood transfusions.³⁸ In a survey of 181 lesbians (10 of them injection drug users) undertaken in Turin, Italy in 1992-93, 6.1 percent (n=11) tested HIV-positive.³⁹ In another survey undertaken in San Francisco and Berkeley among 500 lesbian and bisexual women, of whom 10 percent reported injection drug use, 1.2 percent were HIV-positive.⁴⁰ However, no epidemiological studies of lesbians have been undertaken in Canada. A few studies notwithstanding, the numbers of lesbians with HIV/AIDS remain largely unknown, and speculation continues about whether lesbians can sexually transmit HIV to one another.

Most would agree that if transmission between women is occurring, it is inefficient, and that "[e]ven if it is occurring at a very slow rate, social-sexual patterns – lesbians tend to have fewer sexual partners than gay men – make it unlikely that lesbians as a group will ever be devastated in the same way that gay men have been."⁴¹ The greatest risk factor for lesbians is the use of injection drugs. Most lesbians who are infected fall into this category, a strong reason for recognizing drug use among lesbians and advocating an educational program stressing the dangers of HIV transmission through the sharing of needles.⁴² Another route of infection is sex with men. In one study of women who defined themselves as lesbians, 46 percent had had sex with men at least once since 1980.⁴³ In the lesbian sex survey undertaken in 1995 by the gay and lesbian magazine *The Advocate*, three out of four respondents indicated that they had experienced vaginal intercourse with a male. Five percent of lesbians surveyed had had a male sex partner within the past year.⁴⁴ And when women who consider themselves as lesbians "do have sex with a man, often it will be with one who is gay or bisexual – increasing their risk."⁴⁵ Finally, the lesbian sex survey concluded that "there may be some truth" to the stereotype that lesbians are overrepresented in the field of sex work: nine percent of those who completed the survey said that they had been paid for sex – six percent by males, two percent by females, and one percent by both.⁴⁶

The Second Epidemic: Stigma and Discrimination

Persons with HIV/AIDS face double jeopardy: they face death, and while they are fighting for their lives, they often face discrimination. This discrimination is manifested in all areas of life – from health care to housing, from education to work to travel. It is generally based on ignorance and prejudice and is expressed in particularly harsh forms against the most vulnerable: homosexual men, women, children, prisoners, and refugees among them.⁴⁷

If one were to read the Universal Declaration of Human Rights with the aim of finding out which human rights have been affected by various responses to AIDS, one would see that most, if not all, basic human rights and freedoms, laid down as the common standard of achievement for humanity more than 40 years ago, have been challenged, violated, or denied in the context of HIV/AIDS. ... The core of human rights is the postulate that all human beings have equal rights. This has been challenged by denying human rights to people affected by AIDS.⁴⁸

Since the beginning of the HIV/AIDS epidemic, there has been a second epidemic, an epidemic of stigma and discrimination directed at those living with HIV/AIDS and at those associated, in the public mind, with HIV/AIDS. Prejudice, stigmatization and even violence against people living with HIV/AIDS "are a worldwide phenomenon," and "AIDS has been successively used to direct blame, stigmatisation and prejudice at homosexual men, prostitutes, intravenous drug users, Haitians, African students in the USSR and India, blacks and Hispanics in the United States, US seamen in the Philippines, foreigners in Japan, Europeans in Africa."⁴⁹

Stigma⁵⁰

[T]he stigmatized are a category of people who are pejoratively regarded by the broader society and who are devalued, shunned or otherwise lessened in their life chances and in access to the humanizing benefits of free and unfettered social intercourse.⁵¹

Stigma "is a powerful discrediting and tainting social label that radically changes the way individuals view themselves and are viewed as persons."⁵² People who are stigmatized are usually considered deviant or shameful for some reason or other, and as a result are shunned, avoided, discredited, rejected, restrained or penalized. As such, stigma is an expression of social and cultural norms, shaping relationships among people according to those norms. Stigma marks the boundaries a society creates

between "normals" and "outsiders," between "us" and "them."

Multiple Dimensions of Stigma

HIV/AIDS is not alone among illnesses and diseases in being marked by stigma. Other conditions, such as epilepsy, mental illness, cancer, tuberculosis, and syphilis, have been stigmatized and stigmatizing, both in the past and the present. What distinguishes HIV/AIDS from many illnesses and diseases, however, are the many dimensions of AIDS-related stigma. Research into HIV/AIDS-related stigma has found that people living with HIV/AIDS are stigmatized because:⁵³

- HIV/AIDS is associated with behaviours that are already stigmatized or considered deviant, particularly homosexuality and injection drug use;
- people living with HIV/AIDS are thought to be responsible for having contracted HIV;
- HIV/AIDS is a life-threatening disease;
- people are afraid of contracting HIV; and
- the religious or moral beliefs of others lead them to conclude that having HIV/AIDS is the result of a moral fault, such as promiscuous or deviant sex, that deserves punishment.

It is the combination of these dimensions of stigma, together with their strength, that makes it so difficult to overcome HIV/AIDS-related stigma. When researchers have attempted to determine the extent to which various dimensions of HIV/AIDS-stigma contribute to attitudes toward someone living with AIDS, they have found that when others were held more responsible for the onset of AIDS, and when the cause of AIDS was perceived as more external, people reported more positive emotions toward the person living with AIDS, and that more positive emotions corresponded with an increase in helping behaviour. At the same time, a negative attitude toward homosexuality contributed to negative emotions toward the person living with AIDS and, together with concern about the risk of infection, corresponded with less inclination to help the person living with AIDS.⁵⁴

The Links with Homophobia

Gay – Got AIDS Yet?⁵⁵

The link in people's minds between homosexuality and AIDS is so firmly established that discrimination against people with HIV/AIDS is inseparable from discrimination on the basis of sexual orientation.⁵⁶

The early prevalence of HIV/AIDS among gay men in North America has resulted in an enduring

association between the stigma of HIV/AIDS and the stigma of homosexuality. The predominantly negative attitudes toward homosexuality have influenced people's attitudes and behaviour toward people living with HIV/AIDS in general and gay and bisexual men in particular.⁵⁷ As a result:

- Stigma associated with homosexuality is transferred to HIV/AIDS, so that people living with HIV/AIDS may be discriminated against because they are assumed to be homosexual. It has been said that "[t]he historic and very real links between gay men and HIV have generalised some aspects of homophobia to HIV, so that even if gay men stopped getting HIV altogether, homophobic reactions to HIV issues and to people living with HIV would stay in the public mind for a long time."⁵⁸ This means that, in effect "all people with HIV ... encounter homophobia and homophobic discrimination."⁵⁹
- Stigma associated with HIV/AIDS is transferred to homosexuality, so that gay and bisexual men experience discrimination because they are assumed to be HIV-positive or to be the cause of the HIV/AIDS epidemic. From the beginning, HIV/AIDS was associated with gay men. AIDS was called the gay plague, gay cancer, and Gay Related Immune Deficiency (GRID), terms that made it possible to socially "contain" the spread of the virus. The HIV/AIDS epidemic has intensified and extended discrimination against gay men, usually based on assumptions like "All gay men have AIDS and are infectious," or "Gay men are to blame for AIDS."⁶⁰ Apart from discrimination on the basis of their sexual orientation, gay men now have to fear being discriminated against because of HIV/AIDS, regardless of whether they themselves are HIV-positive. A study of gay and bisexual men carried out in 1991 revealed that one respondent in five feared discrimination because of AIDS.⁶¹
- Men who have acquired HIV through sex with other men have been the objects of considerable blame and little sympathy, in contrast not only with people who acquire disease through events beyond their control (as might be expected from prevailing attitudes about responsibility for disease) but also with people who acquire disease because of their habits or lifestyle. In a study of attitudes to people living with AIDS undertaken in Australia, many expressed the view that gay men were to blame for their disease and that gay men with HIV/AIDS should pay for their own health care.⁶² Generally, there has been a dominant undercurrent of hostility toward many people with HIV/AIDS, as if they are somehow to blame. People with HIV/AIDS have been divided into two categories – the "guilty majority" of gay men and injection drug users, and the "innocent minority" of hemophiliacs or transfusion cases.⁶³
- For gay and bisexual men living with HIV/AIDS, disclosure of HIV status may entail disclosure of their sexual orientation, and the possibility of discrimination on the basis of their sexual orientation as well as their HIV status.

In addition, the association between HIV/AIDS and homosexuality has had effects on how governments and institutions have reacted (or failed to react promptly, adequately and consistently) to HIV/AIDS, and on HIV prevention in the general population (see *infra*, "The Impact of Stigma and Discrimination").

It should be noted that men who have sex with men may not identify as gay or bisexual and may have a very loose association with the "gay community."⁶⁴ The categories "men who have sex with men," "bisexual," and "gay" comprise a diversity of identities, cultures and behaviours. The degrees to which such men may have been affected by the negative stereotypes and stigmas associated with homosexual activity or identity in their surrounding culture will vary.⁶⁵

Discrimination

Definition of HIV/AIDS-Related Discrimination

The Joint United Nations Programme on HIV/AIDS (UNAIDS) has developed a protocol for the identification of discrimination against people living with HIV/AIDS. According to the protocol, HIV/AIDS-related discrimination is defined as follows:

Any measure entailing any arbitrary distinction among persons depending on their confirmed or suspected HIV serostatus or state of health.⁶⁶

The protocol distinguishes between legitimate and illegitimate discrimination. *Illegitimate* discrimination is unjustified, disproportionate, and arbitrary. A measure or an action is *unjustified* if it lacks rational and objective reasons. It is *disproportionate* if the means employed and their consequences far exceed or do not achieve the aims pursued. It is *arbitrary* if it seriously infringes the rights of the individual and is not necessary to protect the health of others.⁶⁷

The protocol recognizes that "[d]iscrimination against people living with HIV/AIDS also extends to those with whom AIDS is associated in the public mind (homosexuals, prostitutes, drug addicts, hemophiliacs, and family members and associates of HIV-positive people)."⁶⁸

In 1991 the Anti-Discrimination Board in the state of New South Wales, Australia, held a public inquiry into HIV/AIDS-related discrimination. The Board observed that HIV/AIDS-related discrimination can take a variety of forms, which may be more or less obvious or identifiable:

It can range from almost imperceptible attitudinal hostility through to physical violence. It can manifest itself in forms which appear reasonable and justifiable, or in extremes of pathological behaviour. It is sometimes blatantly explicit, but more often subtle, sophisticated and difficult to define.⁶⁹

The Board identified eight forms of discrimination:⁷⁰

1. *direct discrimination*: discrimination that is explicitly based on characteristics of or attributed to the individual against whom the discrimination is directed, including characteristics attributed on the basis of stereotyping.
2. *indirect discrimination*: discrimination that is based on the establishment of rules, policies or conditions that do not in themselves appear discriminatory, but that have the effect of discriminating against particular groups of people who are unable, or less able, to comply with the conditions.
3. *reactive discrimination*: discrimination that occurs when a person is confronted with someone who is, or who is assumed to be, a member of a group against which the person holds strong prejudices; such discrimination is not intentional or planned.
4. *proactive discrimination*: discrimination that is intentional and planned; it is often found in the development of policies, procedures, and rules that have as their purpose to preclude certain groups, or to exclude them if they are found to be present.
5. *passive discrimination*: discrimination that occurs by failure to act, when the particular needs of particular groups are not met, often with the justification of providing equal treatment for all, but, in fact, failing to meet the special needs of some.
6. *scapegoating*: discrimination that seeks to subject people to punishment, usually on the basis that they are to blame for some social evil, and that involves actively seeking out and victimizing the objects of prejudice.
7. *harassment*: discrimination that involves subjecting a person to psychological, emotional and sometimes physical discomfort, because of characteristics s/he has or are attributed to him/her; it may range from refusal to acknowledge or deal with a person, through indirect and direct verbal ridicule or abuse, to interference with property, and to the extreme of physical assault.
8. *vilification*: discrimination that involves making statements about a group of people on the basis of their characteristics or of stereotypical assumptions about them that bring members of the group into hatred, ridicule or contempt.

Discrimination – Both Feared and Experienced

Studies of stigma related to HIV/AIDS, as well as other illnesses such as epilepsy, have drawn a distinction between "felt" and "enacted" stigma. Felt stigma refers to the shame associated with the illness and the fear of being discriminated against on account of the illness; enacted stigma refers to actual experiences of discrimination. There is abundant evidence that felt stigma and anticipated discrimination prevent people with HIV/AIDS from disclosing their HIV-status to family or friends, from seeking or obtaining employment, from accessing health-care benefits, health-care services, or other services. As a result, people with HIV/AIDS and their caregivers may live with the effects of secrecy about HIV-status, social isolation, concern about how they or those related to them might be treated, lack of employment opportunities, insufficient funds for drugs, and other consequences. Moreover, it is clear that people living with HIV/AIDS have *in fact* experienced stigma and discrimination, whether in inappropriate questions about "how did you get HIV," hostility in the community, refusal of medical services, loss or refusal of employment, travel restrictions, and so on. In addition, many of the populations affected by HIV/AIDS — gay and bisexual men, injection drug users,

sex workers, Aboriginal peoples, prisoners — are the objects of stigma and discrimination for other reasons.

The Extent of HIV/AIDS-Related Discrimination in Canada

Breaches to human rights in the context of HIV infection occur in Canada. On the basis of specific cases heard under Human Rights codes as well as anecdotal information, they are widespread. Such breaches have occurred in relation to housing, workplace situations, access to medical care and the way in which this care is provided, custody of and access to one's children, insurance, and on the basis of disability, sexual orientation, sex and race. Injection drug users or prisoners can be particularly vulnerable to such breaches. Blatant incidents have occurred but many are more subtle. Poverty itself becomes an issue in relation to HIV infection — some people become poor because they have AIDS and people who are poor can be more at risk.⁷¹

Surveys of attitudes in the first decade of the HIV/AIDS epidemic revealed varying degrees of discriminatory attitudes towards people living with HIV/AIDS among the general public.⁷² It is difficult to determine the extent to which these attitudes result in discriminatory actions, but it is apparent how such attitudes contribute to an environment in which people living with HIV/AIDS feel stigmatized, and it is also clear that people living with HIV/AIDS have experienced unfair discrimination in a wide range of areas.

In Canada, an investigation of HIV/AIDS-related discrimination undertaken in 1988-89 by the British Columbia Civil Liberties Association received reports of 83 cases of discrimination.⁷³ The Association noted that it was not able to provide an accurate estimate of the incidence of HIV/AIDS discrimination in Canada at the time for several reasons: the inability of AIDS organizations to keep accurate records of the complaints they had received or to report those they knew of, the likelihood that people had experienced unfair discrimination but had not reported the incident, and the meagre response from the French-speaking community. Nevertheless, it concluded:

We can, however, say that AIDS discrimination is a serious problem. Thirty-three allegations have been made to human rights bodies over the past three years, despite the fact that (a) most people did not know that AIDS was a prohibited ground of discrimination; (b) some human rights bodies did not accept complaints from those who were or were feared to be HIV positive; (c) many persons with AIDS or persons who are HIV positive are afraid to complain for fear of further discrimination; and (d) many persons simply do not complain — they are more concerned to get accommodation, or to seek alternative sources of income or health care, than they are to take to task the person or persons responsible for the discrimination. That we documented a

further 51 allegations of AIDS discrimination which were not brought forward to a human rights body attests to this fact.⁷⁴

The National Advisory Committee on AIDS⁷⁵ and the over 60 individuals and groups consulted in 1995 by the Joint Project⁷⁶ also provided many examples of such discrimination. As recently as 1998, the kinds and the impact of HIV-related stigma and discrimination experienced by people with HIV/AIDS and those affected by HIV/AIDS at this time in the epidemic in Canada have been documented in *HIV/AIDS and Discrimination: A Discussion Paper*.⁷⁷ The Paper provides ample evidence that stigma and discrimination continue to be endemic, reinforcing, once again, the call for laws, policies, programs and practices that address the causes and the effects of HIV-related stigma and discrimination. Based on a review of the academic or scientific literature, reports produced by governmental or nongovernmental agencies, and other literature,⁷⁸ as well as on interviews with a selection of people living with HIV/AIDS, organizations comprised of people living with HIV/AIDS, or organizations providing services to people living with HIV/AIDS or those affected by HIV/AIDS, and the comments of participants in a national workshop on discrimination and HIV/AIDS held on 15 January 1998, the Paper concludes that, in 1998, stigma and discrimination associated with HIV/AIDS are still pervasive, but that the forms they take and the context in which they are experienced have changed since the early days of the epidemic. According to the Paper, these changes have serious implications for people with HIV/AIDS and people affected by HIV/AIDS. It notes the following key aspects of the current situation, as expressed by participants in the January 1998 workshop on discrimination and HIV/AIDS:

- The epidemic of HIV infection is expanding among diverse populations, many of them marginalized within Canadian society. While some aspects of HIV-related discrimination are the same for all these populations, in other ways the experience and impact of discrimination are unique to the various identities that are assumed by or assigned to people with or affected by HIV/AIDS. The most marginalized among people with HIV/AIDS experience many layers of stigma and discrimination. They also have the least resources or support in seeking redress.
- With the restructuring of the health system and the devolution of authority for programming, there is considerable uncertainty about the funding and quality of HIV/AIDS programs in future. There may be fewer programs with a specific focus on HIV/AIDS, resulting in a systemic neglect of needs that are unique to or disproportionate among people living with HIV/AIDS or the populations most affected by HIV/AIDS. At the same time, organizations that provide specific services to people with HIV/AIDS or populations affected by HIV/AIDS are faced with increasing demands, which they must meet with the same level of resources or reduced resources. The difficulty of meeting these demands is all the greater when the populations that need to be served are different; one program will not fit all.
- With the advent of protease inhibitors and combination therapies, many — but not all — people living with HIV/AIDS are living longer and enjoying better health. While the benefits of these developments have been great, they have also been accompanied by new risks for people living with HIV/AIDS. There is a renewed impetus to adopt traditional public health measures, such as

nominal reporting of HIV infection and increased partner notification efforts. There is also a prevailing sense that people living with HIV/AIDS can now lead "normal" lives, and a tendency to become more restrictive in determining whether people living with HIV/AIDS qualify for disability benefits. The fact that people living with HIV/AIDS are still vulnerable to stigma and discrimination is forgotten in these discussions. In many ways, the era of combination therapies has exposed people with HIV/AIDS to greater threat of discrimination. One participant in the workshop stated: "I was able to remain invisible living with HIV until two years ago. Now I have to carry my bag of medications around all the time — I am always visible. I carry my stigma around."

- The era of combination therapies is also raising new concerns about the ethics of informed choice in treatment decisions made by people living with HIV/AIDS. There are reports that people feel pressured by their physicians to begin treatment with the latest generation of HIV drugs, and of instances where people have been denied services or fear losing their physician if they refuse to begin treatment. There are also questions about equity in treatment and access to care for marginalized populations, and about the extent to which they are provided with the supports that may be necessary to assist them in maintaining the complicated regimes of combinations of drugs.
- While discrimination is still pervasive, it has become more subtle and less explicit. In the past, for example, people may have been fired outright when it was discovered they were HIV-positive. Today they may be laid off for what are ostensibly other reasons or they may be harassed and pressured to the point that they quit their jobs or go on disability. Fear of being identified at work and of losing their job in fact prevents some people from taking HIV-related medications, as a study among people living with HIV/AIDS in Montréal found.⁷⁹

The Paper concludes that, even as the epidemic changes, stigma and discrimination continue to have an enormous impact on the lives of people with HIV/AIDS. It further concludes that decisions about the direction that policy and programs should take in response to the changing epidemic need to be based on, among other considerations, a full analysis and assessment of the impact of stigma and discrimination on the people infected and affected by HIV/AIDS.

Human Rights and the HIV/AIDS Epidemic

Safeguarding the human rights of persons with AIDS is vital not only on ethical and legal grounds but for pragmatic reasons. It is a necessity, not a luxury, and it is not a question of the "rights of the many" against the "rights of the few."⁸⁰

This section discusses the links between HIV/AIDS and human rights, showing that protection of human

rights is a necessary component of HIV/AIDS prevention and care, and that health and human rights are inextricably linked. It concludes by citing Justice Michael Kirby, who has an answer to all those who, over 15 years into the HIV/AIDS epidemic, still question what human rights have to do with a successful strategy to contain the spread of HIV.

Contextual factors — discrimination among them, in its various forms — can affect both people's ability to protect themselves from HIV infection or to foster their health when infected with HIV, and society's ability to develop and deliver effective programs in education, prevention and health care. Because of this, many around the world have urged individuals, organizations, and states to analyze the HIV epidemic from the perspective of human rights and human dignity.⁸¹ According to such an analysis, the contextual barriers to effective education, prevention, and health-care programs are identified according to universal human rights established in international law and ratified by international treaties.⁸² The fundamental statement of these human rights is the Universal Declaration of Human Rights.⁸³

The value of such an analysis is that it acknowledges that discrimination is embedded within and contributes to a variety of circumstances that deprive people of their rights and dignity. Frequently, in fact, it is impossible or futile to address HIV/AIDS-related discrimination without addressing the context in which such discrimination is embedded. Thus, for example, women have experienced discrimination when their physicians have failed to advise them about HIV testing, have discouraged them from being tested, or have associated risk of HIV infection with negative connotations of "promiscuity." Such discrimination cannot be adequately understood or addressed without addressing the cultural identities of women, perceptions of risk of HIV infection and populations most affected by HIV infection among both women and physicians, and the practices of physicians in relation to women.⁸⁴ Similarly, the risk of HIV infection among injection drug users who inhabit impoverished urban centres with a high density of drug users is in part (and arguably in large part) an effect of the criminal status of drug use in Canadian law, a legislated form of discrimination against drug users.⁸⁵ Likewise, the risk of HIV infection experienced by Aboriginal peoples as a result of their overrepresentation among drug users and in prison populations cannot be understood or addressed without recognizing the events and structures, both past and present, that have contributed to substance abuse, migration, unemployment, and despair among Aboriginal peoples in Canada.⁸⁶ So too, an environment that does not acknowledge and respect the sexual identities of gay and bisexual youth, that does not provide support at home or at school for the coming out process, and that tolerates high levels of violence and abuse against gay men contributes to the many risks to the health of gay and bisexual youth, including the risks of HIV infection.⁸⁷ Finally, any analysis of what makes people vulnerable to HIV infection or what makes people living with HIV vulnerable to sickness and death must now take into account the role of poverty, independent of any risk factors, in leading to HIV infection and to sickness and death, and how the structures of our economy and our society inadvertently or programmatically benefit (discriminate in favour of) people with higher incomes or more wealth.⁸⁸

Indeed, it is precisely in the context of HIV/AIDS that the strong public health rationale not to interfere with human rights has become apparent. There has been a realization that protection of human rights is a necessary component of HIV/AIDS prevention and care, and that health and human rights are

inextricably linked. The chapter on the "The Impact of Stigma and Discrimination" will demonstrate this in greater detail. It will discuss what is now known about how discrimination affects the course of HIV infection among gay and bisexual men, and how discrimination affects the lives of gay and bisexual men living with HIV/AIDS.

Mann identified four reasons why human rights must be protected:

- because "it is right to do so";
- because preventing discrimination helps ensure a more effective HIV prevention program;
- because social marginalization intensifies the risk of HIV infection; and
- because "a community can only respond effectively to HIV/AIDS by expressing the basic right of people to participate in decisions which affect them."

Therefore, Mann has concluded, it is "essential and inevitable that we look to the insights and guidance of human rights, ethical and humanitarian values as we consider – as public health experts – how to move ahead and advance in policy and program in the 1990s."⁸⁹ Reflecting this understanding, the Forty-first World Health Assembly adopted a resolution urging member states to:

- foster a spirit of understanding and compassion for persons living with HIV/AIDS through information, education and social support programs;
- protect the human rights and dignity of persons living with HIV/AIDS and of members of population groups, and to avoid discriminatory action against and stigmatization of them in provision of services, employment and travel;
- ensure the confidentiality of HIV testing and to promote the availability of confidential counselling and other support services to persons living with HIV/AIDS; and
- include in any reports to WHO on national AIDS strategies information on measures being taken to protect the human rights and dignity of persons living with HIV/AIDS.⁹⁰

Recognizing that there is a

strong and clear public health rationale for this emphasis on the protection of the human rights and dignity of HIV-infected persons, including people with AIDS, the World Health Assembly has stated that this policy is critical to the success of national and international AIDS prevention programs. Therefore the protection of the rights and dignity of HIV-infected persons is an integral part of the Global AIDS Strategy.⁹¹

In the Declaration of the Paris AIDS Summit,⁹² 42 countries including Canada solemnly stated their determination to fight against poverty, exclusion and discrimination. More recently, the Québec department of health and social services recommended, in order to reduce the spread of HIV, "encouraging the adoption of nondiscriminatory attitudes toward persons vulnerable to or living with HIV, for example by supporting, at the departmental level, proposals to amend current laws to favour recognition of the social status of homosexual persons."⁹³

As expressed by the New South Wales Anti-Discrimination Board,

an effective response to HIV and AIDS related discrimination is not just about a *fair go* for the victims of discrimination; it is about a *fair go* for the whole community. The community response must be to fight the virus, not those infected with it [emphasis in the original].⁹⁴

However, many citizens – and most political leaders – still question what human rights have to do with a successful strategy to contain the spread of HIV. For them, Justice Michael Kirby has the following answer:

However imperfect our understanding of the tools of behaviour modification, this much at least seems clear. To have a chance of penetrating into the mind of an individual, so that he or she secures the knowledge essential to change behaviour at a critical moment of pleasure-seeking, it is imperative to win the trust of that individual. Only in that way will their attention be captured in a manner that will convert words and information into action. Pamphlets and posters, homilies and sermons are only of minor use in this regard. What is needed is the direct supply of information by a source regarded as trusted, impartial and well intentioned, so that, by repeated messages of this kind, a general awareness about the existence of HIV can be translated into individual daily conduct.

The paradox is that laws which criminalise particular target groups (sex workers, homosexuals, injecting drug users, &c) may appear to be a suitable response. They are often attractive to the public and therefore to distracted politicians who are anxious to be seen to be doing something in the face of the grave challenge to public health that HIV presents. But experience

teaches that such responses have little impact on the containment of an epidemic of this nature. They actually tend to have a negative impact on behaviour modification because they place targeted groups beyond the reach of the requisite information. They undermine the creation of the supportive social and economic environment in which effective strategies can be prosecuted.

Thus the HIV paradox teaches, curiously enough, that one of the best strategies of behaviour modification which will actually work to reduce the spread of HIV, by enhancing and sustaining self-protection, is to be found in measures that positively protect the targeted groups and uphold the rights of individuals within them. In those countries where there has been a measure of success in achieving and sustaining behaviour modification, and thereby reducing the spread of HIV infections, such strategies have been adopted

To those who find the HIV paradox unconvincing or even offensive, two answers may be given. The first is that of practicality. No other strategy has been shown to work. Without effective behaviour modification HIV will continue to spread rapidly, causing enormous personal suffering and devastating economic and human loss. By 1987, most informed health officials, led by the World Health Organization, had come to recognize the force of the HIV paradox. However, their endeavour to supplement public campaigns and health prevention efforts with attention to human rights has only been partly successful. The effort must continue.

The second justification for the strategy which I have described takes me back to fundamental human rights. They are important, not because they are contained in the international constitutions or laws. Their importance lies in the fact that such rights are basic for every human being for no reason other than the humanity and unique individuality of each of us. I once explained, to a law school in the USA, the practical reasons for supporting a strategy protective of the rights of individuals especially at risk of HIV infection. A young law student rebuked the judge. He told me that I had forgotten the main reason. This was that we accord every human being that person's human rights because it is our duty and their right. When epidemics are about, human rights tend to go out of the window. But even in times of epidemic, departures from respect for fundamental human rights must be controlled by law. They must be limited to measures that are strictly proportional and necessary. They must be compatible with the other objectives of a democratic society.⁹⁵

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FOOTNOTES

⁹ New South Wales Anti-Discrimination Board. *Discrimination – The Other Epidemic. Report of the Inquiry into HIV and AIDS Related Discrimination*. The Board, 1992.

¹⁰ The Honourable Mr Justice H Krever. *Commission of Inquiry on the Blood System in Canada: Final Report*. Volumes 1 to 3. Ottawa: Minister of Public Works and Government Services Canada, 1997.

¹¹ Patrick. Gay men led fight against tainted blood: Krever report exonerates gay community from accusations. *Capital Xtra*, No 52, 12 December 1997, at 11.

¹² For a detailed historical analysis see, inter alia, M Lever. *Les Bûchers de Sodome*. Paris: Fayard, 1985; R Plant. *The Pink Triangle. The Nazi War against Homosexuals*. New York: Holt, 1986.

¹³ Factum of Canadian Jewish Congress, *Vriend v Alberta*, Supreme Court of Canada, para 5.

¹⁴ International Lesbian and Gay Association Annual Report 1997; 4 (October-December): 9-11.

¹⁵ Tielman & de Jonge. Country-by-Country Survey: A worldwide inventory of discrimination and liberation of lesbians and gay men. In: *Second International Lesbian and Gay Association Pink Book*, 185 at 211.

¹⁶ Statement of Congo Embassy, reported in Tielman and de Jonge, *ibid*, at 191.

¹⁷ Canadian AIDS Society. *Homophobia, Heterosexism and AIDS. Creating a More Effective Response to AIDS*. Ottawa: The Society, 1991.

¹⁸ McCarthyism Ottawa Style. *Capital Xtra!* 25 March 1994, at 11; Beeby. Mounties Staged Massive Hunt for Gay Males in Civil Service. *Globe and Mail* 24 April 1992, at A1.

¹⁹ M Pollak. *Les homosexuels et le sida. Sociologie d'une épidémie*. Paris: AM Métailié, 1988.

- ²⁰ See, eg, R Remis, AC Vandal, P Leclerc. *La situation du sida et de l'infection au VIH au Québec, 1994*. Québec, Unité des maladies infectieuses de l'hôpital général de Montréal, Direction de la Santé publique de Montréal-Centre, 1996.
- ²¹ D Garmaise. *The Role of Prejudice and Discrimination in AIDS* (address to a public forum on AIDS Awareness and Responsibility: Bigotry and Education in Canadian Society, McGill AIDS Centre, Montréal, 1 December 1993). Ottawa: Canadian AIDS Society, 1993.
- ²² Toonen, *supra*, note 8.
- ²³ Health Canada. *HIV/AIDS Epi Update: HIV and AIDS Among Men Who Have Sex with Men*. Ottawa, November 1997.
- ²⁴ *Ibid.*
- ²⁵ P Yan et al. Estimation of the Historical Age-Specific HIV Incidence in Canada. XI International Conference on AIDS, Vancouver, July 1996. Abstract no Tu.C.573.
- ²⁶ SA Strathdee et al. HIV Prevalence, Incidence and Risk Behaviours Among a Cohort of Young Gay/Bisexual Men. 6th Annual Canadian Conference on HIV/AIDS Research, 22-25 May 1997. *Canadian Journal of Infectious Diseases* 1997; 8(Suppl A): 24A. Abstract no. 204.
- ²⁷ G Godin, J Carsley, K Morrison et al. *Les comportements sexuels et l'environnement social des hommes ayant des relations sexuelles avec d'autres hommes (Enquête québécoise: Entre hommes 91-92)*. Québec, Ministère de la Santé et des Services sociaux, Université Laval, Hôpital général de Montréal, COCQ-sida et Société canadienne du sida: 1993. English summary available as *Between Men: Sexuality and Social Environment in the Age of AIDS*.
- ²⁸ Canadian AIDS Society. *Canada's National AIDS Strategy: Where Is the Leadership? A Critical Analysis 15 Years into the Epidemic*. Ottawa: The Society: 1995.
- ²⁹ MT Schechter, KJP Craib, B Willoughby et al. Patterns of sexual behavior and condom use in a cohort of homosexual men. *American Journal of Public Health* 1988; 78: 1535-1538; LM Calzavara, RA Coates, K Johnson et al. Sexual behavior changes in a cohort of male sexual contacts of men with HIV disease: A three-year overview. *Canadian Journal of Public Health* 1991; 82: 150-156.
- ³⁰ M Tann. Recent HIV/AIDS developments among men who have sex with men. X International Conference on AIDS, Yokohama, 1994.
- ³¹ AC Kinsey, WB Pomeroy, CE Martin. *Sexual Behavior in the Human Male*. Philadelphia: Saunders, 1948. Subsequent, less important, studies corroborated these results: S Hite. *The Hite Report*. New York:

Dell, 1976; SS Janus, CL Janus. *The Janus Report on Sexual Behavior*. New York: John Wiley & Sons, 1993.

³² A Spira, N Bajos and the ACSF group. *Les comportements sexuels en France*. Paris: La Documentation française (Collection des Rapports officiels), 1993.

³³ J Livingston. *Lesbians and AIDS – What Are the Risks?* In: *Safer Sex Information for Women Who Have Sex with Women*. Ottawa: AIDS Committee of Ottawa.

³⁴ Ibid.

³⁵ N Solomon. Risky Business. Should Lesbians Practice Safer Sex? *OUT/LOOK* Spring 1992: 47-52.

³⁶ Ibid.

³⁷ Ibid.

³⁸ Ibid at 49-50.

³⁹ R Raiteri et al. Seroprevalence, risk factors and attitude to HIV-1 in a representative sample of lesbians in Turin. *Genitourinary Medicine* 1994; 70(3): 200-205.

⁴⁰ GF Lemp et al. HIV Seroprevalence and Risk Behaviours among Lesbians and Bisexual Women in San Francisco and Berkeley. *American Journal of Public Health* 1995; 85(11): 1549-1552.

⁴¹ Solomon, supra, note 35 at 50.

⁴² Livingston, supra, note 33.

⁴³ Cited in Livingston, ibid.

⁴⁴ J Lever. Lesbian Sex Survey. The 1995 Advocate Survey of Sexuality and Relationships: The Women. *The Advocate*, 22 August 1995, 23-30 at 24.

⁴⁵ Livingston, supra, note 33.

⁴⁶ Lesbian Sex Survey, supra, note 44 at 29.

⁴⁷ R Cohen, LS Wiseberg. *Double Jeopardy – Threat to Life and Human Rights. Discrimination against Persons with AIDS*. Cambridge, MA: Human Rights Internet, 1990, at 3.

⁴⁸ K Tomaševski. AIDS and Human Rights. In: H Fuenzalida-Puelma et al (eds). *Ethics and Law in the Study of AIDS*. Pan American Health Organization Scientific Publication No 530, at 200-207.

⁴⁹ Cohen & Wiseberg, *supra*, note 47.

⁵⁰ Most of the following sections of the Report have been adapted from *HIV/AIDS and Discrimination: A Discussion Paper*, *supra*, note 5.

⁵¹ AA Alonzo, NR Reynolds. Stigma, HIV and AIDS: An Exploration and Elaboration of a Stigma Trajectory. *Social Science and Medicine* 1995; 41(3): 303-315 at 304.

⁵² *Ibid* at 304. See also, for a general discussion of stigma and HIV/AIDS, N Gilmore, MA Somerville. Stigmatization, Scapegoating and Discrimination in Sexually Transmitted Diseases: Overcoming 'Them' and 'Us.' *Social Science and Medicine* 1994; 39(9): 1339-1358.

⁵³ For analyses of HIV/AIDS-related stigma, based on the available research, see L Peters, et al. Public Reactions Towards People with AIDS: An Attributional Analysis. *Patient*

Education and Counseling 1994; 24(3): 323-335 at 323-324; SD Johnson. Models of Factors Related to Tendencies to Discriminate Against People with AIDS. *Psychological Reports* 1995; 76(2): 563-572; Alonzo & Reynolds, *supra*, note 51 at 305.

⁵⁴ Peters, *supra*, note 53 at 330.

⁵⁵ Toilet graffiti, McGill Faculty of Law, men's bathroom, third floor, 1994 (as cited in McCann T. Sexual Orientation, HIV/AIDS, and Discrimination. Presentation given at the seminar on AIDS

and the Law, Faculty of Law, McGill University, 13 March 1995.

⁵⁶ *Homophobia, Heterosexism and AIDS*, *supra*, note 17 at 34.

⁵⁷ JB Pryor et al. The Instrumental and Symbolic Functions of Attitudes toward Persons with AIDS. *Journal of Applied Social Psychology* 1989; 19(5): 377-404; JB Pryor et al. Fear and Loathing in the Workplace: Reactions to AIDS-Infected Co-Workers. *Personality and Social Psychology Bulletin* 1991; 17(2): 133-139; TA Fish, BJ Rye. Attitudes toward a Homosexual or Heterosexual Person with AIDS. *Journal of Applied Social Psychology* 1991; 21: 651-667; BA Le Poire. Attraction toward and Nonverbal Stigmatization of Gay Males and Persons with AIDS: Evidence of Symbolic over Instrumental Attitudinal Structures. *Human Communication Research* 1994; 21(2): 241-279; L Peters et al. Public Reactions Towards People with AIDS: An Attributional Analysis. *Patient Education and Counseling* 1994; 24(3): 323-335; SD Johnson. Models of Factors Related to Tendencies to

Discriminate Against People with AIDS. *Psychological Reports* 1995; 76(2): 563-572.

⁵⁸ Toonen, *supra*, note 8.

⁵⁹ *Ibid*.

⁶⁰ New South Wales Anti-Discrimination Board, *supra*, note 9.

⁶¹ T Myers, G Godin, L Calzavara et al. *The Canadian Survey of Gay and Bisexual Men and HIV Infection: Men's Survey*. Ottawa: Canadian AIDS Society, 1993.

⁶² New South Wales Anti-Discrimination Board, *supra*, note 9.

⁶³ D Altman, K Humphry. Breaking Boundaries: AIDS and Social Justice in Australia. *Social Justice* 1989; 16(3): 158-166 at 163.

⁶⁴ BD Adam, A Sears. *Experiencing HIV: Personal, Family and Work Relationships*. New York: Columbia University Press, 1996, at 67-70; T Myers et al. Variations in Sexual Orientations Among Men Who Have Sex with Men, and Their Current Sexual Practices. *Canadian Journal of Public Health* 1995; 86(6): 384-388; E Nonn et al. Dimensions identitaires, appartenance à la communauté gaie et prévention contre le virus du sida. Sixième conférence canadienne annuelle de la recherche sur le VIH/SIDA, 22-25 mai, 1997. *Journal canadien des maladies infectieuses* 1997; 8(Suppl A): 9A. Abstract no. 104; E Nonn et al. Construction de l'échantillon à partir d'une population difficile à définir: Diversité versus représentativité. Sixième conférence canadienne annuelle de la recherche sur le VIH/SIDA, 22-25 mai, 1997. *Journal canadien des maladies infectieuses* 1997; 8(Suppl A): 9A. Abstract no 107.

⁶⁵ See, eg, JP Stokes et al. Comparing Gay and Bisexual Men on Sexual Behaviours and Attitudes Relevant to HIV/AIDS. XI International Conference on AIDS, Vancouver, 7-12 July 1996. Abstract no Tu.C.2404.

⁶⁶ UNAIDS. Protocol for the Identification of Discrimination against People Living with HIV. Geneva: UNAIDS, 1996, at 5.

⁶⁷ *Ibid* at 6-7.

⁶⁸ *Ibid* at 5.

⁶⁹ New South Wales Anti-Discrimination Board, *supra*, note 9 at 5.

⁷⁰ *Ibid* at 9-14, paraphrasing or quoting definitions provided by the Board.

⁷¹ National Advisory Committee on AIDS. *HIV and Human Rights in Canada*. Ottawa: National Advisory Committee on AIDS, 1992, at 7.

⁷² See, eg, RJ Blendon, K Donelan. Discrimination against People with AIDS: The Public's Perspective. *New England Journal of Medicine* 1988; 319(15): 1022-1026; GM Herek, JP Capitanio. Public Reactions to AIDS in the United States: A Second Decade of Stigma. *American Journal of Public Health* 1993; 83(4): 574-577; J Marquet et al. Public Awareness of AIDS: Discrimination and the Effects of Mistrust. In: D FitzSimons et al (eds). *The Economic and Social Impact of AIDS in Europe*. London: National AIDS Trust, 1995, 219-233 at 226-228.

⁷³ B.C. Civil Liberties Association. *AIDS Discrimination in Canada: A Study of the Scope and Extent of Unfair Discrimination in Canada against Persons with AIDS, and Those Known or Feared to be HIV Positive*. Vancouver: B.C. Civil Liberties Association, 1989.

⁷⁴ Ibid at 32.

⁷⁵ See supra, note 71.

⁷⁶ See supra, Introduction.

⁷⁷ Supra, note 5.

⁷⁸ A working bibliography of approximately 500 items was selected from the available literature. The academic and scientific literature was identified from citations and by searching such databases as AIDSline, Medline, LegalTrac, and Sociofile.

⁷⁹ See infra, note 396.

⁸⁰ Centre for Human Rights, Geneva. *Report of an International Consultation on AIDS and Human Rights* (Geneva, 26-28 July 1989). New York: United Nations, 1991 (HR/PUB/90/2).

⁸¹ J Mann, D Tarantola (eds). *AIDS in the World II: Global Dimensions, Social Roots, and Responses*. New York: Oxford University Press, 1996, at 463-476; LO Gostin, Z Lazzarini. *Human Rights and Public Health in the AIDS Pandemic*. New York: Oxford University Press, 1997.

⁸² For an example of such an analysis, which identifies the human rights that relate to different factors that contribute to societal vulnerability, see Mann & Tarantola, supra, note 81 at 469-471.

⁸³ A convenient guide to declarations and covenants on human rights, and how to apply them to HIV/AIDS, can be found in *The UNAIDS Guide to the United Nations Human Rights Machinery for AIDS Service Organizations, People Living with HIV/AIDS, and Others Working in the Area of HIV/AIDS and Human Rights*. Geneva: Joint United Nations Programme on HIV/AIDS, 1997. On the various rights and freedoms protected by international law, and their relevance to HIV/AIDS, see Gostin & Lazzarini, *supra*, note 81 at 1-32.

⁸⁴ LA Jackson et al. HIV-Positive Women Living in the Metropolitan Toronto Area: Their Experiences and Perceptions Related to HIV Testing. *Canadian Journal of Public Health* 1997; 88(1): 18-22.

⁸⁵ CN Mitchell. A Justice-Based Argument for the Uniform Regulation of Psychoactive Drugs. *McGill Law Journal* 1986; 31: 212-263.

⁸⁶ *Discrimination, HIV/AIDS and Aboriginal People: A Discussion Paper*, *supra*, note 6.

⁸⁷ SL Martindale et al. Evidence of Psychologic Distress in a Cohort of Young Gay/Bisexual Men. 6th Annual Canadian Conference on HIV/AIDS Research, 22-25 May 1997. *Canadian Journal of Infectious Diseases* 1997; 8(Suppl A): 8A. Abstract no 102.

⁸⁸ LE Krueger et al. Poverty and HIV Seropositivity: The Poor are More Likely to Be Infected. *AIDS* 1990; 4(8): 811-814. MT Schechter, et al. Higher Socioeconomic Status is Associated with Slower Progression of HIV Infection Independent of Access to Health Care. *Journal of Clinical Epidemiology* 1994; 47(1): 59-67; RS Hogg et al. Lower Socioeconomic Status and Shorter Survival Following HIV Infection. *The Lancet* 1994; 344: 1120-1124.

⁸⁹ JM Mann. Human Rights and Priorities for HIV/AIDS Prevention and Care in the 1990s. In: Rights and Humanity. *Global Expert Meeting. AIDS: A Question of Rights and Humanity*. Participants' Presentations & Background Papers (The Hague, 21-24 May 1991).

⁹⁰ Centre for Human Rights, Geneva. *Report of an International Consultation on AIDS and Human Rights*. Geneva, 26-28 July 1989. New York: United Nations, 1991 (HR/PUB/90/2).

⁹¹ *Ibid*.

⁹² Paris, 1 December 1994.

⁹³ Direction de la Santé publique. *Priorités nationales de santé publique 1997-2002*. Québec: MSSS, 1997.

⁹⁴ New South Wales Anti-Discrimination Board, *supra*, note 9.

⁹⁵ Supra, note 4.

Gay and Lesbian Issues and HIV/AIDS: Final Report

by John Fisher, Ralf Jürgens, Anne Vassal, Robert Hughes

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GAY MEN, LESBIANS, AND THE LAW

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***Browsers please note:** for ease of loading, this long chapter has been divided into four different pages as indicated by the numbers in the links above. When downloading or printing, keep in mind that each of the four pages must be opened in order to access the entire chapter*

The first chapter of the Report illustrated how, historically, gay men and lesbians have suffered persistent patterns of discrimination and persecution, have been branded "unnatural," subjected to numerous damaging stereotypes, and how their relationships have been devalued and treated as unworthy of recognition and respect. The chapter then described how, since the beginning of the HIV/AIDS epidemic, there has been a second epidemic, an epidemic of stigma and discrimination directed at those living with HIV/AIDS and at those associated, in the public mind, with HIV/AIDS. In 1998, this second epidemic continues, and continues to be inseparable from and to reinforce discrimination on the basis of homosexuality.

This chapter examines the treatment of gay men and lesbians by the law. It shows that, in the last thirty years, there has been substantial progress on gay and lesbian equality issues. The first significant breakthrough came in 1969 when the Canadian government passed an omnibus bill removing criminal sanctions against same-sex practices between consenting adults. In 1977, Québec became the first province to prohibit discrimination against gay men and lesbians, and in 1979 prohibitions on the immigration of "homosexualists" were removed from the *Immigration Act*. During the 1980s and 1990s, most Canadian provinces amended their human rights acts to extend antidiscrimination protection to gay men and lesbians, and on 9 May 1996, after ten years of unkept promises, the *Canadian Human Rights Act* was also amended. In the context of HIV/AIDS, such protection is seen as a necessary corollary to

the protection against discrimination on the basis of physical disability, including HIV infection. As stated by the National Advisory Committee on AIDS:

One should not be able to defend discrimination against persons with HIV infection on the grounds that it was in fact discrimination related to a person's sexual orientation and thus not expressly prohibited.⁹⁶

Further, while sexual orientation was not included as a prohibited ground of discrimination in the equality rights provision (section 15) of the *Canadian Charter of Rights and Freedoms*, section 15 was left open-ended to enable new grounds to be recognized over time. Courts have now ruled that section 15 of the Charter includes a guarantee of equality on the basis of sexual orientation. Gay men and lesbians are increasingly invoking the assistance of the courts to counter legal discrimination, and have obtained some significant victories for gay and lesbian rights, particularly in the context of equal relationship recognition.

Nevertheless, this chapter shows how pervasive discrimination against gay men and lesbians is, in all the following areas: criminal law; censorship; protection from discrimination; benefits; children and parenting; immigration; and incapacity, wills, and estate litigation.

The first section (Criminal Law) reminds us that, until very recently, it was illegal under the *Criminal Code* to have sex with someone of the same sex. Even today, a number of problems remain with both the content and the application of the criminal law to gay sexual activity.

The second section (Censorship) shows that lesbian and gay materials have been systematically targeted over the years under Canada's obscenity laws. The consequences of this censorship go beyond a simple pattern of discrimination: the active suppression of lesbian and gay materials has made it more difficult for the gay and lesbian communities and HIV/AIDS educators to speak forthrightly about same-sex sexual practices and to educate the communities about at-risk behaviour.

The third section (Protection from Discrimination) illustrates the difficulties that gay men and lesbians have faced in securing even the most basic human rights protections. While the situation has much improved over the last twenty years, some jurisdictions have yet to amend their human rights legislation to protect gay men and lesbians from discrimination; open and hidden discrimination in the workplace remains endemic; generally, discriminatory attitudes persist even where human rights legislation has been passed; and vilification of gay and lesbian Canadians by Members of Parliament continues, and continues to be tolerated.

The fourth section (Same-Sex Benefits) examines the law dealing with the recognition of same-sex relationships. It emphasizes that, as legal sanctions have begun to be removed against gay men and lesbians *as individuals*, the next challenge will be to achieve recognition of the fact that investing only heterosexual *relationships* with privileges and obligations is also discriminatory. The chapter examines the Supreme Court of Canada decision in *Egan & Nesbit v Canada* and subsequent decisions by lower

courts and tribunals regarding same-sex benefits, showing how discriminatory legislation is increasingly being challenged with some success before the courts.

The fifth section (Children and Parenting) points out that the relationships between gay men and lesbians and their children have perhaps inspired more homophobia than almost any other area of law. Gay men and lesbians have often been portrayed as depraved child-molesters, and judges have frequently expressed unfounded fears around lesbian and gay parenting. While lesbians and gay men are now increasingly able to obtain equal parenting rights, many challenges remain. In particular, the public needs to be educated about the fact that gay men and lesbians are as capable parents as heterosexuals.

The sixth section (Immigration) reminds us of how, until 1976, gay men and lesbians were not allowed to immigrate to Canada. Today, while same-sex partners of Canadian citizens or permanent residents can apply to be allowed to immigrate to Canada on "humanitarian and compassionate grounds," the *Immigration Regulations* still do not allow gay and lesbian Canadians to sponsor their same-sex partners under the family class. This means that lesbian and gay partners of Canadians are being allowed into Canada through the back door.

The final section (Incapacity, Wills, and Estate Litigation) points out that the law's refusal to recognize gay and lesbian relationships is most keenly felt in times of crisis: at a time when a same-sex partner most needs institutional support, the law, far from facilitating resolution of the crisis, can become yet another insurmountable obstacle. When a heterosexual spouse becomes incapacitated or dies, the law automatically provides recognition and support to an opposite-sex partner. Almost invariably, however, the law treats a same-sex partner in similar circumstances with indifference and exclusion.

In each section, the Report briefly reviews how, in the past, the law has treated gay men and lesbians (History). The Report then examines the current state of the law (Current Situation). Finally, it makes recommendations about what should be done to redress the continuing discrimination against gay men and lesbians (Recommendations).

Criminal Law

This section first points out that until very recently it was illegal, under the *Criminal Code*, to have sex with someone of the same sex. It continues by analyzing some of the many problems that remain even today, both with the content and the application of the criminal law to gay sexual activity. The section concludes by proposing a variety of measures, both legal and educational in nature, that would help solve some of the existing problems for gay men and lesbians in this area of the law.

History

Current attitudes toward gay men, lesbians and people with HIV/AIDS can only be understood in their social and historical context. It must be remembered that, not long ago, same-sex sexual activity was criminalized. To this day, discriminatory age of consent laws are maintained.

Until 1969, when changes to the *Criminal Code* were made, it was illegal to have sex with someone of the same sex. The *Criminal Code* had outlawed "buggery," "bestiality" and "acts of gross indecency" - crimes that had been held to apply to homosexual activity.

In 1983, motivated by concerns about whether the *Criminal Code* provisions with respect to homosexual sex would survive a challenge under the *Canadian Charter of Rights and Freedoms*, s 156 of the *Criminal Code*, which stated that "everyone who commits an act of gross indecency with another person is guilty of an indictable offence and is liable to imprisonment for five years," was repealed.

In 1985, with the introduction of the *Criminal Code* amendments, a uniform age of consent, except for anal intercourse, was introduced.

The Wolfenden Report

Canadian law closely followed the law of Britain, where in 1954 the Home Office set up a committee chaired by Sir John Wolfenden to examine the law relating to homosexual offences and prostitution. The Wolfenden reform proposals were released in 1957 and generally concluded that adult male homosexual relationships in private should no longer be criminal.⁹⁷ It took ten years before the proposals were implemented: the *Sexual Offences Act* 1967 removed criminal sanctions for sex between adult males in private, but defined youths as men below the age of 21, whereas the age of consent for heterosexual activity was 16. In addition, the Act raised the maximum penalty for gross indecency (homosexual sex except anal intercourse) with someone under 21 from two to five years' imprisonment.

According to Lord Arran, the chief architect of the Act,

Any form of ostentatious behaviour now or in the future, or any form of public flaunting, would be utterly distasteful and would, I believe, make the sponsors of the bill regret that they had done what they had done. Homosexuals must continue to remember that while there may be nothing bad in being homosexual, there is certainly nothing good.⁹⁸

The Case of Everett Klippert

In Canada, as in Britain, "gross indecency" carried a maximum penalty of five years in prison. One case, that of Everett Klippert, drew a lot of attention to this provision. In 1965, during a police investigation into a case of arson, Klippert told the police he was homosexual and admitted to having had sex with other men over a 24-year period. He was sentenced to three years in prison. While in jail he was interviewed by two psychiatrists who concluded that because Klippert's homosexuality was "incurable," he fitted within Canada's law respecting dangerous sexual offenders. As a result, Klippert was imprisoned indefinitely, a sentence confirmed by the Supreme Court of Canada in 1967.⁹⁹

Reaction to the judgment was swift and horrified. An editorial in the *Toronto Star* called the decision "a return to the Middle Ages," and Pierre Elliott Trudeau, then Justice Minister, said that "the state has no place in the bedrooms of the nation."

Although Klippert's treatment led to a change in the law, which came into effect in August 1969, Klippert himself was not released until 20 July 1971.¹⁰⁰

Bill C-150

In 1969, Canada debated Bill C-150, an omnibus bill dealing with everything from gross indecency to abortion to gambling. With regard to homosexual sex, the Bill did not legalize such activity, but established a distinction between public and private sex: certain sexual acts between consenting adults, when performed in private, became legal. Then Justice Minister John Turner quoted heavily from the Wolfenden Report to defend the sections of the Bill decriminalizing certain forms of sex with someone of the same sex. However, even those in Parliament who supported changes to the criminal law provisions applying to homosexual activity did not defend the civil and human rights of gay men and lesbians, but rather tied their arguments to the idea that gay men and lesbians are sick and need to be protected. Robert Kaplan, an influential Liberal MP, said:

This is a form of sexual perversion which arouses a sense of horror in most people. But many Canadians feel an equal sense of horror about the present treatment of homosexuals in this country. For example, our government has been holding in prison under an indeterminate or life sentence, confirmed by the Supreme Court, one Everett George Klippert.¹⁰¹

According to Laprise, a Creditiste MP who opposed the Bill,

[t]he duty of the government should be to protect these individuals by treating their sickness like that of any person. ... With the appropriate means

we can control homosexuality since we recognize and admit that it is a sickness.¹⁰²

Laprise criticized the Canadian Broadcasting Corporation for giving too much coverage to homosexuality, allowing "sexual perverts to express themselves freely and sometimes in an arrogant manner on the air." Laprise referred to "sexual perverts" who seduce boys and engage in murder to satisfy their lust.

Bill C-150 was passed on 14 May 1969. While it did allow for some forms of sexual activity between consenting adults of the same sex, it did not stop the harassment and arrest of gay men and men in "public" cruising areas or bars. According to a 1971 statement by a Canadian coalition of gay and lesbian liberation groups,

[i]n 1969 the Criminal Code was amended so as to make certain sexual acts between consenting adults, in private, legal. This was widely misunderstood as "legalizing" homosexuality and thus putting homosexuals on an equal basis with other Canadians. In fact, this amendment was merely a recognition of the non-enforceable nature of the Criminal Code as it existed. Consequently, its effects have done but little to alleviate the oppression of homosexual men and women in Canada. In our daily lives we are still confronted with discrimination, police harassment, exploitation and pressures to conform which deny our sexuality.¹⁰³

However, as a result of the debate and public discussions before and after passage of the Bill, gay men and lesbians in Canada became more visible: the reform set the stage for the emergence of gay and lesbian liberation movements and for the expansion of gay and lesbian ghettos and communities.

The law was to remain in effect until 1985, when a uniform age of consent, except for anal intercourse, was introduced.

Current Situation

In 1998, a number of problems remain, both with the content and the application of the law: (1) section 159 of the *Criminal Code* discriminates on the basis of sexual orientation; (2) other *Criminal Code* provisions continue to be applied disproportionately against gay men and lesbians; (3) in criminal cases, homosexual advances are sometimes treated as "provocation" (thus justifying a shorter sentence for an assailant), even when a similar heterosexual advance in like circumstances would not be so treated; (4) hate crimes directed at gay men and lesbians continue to be widespread; and (5) under the *Criminal Code*, it is not illegal to advocate the genocide of gay men, lesbians or people with HIV/AIDS. These problems are discussed below.

Section 159: Anal Intercourse

The current section 159 of the *Criminal Code* criminalizes anal intercourse, but contains an exemption if anal intercourse is engaged in by a husband and wife, or by two consenting adults aged 18 or over. The section is problematic for many reasons:

- It exemplifies the discriminatory attitudes that continue to cause difficulties for many safe-sex educators. The very structure of the section reflects prejudicial beliefs that anal sex is inherently criminal. Instead of providing that anal intercourse constitutes a crime when committed with someone under the age of consent, as with other sexual offences, the Code criminalizes *every* act of anal intercourse. The section then goes on to provide a *defence* if the "crime" is committed in private by two persons aged 18 or more, each of whom consents.^[104] The structure of the section thus reinforces attitudes that anal sex is "dirty" or disgusting, deserving the sanction of the criminal law.
- The age of consent for anal intercourse is 18, while it is 14 for vaginal intercourse.
- The defence is only available if the act is committed by "two persons" in "private." If more than two persons are present, a crime is committed, even if the activity takes place in a private dwelling and among consenting adults.
- A further defence is provided if anal intercourse takes place in private between a consenting husband and wife: persons under the age of 18 (or a couple one of whom is over 18 and one of whom is under 18) may lawfully engage in anal sex, provided that they are married to each other. It is not at all clear what rational policy basis could justify creating a defence for married heterosexuals that is not available to unmarried heterosexuals or to same-sex partners.

The constitutionality of section 159 of the *Criminal Code* was challenged in the case of *Halm v Canada*,¹⁰⁵ in which Halm challenged a deportation order to stand trial in New York on a charge of anal sex with someone under the age of 17. Halm claimed that he could not be deported to stand trial for activity that was not illegal in Canada.

The Federal Court Trial Division accepted Halm's arguments that the only comparable Canadian

provision, s 159, was unconstitutional due to discrimination based on sexual orientation and age. In particular, Reed J rejected the Crown's arguments that the higher age of consent was necessary to protect young people from the increased risk of HIV transmission, noting that "while unprotected anal sex may be riskier, as a potential conduit for HIV transmission than vaginal sex, in both cases it is *unprotected* sex which is the cause, *not the activity itself*."¹⁰⁶

Reed J went on to note that a previous section criminalizing the transmission of sexually transmitted diseases had been repealed because it was "ineffective" and "counterproductive":

It drove "underground" those who engaged in the activity which was the object of the provisions. It made it more difficult to obtain accurate reports of the incidence of disease. A much more effective way of dealing with the problem was through increased education.¹⁰⁷

Ironically, another challenge to the constitutionality of s 159 came from a heterosexual male charged with engaging in anal intercourse with a 13-year-old female complainant. The accused contended there was no rational basis for distinguishing anal intercourse from other forms of consensual sexual activity and that s 159 discriminated on the grounds of age, sexual orientation and marital status. In particular, it was argued that (1) it would constitute age discrimination to prohibit people from 14 to 18 from engaging in a form of sexual expression available to others; (2) the prohibition on anal sex in certain circumstances had a disproportionate impact upon gay men; and (3) it was marital status discrimination to provide a defence only to married couples.

At trial, the Ontario Court (General Division) held that the prohibition on consensual anal intercourse by youths was arbitrary and therefore infringed the accused's right to liberty in accordance with the principles of fundamental justice, in violation of s 7 of the Charter. Because of the s 7 violation, the Court found it unnecessary to consider whether there was also a breach of the right to equality guaranteed by s 15(1) of the Charter.¹⁰⁹

On appeal by the Crown, the Ontario Court of Appeal unanimously upheld the decision, but did so by relying on s 15(1) of the Charter. [] Goodman and Catzman JJ wrote a terse, 19-line judgment finding that s 159 constitutes an infringement of s 15 on the ground of age discrimination, and did not refer to other grounds. According to Madam Justice Abella, however, there was discrimination on the basis of sexual orientation. She wrote a more detailed judgment outlining her reasons and concluded:

S.159 arbitrarily disadvantages gay men by denying to them until they are eighteen a choice available at the age of fourteen to those who are not gay, namely, their choice of sexual expression with a consenting partner to whom they are not married. Anal intercourse is a basic form of sexual expression for gay men. ... Unmarried, heterosexual adolescents fourteen or over can participate in consensual intercourse without criminal penalties; gay adolescents cannot. It perpetuates rather than narrows the gap for an

historically disadvantaged group - gay men.¹¹⁰

The Crown had argued that s 159 was necessary as an AIDS prevention measure, on the basis that a higher age of consent was necessary to protect young people from the risks associated with unprotected anal sex. Abella JA dismissed these arguments, commenting that it is "decidedly inappropriate to deal with minimizing health risks at any age by using the punitive force of the *Criminal Code*, but especially so for young people."¹¹¹ She pointed out that "unlike other provisions of the *Code* attempting to protect young persons from any harm associated with sexual conduct, only the provision prohibiting anal intercourse criminalizes the younger as well as the older person's participation."¹¹² She continued by saying that "[h]ealth risks ought to be dealt with by the health care system," and emphasized:

Ironically, one of the bizarre effects of a provision criminalizing consensual anal intercourse for adolescents is that the health education they should be receiving to protect them from avoidable harm may be curtailed, since it may be interpreted as counselling young people about a form of sexual conduct the law prohibits them from participating in.¹¹³

Abella JA concluded that there was no evidence that adolescents are more at risk of HIV transmission than others or that criminalizing their sexual behaviour would protect them, and that the real intent of s 159 was an attempt on the government's part to define moral behaviour in a way that had no objective or rational justification.

As a result, the Ontario Court of Appeal unanimously ruled s 159 to be unconstitutional and of no force and effect.

However, a ruling of the Ontario Court of Appeal, while persuasive, is not binding upon courts in other jurisdictions. It remains open to courts in other provinces to adopt a different approach and uphold the validity of s 159. Until the matter is resolved by the federal government or the Supreme Court of Canada, s 159 will continue to create inequality and confusion, and hamper the work of AIDS educators by making it difficult to provide information to young people about safe sexual practices.

Other Criminal Provisions

Other provisions in the *Criminal Code* have historically been applied to harass members of the gay and lesbian communities: although the provisions themselves do not distinguish between same-sex and opposite-sex behaviour, discriminatory attitudes have often led to their being applied disproportionately against gay men and lesbians. Among them are bawdy-house offences, laws against public indecency, child pornography laws, and HIV transmission or endangerment laws.

Bawdy-House Offences

"Bawdy-house offences"¹¹⁴ have been used by the police, particularly in the early 1980s, to raid gay bathhouses.¹¹⁵ In some cases, the names of all those arrested were published: the men involved were outed to their family, community, and employer, and - in the face of such public humiliation - some killed themselves.

Laws against Public Indecency

Laws against public indecency (s 173 of the *Criminal Code*) prohibit public sexual activity, whether homosexual or heterosexual, if committed "in the presence of one or more persons." Concerns, however, must be raised about the unequal application of the law. Police officers regularly arrest gay men in washrooms, parks and other public places. To arrest them, they have undertaken extraordinary efforts to conceal themselves in public washrooms, in one case even hiding in a crawlspace behind a ventilator grille fitted in the ceiling.¹¹⁶ More recently, Toronto police raided the gay strip club Remington's, arresting 19 men on public indecency and bawdy-house charges,¹¹⁷ and gay bars have been forced to close "back rooms" where consensual sexual activity was taking place in a secluded, semi-private setting. Police do not seem to apply the same vigour to identify and combat heterosexual sexual activity taking place in remote or secluded locations, leading to concerns that homophobia is the true basis for the zeal with which laws against public indecency are enforced against gay men.

Child Pornography Laws

New laws dealing with child pornography have also been applied unequally against gay men. In 1993, Bill C-128 introduced a new section 163.1 into the *Criminal Code*, making it illegal to possess, produce, distribute or import "child pornography." "Child pornography" is defined to include:

(a) a photographic, film, video or other visual representation, ...

(i) that shows a person who is or is depicted as being under the age of eighteen years and is engaged in or is depicted as engaged in explicit sexual activity, or

(ii) the dominant characteristic of which is the depiction, for a sexual purpose, of a sexual organ or the anal region of a person under the age of eighteen years; or

(b) any written material or visual representation that advocates or counsels sexual activity with a person under the age of eighteen years that would be an offence under this Act.

Since the age of consent for most forms of sexual activity is 14, but s 163.1 prohibits the depiction of sex involving people up to age 18, these provisions were challenged on the basis that the provision makes it illegal to depict activities that are not illegal. This argument was rejected, however, in the *Langer* case,¹¹⁸ where it was held that the restriction on freedom of expression could be justified under s 1 of the Charter.

It should be noted that these provisions prohibit material involving persons under 18 as well as persons who are *depicted as being* under the age of 18. In addition, whereas simple possession of obscene material is not an offence, simple possession of child pornography is illegal.

According to *Repeal the Youth Law Campaign*, a group opposed to the child pornography law, the police force in London, Ontario took advantage of these provisions to launch a major "child porn" offensive, which specifically targeted gay men. The Campaign reports that over 150 charges were laid, that 29 of these charges involved the offence of anal intercourse with someone under the age of 18, even though this provision had been ruled unconstitutional by the courts, that young gay men were interviewed by the police and "outed" to their parents against their will, and that all charges laid involved same-sex relations, with no attempt being made to apply the law with equal vigour against heterosexual men.¹¹⁹

According to the group,

both the Ontario AIDS Network and the Canadian AIDS Society oppose the youth porn law because it is a barrier to AIDS education. These police investigations drive young people away from essential health and other services.¹²⁰

HIV Transmission or Endangerment Laws

The link between AIDSphobia and homophobia can be clearly seen in recent attempts to respond to the spread of HIV by calls for a broad application of criminal law. A private member's bill introduced by Reform MP Garry Breitkreuz on 25 October 1995, for example, would have been broad enough to effectively recriminalize gay male sexual expression.¹²¹ It proposed amending the *Criminal Code* to create a new criminal offence of engaging in an act that *could result* in the transmission of HIV. If the act resulted in infection by HIV, the offence would have been punishable by imprisonment for life. If the act could not be shown to have resulted in infection, the offence would have been punishable by imprisonment for up to seven years. The act would have been criminal if committed by anyone who "knows or should reasonably know that he is HIV positive or has AIDS," irrespective of whether the other partner consented to it. Furthermore, the potentially "infecting act" would have created criminal liability "whether or not carried out using measures that may or do reduce the risk of infection." In other words, a man who was unaware of his HIV status could have been imprisoned for up to seven years if he had oral sex with another man while using a condom, with that man's full consent.

"Homosexual Panic" and Gay Advances

In a recent case in British Columbia, the Crown accepted a plea on the minor offence of manslaughter from a person accused of murder, on the ground that the person had been provoked by an "aggressive homosexual assault."¹²²

Expressions of physical interest that typically would be held irrelevant to a criminal case were they directed by a man to a woman, may be seen as relevant to the case (and as justifying a shorter sentence) if directed by a man to another man. This is a reflection of a societal double standard. Women are routinely expected to suffer unwanted expressions of male sexual interest, but expressions of interest from a lesbian or a gay man are considered sufficiently repugnant that they may justify a violent assault. As one commentator stated, courts have accepted arguments that a heterosexual man should be expected to react to an alleged homosexual advance with extreme violence.¹²³

Such arguments can be raised by defendants in a number of contexts. The so-called "homosexual panic defence" is based on a theory according to which a homosexual proposition can cause a reaction bordering on temporary insanity in a person with latent homosexual tendencies. More commonly, "homosexual advances" by the victim have been used as evidence of provocation, to reduce the attacker's sentence, or reduce murder to manslaughter. In one case, the Manitoba Court of Appeal said that "there can be no doubt [that] a homosexual advance may be provocation."¹²⁴ In another case, however, where the defendant alleged that the victim had reached towards the accused "as if" to grab him, the Alberta Court of Appeal held that "it would have been impossible for the jury in this case to conclude that an ordinary man's sensitivity to a second homosexual approach would lead to anything more than annoyance."¹²⁵

Nevertheless, given the strong possibility that discriminatory attitudes by judges, juries, prosecutors and others may preclude objective evaluation of the circumstances in cases involving gay men and lesbians, explicit legislation should be introduced to reduce the likelihood that homophobic violence will be justified by resorting to discriminatory beliefs. Only combining effective legislation with changes in community policing, and greater sensitivity to homophobia by Crown counsel and judges, will reduce violence directed at gay men and lesbians.

Hate Crimes

The most extreme manifestation of homophobia and AIDSphobia remains the shockingly high level of physical violence directed toward gay men and lesbians. Some appreciation of the extent of the violence

directed toward gay men and lesbians can be derived from the following examples:¹²⁶

- In 1985, Kenn Zeller was murdered by five teenagers in a Toronto park. Evidence at trial revealed that the teenagers had agreed to go to the park to "beat up a fag."¹²⁷
- In March 1989, a gay AIDS activist, Joe Rose, was murdered on a crowded Montréal bus. A gang of about 15 youths boarded the bus, taunted him with shouts of "faggot" and stabbed him to death with scissors, hunting- and kitchen knives.¹²⁸
- In August 1989, Alain Brosseau, a young man who was perceived to be gay, was thrown to his death from a bridge between Ottawa and Hull. His attackers testified that they were out "just to roll a queer." Thomas MacDougall, one of the attackers, stated that he put an imitation gun to the guy's head and he freaked out ... I started laughing. Jeffrey Lalonde, another of the youths, dangled Brosseau upside-down from the bridge, said "Oh, I like your shoes," and then let go.¹²⁹
- In December 1992, in Montréal, Yves Lalonde was savagely killed because of his sexual orientation. The attack was one of a series of dozens of attacks on gay men, believed to be part of the initiation ritual of a white supremacist group that required aspiring members to attack at least ten gay men and lesbians.¹³⁰
- In 1992, Daniel Lacombe was killed in Montréal by a group of young adults who had decided to go out and beat up gay men.¹³¹
- At a November 1993 adult high school meeting hosted by the Action Plan Project of the Ottawa Police Services Board, a bisexual woman reported having four ribs broken by a man wielding a baseball bat because he resented her relationship with another woman; another woman stated that a friend of her brother had been murdered in Toronto because he was gay; a third woman spoke of a friend who had been gay-bashed.¹³²
- In November 1992, a gay man in Ottawa had his nose broken by four men upon leaving a gay bar and was admitted to hospital.
- In June 1993, a young man visiting Ottawa was accosted by a group of neo-Nazis who called him "faggot" repeatedly, carried knives and uttered death threats.
- In July 1993, a motorist jumped out of his car and assaulted a pedestrian after asking him if he was gay.
- In August 1993, a gay man was hit in the face by his aunt and uncle at a family party.
- In August 1993, two strangers approached a man returning to Ottawa from Hull and asked him where he had been. When he gave the name of a local gay bar they remarked "Oh, you're a fag" and beat him so badly he was in hospital for two days.

- A gay man in Peterborough was leaving a bar when he heard someone yell: "Hey fag." He turned around, was beaten with a baseball bat, and required reconstructive surgery on his cheeks.
- On 6 October 1993, a man was punched in the mouth and his teeth were chipped by an assailant who said: "Hey queer, I'm going to kill you."
- On 10 March 1994, a woman was pulled behind a store and assaulted by neo-Nazi skinheads who called her a "dyke"; she was left with two cracked ribs and a badly bruised face.
- A gay male in Vancouver was verbally abused by another male who "said he would show me - he'd fuck me, then kill me and that would make me smarten up." The gay male reported that this kind of harassment happens "at least once a week" to someone in his circle of gay friends.¹³³
- After his partner died of AIDS, a 52-year-old supervisor was verbally and physically victimized by his superior in upper management.
- One respondent to a survey of anti-gay/lesbian violence undertaken in Vancouver, when asked how much harassment he experienced at school, reported "a lot." When asked to explain this, he replied that it was "too painful to relate, sorry!"
- While walking near Stanley Park in downtown Vancouver, a gay man was assaulted with a knife by a youth he believed to be under 18 years of age.
- A 23-year-old gay male reported that he was "pushed against a wall and threatened with a baseball bat" by another male. He suffered a broken nose and had his jacket stolen.
- While waiting in line outside a downtown Vancouver gay bar, a 55-year-old man reported that a young man grabbed his hair and called him a "fucking queer." When the gay male tried to walk away, the offender punched him in the face and knocked him down.
- At least 14 gay men were murdered in Montréal between 1989 and 1994 as a result of homophobic violence.¹³⁴
- Two 19-year-old youths spray-painted slogans such as "Stop AIDS, Kill Fags" on Vancouver's West End Community Centre.¹³⁵

Prevalence of Homophobic Violence

There is no Canadian equivalent of the American *Hate Crimes Statistics Act* to measure the prevalence of homophobic violence in Canada. However, even without yearly statistics about the number of hate crimes directed toward gay men and lesbians that are reported, there is enough evidence in various Canadian reports and studies to show that homophobic violence is pervasive in Canada and omnipresent in the daily lives and concerns of gay men and lesbians.

For example, in its report on public violence and discrimination against gay men and lesbians, the Québec Human Rights Commission referred to the many testimonies it had heard from gay men and

lesbians who had been physically attacked in the streets, in parks and even in teaching institutions. The Commission found that acts of violence based on sexual orientation are often accompanied by homophobic insults and threats, that the degree of physical violence used in such acts is often more extreme, and that the attacks are frequently committed by strangers with no link to the victim, and often by members of groups with an extremist and discriminatory ideology. The Commission concluded that anti-gay/lesbian violence in Canada may be as prevalent as in the US, where figures provided by the National Gay and Lesbian Task Force show that one-fifth of gay men and one-tenth of lesbians responding to a survey had been physically assaulted, and one-third had received threats of violence.¹³⁷

Another study on discrimination and violence against lesbians, gay men and bisexuals, undertaken in New Brunswick, found that, because of their sexual orientation, 82 percent of lesbian, gay, and bisexual respondents had been verbally abused, 34 percent had been chased or followed, 10 percent had been spat upon, 19 percent had had their property damaged, 17 percent had had objects thrown at them, 18 percent had been punched, kicked, hit or beaten, and 23 percent had been harassed or assaulted by the police.¹³⁸

Results similar to those in New Brunswick were found in a Nova Scotia study on homophobic abuse and discrimination: 72 percent of respondents to a survey had been verbally abused because of their actual or presumed sexual orientation, 42 percent had been threatened with violence, 33 percent had been chased or followed, 9 percent had been spat upon, 12 percent had had their property damaged (one man, for example, had the word "fag" engraved on his car hood), 25 percent had had objects thrown at them, 18 percent had been assaulted with a weapon, punched, kicked or beaten, 16.5 percent had been harassed, and another two percent had been beaten, by the police.¹³⁹

A report on anti-gay/lesbian violence in Vancouver concluded that violence against lesbians and gay men due to their sexual orientation is widespread in Canadian society and that, according to criminal justice statistics, it is on the increase, especially in large cities across the country.¹⁴⁰ The report further noted that anti-gay and anti-lesbian violence in Canadian society closely mirrors that found in the United States, citing a Director of Victim Services at Bellevue Hospital in New York City who observed that

attacks against gay men were the most heinous and brutal I encountered. They frequently involved torture, cutting, mutilation, and beating, and showed the absolute intent to rub out the human being because of his sexual orientation.¹⁴¹

Impact of Homophobic Violence

In a society where many people are taught that it is acceptable to hate homosexuals, public expressions of this hatred reinforce the message that violence against gay men and lesbians is acceptable. For example, in the case of Kenn Zeller (the gay man who was beaten to death in Toronto by five youths), a prison psychologist who examined the perpetrators of the murder remarked:

These boys aren't stupid, they're well raised, and yet they talk of

homosexuals as some lesser species. ... Maybe the feeling is too much ingrained from their environment.¹⁴²

In its report, the Québec Human Rights Commission emphasized the particularly devastating impact of hate violence, particularly upon lesbians who face disadvantage related both to their sexual orientation and to their gender.¹⁴³ Another report points out that

[r]esearch by the National Institute Against Personal Prejudice and Violence in the United States indicates that "victims of [hate] violence suffer 21 percent more trauma symptoms than other victims of similar crimes." The psychological effects of victimization because of who you are - whether that be because of your religion, the colour of your skin, your gender, or your sexual orientation - creates severe psychological trauma for victims.¹⁴⁴

For lesbians, gay men, bisexuals and transgendered people, hate-motivated violence contributes to the difficulties experienced in overcoming the stereotypes and prejudices prevalent in the society in which they are raised:

As young people we are told that gay men are to be avoided and gayness hidden because homosexuals are perverted, unhealthy, unhappy, disgusting and likely to molest heterosexuals. Sometimes it was said directly through queer jokes, verbal attacks and threats or reports of violence. Others of us heard more subtle comments ... bit by bit we began to accept what we were told. We absorbed anti-gay beliefs before we knew that we were gay. It was often only with great difficulty that we could acknowledge our own gayness, for then these beliefs would apply to us.¹⁴⁵

Reacting to Homophobic Violence

In recent years, both the law and law enforcement agencies have moved toward recognizing the scope and seriousness of the problem. Many major Canadian cities now have bias crimes units to carry out public education about the impact of hate crimes and to respond more effectively to crimes motivated by hatred of a disadvantaged community.

In 1995, Parliament enacted Bill C-41, which inserts a new section 718.2 into the *Criminal Code*. This section provides that "(i) evidence that the offence was motivated by bias, prejudice or hate based on race, national or ethnic origin, language, colour, religion, sex, age, mental or physical disability, sexual orientation or any other similar factor, ... shall be deemed to be aggravating circumstances."

In other words, crimes against lesbians, gay men, women, people with HIV/AIDS, and others will warrant a more severe penalty if they are motivated by hatred based on sexual orientation, disability or any of the other factors set out in the section.

This section sends the clear message that violence against lesbians, gay men, women, people with disabilities, and other disadvantaged communities is not acceptable behaviour. Bill C-41 was proclaimed in force in 1996.

Advocating Genocide

Sections 318 and 319 of the *Criminal Code* prohibit advocating the genocide of an "identifiable group" and, in certain circumstances, wilfully promoting hatred against an "identifiable group."¹⁴⁶ The definition of "identifiable group" is restricted to "any section of the public distinguished by colour, race, religion, or ethnic origin." Sexual orientation, gender, and disability are not included, meaning that it is not illegal to advocate the genocide of gay men, lesbians, or people with HIV/AIDS.

The omission of sexual orientation and disability in ss 318 and 319 of the *Criminal Code* would provide a basis for a constitutional challenge aimed at extending the range of groups protected by the sections. However, questions remain: (1) Can discriminatory attitudes be adequately addressed through criminal prohibition? (2) Should gay men and lesbians fight, either by starting a court challenge, or by asking for legislative amendments, for inclusion of sexual orientation and disability in the genocide provisions?

Particularly on the latter point, opinion remains divided. Some have argued that

except in the most extreme cases of anti-lesbian and gay expression, it is probably better to err on the side of freedom of expression. Perhaps it is better to let society recognize that homophobia exists, to look homophobia directly in the face, and to fight it directly. Overly broad restrictions on freedom of expression may boomerang and restrict the freedom of expression of those who historically have suffered stigmatization, marginalization and discrimination. It is submitted that the misapplication of *Butler* to lesbian and gay male pornography affords an example of this possibility. Limiting freedom of expression with the stated purpose of preventing harm to one oppressed group, women, has boomeranged to restrict the exercise by another oppressed group, lesbians and gay men, of the right to freedom of expression.¹⁴⁷

On the other hand, the Supreme Court of Canada, in upholding the constitutionality of the hate propaganda provisions in the *Criminal Code*, has emphasized that

a response of humiliation and degradation from an individual targeted by hate propaganda is to be expected. A person's sense of human dignity and belonging to the community at large is closely linked to the concern and

respect accorded the groups to which he or she belongs. The derision, hostility and abuse encouraged by hate propaganda therefore have a severely negative impact on the individual's sense of self-worth and acceptance.¹⁴⁸

The Supreme Court of Canada has recognized that criminalization of hate propaganda

serves to illustrate to the public the severe reprobation with which society holds messages of hate ... the message sent out is that hate propaganda is harmful to target group members and threatening to a harmonious society. ... The harms caused by [hate propaganda] run directly counter to the values central to a free and democratic society, and in restricting the promotion of hatred Parliament is therefore seeking to bolster the notion of mutual respect necessary in a nation which venerates the equality of all persons.¹⁴⁹

One could therefore argue that the omission of "sexual orientation" and "disability" from the genocide provision creates the inference that - whereas advocating genocide against other disadvantaged communities is criminal behaviour - advocating the death of gay men, lesbians and people with HIV/AIDS is socially acceptable. As a result, serious community consideration needs to be given to whether "sexual orientation," "disability" and other grounds should be added to the list of groups protected by ss 318 and 319.

Although sexual orientation and disability are not included in the *Criminal Code* genocide provision, some protection against hate speech is afforded to gay men and lesbians and to people with a disability by the *Canadian Human Rights Act*¹⁵⁰ and three provincial human rights statutes.¹⁵¹ In 1994, the Canadian Human Rights Tribunal decided one case concerning homophobic hate messages.¹⁵² The Canadian Liberty Net operated a telephone message menu that included the following message:

Hell the ancient Celts used to take their queers and trample them in to peat bogs. It's not such a bad idea, maybe. Perhaps we have finally stumbled across the argument which will save the Burns Bog in Delta from development because it is the only bog big enough to service the needs of the progressive city of Vancouver.

The Tribunal concluded that the message was likely to expose lesbians and gay men to hatred on the basis of a prohibited ground of discrimination: sexual orientation.

In addition, the Canadian Radio-Television and Telecommunications Commission and some employers and professional associations have adopted codes of conduct prohibiting hate speech against lesbians and gay men.

Recommendations

A number of problems that remain, with both the content and the application of the criminal law, have been discussed in this section: (1) section 159 of the *Criminal Code* discriminates on the basis of sexual orientation; (2) other *Criminal Code* provisions continue to be applied disproportionately against gay men and lesbians; (3) in criminal cases, homosexual advances are sometimes treated as "provocation" (thus justifying a shorter sentence for an assailant), even when a similar heterosexual advance in like circumstances would not be so treated; (4) hate crimes directed toward gay men and lesbians continue to be pervasive; and (5) under the *Criminal Code*, it is not illegal to advocate the genocide of gay men, lesbians, or people with HIV/AIDS. The following measures should be undertaken to ensure that these problems and issues are addressed.

1. Section 159 of the *Criminal Code* should be revised to update its language and structure and to bring it into conformity with the Charter. In particular:

- **there should be a uniform age of consent for anal and vaginal intercourse;**
- **consensual activity in private should not be criminal, regardless of the number of adults present; and**
- **no special defence should apply to those who are married.**

2. Police education programs must address discriminatory attitudes that lead to the unequal application of criminal laws.

3. Legislation should be introduced to ensure that discriminatory attitudes cannot be used to justify homophobic violence by forming the legal foundation for a "provocation" defence.

4. Serious consideration must be given to adding "sexual orientation" to the list of grounds on which the advocacy of genocide is prohibited.

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FOOTNOTES

⁹⁶ National Advisory Committee on AIDS, *supra*, note 71.

⁹⁷ *The Wolfenden Report. Report of the Committee on Homosexual Offences and Prostitution*. American Edition. New York: Lancer Books, 1964.

⁹⁸ P Crane. *Gay men and the Law*. London: Pluto Press, 1982, at 14.

⁹⁹ [1967] SCR 822.

¹⁰⁰ See DW McLeod. *Lesbian and Gay Liberation in Canada: A Selected Annotated Chronology, 1964-1975*. Toronto: ECW Press/Homewood Books, 1996, at 32.

¹⁰¹ G Kinsman. *The Regulation of Desire: Sexuality in Canada*. Montréal: Black Rose Books, 1987, at 168.

¹⁰² *Ibid* at 170.

¹⁰³ *Ibid* at 172.

¹⁰⁴ *Criminal Code*, s 159(2)(b).

¹⁰⁵ (1995), 28 Imm LR (2d) 252.

¹⁰⁶ *Ibid* at 278-279; emphasis added.

¹⁰⁷ *Ibid*.

¹⁰⁸ *R v M (C)*, 98 CCC (3d) 481.

¹⁰⁹ *The Queen v Carmen M* (1995), 23 OR (3d) 629, per Goodman, Catzman and Abella JJA.

¹¹⁰ *Ibid* at 636.

111 Ibid at 638.

112 Ibid.

113 Ibid.

114 *Criminal Code*, s 197(1). A "common bawdy-house" is defined as "a place that is a) kept or occupied, or b) resorted to by one or more persons for the purpose of prostitution or the practice of acts of indecency."

115 *R v Pisces Health Spa Ltd* (1981), 63 CCC (2d) 427 (Alta CA); *R v Woszczyna* (1983), 6 CCC (3d) 221 (Ont CA).

116 Bruner. *Out of the Closet: Study of Relations between the Homosexual Community and the Police*. Report to Mayor Arthur Eggleton and the City of Toronto, at 123-139.

117 J Bora. Remember Remington's? *Xtra!* 1997; 319(16 Jan 1997): 13.

118 *Ontario (Attorney General v Langer)* (1995), 123 DLR (4th) 289 (Ont Gen Div) per McCombs J.

119 *Censored Sexualities*, a brochure produced by the *Repeal the Youth Law Campaign*, 29 June 1994.

120 Ibid.

121 Bill C-354. For a comprehensive analysis, see R Elliott. *Criminal Law and HIV/AIDS: Final Report*. Montréal: Canadian HIV/AIDS Legal Network & Canadian AIDS Society, 1997. See also R Jürgens. HIV-Specific Criminal Offence Proposed. *Canadian HIV/AIDS Policy & Law Newsletter* 1996; 2(2): 1, 26-27.

122 L Still. Homophobe who killed gay handed five-year sentence. *The Vancouver Sun* 29 June 1995.

123 D Dahl. Bias in the Criminal Justice System - the "Homosexual Panic Defence." *The Vancouver Sun* 28 December 1995.

124 *R v Ryznar*, [1986] 6 WWR 210 (Man CA) at 221.

125 *R v Hansford* (1987), 55 CR (3d) 347 (Alta CA) at 363.

126 From the EGALE brief to the House of Commons Standing Committee on Justice and Legal Affairs, re: Bill C-41, 1 December 1994.

¹²⁷ C Petersen. A Queer Response to Bashing: Legislating Against Hate. *Queen's Law Journal* 1991; 16 (2): 237 at 246.

¹²⁸ Ibid.

¹²⁹ Man jailed 7 years for waiter's slaying. *Ottawa Citizen* 3 April 1990.

¹³⁰ Hate slaying of gay man stuns Montreal. *Globe and Mail* 4 December 1992, at A1.

¹³¹ Québec Human Rights Commission. *De l'illégalité à l'égalité. Rapport de la consultation publique sur la violence et la discrimination contre les gais et les lesbiennes*. Québec: The Commission, at 68.

¹³² Pepper & Holland. Moving Toward a Distant Horizon. The Final Report of the Action Plan Project funded by the Ottawa Police Services Board, June 1993 - March 1994. Ottawa, April 1994, at 45. The following examples are also taken from this report.

¹³³ S Samis. An Injury to One is an Injury to All: Heterosexism, Homophobia and Anti-Gay/Lesbian Violence in Greater Vancouver. MA (Sociology) thesis, Simon Fraser University, 1994. The following examples are also taken from this thesis.

¹³⁴ Québec Human Rights Commission, *supra*, note 131 at 68.

¹³⁵ They were later convicted (see *R v Pelletier and Sillje*, cited in D Casswell. *Lesbians, Gay Men and Canadian Law*. Emond Montgomery Publications Ltd, 1996, at 638). The case graphically demonstrates the link between homophobia and discrimination against people with HIV/AIDS.

¹³⁶ Québec Human Rights Commission, *supra*, note 131 at 69.

¹³⁷ Ibid at 70.

¹³⁸ *Discrimination and Violence Encountered by Lesbian, Gay and Bisexual New Brunswickers*. New Brunswick Coalition for Human Rights Reform, 1990.

¹³⁹ *Proud but Cautious: Homophobic Abuse and Discrimination in Nova Scotia*. Nova Scotia Public Interest Research Group, 1994.

¹⁴⁰ Samis, *supra*, note 133.

¹⁴¹ Ibid.

¹⁴² From EGALE brief, *supra*, note 126.

¹⁴³ Québec Human Rights Commission, *supra*, note 131 at 69.

¹⁴⁴ Samis, *supra*, note 133.

¹⁴⁵ Goodman, Lakey, Lashof & Thorne. *No Turning Back: Lesbian and Gay Liberation for the Eighties*. 1983, at 23-24.

¹⁴⁶ Defences are available if the accused is expressing a religious opinion in good faith or engaging in a discussion on a matter of public interest.

¹⁴⁷ Casswell, *supra*, note 135 at 553.

¹⁴⁸ *R v Keegstra*, [1990] 3 SCR 697 at 746.

¹⁴⁹ *Ibid* at 756, 769.

¹⁵⁰ *Canadian Human Rights Act*, RSC 1985 c H-6, s 13(1).

¹⁵¹ *British Columbia Human Rights Act*, SBC 1984 c 22, amended 1992 c 43 and 1993 c 27; *Manitoba Human Rights Act*, SM 1974 c 65; and *Saskatchewan Human Rights Act* 1979 c S-24.1.

¹⁵² *Payzant v McAleer, Vaccaro and Canadian Liberty Net*, [1994] CHR D No 4 (CHRT); application for judicial review dismissed.

Gay and Lesbian Issues and HIV/AIDS: Final Report

by John Fisher, Ralf Jürgens, Anne Vassal, Robert Hughes

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This page contains part 2 of Chapter 4, Gay Men, Lesbians, and the Law. Part 2 has two sections:

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Censorship

This section addresses the issue of censorship of gay and lesbian materials. It first points out how, in view of the historical repression of gay and lesbian sexuality, it is not surprising that gay and lesbian materials have been systematically targeted under Canada's obscenity laws. It then discusses recent court decisions, in particular the decision in *Little Sisters Book and Art Emporium* which recognized that, by targeting lesbian and gay bookstores, Canada Customs has discriminated on the basis of sexual orientation. Finally, the section discusses the consequences of the censorship of gay and lesbian materials, which go beyond a simple pattern of discrimination. From a safe-sex perspective, the active suppression of gay and lesbian materials has inhibited the ability of AIDS educators to speak forthrightly about same-sex sexual practices and to educate about at-risk behaviour.

History

Until very recently, Canada Customs routinely classified as "obscene" *any* depiction of anal sex, regardless of context or circumstances. As a result, even safe-sex educational materials were seized by Customs. The government's actions in actively suppressing materials designed to inform and educate in order to curb the spread of HIV, reflected a willingness to enforce the State's own moral code even at the expense of human life.

In one case in 1987, Canada Customs seized *The Joy of Gay Sex*, a sex manual written from an information and health-based perspective, solely on the ground that part of the book dealt with anal

intercourse. A bookstore challenged the decision, and the Court agreed that the book was not obscene, observing that "[t]o write about homosexual practices without dealing with anal intercourse would be equivalent to writing a history of music and omitting Mozart."¹⁵³

In another case,¹⁵⁴ the federal government consented to a ruling that an issue of the gay news magazine *The Advocate* was not obscene. However, these cases had little effect on official practice, and shipments of books destined for gay and lesbian bookstores continued to be targeted for seizures by Canada Customs.

The Current Situation

In *R v Butler*,¹⁵⁵ the Supreme Court of Canada held that the criminalization of obscenity by s 163 of the *Criminal Code* is an infringement of freedom of expression but is nonetheless justifiable as an appropriate state limit on that freedom.

In *Butler*, intervenor groups sought to persuade the Supreme Court to move away from an approach to pornography based upon the regulation of morality, and instead to adopt a "harms-based" analysis. The Supreme Court largely accepted this approach, ruling that materials may be classified as obscene if there is a risk of harm because of their "degrading or dehumanizing" nature. However, what is degrading or dehumanizing is to be measured against "community standards of tolerance." As a result, there remains substantial scope for judges to apply this test in accordance with their own particular standards of morality.

Almost immediately following the release of the *Butler* decision, gay and lesbian materials were again targeted for seizure. A large number of shipments to the Glad Day bookstore in Toronto were seized. The bookstore challenged the decision, but the books seized were deemed obscene by Hayes J in *Glad Day Bookshop Inc v Canada*. The judge provided scant reasons for his decision and appears to have simply expressed his own opinion on the materials in question rather than follow any legal standard. For example, in relation to a book called *Spartan's Quest*, he said:

This is a succession of grotesque drawings of three males engaged in various forms of sexual activity, one of the men having emerged from the sea in a fishing net. It is a sexual encounter without any meaningful human relationship. The manner in which the conduct is depicted would not be recognized as compatible with the proper functioning of society. It is degrading. There is a strong inference of harm. The community would not tolerate others being exposed to this gross material. I find it to be obscene.¹⁵⁶

The book appears to be nothing more than an explicit depiction of a casual sexual encounter. Nothing in the judge's reasons reveals it to be particularly shocking. There is no reference to any underage sex, violence, cruelty or other demeaning characteristics. The judge seems to have felt that the book is "degrading" solely because of the absence of "any real meaningful human relationship," a test that would seem to exclude virtually all pornography or erotic materials, heterosexual or homosexual.

Of even greater concern is that the judge rejected evidence about standards of tolerance within the gay community and suggestions that the dynamics of heterosexual relations do not necessarily apply to homosexual relations, where there is no gender imbalance. Such considerations were curtly dismissed by the judge as evidence that "does not assist with respect to the community standards test." Clearly, the "community standards" that were applied were based upon a heterosexual model of the community in which there is no room for an understanding of gender differences or the characteristics of same-sex relationships and forms of sexual expression.

The unwillingness to take into account potential differences between the dynamics of opposite-sex and same-sex encounters was explicitly articulated in another case, *R v Scythes*,¹⁵⁷ concerning the seizure of the lesbian magazine *Bad Attitude*: the Court stated that the "community tolerance test is blind to sexual orientation or practices," and that "[a]ny consideration given to the sexual orientation of the material would constitute an unwarranted application of the test." As a result, *Bad Attitude* was judged obscene.

In reality, contrary to what stated in the decision, the community standards test is *not* "blind to sexual orientation"; by refusing to acknowledge sexual orientation, gay and lesbian materials are, by default, judged in accordance with the standards of the *heterosexual* community.

A major breakthrough did occur, however, in 1996 with the judgment of the BC Supreme Court in *Little Sisters Book and Art Emporium et al v Minister of Justice and Attorney General of Canada et al.*¹⁵⁸ In this case, the lesbian and gay bookstore Little Sisters challenged the constitutional validity of key sections of the *Customs Tariff* and the *Customs Act*. It argued that Canada Customs' ability to arbitrarily seize and detain materials at the border, and their implementation of that policy, infringed the constitutional rights to freedom of expression and freedom from discrimination.

One of the key aspects of the *Little Sisters* trial was a challenge to Memorandum D-911, a policy memorandum of Canada Customs that explicitly stated that *any* depiction of "anal penetration" was obscene in and of itself. On 29 September 1994, just weeks before the *Little Sisters* trial was due to begin, Canada Customs announced that it was removing the prohibition on the depiction of anal penetration from Memorandum D-911.

The trial in *Little Sisters* went ahead, and Smith J issued his decision on 19 January 1996. He held that Customs' power to detain materials was constitutional and not in and of itself discriminatory. He did, however, hold that - although the law itself was valid - it had been implemented in a discriminatory way. By targeting lesbian and gay bookstores, Canada Customs was discriminating on the ground of sexual orientation.

In particular, the judge stated that the absolute prohibition on depictions of anal intercourse "constituted an embargo of 'safe sex' guidelines within Canadian homosexual communities at a time, in the context of the AIDS epidemic, when such guidelines have been particularly important." He continued by saying that "[t]his discrimination is arbitrary and infringed the Section 15(1) *Charter* right to equality of [the plaintiffs], as well as other homosexual Canadian males."

According to the Court, "[s]ome Customs officers have from time to time exercised their discretion in an arbitrary and improper manner," and "[b]ooks had been prohibited without any proper consideration of whether the exploitation of sex was undue in the overall context and whether there existed artistic, literary, or other similar merit."

Little Sisters obtained substantial costs and an injunction prohibiting further arbitrary detentions of their materials, and have lodged an appeal against the finding that the impugned legislation is constitutional.

The decision in *Little Sisters* notwithstanding, censorship of gay and lesbian materials has not ended. In addition, the banning of lesbian and gay materials does not only take place at the border. In April 1997, the Surrey School Board passed a motion banning three books on same-sex couples, and prohibiting the use of any materials prepared by the Gay and Lesbian Educators of British Columbia. According to one parent who read the books with her son, the stories "do not teach homosexuality, but tolerance and acceptance."¹⁵⁹ On 3 August 1997, a petition was filed in the British Columbia Supreme Court to challenge the School Board's motion.

This is not an isolated incident. On 20 November 1997, the Calgary Public School Board banned two books, claiming they promoted homosexuality. A spokesperson for a parents' group said that "a major concern is that a lot of the stories describe people who >come out' as homosexual, which [the parents' group] finds inappropriate."¹⁶⁰

Comments made by Reform Party MPs also provide textbook examples of the way in which homophobia continues to lead to attempts to suppress efforts to control the spread of HIV. Reform MPs Myron Thompson and Grant Hill launched a major attack on a safe-sex brochure produced by the Canadian AIDS Society with funding from Health Canada.¹⁶¹ The brochure *Doing it in the '90s* reports the results of a major survey of gay men carried out in order to develop HIV/AIDS education and support programs. Thompson commented:

Could our tax dollars - \$500,000 - not be spent more effectively through proper AIDS educational materials, not advocating homosexuality and bisexuality and the practices associated with them?

Hill agreed:

I believe the pamphlets were teaching more the homosexual lifestyle. I was

appalled by the graphic nature of these pamphlets and am absolutely unalterably opposed to this mechanism of teaching about AIDS. It's totally inappropriate. They were almost nauseating in their graphic portrayal of the practices.

Recommendations

In the area of censorship, the link between homophobia and HIV transmission is clear and direct: through its customs laws and their enforcement, the federal government actively suppressed for many years information about the risks of transmission associated with anal sex, as a direct result of homophobia and discomfort about matters of a sexual, particularly homosexual, nature. Had this safer-sex information been available and publicized in a responsible and open fashion, many lives might have been saved and the chances of controlling the spread of the virus in its early years would have been increased. The Krever Inquiry examined the transmission of HIV as a result of tainted blood transfusions, and both federal and provincial governments reached settlements with those who contracted HIV through blood transfusions. The government has not, however, acknowledged its responsibility to gay men for actively suppressing information that could have saved lives.

The following measures should be undertaken to ensure that the problems and issues discussed in this section are addressed.

5. Customs legislation and practice regarding the seizure of materials deemed to be obscene should be reviewed, particularly the doctrine of "prior restraint," which gives Customs officers free reign to exercise discriminatory attitudes without proper accountability.

6. Education workshops should be undertaken to ensure that Customs officers recognize their legal and constitutional duty not to discriminate in making decisions about what is or is not "obscene."

7. The government of Canada should acknowledge its responsibility for suppressing for many years safer-sex information that could have helped educate the gay community about safer sex practices. This acknowledgment would help to redress the public prejudice that gay men are "to blame" for HIV.

8. School boards need to ensure that young people receive a balanced education, including appropriate recognition of the contributions to Canadian society, literature and history of gay men and lesbians. School curricula should not suppress acknowledgment of the existence

of lesbians and gay men but should recognize the diversity of human relationships and family forms. Age-appropriate information about safer sex should address sexual practices between people of the same sex in a non-judgmental way.

Protection from Discrimination

This section illustrates the difficulties that gay men and lesbians have faced in securing even the most basic human rights protections. It first provides examples of the extent of discrimination perpetrated against gay men and lesbians. While the situation has much improved over the last twenty years - most Canadian jurisdictions have provided some protection against discrimination - the section draws attention to gaps in human rights legislation and other ongoing problems. The section then considers the particular obstacles faced by transgendered people in securing adequate protection from discrimination. It concludes by suggesting ways to reduce discrimination against gay men, lesbians, and transgendered people.

History

Extent of Discrimination

Perhaps the most fundamental right of gay men and lesbians is the right to live their lives and participate in Canadian society without fear of discrimination. Gay men, lesbians and people with HIV/AIDS are all too familiar with the difficulties experienced in the workplace and other spheres of their personal lives as a result of homophobia, AIDSphobia, cruel jokes and thoughtless comments. Throughout the years, discrimination has been perpetrated by both the public and private sectors, often at the instigation of government itself.

A systematic review of discriminatory federal laws and policies took place in 1985, when an all-party Parliamentary Committee on Equality Rights held public hearings across Canada to examine what laws should be changed to comply with the equality guarantees in the Charter. For the first time, lesbian and gay organizations and individuals turned out at meetings across the country to seek protection from discrimination. In its report, the Parliamentary Committee stated:

We were shocked by a number of the experiences of unfair treatment related to us by homosexuals in different parts of the country. We heard about the harassment of and violence committed against homosexuals. We were told in graphic detail about physical abuse and psychological oppression

suffered by homosexuals. In several cities, private social clubs serving a homosexual clientele were damaged and the members harassed. Hate propaganda directed at homosexuals has been found in some parts of Canada. We were told of the severe employment and housing problems suffered by homosexuals.¹⁶²

Since the *Equality for All* report, other studies and reports have confirmed the extent of discrimination experienced by gay men and lesbians. The Québec Human Rights Commission, for example, reported about discrimination in many sectors, including "the dismissal of several teachers because of their sexual orientation, the refusal of a newspaper to publish a classified ad for a homosexual club, the harassment of several homosexual waiters by a restaurant manager, the lowering of a student's mark because he was a homosexual, the refusal to rent a meeting room to a homosexual rights group."¹⁶³ Another study, by the New Brunswick Coalition for Human Rights Reform, reported that 49 percent of respondents had experienced employment discrimination; seven percent had been denied housing; 17 percent had experienced discrimination in public services; and 23 percent had experienced violence or discrimination by police officers because of their sexual orientation.¹⁶⁴ Similar numbers are reported in *Proud but Cautious: Homophobic Abuse and Discrimination in Nova Scotia*.¹⁶⁵

Protection against Discrimination

Over the years, nearly every jurisdiction in Canada has moved to provide some protection against acts of discrimination by including "sexual orientation" in human rights legislation: Québec added "sexual orientation" to its *Charter of Human Rights and Freedoms* in 1977. Ontario followed in 1986, Manitoba and Yukon in 1987, Nova Scotia in 1991, New Brunswick and British Columbia in 1992, Saskatchewan in 1993, the federal government in 1996, and Newfoundland in 1997.

The long history of the struggle to see "sexual orientation" added to the *Canadian Human Rights Act* as a prohibited ground of discrimination aptly illustrates the difficulties that gay men and lesbians have faced in securing even the most basic human rights protections:

- In 1979, and in every single year thereafter, the Canadian Human Rights Commission in its annual reports called upon Parliament to amend the *Canadian Human Rights Act* to prohibit sexual orientation discrimination.
- In its 1985 report, the Parliamentary Committee on Equality Rights unanimously recommended that sexual orientation be included as a prohibited ground of discrimination in the *Canadian Human Rights Act*.¹⁶⁶
- On 4 March 1986, in its response to the Parliamentary Committee's

recommendations, the Government committed itself to taking "whatever measures are necessary" to ensure that sexual orientation become a prohibited ground of discrimination "in relation to all areas of federal jurisdiction."¹⁶⁷ Over the next ten years, justice ministers continued to reiterate and then break the commitment.

- Numerous private member's bills to add sexual orientation to the *Canadian Human Rights Act* were introduced in the House of Commons, but none was passed: Bill C-242 (2 May 1980), Bill C-676 (9 March 1983), Bill C-225 (4 March 1985), Bill C-277 (7 March 1986), Bill C-212 (8 October 1986), Bill C-232 (12 April 1989) and Bill C-246 (19 June 1991).
- In 1992 Graham Haig and Joshua Birch successfully challenged the *Canadian Human Rights Act* on the ground that it was discriminatory because it did not include sexual orientation as a prohibited ground of discrimination.¹⁶⁸ The Ontario Court of Appeal held that the omission of "sexual orientation" infringed the equality guarantees in the Charter. The Court ruled that to correct the discrimination, "sexual orientation" would be "read into" the Act from then on. The federal government did not appeal the decision.
- Then Minister of Justice Kim Campbell promised to amend the Act to bring it into line with the ruling in *Haig and Birch*. On 9 December 1992, she introduced Bill C-108, which would have added "sexual orientation" to the Act, but would also have added an opposite-sex definition of "marital status." Bill C-108 was widely condemned by equality-seeking communities for taking away more than it gave, and the Bill became stalled following a wave of protest.
- On 1 December 1992, Senator Noel Kinsella, concerned by inaction in the House of Commons, introduced his own bill in the Senate. Bill S-15 would have added "sexual orientation" to the *Canadian Human Rights Act*, but without restricting the definition of "marital status." The bill received third reading and passed through the Senate on 3 June 1993 and received first reading in the House of Commons on 9 June 1993. The federal election intervened, however, and bills S-15 and C-108 died on the Order Paper.
- Then Minister of Justice Allan Rock publicly committed to amend the *Canadian Human Rights Act* by the end of 1994, a commitment breached when the proposed legislation was delayed because of the concerns of a vocal minority of backbench Liberal MPs. Subsequently, the government refused to set even the most general timetable and doubts arose as to

whether it would keep its commitment at all.

- In the meantime, Senator Noel Kinsella once again introduced his own Senate bill to add "sexual orientation" to the Act. Essentially unchanged from the previous Bill S-15, Bill S-2 cleared the Senate in early 1996, and increased the pressure on the government to act.
- Finally, on 29 April 1996, Bill C-33, which added sexual orientation to the *Canadian Human Rights Act*, was introduced in the House of Commons. It passed third reading on a free vote on 9 May 1996, cleared the Senate on 5 June, and received royal assent and came into force on 20 June 1996.

Current Situation

While the situation has much improved, there are ongoing concerns and problems: (1) concerns have been expressed that the Preamble to Bill C-33 could create difficulties; (2) some jurisdictions have yet to amend their human rights legislation to protect gay men and lesbians from discrimination; (3) open and hidden discrimination in the workplace remains pervasive; (4) there is seldom explicit recognition that discrimination can occur on multiple grounds; (5) inadequate provision exists to protect transgendered people from discrimination; and (6) generally, discriminatory attitudes persist even where human rights legislation has been passed. These concerns and problems are addressed in the following sections.

The Preamble to Bill C-33

Concern has been expressed¹⁶⁹ that the Preamble to Bill C-33 may create difficulties because of its reference to "the importance of family as the foundation of Canadian society" and the affirmation that "nothing in this Act alters its fundamental role in society."

While it is true that "family" has sometimes been interpreted restrictively to exclude same-sex couples,¹⁷⁰ such concerns may be unfounded. An examination of the legislative history reveals that the government deliberately left the term "family" in the Preamble undefined in order to allow the courts to continue to address the issue of same-sex relationship recognition. "Family" is used in the Preamble without any restrictive qualifiers such as "the heterosexual" family, "the traditional" family, or even "the" family - qualifiers that might have suggested that there is only one form of family. In addition, then Minister of Justice Rock, in his testimony before the House of Commons Standing Committee on Human Rights during hearings on Bill C-33, was repeatedly asked by NDP MP Svend Robinson and Reform MP Sharon Hayes to confirm whether or not same-sex relationships were included within the

term "family." The Minister refused to specify whether same-sex relationships were included or excluded, commenting that "family is in the eye of the beholder" and affirming that the question of same-sex relationship recognition would be left up to the courts to decide. In accompanying materials produced by the Department of Justice, the government stated:

The issue of benefits for same-sex partners under the CHRA is already before the courts and tribunals. Whether or not the amendment is made, those cases will be decided, and the relevant statutes considered, as the courts and tribunals see fit.¹⁷¹

Finally, and perhaps most significantly, Reform and Liberal MPs brought forward a host of amendments to Bill C-33. These amendments sought to "affirm the importance of the traditional, heterosexual institution of marriage" and "the irreplaceable role [of] procreation," and explicitly excluded same-sex couples from the definition of family.¹⁷² All proposed amendments were voted on and decisively rejected: Parliament had the opportunity to explicitly restrict the protections of the *Canadian Human Rights Act* to opposite-sex couples, but expressly declined to do so.

Gaps in Human Rights Protection

With the passage of Bill C-33 and the recent changes to Newfoundland's human rights legislation, only three Canadian jurisdictions have yet to protect gay men and lesbians from discrimination: Prince Edward Island, Alberta, and the Northwest Territories. Of these, Prince Edward Island has indicated a willingness to amend its provincial human rights statute to add "sexual orientation," while Alberta is actively resisting and has challenged a lower court decision which held that sexual orientation must be read into the Alberta human rights legislation. The scope of that legislation is currently being considered by the Supreme Court of Canada.

Prior to the Alberta challenge, both the Ontario Court of Appeal in *Haig v Canada*¹⁷³ and the Supreme Court of Newfoundland¹⁷⁴ ruled that sexual orientation had to be read into the human rights legislation under consideration in each case. In *Vriend v Alberta*,¹⁷⁵ however, the Alberta Court of Appeal, by a 2-1 majority, overturned a finding of the Alberta Court of Queen's Bench that "sexual orientation" must be read into the Alberta *Individual Rights Protection Act*. McClung and O'Leary JJA held that the Charter does not require the extension of human rights legislation to include omitted grounds, but reached this conclusion on substantially different grounds: McClung JA left no doubt as to his position, criticizing the "ideologically-determined" and "rights-restless judges" who "pitchfork their courts into the uncertain waters of political debate" and "choose to privateer in parliamentary sea lanes," influenced by "the creeping barrage of the special-interest constituencies that now seem to have conscripted the Charter."¹⁷⁶ He did not even mention that his decision ran counter to the unanimous judgment of the Ontario Court of Appeal in *Haig*.

O'Leary JA based his reasons on the more measured position that the *Individual Rights Protection Act*, in omitting the ground of "sexual orientation," makes no distinction between heterosexuals and homosexuals and therefore does not discriminate.

Hunt JA dissented, arguing that the deliberate exclusion of "sexual orientation" from the statute discriminates by reinforcing prejudicial beliefs about gay men and lesbians.

The Supreme Court of Canada will have to resolve the difference between the conflicting positions taken by the Ontario Court of Appeal in *Haig* and the Alberta Court of Appeal in *Vriend*. On 4 November 1997, the Supreme Court considered *Vriend*'s appeal. The Court vigorously questioned Alberta's reasons for refusing to protect gay men and lesbians from discrimination, and ultimately reserved its judgment. In the Alberta Court of Appeal, McClung JA had suggested that gay men and lesbians were appropriately denied human right protection because of "fear of the spread of sexually-transmitted diseases."¹⁷⁷ This conclusion not only promotes offensive stereotypes that the gay community is responsible for the spread of HIV/AIDS and other sexually transmitted diseases, but fails to explain why lesbians were also excluded from the legislation. Intervenors in support of *Vriend* before the Supreme Court of Canada included the Canadian AIDS Society, which responded to McClung JA's assertions by arguing cogently in favour of meaningful human rights protection in order to promote effective HIV management.

Until the Supreme Court resolves the issue, the constitutional obligation of governments to protect gay men and lesbians from discrimination remains in doubt in each of the jurisdictions that have not explicitly added "sexual orientation" to their human rights legislation.

Discrimination in the Workplace and Other Settings

As a result of human rights act amendments across the country, most jurisdictions now prohibit discrimination in the workplace. Although human rights commissions can be slow in processing complaints, protection from discrimination can be of real practical value, both to gay men and lesbians and to people with HIV/AIDS. However, the burden remains on complainants to prove discrimination, a task that can be undertaken effectively only by those who are willing to be "out" about their sexual orientation or HIV status.

Successful Complaints

Many complaints by gay men and lesbians and by people with HIV/AIDS have been successful. For example, human rights litigation against the federal government resulted in the removal of restrictions against gay men and lesbians serving in the Armed Forces, the Royal Canadian Mounted Police and the Canadian Security Intelligence Service. One example is the case of Michelle Douglas, who graduated from basic training in the Armed Forces at the top of her class. In 1988 she faced repeated questioning

about her sexual activity, as a result of which she acknowledged that she was a lesbian. She was then transferred to a more junior position, denied any level of security clearance, and a military review board recommended that she be released from the Forces.

Michelle Douglas commenced legal action. The federal government took the position that the exclusion of lesbians and gay men was justified because inclusion would affect the morale of heterosexual colleagues, impair operational effectiveness, create security risks from people blackmailed by threat of disclosure of their sexual orientation, and create difficulties around posting in foreign countries that criminalize homosexual acts.

However, on the day of the trial the government acknowledged that the exclusion of gay men and lesbians from the Forces could not be justified, agreed to settle with Douglas, and agreed to change military policy.¹⁷⁸

In the context of HIV/AIDS, several cases have upheld discrimination complaints launched by people with HIV/AIDS.¹⁷⁹ For example, in *Hinkel v Wood*,¹⁸⁰ Mr Hinkel, a man with AIDS, telephoned Dr Wood, who had been his dentist since April 1986, to request treatment. Dr Wood apparently refused to treat him and Mr Hinkel filed a complaint of discrimination under the BC *Human Rights Act*. The Human Rights Council held that Hinkel's complaint was justified and awarded him compensation for expenses as well as for humiliation and hurt feelings, totaling \$3400.

Similarly, in *Hamel v Malaxos*,¹⁸¹ the plaintiff, a 25-year-old man with asymptomatic HIV infection, succeeded in an action in Small Claims Court against a dentist who allegedly refused to treat him because of his HIV infection. The Court found that the defendant, in refusing to treat the plaintiff because he was seropositive, had committed a discriminatory act contrary to the Québec *Charter of Human Rights and Freedoms*, and awarded the plaintiff \$1000 in damages.

In another case, *Biggs v Hudson*,¹⁸² the British Columbia Human Rights Council explicitly held that discrimination against a person living with HIV/AIDS or *perceived* to be HIV-positive (regardless of actual HIV status) constitutes discrimination on the basis of "physical disability" and is therefore prohibited under the BC human rights legislation. The extension of human rights protection to those with a *perceived* disability is important, since it would cover situations where, for example, an HIV-negative gay man faces discrimination because of stereotypes that gay men are likely to have AIDS.

Some jurisdictions, such as Nova Scotia, go further, explicitly prohibiting discrimination based on "an irrational fear of contracting an illness or disease." The inclusion of this ground was apparently partly based upon the case of Eric Smith, a gay Cape Sable teacher turned out of his teaching position when he was discovered to be HIV-positive.¹⁸³ In 1995, the provision in the Nova Scotia Act was held to cover the situation of a Daycare Centre that dismissed a driver who had been successfully treated for hepatitis B, based upon irrational fears that the children he was responsible for transporting might be at risk of contracting hepatitis B.¹⁸⁴ Clearly, the provision would also extend to discrimination based on irrational fears associated with the transmission of HIV.

Challenges

However, not all complaints are successful, because a number of defences are available to employers and service providers under human rights statutes. In *Jerome v DeMarco*,¹⁸⁵ for example, the complainant alleged discrimination in the provision of dental services, contrary to sections 1 and 8 of the Ontario *Human Rights Code*. The complainant had a morning appointment, but the dentist deferred treatment until the end of the day when he learned that the complainant had AIDS. The Board held that this constituted *prima facie* discrimination on the basis of handicap, but that the postponement was justified because people with HIV/AIDS may require deeper and more thorough dental cleaning. The Board held that, given the dentist's tight appointment schedule, if the respondent had treated the complainant at the agreed time, it would have caused significant delay in the treatment of the next patient, amounting to undue hardship under s 16(1)(a) of the Code.

A further difficulty in many human rights complaints is that discriminatory attitudes are often subtle, and it is not always easy to prove that a particular decision was based on sexual orientation, disability, or indeed any specific prohibited ground of discrimination.

In addition, homophobia and AIDSphobia are inextricably linked. Discrimination on the basis of HIV positivity and discrimination based on sexual orientation frequently overlap; it is often difficult to determine which is the motivation for the discrimination.

A striking example of the interplay between homophobia and AIDSphobia occurred in the case of Simon Thwaites, a gay man who had served for six years in the Armed Forces when it was discovered that he was HIV-positive. At the time, he was being investigated by military police because of an unrelated allegation that he was gay. Mr Thwaites was released and, although his release was effected on the basis of medical grounds (at the human rights hearing the Armed Forces argued that Thwaites's release was based on the prohibited ground of disability and not on the ground of sexual orientation, and that it was not discriminatory because it was based on a bona fide occupational requirement), it may be that this was not the only reason for his release: the military tribunal hearing his case was aware of the allegations of homosexuality.¹⁸⁶

The general difficulty is not restricted to the grounds of "sexual orientation" and "disability," however. A native lesbian, for example, faces discrimination because of her race, her gender and her sexual orientation. The discrimination she experiences in a particular instance may not fit neatly into any one of these categories, and she should not need to prove that what she experienced was wholly race discrimination *or* sex discrimination *or* sexual orientation discrimination. Instead, human rights legislation should recognize that the existing grounds of discrimination are often inextricably linked, and that discrimination is often based on more than one ground simultaneously.

Although some courts have indicated a willingness to read the grounds of discrimination in human rights statutes interactively,¹⁸⁷ explicit amendments providing that discrimination may be based on any one or

more of a number of possible grounds would help to clarify that the grounds of discrimination are often interwoven and that it is not necessary to prove which of a number of grounds formed the specific basis for an act of discrimination.

On 9 October 1997, Bill S-5 was introduced in the Senate. If adopted, this Bill will, inter alia, insert a new section 3.1 into the *Canadian Human Rights Act* to provide:

For greater certainty, a discriminatory practice includes a practice based on one or more prohibited grounds of discrimination or on the effect of a combination of prohibited grounds.

British Columbia is currently considering similar provisions. It is recommended that provisions dealing with multiple grounds be added to all human rights legislation.

Professional Codes of Conduct

Professional codes of conduct may provide standards of non-discrimination and respect for the rights of gay and lesbian members. A workplace where lesbian and gay put-downs or unpleasant comments about people with HIV are common will probably be held to constitute a poisoned work environment, giving rise to legal liability. Professional codes of conduct could also be developed to cover, for example, members of Parliament, Senators, provincial legislatures and the judiciary.

Employment Equity Programs

Employment equity programs could reverse patterns of discrimination against lesbians and gay men in the workplace and allow them to be "out" safely. Such programs have a valuable educational effect that reaches beyond the individuals who receive training and employment from which they might otherwise be excluded. Thus far, although most other discriminated groups have been afforded some recognition in employment equity programs, lesbians and gay men have been ignored, ironically on the basis that it is not possible to "count" them in order to establish whether they are victims of employment discrimination, because many remain in the closet in the workplace.

Harassment Complaints

As more lesbians, gay men and bisexuals come out of the closet in the workplace, they are increasingly susceptible to complaints of sexual harassment.¹⁸⁸ This raises a number of issues. Sexual harassment policies have been established in the context of a power difference between men and women, where the complainant is typically the person with less power in the workplace. It does not occur to many people that a heterosexual complainant in a harassment complaint against a lesbian or gay coworker of the same sex is socially situated with more power than his or her gay coworker. The issue is very difficult to analyze and resolve because the dynamic of these complaints is not well-understood. As a result, gay or lesbian workers can be at extreme risk from such complaints. Casswell offers a succinct analysis of the

nature of the problem:

Of course, lesbians and gay men may be guilty of harassment on the basis of sexual orientation just as heterosexuals may be. However, it is submitted that the prevalence of homophobia in the workplace must be taken into account in considering an allegation of harassment on the basis of sexual orientation made against a lesbian or gay man as opposed to by a lesbian or gay man. Because of homophobia and in particular the fear of many people of having any physical contact with a lesbian or gay man or being perceived, by others or by themselves, as perhaps being thought desirable or approachable by a lesbian or gay man, the slightest touching or show of affection by a lesbian or gay man toward a heterosexual may be misinterpreted as harassment even if such conduct directed toward the complainant by another heterosexual would not attract any adverse attention, let alone an allegation of harassment.¹⁸⁹

Unions in particular need to be sensitive to the dynamics of the workplace in this regard, and understand that unfounded fears based on homophobia should not be sufficient to form the basis of a complaint of harassment.

Inadequate Protection of Transgendered People

Although detailed analysis of the many obstacles faced by transgendered people as a result of discriminatory attitudes in society is beyond the scope of this Report, it is important to underline the inadequacy of current human rights laws in extending basic protection from discrimination to transgendered people.

Transgendered people are faced with discriminatory attitudes as part of their daily lives. The law firm Dahl Findlay Connors reports having transgendered clients who have had access to their children denied because they are transgendered; have been fired or threatened with being fired when they have gone through transition from one gender to another; have been harassed by police officers in the streets or when they call 911 for assistance; have been refused service by women's services because they are not "real women"; have been challenged in washrooms, had security or police called, been evicted from public facilities, etc; have been refused publicly funded medical care on a discriminatory basis (for example, electrolysis is available through medicare for hirsute women but not for transitioning women); have been refused participation in training institutions as transgendered people; and have been told they cannot cross-dress because to do so would be a violation of the workplace dress code.¹⁹⁰

Discrimination against transgendered people has a severe impact on the self-esteem of those targeted, with corresponding repercussions for the spread of HIV. One source reports that "estimates in

Vancouver are that 70 to 80 percent of transgendered people on the streets are HIV-positive."¹⁹¹

The pervasiveness of discrimination against transgendered people creates a clear need for protection under human rights laws. Yet adequate protection is simply not available under existing grounds of discrimination. In the only reported case,¹⁹² a transsexual was held to be protected on the ground of "civil status" under Québec's human rights legislation. However, this ground is unique to Québec's human rights code and can therefore not serve as a basis for protection in other jurisdictions.

A detailed analysis of the (lack of) protection available to transgendered people is contained in the report *Finding Our Place: Transgendered Law Reform Project*.¹⁹³ The authors consider the scope of other existing grounds, such as "sex," "sexual orientation" and "disability." Although some have argued that a person's gender identity fits within the scope of the term "sex" and a favourable settlement was apparently reached recently before the Ontario Human Rights Commission on this basis,¹⁹⁴ the authors are concerned that because of rigid societal insistence that "sex" requires classification into fixed categories of "male" and "female," protection on this basis is likely to be arbitrary and inconsistent, particularly in cases where a transgendered complainant's gender status challenges preexisting notions of these categories.

In addition, they conclude that addressing discrimination against transgendered people under the ground of sexual orientation "betrays a basic lack of understanding about both sexual orientation and transgendered people."¹⁹⁵ Sexual orientation refers to the gender of the people to whom one is attracted emotionally and physically, and is independent of one's gender identity. It is therefore inappropriate for complaints to be based upon the ground of sexual orientation.

Finally, the authors acknowledge the possibility of success by treating transgenderism as a "disability," particularly when one considers that to constitute a disability, a condition need not "inherently impair" an individual (as with an individual who is HIV-positive but has no physical impairment). In addition, it may be sufficient that the condition be perceived as a disability, and does not need to be considered a disability by the complainant. However, there are at least two major difficulties with this approach:

The first is that it is an argument which may assist only transsexuals and not other transgendered people. Transvestites, for example, may not seek or require medical intervention, so unless they are considered in need of psychiatric help they may not be considered disabled. Second, proceeding on the ground of disability forces transgendered people to accept a self-definition as disabled either mentally or physically in order to make a claim that they deserve to have human rights.¹⁹⁶

The Canadian Human Rights Commission, which has developed a practice of accepting complaints from transgendered people based on disability, acknowledged the drawbacks inherent in this approach:

The illness model of transsexuality is widely accepted throughout society.

An illness model makes it difficult for any individual or group of people to be respected as autonomous, equal participants in society and it makes it difficult to educate others away from discriminatory treatment. As with many human states of being, transsexuality is only a problem because people think it's a problem. The danger in insisting exclusively on an illness model is that we will not be able to break free of the notion that transsexualism needs to be "cured." In a similar way, current research attempting to find biological causes of homosexuality has led to concerns that in our current social climate a cure will become the goal of that research or that amniocentesis will be used to screen out potentially homosexual foetuses.¹⁹⁷

Recently, the British Columbia Human Rights Commission recognized the lack of adequate protection for transgendered people on existing grounds. In September and October 1997 the Commission held public hearings to solicit feedback on adding a new ground to the BC Human Rights Code to explicitly protect transgendered people from discrimination. As noted by EGALE in its submissions to the Commission concerning the proposed amendment, such an approach not only overcomes potential legal difficulties with the scope of existing grounds, but is also important from a public education perspective. Explicit human rights protection does raise public awareness and understanding of the needs of disadvantaged groups. In contrast, in a society where many people are taught that it is acceptable to discriminate against those who are different because of factors such as gender identity, the lack of clear legal denunciation of transphobic discrimination legitimizes that discrimination. The remarks of one commentator in the context of sexual orientation are equally applicable in the context of gender identity:¹⁹⁸

Mainstream culture ... relegates [us] to the periphery of society. Our cultures are suppressed, our histories erased, our families ignored, our communities ridiculed and our contributions devalued. We are so degraded, stigmatized, and marginalized that the normative restraints of members of the mainstream culture are neutralized. At best, we are seen to occupy merely peripheral space and are socially defined as worthless. At worst, we are perceived to be socially infectious and are believed to be worthy of extinction. [Violence and discrimination are] not only tolerated, [but] encouraged by mainstream culture.

While legislation cannot change prejudiced attitudes overnight, it can provide the educational foundation for a more informed perception of the rights of transgendered people.

In a report presented to the BC government on 19 January 1998, the BC Human Rights Commission recommended that transgendered people be fully protected under the province's human rights code, acknowledging that "[p]eople who don't fit society's views of what a man should look like or what a woman should look like are indeed subjected to harassment."¹⁹⁹ It is recommended that transgendered

people be explicitly protected from discrimination in all human rights legislation.

Persistence of Discriminatory Attitudes

While passage of human rights legislation to protect gay men, lesbians and transgendered people against discrimination is important, it does not reverse discriminatory attitudes overnight. Many examples of such attitudes can be found in the comments made by elected representatives during debates about Bill C-33 in the House of Commons. For example, Reform MP Bob Ringma stated that an employer should be able to fire a black person or a homosexual or at least move them "to the back of the shop."²⁰⁰ Other MPs have made similar comments:

- Reform MP Jake Hoepfner is reported to have said that Bill C-33 could lead to civil war "like that in Liberia."²⁰¹

- Reform MP Art Hanger said:

Homosexuality, to anyone who has not been brainwashed by the last decade of effective propagandizing by the gay lobby, is unnatural. It is a repudiation of nature. Nature requires procreation. Morality must defend the continuation of humanity. Rights must protect those things that promote the continuation of our country and of our species. Homosexuality does none of those things. Homosexuality is nihilistic. It protects nothing, it defends nothing, it continues nothing, and it sustains nothing.

- Reform MP Myron Thompson:

I want the whole world to know that I do not condone homosexuals. I do not condone their activity. I do not like what they do. I think it is wrong. I think it is unnatural and I think it is totally immoral. I will object to it forever whenever they attack the good, traditional Canadian family unit that built the country.

- Reform MP John Williams:

That is why I find it repulsive. It is not only the fact that sexual orientation is in here which I find repulsive but that a few Canadians are being told that they are entitled to special treatment.

- The Hon Don Boudria, Liberal MP:

I object to any suggestion which would have homosexual couples treated the same way as heterosexual couples. I do not believe homosexuals should be treated as families.

My wife Mary Ann and I do not claim we are homosexual; why should homosexuals pretend they form a family?

- Liberal MP Tom Wappel:

Homosexuality is statistically abnormal, it's physically abnormal and it's morally immoral.

My aversion to homosexuality, which is shared by the vast majority of Canadians, does not mean that we hate homosexuals. ... Logically, one can abhor war without abhorring the individual participants in the war. Similarly, one can abhor homosexuality, without abhorring individual homosexuals.

The Prime Minister's response to such statements, including some by his caucus members, was not to deplore the vilification and to officially distance himself from his MPs' comments, or to require that they apologize. Instead, he said that "[w]e give our members the freedom to express themselves."²⁰²

It is difficult enough to address the homophobia systemic in society at large; it is even more difficult when homophobia is expressed and endorsed publicly by members of the Canadian Parliament and condoned by the silence of the leadership.

For many, homophobia is inextricably linked with HIV/AIDS. For example, then MP Roseanne Skoke said:

[T]here are those innocent victims that are dying from AIDS, and then there are those homosexualists that are promoting and advancing the homosexual movement and that are spreading AIDS. AIDS is a scourge to mankind and there will be no cure for AIDS. And so this "love," this "compassion" [between homosexuals], based on an inhuman act, defiles humanity, destroys family ... and is annihilating mankind.²⁰³

Although most would not go so far as to describe sex between men as "inhuman," the notion that there are "those innocent victims who are dying of AIDS" and "then there are those homosexualists" is not restricted to elected representatives. Indeed, as the Canadian AIDS Society noted:

The way society and governments react to HIV/AIDS is often a direct

mirror of the way they continue to react to homosexuality and gay men. ...
When people with HIV/AIDS who are not gay are judged innocent and
worthy of sympathy and compassion, but homosexuals are considered
guilty victims, that's homophobia.²⁰⁴

Clearly, human rights protections must be accompanied by meaningful education programs and public awareness campaigns to ensure that discriminatory attitudes can be redressed over time.

Changing discriminatory attitudes requires human rights commissions to be active in pursuing their educational mandate, including developing brochures and poster campaigns to educate employers about their responsibilities in ensuring workplace equality for those who are gay, lesbian, bisexual, transgendered or living with HIV/AIDS. Human rights commissions should also take steps to actively review all provincial, territorial or federal legislation in order to encourage governments to ensure that such legislation conforms to the standards required by the Charter and human rights statutes.

Recommendations

This section has illustrated the difficulties that gay men and lesbians have faced in securing even the most basic human rights protections. After providing examples of the extent of discrimination perpetrated against gay men and lesbians, the section acknowledges that in recent years the situation has much improved. However, there are ongoing concerns and problems: (1) concerns have been expressed that the Preamble to Bill C-33 could create difficulties; (2) some jurisdictions have yet to amend their human rights legislation to protect gay men and lesbians from discrimination; (3) open and hidden discrimination in the workplace remains pervasive; (4) there is seldom explicit recognition that discrimination can occur on multiple grounds; (5) inadequate provision exists to protect transgendered people from discrimination; and (6) generally, discriminatory attitudes persist even where human rights legislation has been passed.

In order to address these concerns and problems, the following measures should be undertaken:

9. All provincial and territorial human rights acts need to include protection against discrimination on the ground of sexual orientation, to provide uniform protection from discrimination for gay men and lesbians across Canada.

10. Human rights acts should be changed to include clauses explicitly providing that discrimination is prohibited on multiple grounds of discrimination, to ensure that human rights legislation adequately addresses the overlap between HIV discrimination and sexual orientation discrimination, as well as other areas of overlap. Human rights acts should also explicitly prohibit discrimination on perceived grounds and discrimination based on the irrational fear of contracting an

illness or disease.

11. All human rights legislation should explicitly protect transgendered people from discrimination.

12. Human rights protections in legislation must be accompanied by meaningful education programs, including the development of brochures, posters, workplace and public awareness campaigns to ensure that discriminatory attitudes can be redressed over time.

13. Human rights commissions should review all provincial, territorial or federal legislation and encourage governments to change discriminatory legislation so that it conforms to the standards required by the Charter and human rights statutes.

14. Employers and unions should ensure that workplace policies clearly specify that sexual orientation discrimination, prejudicial jokes and comments, and harassment are not permitted in the workplace. Personnel managers should be fully aware of their legal responsibilities, policies should be included in employment manuals, and training workshops should be held in workplaces. Staff and union members responsible for dealing with sexual harassment complaints should be appropriately sensitized to the dynamics of the interactions between heterosexuals and lesbians and gay men.

15. Employment equity legislation should ensure that information-gathering and education provisions apply to gay men and lesbians.

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FOOTNOTES

¹⁵³ *Glad Day Bookshop Inc v Canada*, no 300/86, 20 March 1987, Ontario District Court.

- ¹⁵⁴ *Little Sisters Book & Art Emporium*, 1988, BC Co Ct, referred to in Casswell, supra, note 180 at 532.
- ¹⁵⁵ [1992] 1 SCR 452.
- ¹⁵⁶ *Glad Day Bookshop Inc v Canada*, [1992] OJ No 1466, 14 July 1992 (Ont Ct Gen Div).
- ¹⁵⁷ *R v Scythes*, [1993] OJ no 537, 16 January 1993 (Ont Ct Prov Div).
- ¹⁵⁸ (1996), 131 DLR (4th) 486 (BCSC).
- ¹⁵⁹ Gay Rights Activists File Petition. *Globe and Mail* 4 August 1997, at A4.
- ¹⁶⁰ Books Banned after "Gay Agenda" Complaints. *Globe and Mail* 20 November 1997, at A1.
- ¹⁶¹ No educational value: MP plans "major scale" attack on safer-sex info. *Capital Xtra* 20 May 1994, at 1.
- ¹⁶² House of Commons Parliamentary Committee on Equality Rights. *Equality for All*. Ottawa: The Committee, 1985, at 26.
- ¹⁶³ Québec Human Rights Commission, supra, note 131.
- ¹⁶⁴ New Brunswick Coalition for Human Rights Reform, supra, note 138.
- ¹⁶⁵ Supra, note 139.
- ¹⁶⁶ Parliamentary Committee, supra, note 162 at 30 (recommendation 10).
- ¹⁶⁷ *Towards Equality: The Response to the Report of the Parliamentary Committee on Equality Rights*. Government of Canada, 1986, at 13.
- ¹⁶⁸ *Haig and Birch v Canada* (1992), 9 OR (3d) 495.
- ¹⁶⁹ See Casswell, supra, note 135 at 27.
- ¹⁷⁰ See, for example, *Mossop v Canada*, [1993] 1 SCR 554.
- ¹⁷¹ Department of Justice. Working Against Discrimination - The Amendment to the Canadian Human

Rights Act: The Facts. Ottawa: The Department, May 1996, at 18.

¹⁷² Hansard, Notices of Motions, 7 May 1996, at 50.

¹⁷³ (1992), 9 OR (3d) 495 (Ont CA).

¹⁷⁴ *Newfoundland and Labrador (Human Rights Commission) v Newfoundland and Labrador (Minister of Employment and Labour Relations)* (1995), 127 DLR (4th) 694 (Nfld SCTD).

¹⁷⁵ (1996), 181 AR 16 (Alta CA).

¹⁷⁶ *Ibid.*

¹⁷⁷ *Ibid* at 34.

¹⁷⁸ (1992), 12 CRR (2d) 294 (FCTD) (27 October 1992); 12 CRR (2d) 284 (TD) (1 December 1992).

¹⁷⁹ See also R Jürgens. *Legal and Ethical Issues Raised by HIV/AIDS. Literature Review and Annotated Bibliography*. Montréal: Canadian HIV/AIDS Legal Network & Canadian AIDS Society, 1995.

¹⁸⁰ 29 June 1993, British Columbia Council of Human Rights, unreported.

¹⁸¹ 25 November 1993, no 730-32-000370 929, Small Claims Court, Joliette, unreported. For a summary, see D Patterson. Québec Court Finds Asymptomatic HIV Infection a Charter AHandicap. @ *Canadian HIV/AIDS Policy & Law Newsletter* 1994; 1(1): 1, 3-4.

¹⁸² (1988), 9 CHRR D/5391 (BC HRC).

¹⁸³ Letter from Nova Scotia Human Rights Commission, 10 October 1997.

¹⁸⁴ *Lafosse v Kinsmen Daycare Centre Society*, #3672, 20 November 1995, Board of Inquiry.

¹⁸⁵ (1992), 16 CHRR, D/402.

¹⁸⁶ *Canada (Attorney General) v Thwaites* (1994), 94 CLLC 17040, Federal Court of Canada, Gibson J. For more details, see R Ellis, P Engelmann. HIV/AIDS and the Military in Canada. *Canadian HIV/AIDS Policy & Law Newsletter* 1995; 1(3): 1, 14-15.

¹⁸⁷ See, for example, *Mossop v Canada*, [1993] 1 SCR 554, per Lamer CJ.

¹⁸⁸ See, for example, *Bennett and Treasury Board (National Defence)*, [1991] CPSSRB no 148.

¹⁸⁹ Casswell, *supra*, note 135 at 215.

¹⁹⁰ Submissions of Dahl findlay Connors to the British Columbia Human Rights Commission, September 1997.

¹⁹¹ Brady, Laframboise & findlay. Transgendered People, Discrimination, and HIV/AIDS. *Canadian HIV/AIDS Policy & Law Newsletter* 1996; 2(3).

¹⁹² *La Commission des droits de la personne du Québec v Anita Anglsberger*, (1982) 3 CHRR D/1796.

¹⁹³ High Risk Project. *Finding Our Place: Transgendered Law Reform Project*. Law Society of British Columbia, April 1992.

¹⁹⁴ See L Blake. Transgender Inclusion: A Concern about Grounding of Complaints. *TransEqual*, 1997.

¹⁹⁵ High Risk Project, *supra*, note 193 at 27.

¹⁹⁶ *Ibid* at 26.

¹⁹⁷ Transgenderists Transsexuals and Transvestites and the CHRA. Canadian Human Rights Commission, Policy and Planning Branch, 9 September 1992.

¹⁹⁸ C Petersen. A Queer Response to Bashing: Legislating Against Hate. *Queen's Law Journal* 1991; 16 (2): 237.

¹⁹⁹ M Cernetig. Protect Transsexuals, B.C. Panel Urges. *Globe and Mail* 19 January 1998, at A9.

²⁰⁰ Wilson. Reform MP Under Fire for Anti-Gay Comment. *Victoria Times-Colonist* 1 May 1996, at A1.

²⁰¹ Lett. Gay rights will spark civil war: MP. *Winnipeg Free Press* 9 May 1996.

²⁰² Chrétien defends right of anti-gay MP to speak. Media clipping, 28 September 1994.

²⁰³ Roseanne Skoke, MP, media interview, *On the Line* (Newsworld), 15 May 1994.

²⁰⁴ B Huskins, Chair of the Canadian AIDS Society. News Release of 15 September 1995.

Gay and Lesbian Issues and HIV/AIDS: Final Report

by John Fisher, Ralf Jürgens, Anne Vassal, Robert Hughes

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This page contains part 3 of Chapter 4, Gay Men, Lesbians, and the Law. Part 3 has one section:

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Same-Sex Benefits

This section examines the law dealing with the recognition of same-sex relationships. It first points out the extent to which federal and provincial statutes explicitly or implicitly exclude same-sex couples from the rights and responsibilities accorded to heterosexual relationships. It then examines the Supreme Court of Canada decision in *Egan & Nesbit v Canada* and subsequent decisions by lower courts and tribunals regarding same-sex benefits, showing how, with some success, discriminatory legislation is increasingly being challenged before the courts. The section concludes by emphasizing that the prevalence of systemic homophobia in our social and legal institutions has relevance to HIV/AIDS, particularly because the reluctance to recognize same-sex relationships may result in a same-sex partner being excluded from the decision-making process in the event of medical emergency or other times of crisis. Finally, the section warns that simply providing legal redress when discrimination occurs is not sufficient: proactive remedies and education programs are also needed.

History

The law dealing with the recognition of same-sex relationships is complex and constantly changing. A large number of benefits and privileges are conferred as a result of status based on a relationship that is recognized by statute. Most of these statutes were drafted at a time when discrimination against gay men and lesbians was viewed by the State as socially acceptable, and legislators could not even countenance the concept of respecting same-sex relationships equally. Indeed, even in the heterosexual context, many statutes are based on archaic presumptions about the subordinate role of women and the supremacy of marriage.

The federal government has identified over 50 statutes that contain "opposite sex" definitions of spouse, and most provinces and territories also have dozens of laws that explicitly exclude same-sex couples from the rights and responsibilities accorded to heterosexual relationships. The state, both through legislatures and the courts, decides who is "in" and who is "out" of the "family," not the people who are in family relationships. In addition, the definitions of "spouse" or "family" in the many federal and provincial statutes that recognize, and often confer benefits or obligations on, relationships are not consistent, but constructed differently depending on the purpose of the legislation.

Until very recently, heterosexual privilege was the unchallenged cornerstone of the law and the unspoken assumption was that only heterosexual relationships mattered. However, gay men and lesbians have started coming out of the closet as sanctions in the law have started to be removed against them *as individuals*; the next challenge is to achieve recognition of the fact that investing only heterosexual *relationships* with privileges and obligations is also discriminatory. Section 15(1) of the Charter, which provides not only for "equal protection" but also for "equal benefit of the law," offers an opportunity to challenge the special status given to heterosexual relationships and to extend government benefits to same-sex partners.

Many trade unions have negotiated same-sex benefits in collective agreements and an increasing number of public- and private-sector employers are extending benefits to the same-sex partners of employees. Employers doing this have found that the actual costs of including same-sex partners in their plans are minimal. However, such employers remain in the minority. Further, benefits tend to apply to medical and dental coverage but not to pension benefits. Income tax regulations do not allow registration of retirement savings plans that cover same-sex partners. Because employers cannot receive their usual tax breaks if they attempt to cover same-sex partners under a pension plan, there is no incentive to do so, and setting up a separate plan only for gay and lesbian employees is not cost-effective. This results in lesbian or gay partners being deprived of death or survivor benefits.

Any analysis of same-sex relationship recognition has to take into account not only those who will profit from changes in the law, but also examine whether there will be others who will be unfairly burdened as a result. This could be the case for gay men and lesbians with HIV/AIDS who are in same-sex relationships and living on fixed incomes. Examples of areas where there could be negative effects are social assistance and income tax. However, many provinces already have broad rules about who is considered to be a spouse for the purposes of calculating total household income, including same-sex partners. Such rules can result in disabled gay men or lesbians with HIV/AIDS who live with a partner being cut off social assistance (while, at the same time, they may be excluded from benefits accorded to heterosexual relationships; see *infra*). Groups such as EGALE have argued that discrimination within existing relationships models should be removed, while at the same time consideration should be given to restructuring the basis on which benefits are allocated to ensure that each government program applies to all those who truly fit within its purpose.

Of course, in some cases, recognition of same-sex relationships would have beneficial financial consequences. For those living with HIV/AIDS who are in a relationship, monetary benefits that are available because of the relationship, no matter how small, can be important - eg, inclusion as a

dependent on a same-sex partner's medical and dental plan. It must also be remembered that recognition of same-sex relationships can positively reinforce the self-respect and self-esteem of gay men and lesbians, regardless of whether they are in a relationship or not.

Current Situation

The starting point for any discussion of the current law is the decision of the Supreme Court of Canada in *Egan & Nesbit v Canada*.²⁰⁵ The decision, released on 25 May 1995, dramatically altered the landscape of same-sex equality claims and is binding on all lower courts and tribunals.

Despite its importance, the impact of the case is far from clear. In assessing the Supreme Court's approach to equality issues reflected in the judgment, commentators have described the Court as "splintered," "deeply divided" and as having "spoken with numerous and conflicting voices."²⁰⁶

The *Egan* Case²⁰⁷

The *Egan* case was a Charter challenge to the spouse's allowance provision of the *Old Age Security Act*. The appellants, Jim Egan and Jack Nesbit, had been in a same-sex relationship for over forty years when Egan applied for a spouse's allowance for his partner. The application was denied on the basis that his partner was of the same sex.

The spouse's allowance is available to the spouse of a pensioner under the *Old Age Security Act* if their joint income falls below a fixed level and the spouse is between the ages of 60 and 64. "Spouse," as defined in the legislation, includes persons who are married as well 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 publicly represented themselves as husband and wife."

The appellants challenged the constitutionality of the definition of common law spouse, claiming that it was discriminatory under s 15(1) of the Charter. However, both levels of the Federal Court found that the denial did not amount to discrimination.

On appeal to the Supreme Court of Canada, a majority of the Court held that the denial was a violation of s 15(1), but that the legislation was saved under s 1 of the Charter.

The Appellants' Arguments

The appellants argued that the exclusion of same-sex couples from the spouse's allowance program was

a violation of s 15 of the Charter; argued that sexual orientation is an analogous ground of discrimination, and that they suffered discrimination by the stigmatizing of their relationship due to lack of recognition; challenged the argument of the Attorney General of Canada that same-sex relationships are inherently "non-spousal"; and provided evidence of their 48-year relationship and of their degree of commitment and caring.

The Attorney General's Arguments

The Attorney General claimed that

- the statute was not discriminatory since it had the worthy objective of supporting "near-elderly spouses ... based upon traditional patterns of economic dependence in heterosexual relationships."²⁰⁸
- the effect of the legislation was also not discriminatory because the legislation did not exclude homosexuals, but "non-spouses." Homosexual relationships were excluded not because of sexual orientation, but because a homosexual relationship by definition could not be "spousal" in nature. According to the Attorney General, the concept of "spouse" was not created by the legislation; it had a distinct social meaning that simply did not apply to those in same-sex relationships.
- there was no discrimination against gay men and lesbians because many other categories of "non-spouse" were equally excluded, such as siblings, friends and flatmates.

In addition, the Attorney General submitted that, if the Court found a breach of s 15, the restriction of the appellants' rights would be justified under s 1 of the Charter.

The Attorney General relied upon *McKinney v University of Guelph*²⁰⁹ to assert that the Court should defer to legislative choices in situations where the legislation represents "a balancing of competing interests in determining who gets a limited benefit."²¹⁰ The asserted objective of the spouse's allowance program was to aid spouses of Old Age Security recipients who were dependent upon their partner "because of societal patterns of relationships."

It argued that the government must have freedom to allocate financial resources and that it had chosen to "recognize the unique nature of the heterosexual spousal relationship and the well-known traditional structure with its resultant financial consequences for women."²¹¹

Finally, the Attorney General submitted that there was simply no information available to support the assertion that similar patterns of dependence exist within same-sex relationships.

In summary, the Attorney General challenged the appellants' claim on every conceivable basis. It argued that there was no denial of the equal benefit of the law, that sexual orientation was not an analogous ground of discrimination, that there was no discrimination, and that, had there been discrimination, it would have been justified under s 1 of the Charter.

The Supreme Court's Decision

The Supreme Court rejected the appellants' claim. All nine judges agreed that sexual orientation is an analogous ground of discrimination under s 15 of the Charter. A majority of five judges held that the impugned legislation was discriminatory and infringed s 15(1) of the Charter. However, a majority of five judges (differently constituted) ruled that the legislation, even if discriminatory, was saved by s 1 of the Charter.

APPROACH UNDER SECTION 16

According to La Forest J, writing for the minority of the Court, the objective of the legislation was "both obvious and deeply rooted in our fundamental values and traditions," namely the protection of the institutions of heterosexual marriage and procreation:

Suffice it to say that marriage has from time immemorial been firmly grounded in our legal tradition, one that is itself a reflection of long-standing philosophical and religious traditions. But its ultimate *raison d'être* transcends all of these and is firmly anchored in the biological and social realities that heterosexual couples have the unique ability to procreate, that most children are the product of these relationships, and that they are generally cared for and nurtured by those who live in that relationship. It would be possible to legally define marriage to include homosexual couples, but this would not change the biological and social realities that underlie the traditional marriage.²¹²

La Forest J dismissed arguments that many lesbians and gay men are in fact raising children, and that many heterosexuals who qualify for the benefit do not have children:

I am not troubled by the fact that not all these heterosexual couples in fact have children. It is the social unit that uniquely has the capacity to procreate children and generally cares for their upbringing, and as such warrants support by Parliament to meet its needs.²¹³

What is astonishing about La Forest J's judgment is that the appellants' claim is rejected for reasons that are completely unrelated to the legislation or program being challenged. The spouse's allowance program under the *Old Age Security Act* has nothing to do with children or procreation, but is available to all qualifying heterosexual couples, regardless of whether they have children. Nor is access to the benefit dependent upon marriage, but is equally available to both married and unmarried heterosexual couples.

La Forest J's approach is explicitly challenged by Cory J in his majority reasons. Indeed, Cory J rejects as "inaccurate and misleading" the submission of the Attorney General that a finding in favour of the appellants would "change fundamentally the essential meaning of the societal concept of marriage."²¹⁴ He then indirectly disputes the assertions of both the Attorney General and the judges who concurred with La Forest J, emphasizing that "the Act makes no reference to children," is not "designed to benefit only women," and "has nothing to do with the recognition of the contribution made by the couple in

raising children nor has it anything to do with the gender of the spouse."²¹⁵ Cory J has no difficulty in finding that the legislation creates a distinction that disadvantages and is discriminatory with respect to gay and lesbian couples. He explicitly rejects the notion put forward by the Attorney General of Canada that "discrimination" requires proof of economic disadvantage, focusing instead on the consequences of stigmatization and the denial of the opportunity to make equal relationship choices:

Cohabiting heterosexual persons have the right to make a choice as to whether they wish to be publicly recognized as a common law couple. Homosexual couples, on the other hand, are denied the opportunity because of the definition of "spouse" set out in the challenged Act. The public recognition and acceptance of homosexuals as a couple may be of tremendous importance to them and to the society in which they live.²¹⁶

For Cory J, the essence of a s 15 violation lies in the intangible affront to human dignity. To illustrate his argument, he uses the analogy of a benefit denied to couples of different races or religions: "The public outcry would, I think, be immediate and well-merited."²¹⁷

Cory J concludes that s 15 has been violated. In addition, he made the following significant *obiter* comment:

In this case, a great deal of time was spent demonstrating the nature of the warm, compassionate, caring relationship that very evidently existed between the appellants. In passing, it is, I think, worth mentioning that this need not be done in every case. It is not necessary that the evidence demonstrate that a homosexual relationship bears all the features of an ideal heterosexual relationship for the relationship of many heterosexual couples is far from ideal. ... In this case, it would have sufficed to prove that the homosexual relationship had existed for more than one year during which time the partners had publicly indicated their relationship and that their combined income was below the statutory limit. This is the same evidence that would be sufficient to qualify a heterosexual common law couple for the spousal allowance.²¹⁹

Cory J's judgment was concurred in by Iacobucci, McLachlin and Sopinka JJ. L'Heureux-Dubé J wrote a separate concurring judgment. Both L'Heureux-Dubé and Cory JJ emphasize that whether or not there is discrimination is a determination that can only be made from the point of view of the person affected. The need to place oneself in the claimant's shoes is an often overlooked but fundamental component of lesbian and gay equality claims. Discrimination that is clear and obvious to any member of the lesbian and gay communities is often justified by reference to systemic beliefs about the structure of "traditional relationships." In *Egan*, for example, La Forest J was concerned only with maintaining the unquestioned social superiority of heterosexual relationships. No sincere attempt was made to consider the detrimental impact of these patterns of historical discrimination upon members of the gay and lesbian communities. As soon as the question is examined from a lesbian or gay perspective, however, the focus of the inquiry properly shifts from the need to maintain the dominance of heterosexual structures to the discriminatory effects flowing from the ongoing subjugation of same-sex relationships.

In summary, the following principles may be drawn from the judgments:

- The exclusion of same-sex couples from a spousal benefit amounts to a denial of equality not only because the economic benefit is lost, but also because of the non-recognition of the relationship, which may have a serious detrimental effect upon the sense of self-worth and dignity of lesbians and gay men.
- Sexual orientation is an analogous ground under s 15(1).
- Sexual orientation includes aspects of status and conduct - both should receive protection. Sexual orientation is demonstrated in a person's choice of life partner, and "it follows that a lawful relationship which flows from sexual orientation should also be protected."
- There is overwhelming evidence that gay men and lesbians, whether individuals or couples, form an identifiable minority who have suffered and continue to suffer serious social, political and economic disadvantage.
- It is not necessary that the evidence demonstrate that a same-sex relationship bears all the features of an ideal heterosexual relationship, but simply that the same-sex relationship has existed for the qualifying period of time, during which time the partners publicly represented themselves as being in such a relationship.
- A challenge to the constitutionality of excluding same-sex couples from the definition of common law spouse does not amount to a challenge to the legal or social concept of marriage, or to a challenge to the constitutionality of excluding non-spouses from the benefit.
- The government's justifications for the exclusion, such as the purpose of the benefit and the offsetting of provincial benefits, as well as the "relevance" of the impugned distinction, are not proper considerations under s 15 and belong under s 1.
- The determination of whether or not the impugned provision is discriminatory must be addressed from the perspective of the person claiming the rights violation.
- The denial of the spousal allowance to same-sex couples is discriminatory. The definition of spouse as someone of the opposite sex reinforces the stereotype that lesbians and gay men cannot and do not form lasting, caring, mutually supportive relationships with economic interdependence, in the same manner as heterosexual couples.

SECTION 1 OF THE CHARTER

There is no clear majority of the Court on the approach to be taken under s 1. La Forest J, still writing for three other judges, states his s 1 position in a single sentence: "Had I concluded that the impugned legislation infringed s. 15 of the *Charter*, I would still uphold it under s. 1 of the *Charter* for the considerations set forth in my reasons in *McKinney*, especially at pp. 316-18, some of which are referred to in the reasons of my colleague Justice Sopinka, as well as for those mentioned in my discussion of discrimination in the present case."²¹⁹ There is no analysis of the s 1 arguments, nor is such an analysis required, since La Forest J and the other judges concurring with him rejected the appeal under s 15.

This leaves many questions unanswered. The reference to the reasons "mentioned in my discussion of discrimination" suggest that La Forest J would have advanced as a state objective under s 1 the need to preserve and protect heterosexual marriage. However, an objective that is itself discriminatory cannot be

upheld as valid under s 1, and no consideration appears to be given by La Forest J to the circular nature of justifying the exclusion of homosexuals from a benefit program simply by asserting the need to support heterosexuals. In any event, La Forest J's s 1 reasons can have little persuasive value for other courts and tribunals, since his reasoning is premised on a finding that there was no s 15 violation, a position explicitly rejected by the majority of the Court.

It is noteworthy that in the *Egan* case, no evidence whatsoever was filed to suggest that extending relationship recognition to lesbians and gay men will have any harmful consequences. As Iacobucci J pointedly underlines in his own analysis of the s 1 issues in this case:

[I]t eludes me how according same-sex couples the benefits flowing to opposite sex couples in any way inhibits, dissuades or impedes the formation of heterosexual unions. Where is the threat? In the absence of such a threat, the denial of the s 15 rights of same-sex couples is anything but proportional to the policy objective of fostering heterosexual relationships.²²⁰

Ultimately, Sopinka J's analysis of s 1 led to the defeat of the appeal, since Sopinka J had joined with Cory J and the other judges supporting the appeal in finding a violation of s 15. It was Sopinka J's decision to "switch sides" and uphold the legislation under s 1 that enabled the four other judges led by La Forest J to form a majority in deciding that the legislation did not violate the Charter.

This makes Sopinka J's judgment pivotal to the s 1 determination. Yet the judgment makes very little effort to identify clear principles pursuant to which a s 1 analysis should take place.

Sopinka J starts by expressing his agreement with the Attorney General of Canada that the government must be accorded "some flexibility" in extending social benefits and does not have to be proactive in recognizing "new social relationships."²²¹ He then goes on to express concerns about courts requiring governments to make decisions that have financial implications, and stresses that the Court cannot assume that there are "unlimited funds to address the needs of all."²²²

Sopinka J emphasizes that the exclusion of same-sex couples from the *Old Age Security Act* "should not be judged on the basis that Parliament has made this choice for all time,"²²³ and cites the Attorney General's submission that

the means chosen does not have to be necessarily the position for all time. Rather, there may always be a possibility that more acceptable arrangements can be worked out over time.²²⁴

It must be remembered that the s 1 analysis was being conducted in the context of a finding that a fundamental equality right has been violated. Sopinka J seems to accept that this is untenable in the long term and emphasizes that Parliament's choice has not been made "for all time." However, he offers no timelines or parameters within which Parliament must act. He points to no substantive issues of policy

that would justify Parliament's refusal to extend same-sex benefits. He makes no reference to any government evidence that could support a s 1 claim. He identifies no concrete financial implications of extending benefits, and no competing policy considerations. In essence, he seems to be saying that there is discrimination, but that the Court will look the other way for the time being. Particularly noteworthy is his comment that

[i]t may be suggested that the time has expired for the government to proceed to extend the benefits to same-sex couples and that it cannot justify a delay since 1975 to include same-sex couples. While there is some force in this suggestion, it is necessary to keep in mind that only in recent years have lower courts recognized sexual orientation as an analogous ground, and this Court will have done so for the first time in this case. ... Given the fact that equating same-sex couples with heterosexual spouses, either married or common law, is still generally regarded as a novel concept, I am not prepared to say that by its inaction **to date** the government has disentitled itself to rely on s.1 of the *Charter*.²²⁵

These comments are revealing for two reasons. First, Sopinka J seems to be according government some breathing room, while equally clearly heralding a day when government inaction disentitles it from relying upon a s 1 defence. Thus, he appears to be saying that the government can avail itself of s 1 only for as long as it can demonstrate that it is moving in the right direction, toward the equal recognition of same-sex relationships. Precisely how long the courts will tolerate an ongoing situation of discrimination is not articulated. Apparently the twenty years "since 1975" do not constitute sufficient delay to undermine the government's s 1 defence. Second, Sopinka J seems to believe that a s 1 defence can be maintained if the claim is "novel." This is an extraordinary limitation to read into Charter jurisprudence. It imports into s 1 considerations that are simply not there, and seems to fly in the face of previous Supreme Court jurisprudence. For example, in *R v Turpin*,²²⁶ Wilson J had noted:

The argument that s. 15 has not been violated because departures from its principles have been widely condoned in the past and the consequences of finding a violation would be novel and disturbing is not, in my view, an acceptable approach to the interpretation of *Charter* provisions.

L'Heureux-Dubé J comments, almost disparagingly, in *Egan*:

There is a first time to every discrimination claim. To permit the novelty of the appellants' claim to be a basis for justifying discrimination in a free and democratic society undermines the very values which our *Charter*, including s.1, seeks to preserve.²²⁷

She concludes by saying that "it goes without saying that I cannot agree with the novel approach to s. 1 taken by Sopinka J. in this case."²²⁸

Iacobucci J, writing the s 1 analysis for himself, Cory and McLachlin JJ, critiques Sopinka J's extensive reliance upon *McKinney*, noting that "the context of *McKinney* is wholly distinguishable from the

present appeal."²²⁹ In addition, he says:

However, what causes me greater concern is my colleague's position that, because the prohibition of discrimination against gay men and lesbians is "of recent origin" and "generally regarded as a novel concept," the government can be justified in discriminatorily denying same-sex couples a benefit enuring to opposite-sex couples. Another argument he raises is that the government can justify discriminatory legislation because of the possibility that it can take an incremental approach in providing state benefits.

With respect, I find both of these approaches to be undesirable. Permitting discrimination to be justified on account of the "novelty" of its prohibition or on account of the need for governmental "incrementalism" introduces two unprecedented and potentially undefinable criteria into s.1. It also permits s.1 to be used in an unduly deferential manner well beyond anything found in the prior jurisprudence of this Court. The very real possibility emerges that the government will always be able to uphold legislation that selectively and discriminatorily allocates resources. This would undercut the values of the *Charter* and belittle its purpose.²³⁰

Iacobucci J quotes the following comments of L'Heureux-Dubé J in *Mossop*:

It is possible to be pro-family without rejecting less traditional family forms. It is not anti-family to support protection for non-traditional families. The traditional family is not the only family form, and non-traditional families may equally advance true family values.²³¹

In the result, Iacobucci J and those concurring with him would have struck the words "of the opposite sex" from the definition of "spouse" in the *Old Age Security Act*, read in a suitable phrase to encompass those in same-sex relationships, and suspended the declaration for a year to enable Parliament to enact constitutionally acceptable alternatives if it so chose.

Summary

In summary, *Egan* is a complex and challenging case. A majority held that the exclusion of same-sex couples from the spouse's allowance program violates s 15, but the Court adopted no clear or coherent position under s 1: taken together, La Forest and Sopinka JJ's reasons under s 1 constitute a majority, but their reasons are very different. Sopinka J's reasons constitute the "deciding vote," but his decision remains the judgment of only one judge and is explicitly rejected by four other judges as constitutionally unsound and lacking any basis in precedent. Moreover, even if one accepts Sopinka J's reasoning, it articulates no coherent principles for analyzing similar claims in the future. The government succeeds, we are told, because the claim is "novel." But how often do the lesbian and gay communities need to advance similar claims in future before they cease to be "novel"? Further, writes Sopinka J, the government is entitled to act "incrementally" on equality rights provided it does not move *too* slowly.

But how many years must lesbians and gay men wait before the government will be deemed to have "disentitled itself by its inaction" from relying on s 1?

Beyond *Egan*: Recent Decisions

It is clear that the *Egan* case reflected a Supreme Court deeply divided. The outcome of future decisions will be influenced by La Forest J retirement from the Court, and Mr Justice Sopinka's untimely death. In addition, Cory J is understood to be considering retirement. The precise impact of these changes on the bench remains to be seen.

In the meantime, although *Egan* was a loss in the Supreme Court, it was by no means a defeat: "sexual orientation" has been recognized as a prohibited ground of discrimination and it has been recognized that the refusal to accord equal benefits to same-sex relationships violates s 15 of the Charter. Indeed, it is encouraging to note that on the appeal in the *Rosenberg* case, discussed below, the Ontario Court of Appeal did not even need to hear arguments on whether s 15 had been violated, but instead focused the whole of the hearing on whether the discrimination could be justified under s 1.

In addition, at least four judges in *Egan* did not support the government's attempt to justify such a refusal under s 1, and even Sopinka J left the door open for future challenges to governmental inaction.

On the other hand, *Egan* saw a severe watering down of the standards to be applied under s 1, in a way which, if not redressed, will likely result in the substantial erosion of the protections afforded to all equality-seeking communities, as the government seeks to avoid its s 15 responsibilities by pointing to the need for judicial deference to difficult legislative choices. The strong concerns shared by a wide range of equality communities is reflected in the broad coalition of groups that came together to support *Rosenberg v Canada*²³² before the Ontario Court of Appeal.

Another concern is that lower courts may, in the absence of clear guidance from the Supreme Court, feel obliged to routinely reject lesbian and gay Charter challenges by mechanically applying the *result* in *Egan*, without critical analysis. The challenge will be to identify means of applying the *Egan* decision constructively to further the equality principles identified, while finding means to distinguish future cases sufficiently to avoid the application of the elusive and circular reasoning that ultimately led to the rejection of the appeal.

This section will examine the approach taken in several cases released subsequent to *Egan*.

Rosenberg v Canada

One important case, a direct application of the *Egan* decision, is the decision of the Ontario Court (General Division) in *Rosenberg v Canada*. This decision demonstrates the pitfalls of *Egan* to the fullest.

The applicants in *Rosenberg* were two employees of the Canadian Union of Public Employees (CUPE), which provides a number of benefits to its members and their spouses. The union also provides a pension plan that every full-time employee is required to join. The plan provides for spousal survivor benefits.

The applicants sought to have their partners recognized as spouses for the purpose of entitlement to the survivor benefits. CUPE agreed and amended the definition of "spouse" in its pension plan to include same-sex couples.

Pension plans must be registered under the *Income Tax Act* for employees' and employers' contributions to the plan and the plan's earnings to benefit from tax deferral. However, the *Income Tax Act* requires that, for a pension plan to be registered, survivor benefits may be payable only to a spouse, former spouse or dependant. "Spouse" is defined as including married and common law opposite-sex spouses only. When CUPE sought the approval of Revenue Canada for its new inclusive definition of spouse, its request was denied. As a result, CUPE joined with the individual applicants in seeking a declaration that the "opposite sex" definition of "spouse" in the *Income Tax Act* was unconstitutional as it applies to pension plans.²³³

Charron J of the Ontario Court (General Division), following *Egan*, held that the opposite sex definition of spouse did violate s 15 of the Charter but was saved under s 1. He concluded:

I am unable to distinguish this case from the principles set out in *Egan* within the context of this constitutional debate. The facts and the issues are too closely related. My own views on the matter are irrelevant. I am bound to follow the same result and rule that the infringement of the applicants' s.15(1) rights is justified under s.1 of the *Charter*. Consequently, the impugned legislation is constitutionally valid and the application is dismissed.²³⁴

The judge made no effort to conduct a s 1 analysis. No government evidence was presented or discussed. No attempt was made to discuss the objectives of the registration provisions of the *Income Tax Act* and the rationale for excluding same-sex couples. No attempt was made to identify any principles advanced in *Egan* for dealing with s 1 claims or to apply any such principle to the case before the Court. No consideration was given to the fact that four of the five judges in *Egan* finding a s 1 justification made no effort to analyze the legislation, but simply commented in a single paragraph that they would have upheld the legislation under s 1. Even Sopinka J's wide-open "incremental" approach was not applied to see whether the legislature had in fact been making incremental advances in this area or had exceeded a reasonable time frame in which to fashion a legislative response to changing social needs.

The case was appealed to the Ontario Court of Appeal. A broad coalition of equality-seeking groups is intervening on the basis that the approach adopted by the Ontario Court (General Division), far from securing "the unremitting protection of equality rights in the years to come,"²³⁵ undermines the promise

of equality held out by s 15 of the Charter. The hearing before the Court of Appeal took place on 20 and 21 October 1997. At the time of writing, the decision of the Court had not yet been released, and the Attorney General of Canada had given no indication as to whether the case would be appealed to the Supreme Court of Canada in the event that the Court found against the government.

Re Vogel and North

Another case, *Vogel*,²⁴⁴ was released shortly after the decision of the Supreme Court in *Egan*. Chris Vogel is an employee of the government of Manitoba who sought dental, health and superannuation benefits for his same-sex partner. Having been denied the benefits, he brought a claim of sexual orientation discrimination against the provincial government under the *Manitoba Human Rights Code*. An adjudicator initially dismissed the claim, as did the Manitoba Court of Queen's Bench. Vogel appealed to the Manitoba Court of Appeal, which allowed the appeal.

On appeal, Helper and Scott JJ held that *Egan* had resolved the question of whether the ground "sexual orientation" encompassed discrimination based upon the denial of equal benefits to those in same-sex relationships. Although the appeal court hearing in *Vogel* took place before the release of the *Egan* decision, Helper and Scott JJ note that, as a result of *Egan*, it is

unnecessary to review the arguments presented in this court. Cory J's extensive analysis of the meaning of discrimination under s.15(1) of the *Charter* is applicable to the interpretation of s.9 of the [Manitoba Human Rights] Code.²⁴⁵

The case was sent back to the adjudicator to be determined on its merits. On 24 November 1997, the adjudicator affirmed that equal benefits should be extended to lesbian and gay employees, and the Manitoba government announced that it would accept the adjudicator's ruling.

Re Moore & Akerstrom

*Moore & Akerstrom*²⁴⁶ deals with the responsibility of the federal government to extend equal relationship benefits to its lesbian and gay employees. Moore and Akerstrom were federal government employees whose same-sex partners were denied a range of employment benefits available to the spouses of employees in opposite-sex relationships. They laid a complaint of sexual orientation discrimination under the *Canadian Human Rights Act*.

The claim was unanimously upheld by a three-person Human Rights Tribunal. The Tribunal found that "sexual orientation" had been read into the Act by the *Haig* case,²⁴⁷ and noted the passage of Bill C-33,

which added sexual orientation explicitly as a prohibited ground of discrimination.

The Tribunal then considered whether the denial of spousal benefits to same-sex partners constitutes sexual orientation discrimination under the Act. The Tribunal considered the *Egan* decision and concluded:

It is now crystal clear that the law is that denial of the extension of employment benefits to a same-sex partner that would otherwise be extended to opposite-sex common law partners is discrimination on the prohibited ground of sexual orientation.

It is equally clear from the reading of these cases that the inclusion of a definition of "spouse" which excludes same-sex partners in legislation or collective agreements or regulations by the government so as to deny such benefits offends the *Charter* and the Canadian Human Rights Act and constitutes discrimination prohibited by both.²⁴⁸

Laessoe v Air Canada

The Human Rights Tribunal decision in *Laessoe v Air Canada*²⁴⁹ dealt with an issue similar to that raised in *Rosenberg*, namely the obligation of an employer to provide same-sex pension benefits on an equal basis. Whereas *Rosenberg* directly challenges the "opposite sex" definition of "spouse" in the *Income Tax Act*, however, Laessoe argued that until the *Income Tax Act* was amended, employers had an obligation to set up alternative or parallel pension plans for lesbian and gay employees, so that these employees would receive equality of result, albeit under a separate scheme, without jeopardizing the employer's ability to register the main pension plan under the *Income Tax Act*.

The Tribunal rejected this contention, adopting an extraordinarily restrictive interpretation of *Egan*:

It is our view that the recognition of sexual orientation as a prohibited ground of discrimination under the *Human Rights Act* can only be made to the extent that such ground was recognized in *Egan*, supra. That is to say that, although the Supreme Court of Canada found that sexual orientation was an analogous ground under the *Charter*, such Court further found that a definition of spouse which excluded a same sex spouse for the purposes of pension benefits could continue. As such the introduction of sexual orientation as a prohibited ground of discrimination in the *Canadian Human Rights Act* by reason of *Egan* is limited by the findings in *Egan* and thus, when a fact situation, similar to that found in *Egan* is before us we are bound to find that a similar definition of spouse contained in the respondent's pension plan is not discriminatory.²⁵⁰

The Tribunal failed to recognize that the majority in *Egan* had ruled that an "opposite sex" definition of spouse is discriminatory, and sought to incorporate into the *Canadian Human Rights Act* the *Egan* analysis under s 1, overlooking the fact that there is no s 1 defence available under the *Human Rights Act*. The *Laessoe* decision is currently under appeal.

Kane v Ontario

On 1 October 1997, judgment was rendered in the case of *Kane v Attorney General for Ontario*.²⁵¹ Kelly Kane's same-sex spouse was killed in a 1993 motor vehicle accident. The Ontario *Insurance Act* provides that when an insured person dies as a result of such an accident, the person's surviving spouse shall receive a benefit of \$25,000. Kane was denied that benefit, solely on the basis that she and her spouse were of the same sex. Kane therefore brought a legal challenge to the "opposite sex" definition of "spouse" in s 224(1) of the *Insurance Act*.

The Ontario Court (General Division) held unequivocally that the exclusion of same-sex couples from the relevant provisions constituted discrimination that could not be justified under the Charter. In his judgment, Judge Coe wrote:

The denial of equal benefit contained in the legislative provisions is deliberately based only on sexual orientation and runs against the preservation of human dignity and self-worth for part of our society. The legislative scheme manifestly declares that opposite-sex couples are entitled to rights and advantages to which same-sex couples are not. ... The declaration simply carries forward and nurtures now-abandoned stereotypical concepts that have no place in the fabric of our community.²⁵²

The government of Ontario has announced its intention to appeal this decision.

Other Cases

Other relevant cases include:

- *Dwyer and Sims v Municipality of Metropolitan Toronto*,²⁵³ in which an Ontario Board of Inquiry held that the Ontario Human Rights Code prevailed over other provincial legislation, and that the "opposite sex" definitions of spouse in the *Municipal Act* and *The Municipality of Metropolitan Toronto Act* had to be "read down" to ensure equal benefits for the same sex spouses of employees. The Province was also directed to apply provincial pension legislation to include same-sex spouses, contingent upon changes to the federal *Income Tax Act* to allow for federal registration of pension plans that accord equal benefits to same-sex couples. At the time of writing, the decision was under appeal.
- *Hodder v Minister of Human Resources Development*,²⁵⁴ in which at the time of writing an appeal was being lodged from a decision of a review tribunal that a surviving same-sex spouse is ineligible to receive the survivor's pension under the Canada Pension Plan.
- *Boutilier v Treasury Board*,²⁵⁵ in which the Public Service Staff Relations Board held that Treasury Board discriminated against the grievor for refusing to allow him to take marriage leave to participate in a same-sex union celebration with his partner.
- *Bewley v Ontario*,²⁵⁶ in which a lesbian couple sought to make use of provisions in the Ontario

Change of Name Act that allow spouses to take on a hyphenated surname consisting of a combination of the previous surnames of each individual. Their request was rejected by the Registrar on the ground that the two lesbian women were not spouses. On 4 November 1997, however, a human rights adjudicator held that this refusal violated the Human Rights Code.

- *Government of BC v BC Government and Service Employees' Union*,²⁵⁷ in which the grievor Ms Gold was recognized as a "parent" for the purposes of parental leave in relation to the biological child by sperm donation of her lesbian partner.

Conclusions

The above cases demonstrate that lower courts and tribunals are able to find whatever they are looking for in the *Egan* decision. The *Egan* decision is "a good start" for the right to same-sex benefits. At the same time, it is far from the final word on lesbian and gay equality claims. In the absence of a clear direction from the Supreme Court, lower-court judges who wish to be proactive in advancing equality are able to draw on the positive aspects of the decision, while judges inclined to be more restrictive seem equally capable of applying the decision to suit their own ends.

Same-Sex Marriage

In many of the reported cases, judges have expressed concern that recognition of same-sex benefit claims may ultimately lead to same-sex marriage. A Charter challenge to the prohibition on same-sex marriage was before the courts in the case of *Layland v Ontario*.²⁵⁸ The claim was rejected by the Ontario Court (General Division) by a two-to-one majority. In one of the less enlightened examples of judicial reasoning, Southey J wrote for the majority:

The law does not prohibit marriage by homosexuals, provided it takes place between persons of the opposite sex. Some homosexuals do marry. The fact that many homosexuals do not choose to marry, because they do not want unions with persons of the opposite sex, is the result of their own preferences, not a requirement of law.²⁵⁹

When the applicants' relationship ended, new plaintiffs were added and the case was appealed as *Schouwerwou and Shannon v Ontario*. Although that case was started well before the release of the Supreme Court decision in *Egan*, it became clear upon the release of the *Egan* decision that the Supreme Court was unlikely to look upon a marriage challenge favourably at that time. In the face of conflicting community responses, the appellants and their counsel agreed to put their appeal indefinitely on hold and subsequently withdrew it. Favourable developments in Hawaii²⁶⁰ suggest, however, that the marriage issue may be looked at again sooner than expected. Finally, In January 1998 in Québec, Martin Dubé, a Montréal security guard who has been in a relationship with Manuel Gambora Ravell for two years, launched a challenge against article 365 of Québec's *Civil Code*, which states that marriage must be between two members of the opposite sex.²⁶¹

Within the lesbian and gay communities there is some debate about whether it makes sense, analytically, politically, and strategically, to seek the right to marry. Some have tried to prove that lesbian and gay couples are just like married heterosexuals and adopt the "but for" arguments: gay couples and lesbian couples are the same as heterosexual couples but for the fact that the partners are of the same sex. Some lesbians and gay men want the right to marry. Others argue that to seek marriage, which involves the state in the creation of a relationship between two people, is a dangerous strategy: if successful, lesbians and gay men would find themselves at the mercy of the state in the same manner as heterosexual women have been, subject to laws made by and in the interests of heterosexual men. Instead, they argue, lesbians and gay men should demand recognition on their own terms, without trying to fit into the "one size fits all" box the law recognizes as marriage.

Still others feel that although not everyone would choose to marry, couples should be able to decide for themselves, and that allowing for same-sex marriage is important because it challenges homophobic stereotypes that same-sex relationships are uncommitted or unworthy of recognition.

In any event, it seems clear that the current structure of marriage laws discriminates in a very direct manner by excluding gay men and lesbians from a legal and social institution open to heterosexuals.

It should also be noted that restrictions on same-sex marriage are very closely related to rigid, socially constructed gender categories that in turn disadvantage the transgendered. The social and legal insistence that only persons of the opposite sex can marry only has meaning in a society preoccupied with categorizing which "sex" one belongs to in the first place. Thus, in instances where a marriage has been sought or entered into by a couple, one of whom is transgendered, the judicial inquiry focuses immediately upon a determination of the sex of the transgendered person in order to ascertain whether the marriage should be categorized as taking place between two persons of opposite sex, and therefore valid, or two persons of the same sex, and therefore void.²⁶² Such a process can only result in meaningless and artificial distinctions based upon whether, in the mind of the judge, a particular transgendered person was or was not of the opposite sex as his/her partner. If same-sex marriages were treated equally with opposite-sex marriages, these inquiries would be irrelevant since any two partners could marry, irrespective of the sex ascribed to them by the judge.

In 1997, two Nanaimo women claimed status as a married lesbian couple, since they were able to marry when one of the partners was still treated legally as a male prior to undergoing sex reassignment surgery.²⁶³ Following the surgery, Georgina Scott and her partner Linda Fraser self-identified as lesbian, and plan to have a further ceremony to celebrate their married status. Thus far, the legal status of their relationship has not been called into question.

Impact on People with HIV/AIDS: One Example

The unequal application of the law's treatment of gay men and lesbians creates inconsistencies, with dire consequences for those concerned. Brian Ritchie's HIV-positive partner Joshua Gavel required a number of expensive medical treatments. Mr Gavel's enhanced medical insurance benefits had been covered by the British Columbia Ministry of Social Services. The BC Government, however, chose to recognize his relationship and canceled Gavel's benefits on the grounds that his partner, Mr Ritchie, was responsible for his health-care needs. At the same time, however, the federal government refused to recognize the relationship, so that Mr Ritchie was unable to claim the federal tax credit available to heterosexuals who care for a dependent partner.

Ritchie and Gavel were caught between the cracks: their relationship was recognized by the province for the purpose of imposing a burden, but ignored by the federal government for the purpose of denying a corresponding benefit. As evidenced by Brian Ritchie's letter to then Prime Minister Kim Campbell, sexual orientation discrimination can exact a terrible emotional toll on people with HIV/AIDS, at a time when the last thing they need is to be involved in a legal or political battle for financial necessities or basic recognition and respect. Ritchie and Gavel have since launched a legal challenge to the provisions of the federal *Income Tax Act* that preclude recognition of their relationship.

Legislative Change

While most developments in the area of same-sex relationship recognition occur in the courts, as a result of legislatures' reluctance to acknowledge, and give rights to partners in, same-sex relationships, some developments, although not always positive, have occurred in the legislatures:

- Ontario's Bill 167, which would have amended all Ontario statutes to require equal recognition of same-sex relationships, was defeated at second reading on 9 June 1994.
- On 18 September 1995, a private member's motion by Bloc Québécois MP Réal Ménard in favour of same-sex relationship recognition was defeated by a vote of 124 to 52 in the Commons: 18 Liberal MPs voted in favour, 70 against; 32 Bloc Québécois MPs voted in favour, 10 against; not one Reform MP voted in favour.
- The governments of British Columbia, Manitoba, New Brunswick, Nova Scotia, Ontario, Yukon and the Northwest Territories have extended same-sex benefits to provincial employees.
- In response to the *Akerstrom and Moore* decision, the federal government has extended some benefits to same-sex partners of federal employees, including medical, dental and leave-related benefits, and relocation expenses for employees in the Foreign Service.
- In June 1996, Québec passed Bill 133, which repealed article 137 of the Québec *Charter of Human Rights and Freedoms*. Article 137 permitted sexual orientation discrimination in a range of circumstances relating to pensions and other relationship benefits. While it represents a positive development, Bill 133 has been criticized for not going far enough.²⁶⁴ In particular, while Bill 133 removed a negative prohibition on same-sex relationship recognition, it does not require the extension of same-sex benefits or remove "opposite sex" definitions of "spouse" in

other Québec laws.

- In July 1997, British Columbia changed the definition of "spouse" in its family law legislation, extending to same-sex couples the benefits and obligations relating to maintenance, custody and access, and allowing same-sex couples to enter into agreements and be bound by the Act's property division provisions. British Columbia thus became the first province to recognize gay and lesbian couples in legislation that covers child support, access and custody.²⁶⁵

Recommendations

There is ample scope for future cases to develop the issues raised in *Egan*. At both the federal and provincial levels, discriminatory legislation is increasingly being challenged before the courts. However, many judges remain reluctant to overturn discriminatory legislation and judicial deference is often used as a substitute for principle. However, one thing is certain: the cases will not go away, and the Supreme Court will be required to address the issue of relationship recognition again.

The prevalence of systemic homophobia in our social and legal institutions has relevance for HIV/AIDS management. Systemic problems require systemic solutions. Simply providing legal redress when discrimination occurs is not sufficient to dismantle the unequal power structures that perpetuate systemic homophobia. The key challenge is to find innovative methods of breaking down institutional barriers to equality. Although it failed to apply these principles to its analysis of same-sex relationships, the Supreme Court has recognized in other contexts the need for proactive remedies and education programs to redress systemic problems:

When confronted with such a case of "systemic discrimination," it may be that the type of order issued by the tribunal [i.e. modify advertising practices, modify interviewing procedures and increase proportion of women hired until target goal met] is the only means by which the purpose of the *Canadian Human Rights Act* can be met. In any program of employment equity, there simply cannot be a radical dissolution of "remedy" and "prevention." Indeed, there is no prevention without some form of remedy. ...

Systemic remedies must be built upon the experience of the past so as to prevent systemic discrimination in the future.²⁶⁶

In order to address the systemic discrimination outlined in this section, the conditions of disadvantage that give rise to discriminatory attitudes need to be addressed; lesbian and gay communities must be strengthened and empowered; networks that ensure easy access to information need to be built; lesbians and gay men must be encouraged to think of themselves positively and to take control and responsibility for the choices they make; and education campaigns must be mounted to foster positive images of homosexuality among heterosexuals and lesbians and gay men alike. Specific remedies, such as access to the courts when discrimination occurs, are also important, but constitute only one piece of a much

broader puzzle that requires sustained community development in order to be completed.

16. Programs that confer rights and/or responsibilities on heterosexual spouses need to be examined in light of their purpose and redrafted to ensure that all those who fit within that purpose are covered, whether the relationship is same-sex or opposite-sex and, in some cases, whether or not a person is in a relationship.²⁶⁷

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FOOTNOTES

²⁰⁵ [1995] 2 SCR 513.

²⁰⁶ See Casswell, *supra*, note 135 at 83 and sources cited therein.

²⁰⁷ The analysis in this section draws heavily upon a report prepared by EGALE with the assistance of the Court Challenges Program: J Fisher. *The Impact of the Supreme Court decision in Egan v Canada upon claims for the equal recognition of same-sex relationships*, 17 September 1997.

²⁰⁸ Factum of Attorney General, at 19, para 65.

²⁰⁹ [1990] 3 SCR 229.

²¹⁰ Factum of Attorney General, *supra*, note 208 at 24, para 91.

²¹¹ *Ibid* at 26, para 98.

²¹² *Egan*, *supra*, note 205 at 535-536.

²¹³ *Ibid* at 537 (emphasis in original).

214 Ibid at 583.

215 Ibid at 588-590.

216 Ibid at 594.

217 Ibid.

218 Ibid at 598-599.

219 Ibid at 539-540.

220 Ibid at 616.

221 Ibid at 572.

222 Ibid.

223 Ibid at 574.

224 Ibid at 575.

225 Ibid at 576; emphasis added.

226 [1989] 1 SCR 1296.

227 *Egan*, supra, note 205 at 572.

228 Ibid at 571.

229 Ibid at 617-18.

230 Ibid at 618-619.

231 [1993] 1 SCR 554 at 634.

232 (1995), 25 OR (3d) 612.

- 233 It may be noted that the definition of "spouse" is restricted to persons of the opposite sex throughout the *Income Tax Act*. For the purposes of the *Rosenberg* case, the only challenge is to the part of the Act dealing with the registration of private pension plans.
- 234 *Rosenberg*, supra, note 232 at 622.
- 235 *R v Turpin*, [1989] 1 SCR 1296 at 1326.
- 236 (1996), 27 OR (3d) 593 (Ont Ct Gen Div).
- 237 It should be noted that there are differences of opinion within the lesbian and gay communities as to the extent to which relationship recognition should be a priority for these communities, and as to the structure upon which these claims should be based. Issues such as marriage and spousal support are particularly controversial.
- 238 *M v H*, unreported, Ontario Court of Appeal, C23867, 18 December 1996, per Finlayson, Doherty and Charron JJA.
- 239 Ibid at 5.
- 240 Ibid at 10.
- 241 Ibid at 18; emphasis in original.
- 242 Ibid at 29.
- 243 Ibid at 39.
- 244 (1995), 102 Man R (2d) 89.
- 245 Ibid at 102.
- 246 *Moore v Canada (Treasury Board)* [1996] CHR D No 8 (CHRT).
- 247 (1992), 9 OR (3d) 495 (Ont CA).
- 248 *Moore*, supra, note 246 at 28.
- 249 Unreported, 13 September 1996 (CHRT).

250 Ibid at 48.

251 Unreported, File # 6451/96, 1 October 1997, per Coe J (Ont Ct Gen Div).

252 Ibid at 3.

253 (1996), 27 CHRR D/108.

254 Unreported, Ottawa, 9 January 1997, Review Tribunal.

255 Unreported, File # 166-2-26199, 29 April 1997, Public Service Staff Relations Board.

256 Unreported, File # BI-0104-96, Decision No 97-024, 4 November 1997 (Ont Bd Inq).

257 Unreported, File # 626, 10 April 1997, per arbitrator Allan Hope, QC.

258 *Layland v Ontario* (1993), 104 DLR (4th) 214.

259 Ibid at 222-23.

260 *Baehr v Lewin* 852 P 2d 44 (Haw SC 1993).

261 M Hays. Quebec Goes Hawaiian. [Montréal] *Mirror* 15 January 1998, at 3.

262 See, for example, *M v M* (1984), 42 RFL (2d) 55 (PEI HSC); *L.A.C. v C.C.C.*, [1986] BCJ no 2817 (SC); *B v A* (1990), 1 OR (3d) 569 (Master); *L.C. v C.C.* (1992), 10 OR (3d) 254 (Gen Div); *Canada v Owen* (1993), 110 DLR (4th) 339.

263 Married lesbians challenging the status quo. *The Point!* November 1997, at 5.

264 See Plante & Gaudreault. Le projet de loi 133: Un pas de plus vers l'égalité. Brief of the Comité national des jeunes du Parti québécois submitted to the Commission des institutions in the context of the study of Bill 133, *Loi modifiant la Charte des droits et libertés de la personne et d'autres dispositions législatives*, February 1996.

265 McInnis. B.C. Passes Legislation Redefining Term "Spouse." *Globe and Mail* 23 July 1997, at A7.

266 *Action Travail des Femmes v Canadian National Railway Co*, [1987] 1 SCR 1114 at 1141-1142, 1145, per Dickson CJ.

²⁶⁷ In our view, the best solution to the systematic denial of recognition to same-sex relationships would be comprehensive omnibus legislation in every jurisdiction in Canada. The piecemeal changes that are currently occurring create inequities and injustices as some couples are recognized for some purposes but not for others.

Gay and Lesbian Issues and HIV/AIDS: Final Report

by John Fisher, Ralf Jürgens, Anne Vassal, Robert Hughes

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Children and Parenting

The relationships between gay men and lesbians and their children have perhaps inspired more homophobia than almost any other area of law. This section shows how gay men and lesbians have been portrayed as depraved child-molesters, and judges have often expressed unfounded fears around lesbian and gay parenting. The section then reports about more recent cases in which lesbians and gay men have been able to obtain equal parenting rights, but cautions that many challenges remain. It concludes by proposing a variety of measures, both legal and educational in nature, that would help address some of these challenges.

History

Gay men and lesbians have often been portrayed as depraved child-molesters, as illustrated, for example, by the following letter to a major Canadian newspaper:

Finally, I would say to the entire homosexual community that I do understand what is going on: the corrupting of our youth by their initiation into the homosexual lifestyle by any means whatsoever. The fact is that homosexuals have no rights as the propagation of their evil lifestyle depends solely on a supply of children and young people which only heterosexual people can create.²⁶⁸

Another example is a pamphlet that was once available from the general information desk of the largest police station in downtown Toronto, which read as follows:²⁶⁹

QUEERS DO NOT PRODUCE: THEY SEDUCE!

Queers exist to seduce and pervert our children.

Queers are sexually depraved vampires.

If queers are allowed to have 'equal rights,' then they **MUST** be allowed to seduce your child. Do you want a queer calling at your home to see if your little boy can 'come out to play?'

REMEMBER, THEY GAY RIGHTS MOVEMENT WANT THE LEGAL RIGHT TO SEDUCE OUR CHILDREN!

Society may be going to the dogs, but let's not let our children go to the queers!

Critics of the addition of "sexual orientation" in the *Canadian Human Rights Act* based their opposition on their alleged fear that prohibiting sexual orientation discrimination would inevitably lead to the legalization of pedophilia. Judges have also frequently expressed (unfounded) fears around lesbian and gay parenting, such as:²⁷⁰

- A child raised by a lesbian or gay parent may grow up to be lesbian or gay. It is sometimes said that a child needs a "normal" and "healthy" home environment in order to ensure "normal" psychological and sexual development.²⁷¹
- The lesbian or gay parent may attempt to "proselytize" the child.²⁷²
- The child of a lesbian or gay parent will have contact with people of "abnormal tastes and proclivities."²⁷³
- The child of a lesbian or gay parent may be "harmed," may not be "safe," or may be exposed to sexual, physical or psychological abuse.²⁷⁴
- In the case of a lesbian parent, the absence of a "male presence," "father figure" or "male role model" causes concern.²⁷⁵
- Lesbian and gay relationships are unstable.²⁷⁶
- Lesbian and gay relationships are characterized by perversity and, in particular, sexual perversity; lesbian and gay relationships involve exposing children to pornography, overt sexuality, and other "harmful influences."²⁷⁷

Concerns and prejudices are likely to be even more pronounced where, in addition to being lesbian or gay, a parent is also HIV-positive.

The Current Situation

As society's understanding of homosexuality has developed and, in particular, as more and more gay men and lesbians have come out, there has been a positive evolution in the way lesbians and gay men have been treated by the courts and by the law generally. Although there is still a long way to go, lesbians and gay men are increasingly able to obtain equal parenting rights, whether as a result of seeking custody and access, by means of adoption or through alternative insemination procedures.

Custody and Access to Children from Heterosexual Relationships

When courts determine whether a parent should have custody of or access to a child, the paramount consideration is the "best interests of the child." The "best interests of the child" test is seemingly neutral with respect to sexual orientation, but individual judges may be influenced by their own homophobia or that of witnesses. As many of the cases listed above illustrate, some of the worst examples of judicial homophobia can be found in custody and access cases, although it has been clearly established that being gay or lesbian is not in itself a bar to custody of or access to children.

Today, a few judges still characterize homosexuality as detrimental; the majority refer to it as "a factor" relevant to determination of custody or access; and in some cases, judges take the position that a parent's homosexuality is "not relevant"²⁷⁸ or is "a neutral and not a negative factor."²⁷⁹

In one case, a judge stated that a woman's same-sex relationship "should be seen in the same light as if she were living in a heterosexual relationship with another male person, which could also either be positive or negative, depending on the particular facts surrounding that relationship and the outward conduct of the parties."²⁸⁰

However, "equality" for lesbian and gay parents all too often comes at a price: rather than accepting that being out and open about being lesbian or gay is a healthy sign that one is well-adjusted to and comfortable with one's sexual orientation, courts often treat homosexuality as a "neutral" factor only as long as gay men and lesbians lead lives of secrecy and shame. For example, whereas involvement in charitable or religious organizations is often seen as a sign of well-rounded social commitment for a heterosexual parent, for a lesbian or gay parent, involvement in lesbian or gay community organizations is seen as a sign of dangerous militancy. Various courts have commented favourably on the fact that a lesbian or gay parent was "discreet," "not an exhibitionist," did not "flaunt" homosexual activities, was not "a militant homosexual," was "bisexual" as opposed to gay, did not disclose a homosexual orientation to the public, had "no overt sexual contact" with a same-sex partner,²⁸¹ was not an active member of any gay organizations, and was not an "activist" for "homosexual rights."²⁸²

In some cases, courts have placed conditions upon a lesbian or gay parent's right of access or custody, effectively restricting their ability to live their lives openly and honestly as a lesbian or gay man. In one such case, a court imposed on the custody order the condition that no other person reside with the lesbian mother without the approval of the court. The court explicitly stated that it was imposing this condition in order to negate "any open, declared and avowed lesbian or homosexual relationship."²⁸³ When the lesbian mother did begin a same-sex relationship, the father applied for a variation of the order and custody was ultimately granted to the father.

In another case, a mother was granted custody of her daughter on the condition that she cease living with her same-sex partner. When she continued to cohabit with her partner, she lost custody.²⁸⁴ Other courts have not permitted overnight access by the lesbian or gay parent or have put severe restrictions on overnight access.²⁸⁵

Cases Involving Parents with HIV/AIDS

Where a gay or lesbian parent has HIV/AIDS, there can be further attempts at denying custody or restricting access to children. There are few reported cases of this in Canada.

The first was a 1988 Ontario case, *Re B*.²⁸⁶ The heterosexual mother was awarded custody of the couple's eight-year-old son. The father, who was gay, was given access pursuant to an agreement requiring, among other things, that he conceal his homosexuality from his son, be tested for HIV regularly, with the results conveyed to the mother, and that no seropositive individual be permitted near the boy.

The father later tested HIV-positive, and the mother applied for a change in the access order, to allow the father's access only under the condition that he refrain from touching his son, and that the child's paternal grandmother be present during visits to care for the boy's "personal needs."

In another case, a heterosexual custodial mother applied to vary an access order that allowed the gay father, who was her former husband, and his partner, to see the children regularly every two weeks, from Friday evening to Sunday evening.²⁸⁷ After the mother learned of the father's HIV-positive status, she claimed that her decision to change the conditions of visitation resulted from her growing conviction of the irresponsible character of her husband's partner, the pressure she had been subjected to by her family, the state of health of the father and his partner, and her belief that this was the safest solution available for her children. The Court surveyed various medical and legal studies on the transmission of HIV before concluding that the risk of transmission was only theoretical. It denied the mother's application, saying:

After mature reflection, the Court has arrived at the view that a condition of seropositivity ... ought not to constitute grounds for terminating the meetings of father and children, or for surrounding these meetings with supervision or any conditions other than complete respect for the health measures recommended by the relevant public health

authorities. ... The medical testimony ... and the evidence ... make it quite clear that normal family contacts are not a mode of transmission of that seropositivity. ... Nor is there any evidence leading one to believe, think or in the least suspect that Mr. X and his companion could act towards the children in a paedophiliac way. There remains the possibility of an accident in which the children's blood might come into contact with the contaminated blood of Mr. X or his companion. This possibility is so remote in this context that it must be considered purely theoretical. One should perhaps compare it to a case where the parent with custody might object to the exercise of visitation rights by the other perfectly healthy parent on the grounds that some sort of accident could possibly occur. Such reasoning would certainly not be upheld. The Court notes, moreover, that Mrs. X's purpose is not to prevent visits but only to ensure that they take place under her supervision and at her home. The alleged possibility of accident is not more unlikely in this context than in the exercise of the visitation rights Mr. X is claiming. ... The seropositive condition of Mr. X and his companion does not constitute an acceptable reason for denying the children visitation rights to their father and his companion "in their own interest." On the contrary, it is this interest, recognized and acknowledged over and over again by jurisprudence and legal writers and authors from the behavioral sciences, which, in the absence of any special well-proven reasons, militates in favour of reestablishing these visitation rights as soon as possible. As for the details of their resumption, whether under supervision or not and whether at Mr. X's home or elsewhere, the Court sees no reason to specify. On the contrary, it is recognized that the exercise of access rights should take place in as normal a manner as possible.²⁸⁸

Cases Involving Transgendered Parents

Difficulties also arise for parents seeking custody or access who are transgendered. Judicial attitudes appear to be strikingly reminiscent to the attitude that homosexuality is not in itself a bar to custody, provided it is not "flaunted" by the parent. In one case,²⁸⁹ a parent's cross-dressing was considered by the Court to not have an impact on the children, since it only took place in "private." In another case, the judge was clearly alarmed by what he described as the father's "gender disorder."²⁹⁰ He criticized reports prepared by experts from a gender dysphoria clinic on the basis that "the desire to be supportive of the patients would appear to lead to a marked perspective,"²⁹¹ and he expressed deep concern that the father had cross-dressed in public. Ultimately, despite his misgivings, the judge acceded to the children's wishes to remain with their father, and ordered joint custody, with each child remaining in the father's home as primary place of residence.

Conclusions

Recent advances notwithstanding, parents have reason to be worried that their sexual orientation, HIV-positive status and/or gender identity will be negatively perceived by a court. As a result, they may accept terms in separation agreements or consent to court orders restricting custody or access to their children that they otherwise would not have been prepared to agree to. In this as in other areas of

parenting, there is a need for explicit statutory recognition that a person's sexual orientation, gender identity or HIV status is irrelevant to his/her parenting abilities.

Creating New Family Relationships with Children

Gay men and lesbians can enter into parental arrangements through adoption, foster care, or use of reproductive technology such as alternative insemination.

Adoption

There are three main ways in which lesbians or gay men might seek to adopt a child:

- as a single person, whether s/he is in a relationship or not;
- s/he may seek to adopt the biological child of her/his same-sex partner (this is often referred to as "step-parent adoption");
- a lesbian or gay couple may seek to adopt the child of a stranger.

ADOPTION BY SINGLE PERSONS

Adoption statutes differ from province to province. In each case, the law makes no mention of sexual orientation and does not prohibit gay men or lesbians from adopting as single persons. This is often not understood. During the Ontario debate on Bill 167, the inclusion of sections permitting same-sex adoptions were among the most hotly contested provisions. Many seemed to be unaware that gay men and lesbians *can already* adopt a child as single persons. The relevant question should not have been: "Should lesbians and gay men be allowed to adopt?", but: "Given that lesbians and gay men can and do adopt as single persons, why should the ability to adopt be restricted to individuals rather than couples?"

As with custody and access, "the best interests of the child" are the determining factor in deciding adoption cases. Gay men or lesbians may find it more difficult to adopt a child than similarly situated and suited heterosexual men or women because of the prejudicial attitudes of some social workers or judges, who may not recommend or grant an adoption order in favour of a lesbian or gay applicant. Policies in some jurisdictions do, however, specify that sexual orientation is not to be a consideration in screening adoption applicants. It is submitted that it is a clear breach of Charter and human rights act obligations to treat an applicant less favourably solely because of his/her sexual orientation, gender identity or HIV status. However, given the high degree of discretion with which decision-makers in this area are vested, such breaches may be difficult to prove.

STEP-PARENT ADOPTIONS

In 1996, British Columbia passed legislation to provide for the adoption of a same-sex partner's biological child, becoming the first and thus far only jurisdiction to have addressed this issue by statute.

Courts in Ontario have also allowed for step-parent adoption by lesbians and gay men. In *Re K*,²⁹² four lesbian couples made joint applications for adoption in the Ontario Court (Provincial Division). The applicants sought to adopt the child of their same-sex partner, challenging the constitutionality of the "opposite sex" definition of "spouse" in the relevant adoption provisions. The Court heard substantial expert evidence on the quality of lesbian and gay parenting. In considering whether the prohibition on step-parent adoptions by a lesbian or gay applicant violated the s 15 equality guarantees of the Charter, Nevins J pointed out that lesbians and gay men are denied the ability to even apply to adopt for no reason other than their sexual orientation, and stated that he could not "imagine a more blatant example of discrimination."²⁹³

Nevins J then considered whether the discrimination could be justified under s 1 of the Charter, saying:

If I accept, as I must from the evidence before me, that a stable, secure and caring family environment is in a child's best interests, and is in fact the most significant and beneficial component in the healthy development of a child, and further that the paramount objective of the legislation is to promote the best interests of children primarily within the context of the family, then I must also accept from the evidence before me that there is no rational connection whatsoever between the goals of this legislation and a provision in that legislation which contains an absolute prohibition against adoption by homosexual couples. ...

There is, in short, no evidence that families with heterosexual parents are better able to meet the physical, psychological, emotional or intellectual needs of children than families with homosexual parents. ...

When one reflects on the seemingly limitless parade of neglected, abandoned and abused children who appear before our courts in protection cases daily, all of whom have been in the care of heterosexual parents in a "traditional" family structure, the suggestion that it might not ever be in the best interests of these children to be raised by loving, caring and committed parents, who might happen to be lesbian or gay, is nothing short of ludicrous.²⁹⁴

Nevins J held that the "opposite sex" definition of "spouse" was unconstitutional and directed that the adoption applications of all applicants be considered on their merits.

Adoption of a same-sex partner's child without extinguishing the existing parent-child relationship is important for gay or lesbian parents, particularly if they, or one of them, live with HIV/AIDS. Without legal acknowledgment of the relationship between the child and the non-biological parent, the latter may not even be able to take the child out of school to go to the dentist, authorize a field trip, or consent to medical treatment. If a biological parent dies, the non-biological parent has no right to raise "their child." Guardianship provides only an imperfect solution at best, because it can easily be challenged in the courts by relatives who may argue that it would be in the best interests of the child to reassign custody.

In addition, without a legal tie between the non-biological parent and the child that s/he has helped to raise, the child has only a precarious legal right to financial support from the parent's partner if the spousal relationship breaks down.

ADOPTION BY SAME-SEX COUPLES

No court or legislature has explicitly enabled same-sex couples to adopt the child of a stranger, although the reasoning of Nevins J in *Re K* would appear to be broad enough to apply to such situations.

Foster Care

Many gay men and lesbians would like to act as foster parents. While placement of a child in foster care does not provide legal custody of a child or create a parent-child relationship, many of the same questions considered with respect to custody, access, and adoption are raised. Even if the applicable child welfare legislation does not preclude lesbians and gay men, either as single persons or as couples, from being foster parents, do the authorities charged with placement approve lesbians and gay men as foster parents?

In a particularly extreme example of state-sanctioned homophobia, the Government of Alberta has issued a blanket policy to the effect that gay men and lesbians will no longer qualify as fit to foster children. According to a memorandum of the Assistant Deputy Minister of Children's Services, "[i]t is the position of the Director of Child Welfare that if a child is under temporary or permanent guardianship, the Director will not place a child in a family living in a non-traditional arrangement or with a single person when it is known within the community that they are a practising gay or lesbian."²⁹⁵ One lesbian foster mother, known as Ms T, has been told that she may continue to foster the children she has, but will not be eligible for any future placements. She has successfully fostered 74 children over 18 years, and no criticism is leveled at her parenting abilities, other than the fact that she is lesbian.²⁹⁶ The government refused to back down, although an extensive literature review prepared by two academics at the University of Alberta demonstrates that children raised by gay men and lesbians are just as likely to be well-adjusted and healthy psychologically, physically and mentally, as children raised by heterosexuals. The researchers even suggested that "children raised in gay households tend to be better adjusted because they are more accepting and tolerant of people who are different."²⁹⁷ Ms T has announced her intention to challenge the discriminatory policy before the courts.

In a case involving a gay foster parent in Ontario, the Ontario Human Rights Commission reports that an association between sexual orientation and pedophilia was made.²⁹⁸ The complainant, a gay man, was fired shortly after he became a foster parent of a male youth. In addition to claiming discrimination on the basis of sexual orientation, the complainant claims that he was discriminated against on the basis of a perceived handicap, namely AIDS. At the time of writing, the complaint had been successfully amended to include the grounds of family status and reprisal. Evidence was still being called at the Board of Inquiry hearing.

Alternative Insemination

Gay men and lesbians can also create parent-child relationships through alternative insemination. Many lesbians resort to the readily available "turkey baster" method. However, for a number of reasons, both personal and legal, some do not want to resort to that method: they may not want to know the identity of the sperm donor (or may not want the sperm donor to know to whom the sperm is given), and may want to ensure that there are no medical problems with the sperm donated.

There are a variety of understandings that may be reached between the lesbian seeking to be inseminated and the sperm donor. In some cases, the lesbian individual or couple may agree to allow the male partner to have full parental rights and responsibilities. In other cases, they may seek nothing more than a sperm donor arrangement. Similarly, the male in such circumstances may seek to be involved in the parenting or decision-making processes, and, potentially, incur support obligations, or he too may simply seek to supply sperm in an anonymous capacity. The rights of the lesbian co-parent are also at issue, since there is a risk that a court would displace the non-biological co-mother in favour of the sperm donor "father" if the father later brought a custody or access suit. All those involved should have a donor insemination agreement to clearly identify the various parties' rights and responsibilities.

A case in British Columbia²⁹⁹ raised the question of equal access by lesbians to sperm donation facilities. A lesbian couple consulted the only physician in the province who maintained a frozen-sperm bank. The physician told them that he refused his services to lesbians. The British Columbia College of Physicians and Surgeons backed the physician and stated that alternative insemination services were "neither urgent nor emergent" and that therefore Dr Korn had the right to refuse to accept the lesbian couple as patients. The couple subsequently filed a complaint with the British Columbia Human Rights Council alleging sexual orientation discrimination and won the case.

Recommendations

The relationships between gay men and lesbians and their children inspire more homophobia than almost any other area of law. The case-by-case approach in child custody and access cases leaves considerable opportunity for the continued exercise of judicial homophobia and brings with it uncertain results for individual gay and lesbian parents. However, there have been some encouraging developments, including in the area of adoption law. While an attempt to change legislation failed in Ontario when the adoption provisions in Bill 167 were viewed as the most controversial aspect of the Bill and dropped by the government in a desperate effort to save the rest of the Bill, methods that have avoided opposition, such as the quietly initiated administrative policy changes in British Columbia and the uncontested court application in *Re K*, have been successful. However, it remains to be seen whether this type of application would be successful in other provinces. In addition, there needs to be a more concerted effort to educate the public that gay men and lesbians are as capable parents as heterosexuals.

To ensure that lesbians and gay men are able to obtain equal parenting rights, the following measures need to be undertaken:

17. In every province, legislation should be introduced to permit same-sex adoptions. In addition, provisions specifying that a person's sexual orientation, gender identity or HIV status is irrelevant to his/her parenting abilities should be introduced to help reduce arbitrariness in judicial decision-making.

18. Judicial education programs on sexual orientation and homophobia are necessary for all areas of the law, but particularly for child custody and access cases, where there is considerable judicial discretion in determining the best interests of the child.

19. Education programs on sexual orientation and homophobia need to be part of the basic training of social and child-care workers to ensure that their decisions are not influenced by discriminatory attitudes.

Immigration

This section first reminds us of how, until 1976, gay men and lesbians were not allowed to immigrate to Canada. It then discusses the current situation, pointing out that, while same-sex partners of Canadian citizens or permanent residents can apply to be allowed to immigrate to Canada on "humanitarian and compassionate grounds," the Immigration Regulations still do not allow gay and lesbian Canadians to sponsor their same-sex partners under the family class. The section concludes by suggesting changes to law and policy, both for gay and lesbian immigrants and for immigrants with HIV.

History

Canada's immigration policy is a statement regarding whom the country wants as citizens. The treatment of lesbians and gay men in immigration law has been and continues to be a telling reflection of Canada's attitudes to lesbians and gay men.

Prior to 1952, gay men and lesbians were ignored by immigration policy. From 1952 to 1976, Canada's immigration policies were blatantly homophobic and stigmatized gay men and lesbians as members of an inadmissible class. Although the policy was seldom enforced in practice, it contributed to reinforcing official stereotypes of gay men and lesbians and seemingly justified other forms of discrimination.

Despite the decriminalization of homosexuality in the *Criminal Code* in 1969, the federal government did not amend the *Immigration Act* to delete homosexuality from the list of inadmissible classes to Canada until a new *Immigration Act* was proclaimed in 1976.³⁰⁰ The old 1952 *Immigration Act* was a relic of the Cold War and the homosexual witch hunts that had swept through Canada and the United States. Parliamentary committee hearings on changes to the Act were held in major cities across Canada. Representatives from many of the newly formed gay and lesbian liberation groups spoke at these hearings and lobbied the government for the removal of homosexuality from the new Act. This was the first legislative reform due, at least in part, to the efforts of gay and lesbian activists.

It was not until 1992 that similar changes occurred in the United States.³⁰¹

Current Situation

Family Reunification

A major cornerstone of the *Immigration Act*, 1976 is to "facilitate the reunion in Canada of Canadian citizens and permanent residents with their close relatives from abroad."³⁰² The goal of family reunification is accomplished by allowing Canadian citizens and permanent residents of Canada to sponsor close family members for immigration, including fiancé(e)s and married spouses. Section 4 of the Immigration Regulations contains a list of who can be sponsored: same-sex partners are not included.

The first challenge to this lack of inclusion was filed in Federal Court by Christine Morrissey on 14 January 1992. Her partner, Bridget Coll, had filed an application for permanent residence for sponsorship by Morrissey as her "life companion." Morrissey and Coll had been in a committed relationship for over 14 years. However, Immigration Canada refused to process the application because Morrissey and Coll did not fit in the "family class" in the Immigration Regulations. Morrissey and Coll began a court challenge, arguing that the failure to include same-sex couples in the Regulations was a breach of the Charter because it denied equality to lesbians and gay men. Before the case was heard in Federal Court, Immigration Canada gave Bridget Coll permanent resident status, thus eliminating the basis for proceeding with the case. Subsequent challenges to the Regulations have been similarly dealt with, before the courts had an opportunity to decide.³⁰³

Immigration on Humanitarian and Compassionate Grounds

Applicants who would not otherwise be eligible can be allowed to immigrate to Canada on "humanitarian and compassionate" grounds by the Minister of Immigration. This is a discretionary

remedy and applications are decided on a case-by-case basis. The Immigration Manual gives some guidance as to the exercise of the discretion and refers to "situations of family dependency."³⁰⁴

Same-sex partners of Canadian citizens or permanent residents who were already in Canada began to make use of these provisions to file inland applications for immigration. Initially, the Minister alone had authority to approve the application. Because the applicant had to be in Canada to make the application, many people who were unable to get a visitor's or other visa to enter Canada were excluded from making an application on these grounds.

However, on 1 February 1993 the Minister of Immigration delegated authority to approve humanitarian and compassionate consideration applications to the program managers in visa offices outside Canada and to certain other immigration officers in Canada. Filing applications in visa offices outside Canada became even more attractive when Immigration issued guidelines for the use of humanitarian and compassionate discretion for same-sex partnerships to visa officers.³⁰⁵

Thus far, most applications for humanitarian and compassionate consideration based on a same-sex relationship have been approved. However, applicants sponsored in the family class have advantages over those processed on humanitarian and compassionate grounds: family class applications are processed with priority, and the Canadian sponsor of an applicant who has been refused has the right to appeal the decision to the Appeal Division of the Immigration and Refugee Board.³⁰⁶

The right of appeal to the Appeal Division of the Immigration and Refugee Board has particular significance for gay and lesbian Canadians whose same-sex partners are ruled medically inadmissible because they are HIV-positive or have AIDS.

HIV and Medical Inadmissibility

All people applying to immigrate and certain, but not all, visitors to Canada require medical exams.³⁰⁷ They are medically inadmissible if they represent a "danger to public health or to public safety" or "would cause or might reasonably be expected to cause excessive demands on health or social services." At present, "a screening test for HIV is not required as a routine,"³⁰⁸ but this policy may be reviewed in the near future.³⁰⁹

Immigration applicants who are found to be HIV-positive are assessed as "medically inadmissible" and will not normally be allowed to immigrate to Canada. However, they may apply for a Minister's Permit.³¹⁰ The issuing of a Minister's Permit is completely discretionary. The permit is valid for a limited period of time but may be extended repeatedly or revoked with notice at any time.

New regulations regarding medical inadmissibility have been under development for many years. If

adopted, they could affect the current situation whereby people known to be HIV-positive or to have AIDS are prohibited from immigrating to Canada. A first draft of the new regulations, pre-published in August 1993, provided for a five-year "window of comparison" in assessing excessive demand:

applicants for immigration would be medically admissible where, over five years, they would not cost the Canadian health care system more than the average Canadian citizen or permanent resident. Thus "early" cases of HIV would be admissible to Canada.³¹¹

A revised draft of the regulations was expected to be pre-published by the end of June 1995.³¹² However, the determination of medical inadmissibility is ongoing and it now seems "unlikely" that the five-year "window of comparison" suggested in the first draft of the regulations will be maintained.³¹³

The Canadian Disability Rights Council proposed that in determining excessive demands, consideration be given to the person's expected contribution to Canada. This balancing of costs against contribution would be done by requiring that the recommendation of the Medical Officer be concurred in by a three-person committee consisting of no more than one medical doctor, a person with expertise in Canadian health economic policy who is not a government employee, and a member of a community group representative of an organization that promotes the equality rights of people with disabilities.³¹⁴

In *HIV Testing and Confidentiality: A Discussion Paper*, the Canadian HIV/AIDS Legal Network and the Canadian AIDS Society stressed that

[c]learly, Canada needs a system that will not automatically exclude persons living with HIV/AIDS or other similar conditions from immigrating, but will take the individual circumstances of each case into account. With regard to HIV, the situation is changing rapidly: because of new treatments, people living with HIV lead longer and potentially very productive lives during which they can contribute a lot to Canadian society. At the same time, the costs of the new treatments are high. Assessing the potential costs and potential benefits from allowing a particular person with HIV to immigrate to Canada will not be easy, but must be attempted. In a considerable number of cases, the benefits will outweigh the costs, and people living with HIV should be allowed to immigrate to Canada on that basis. In addition, in some cases, even when in purely monetary terms the costs would outweigh the benefits, people living with HIV should be allowed to immigrate to Canada on compassionate grounds. Australia's system of assessing eligibility, while not perfect, is certainly better than Canada's current system and could serve as an example. In any system it must also be ensured that HIV and AIDS are not treated differently from other diseases or situations with potentially high costs for Canadian taxpayers. Any rules about medical admissibility must be applied equally and fairly to all potential immigrants, including people living with HIV. Finally, as a society, we also need to make a fundamental decision about how far we want to go in excluding potential immigrants. Shall we hold people of over 50 years of age medically inadmissible because they are unlikely to contribute significantly to Canadian society in monetary terms, but are likely

to need costly health care relatively soon after immigrating to Canada? Shall we screen for genetic disorders? It is submitted here that we should not. Immigrants as a group have contributed and continue to contribute significantly to Canadian society. Recognizing this, the medical inadmissibility review process should allow for taking humanitarian concerns into account.³¹⁵

We filed our suit in January. In the process our lawyer Rob Hughes had given us Doug Sanders' name, who had said something like "We should do something about this." So I phoned him. As a result, in December Doug and I and one other person met to talk about it. That was the first meeting. Then we had a press conference about our case, and somehow in the planning for the press conference we turned up a number of other gay men and lesbians who had immigration problems. We invited them to the next meeting, and that was it. Somewhere down the line we named ourselves: Lesbian and Gay Immigration Task Force. LEGIT. And now there are chapters in three cities, and I expect that a couple of hundred lesbians and gay men have been able to bring their partners into the country with our help.

- *Chris Morrissey*

Gay and Lesbian Refugees

Gay men and lesbians in many countries face imprisonment, torture and death as a result of their sexual orientation. Some manage to escape to Canada to seek protection from persecution. Canada is a signatory to the United Nations Convention on Refugees and has an obligation to provide haven to those with a well-founded fear of persecution on any of the grounds recognized in the Convention. While sexual orientation is not a specifically enumerated ground in the Convention, there is an open-ended ground that refers to "membership in a particular social group." Although early cases based on sexual orientation persecution were rejected, the Immigration and Refugee Board accepted the claim of a gay man from Argentina, Jorge Inaudi, in 1992.³¹⁶

Since then, there have been several dozen cases before the Board, the majority of which have been successful. In a 1993 case³¹⁷ the Supreme Court of Canada defined the term "social group." According to the Court, there are three possible categories of social groups. One of them is "groups defined by an innate or unchangeable characteristic," which according to the Court "would embrace individuals fearing persecution on such a basis as gender, linguistic background and sexual orientation."

The test for a well-founded fear of persecution is forward-looking. The issue is: what would happen to a person on return to his/her country? Therefore, in order to claim refugee status, a claimant does not have to have been out as a gay man or lesbian in his/her own country or to have previously experienced persecution.

Further, the persecution feared does not have to be imprisonment, torture or death; systematic forms of harassment may amount to persecution. It is unnecessary to establish government involvement in the persecution if there is evidence that the claimant is unable to obtain the protection of state authorities. If measures of discrimination lead to consequences of a substantially prejudicial nature, such as serious restrictions on the right to earn a livelihood or access to normally available educational facilities, this could amount to persecution.

While the Supreme Court of Canada put to rest any doubts that sexual orientation could be a ground for claiming fear of persecution, there have been ongoing problems with decisions by the Immigration and Refugee Board. Organizations such as the Canadian Council on Refugees and the Immigration Committee of the Lesbian and Gay Rights Section of the British Columbia Branch of the Canadian Bar Association have continued to press the Immigration and Refugee Board to adopt written guidelines on sexual orientation persecution. The Board has followed up on requests to implement training programs for its members on sexual orientation persecution facilitated by qualified gay and lesbian activists knowledgeable in refugee law issues.

Extradition

In many countries, homophobia and AIDSphobia are severely ingrained in the political and legal institutions of society. This creates concerns that lesbians, gay men and people with HIV/AIDS may not receive fair treatment if they have to deal with these institutions. In particular, lesbians, gay men and people with HIV/AIDS who face trial in certain countries may find it impossible to obtain a fair hearing.

A recent example involves the attempts of Dennis Hurley to resist extradition to stand trial in Mexico. Dennis Hurley and his partner Murray Haigh, both Canadians, visited Mexico in 1993. According to Hurley, one evening he returned to their guest house to find his lover stabbed in the bathtub. Hurley fled to Canada, and the Mexican authorities sought to extradite him to stand trial in Mexico for murder. An extradition judge granted the request,³¹⁸ and Hurley's lawyers requested that then Minister of Justice Allan Rock exercise his discretion to refuse extradition on the basis that systemic homophobia meant that Hurley would be unable to obtain a fair trial in Mexico. On 26 February 1996, the Minister of Justice declined to exercise his discretion in favour of staying the extradition. The Minister acknowledged that

there are continuing human rights abuses [in Mexico] and certain arms of the government (police and military) are carrying out or involved with some of these abuses. Human rights abuses involve specific groups. Gay men and gay activists are noted as groups more at risk.³¹⁹

The Minister noted, however, that Canadian law does not currently permit a citizen to be tried in Canada for a crime committed abroad, so that the only alternative to extradition was allowing Hurley to go

untried. He therefore refused the stay of extradition, but attached certain conditions to the surrender warrant requesting that Mexico "take all reasonable measures to ensure Mr. Hurley's safety while in detention in Mexico," permit him to communicate with counsel at any reasonable time and be brought to trial expeditiously.³²⁰ Counsel for Hurley sought judicial review of this decision in the Ontario Court of Appeal. On 20 June 1997, the Ontario Court of Appeal rejected the appeal, ruling that although the abuse of the human rights of gay men and lesbians in Mexico is well-documented, the Minister of Justice was entitled to make the decision he did.³²¹

The *Hurley* case illustrates that reliable mechanisms are not available for those who may face an unfair trial due to systemic homophobia in the country where a crime is alleged to have been committed. Because an unfair trial is not consistent with the principles of fundamental justice, and because there will always be cases where it is undesirable to allow a serious crime to go untried, the only reasonable alternative is for the Canadian government to introduce legislation to permit Canadians to be tried in Canada when a fair trial cannot otherwise be assured. While this procedure may involve difficulties in obtaining access to evidence and witnesses, it is surely better than the possibility of allowing potentially innocent people to be convicted because of hostile attitudes related to irrelevant characteristics such as their sexual orientation.

Recommendations

The *Canadian Charter of Rights and Freedoms* has provided lesbians, gay men and bisexuals with a lever against legislated inequalities. In the immigration context, gay and lesbian organizations have focused on the non-inclusion of same-sex relationships in the Immigration Regulations. The government has made some efforts to address this inequity through immigration policy (that is, by telling visa offices they can use humanitarian and compassionate discretion to admit same-sex couples), but has not taken steps toward changing the Regulations. The policy changes constitute a step forward, but are discretionary remedies delegated to immigration officers rather than rights clearly spelled out in law.

Lesbian and gay partners of Canadians are in effect being allowed into Canada through the back door. The government claims to be committed to equality for lesbians, gay men and bisexuals, but has said that it is not planning to amend the *Immigration Regulations* to include same-sex relationships in the family class, even though this would not require a vote in Parliament. Worse, whenever a court challenge has been mounted to those Regulations on the ground that they deny equality under the Charter, the case has not been allowed to proceed and the plaintiffs have been admitted into the country: the government is systematically blocking any attempt to achieve equality through the courts.

Since the devolution of authority over humanitarian and compassionate decisions to visa officers, it has been possible - for those who are aware of the change - for non-Canadian gay and lesbian partners of Canadians to come into Canada on the basis of their relationship with a Canadian. While a court challenge would likely be successful, it is unlikely that an individual applicant would choose to

undertake such a challenge if they have the option of obtaining permanent resident status through humanitarian and compassionate considerations: a court challenge now seems to be unlikely, at least until an applicant is refused for medical inadmissibility and has no choice but to challenge the legislation.

In order to address the issues and problems described in this section, the following measures must be undertaken:

20. The "family class" must be extended in the Immigration Regulations to permit lesbians and gay men to sponsor a same-sex partner to immigrate to Canada.

21. The current system, according to which immigration applicants who are found to be HIV-positive are assessed as "medically inadmissible," should be changed so that people with HIV/AIDS or other conditions will not automatically be excluded from immigrating. A new system should take the individual circumstances of each case into account, weigh the costs against the benefits of allowing a particular person to immigrate, and take humanitarian concerns into account.

22. A law needs to be introduced to enable Canadians to be tried in Canada for crimes allegedly committed abroad, whenever it appears that a fair trial could not be obtained in the country in which the crime is alleged to have been committed.

Incapacity, Wills, and Estate Litigation

This section points out that the law's refusal to recognize gay and lesbian relationships is most keenly felt in times of crisis. At a time when a same-sex partner most needs institutional support, the law, far from facilitating resolution of the crisis, can become yet another insurmountable obstacle. When a heterosexual spouse becomes incapacitated or dies, the law automatically provides recognition and support to an opposite-sex partner. Almost invariably, however, the law treats a same-sex partner in similar circumstances with indifference and exclusion. The section then acknowledges that some changes are taking place, but emphasizes that many significant problems continue. It concludes by making suggestions that would help address these problems.

History

When a partner in a gay relationship becomes incapacitated or dies, the law can, and frequently does, privilege the biological family over the same-sex partner. Because of the many gay men who have died prematurely of AIDS, this has been a frequent problem for gay couples.

If a person with HIV/AIDS has not planned in advance of his/her death or incapacity, his/her same-sex partner will have almost no recourse for making decisions about that person's health care, administering finances and property, or claiming a share of the deceased partner's estate. The partner of the deceased may have a claim based on common law remedies (such as resulting or constructive trusts) or a claim for compensation for having cared for a deceased, but there is no statutory right to a share of the estate or to be appointed to administer the estate.

Many gay men and lesbians are estranged from their families and hide from them their HIV-positive status, sexual orientation, or the fact that they are in a committed same-sex relationship. In times of sickness or after death, the sudden disclosure of these hidden realities can shock family members, who may react by blaming the partner of the person with HIV/AIDS for causing the disease. The same-sex partner is at a legal disadvantage in any disputes with biological family members who may challenge the right of a same-sex partner because of their view that the relationship was invalid.

Current Situation

Progress in this area has been slow; there have been few legislative or judicial changes. However, in order to protect their position as much as possible, lesbians and gay men can draft the following documents:

- A will, although it can be challenged and overturned by biological family members, is an important means of ensuring that property will be distributed as much as possible in accordance with a testator's wishes.
- Powers of attorney are documents that enable a person to designate who should look after his/her financial and other affairs in the event of incapacity.
- A power of attorney for personal care is a document that entrusts a similar decision-making power to the person designated to make medical decisions in the event of incapacity. Such a document will not always have the force of law, and it may be that physicians will still favour the wishes of a patient's biological family over those of a same-sex partner, but a power of attorney for personal care at least maximizes the chances that the person designated will have hospital access and some input into the decision-making process.

In Newfoundland, Nova Scotia, Québec, Ontario, Manitoba and British Columbia, laws specifically permit individuals to designate who can make health-care decisions when they become incapacitated. For example,

- the Ontario *Substitute Decisions Act* gives "spouses" and "partners" equal status, and defines two people as "partners" if they have "lived together for at least one year and have a close personal relationship that is of primary importance in both persons' lives"; and

- the British Columbia *Representation Agreement Act* specifically defines a "spouse" as "a person who is married to another person ... or is living with another person in a marriage-like relationship and, for the purposes of this Act, the marriage or marriage-like relationship may be between members of the same sex."

Recommendations

Some changes are taking place, but the substantial privileging of biological families over same-sex partners continues to create significant problems for gay men and lesbians.

In addition to amending existing legislation to place same-sex partners on an equal footing with married heterosexual spouses as next of kin, there is a need in some jurisdictions to statutorily recognize documents providing for directions about health care and to delegate another person to make decisions in the event of the incapacity of the person executing the document. This person could be a same-sex partner or a friend as well as a family member.

23. All provinces and territories that do not currently have legislation providing for an effective means for the appointment of a representative for health-care decisions should adopt such legislation.

24. All provinces and territories should provide that same-sex partners have the same rights (1) of inheritance in cases of intestacy; and (2) to apply for administration of an estate, as heterosexual married spouses.

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FOOTNOTES

- 268 EG Kennedy. Letter to the Editor of the *Kingston Whig-Standard*, 1992.
- 269 Pamphlet of The League Against Homosexuals (1980) - emphasis in original; reproduced in *Gay Fathers - Some of Their Stories, Experience and Advice*. Gay Fathers of Toronto, 1981, at 64.
- 270 From discussion in Casswell, *supra*, note 135 at 248-249.
- 271 *D v D* (1978), 3 RFL (2d) 327 (Ont Co Ct); *B v B* (1980), 16 RFL (2d) 7; *Elliott v Elliott*, [1987] BCJ no 43 (SC). It should be noted that this concern is founded on the presumption that being lesbian or gay is inherently an inferior condition than being heterosexual.
- 272 *B v B*, *ibid*.
- 273 *Case v Case* (1974), 18 RFL 132 at 138 (Sask QB).
- 274 *D v D*, *supra*, note 271 at 334.
- 275 *K v K* (1975), 23 RFL 58, 64-65 (Alta Prov Ct); *B v B*, *supra*; *Droit de la famille-31* (1983), 34 RFL (2d) 127 (Que SC).
- 276 *Saunders v Saunders* (1989), 20 RFL (3d) 368 at 370-372 (BC Co Ct); *S v S*, [1992] BCJ no 1579 at 44-45 (SC).
- 277 *Case v Case*, *supra*, note 273 at 138; *Saunders v Saunders*, *ibid* at 370-72.
- 278 *Ewankiw v Ewankiw* (1994), 99 Man R (2d) 302 (QB) at 306.
- 279 *Bexaire v Bezaire* (1980), 20 RFL (2d) 358 at 365-366 (Ont CA), per Arnup JA.
- 280 *Steers v Monk*, [1992] OJ no 2701, at 13 (Prov Div).
- 281 *B v B* and *D v D*, *supra*, note 271.
- 282 *A.E. v G.E.* (1989), 77 Nfld & PEIR 142 (Nfld SC).
- 283 *Bexaire v Bezaire*, *supra*, note 279 at 358.
- 284 *Elliott v Elliott*, *supra*, note 292.

²⁸⁵ See, for example, *Worby v Worby* (1985), 48 RFL (2d) 369 (QB); *P-B (D) v P-B (T)*, [1988] OJ no 2398 (Prov Ct).

²⁸⁶ *Re B*, unreported, 1 March 1988, JD of York, SC 106402-84 (Ontario HC). After entering an order on consent, Mr Justice Walsh ordered that the file in this case be sealed. The case is referred to in footnote 203 of T Ducharme. Preparing for Legal Epidemics: An AIDS Primer for Lawyers and Policy Makers. *Alberta Law Review* 1988; XXV(1): 471-520.

²⁸⁷ *Droit de la famille 663* (1989), Québec Superior Court, Melançon J.

²⁸⁸ *Ibid* at 27-28.

²⁸⁹ *Chernoff v Pyne*, Vancouver Registry A850746, 27 June 1990.

²⁹⁰ *Ghidoni v Ghidoni*, Nanaimo Registry, No 5920/009596, Supreme Court of British Columbia, per Williamson J, at 5.

²⁹¹ *Ibid* at 6.

²⁹² *Re K*, 23 OR (3d) 679.

²⁹³ *Ibid* at 703.

²⁹⁴ *Ibid* at 707-708.

²⁹⁵ Cited in Mitchell. Gay rights and Alberta just don't mix. *Globe and Mail* 25 July 1997, at A4.

²⁹⁶ *Ibid*.

²⁹⁷ Rusnell. Report defends gay men as parents. *Edmonton Journal* September 1997.

²⁹⁸ *Moffat v Kinark Child and Family Services et al*, referred to in a letter from the Ontario Human Rights Commission, 3 November 1997.

²⁹⁹ *Potter v Korn* (1995), 23 CHRR D/319 (BC HRC); an application for judicial review of this decision was subsequently dismissed.

³⁰⁰ For a thorough discussion of the history of references to homosexuality in the *Immigration Act* see P Girard. From Subversion to Liberation: Homosexuals and the Immigration Act 1952-1977. *CJLS* 1987; 24(2): 1-27.

³⁰¹ For a comparison of US and Canadian immigration policies on the issue of exclusion of gay men and lesbians, see R Green. Give Me Your Tired, Your Poor, Your Huddled Masses (of Heterosexuals): An Analysis of American and Canadian Immigration Policy. *Anglo-American Law Review* 139.

³⁰² SC 1976-77, C-52 s 3(c).

³⁰³ Based on telephone conversations with Marcel Laflamme, counsel for Anna Carrott and Andrea Underwood.

³⁰⁴ *Immigration Act* s 9.07 para 2(c).

³⁰⁵ ORD 0150. Telex-processing of same sex cases. M Davidson, 2 June 1994.

³⁰⁶ *Immigration Act*, s 77.

³⁰⁷ Visitors include tourists, students, and temporary workers.

³⁰⁸ Correspondence received from Dr GA Giovinazzo, Director, Immigration Health Services, Ottawa, on 13 February 1997.

³⁰⁹ Communication with Dr Giovinazzo on 13 February 1997; for more details, see R Jürgens. Immigration Policy May Be Reviewed to Require Routine HIV Testing of Immigrants. *Canadian HIV/AIDS Policy & Law Newsletter* 1997; 3(2/3): 16-18.

³¹⁰ *Immigration Act*, s 37.

³¹¹ WC Bartlett. *AIDS: Legal Issues*. Ottawa: Library of Parliament Research Branch, Current Issue Review 93-7E, 14 April 1994 (revised 19 April 1995), at 6. For more details, see S Wilson. Recent Developments in Immigration Law. *Canadian HIV/AIDS Policy & Law Newsletter* 1994; 1(1): 9-10.

³¹² Bartlett, *ibid*.

³¹³ Communication with Dr Giovinazzo, *supra*, note 308.

³¹⁴ The Canadian Disability Rights Council. Final Brief on the Proposed Amendments in Bill C-86 to Sections 19(1)(a) and (b). Winnipeg: The Council, at 35.

³¹⁵ R Jürgens, M Palles. *HIV Testing and Confidentiality: A Discussion Paper*. Montréal: Canadian HIV/AIDS Legal Network & Canadian AIDS Society, 1997, at 224.

³¹⁶ *N (LX)(Re)*, [1992] CRDD No 47.

³¹⁷ *Ward v Canada (Attorney General)* (1990), 10 Imm L R(2d) 189, 67 DLR (4th) 1, 108 NR 60, [1990] 2 FC 667 (CA); [1992] 2 SCR 689, 20 Imm LR (2d) 85.

³¹⁸ *Re Hurley*, 23 May 1995, Ontario Court (General Division), per Ewaschuk J.

³¹⁹ Letter from Minister of Justice to Counsel for Dennis Hurley, dated 26 February 1996, at 7.

³²⁰ *Ibid* at 10.

³²¹ Unreported, File # C22032, C24225, 20 June 1997, Ontario Court of Appeal, per McMurtry CJO, McKinlay and Austin JJA.

Gay and Lesbian Issues and HIV/AIDS: Final Report

by John Fisher, Ralf Jürgens, Anne Vassal, Robert Hughes

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The discrimination experienced by gay men and lesbians, described in the previous chapters of this Report, is wrong and unjust in and of itself. In addition, it raises questions about how it affects the course of HIV infection in populations and in individuals. How do homophobia and discrimination influence governmental, institutional and professional responses to HIV/AIDS? How do homophobia and discrimination make people more vulnerable to HIV infection? What is the impact of homophobia and discrimination on people with HIV infection?

This chapter aims to provide answers to these questions. It starts with a discussion of the societal, programmatic, and personal dimensions of homophobia and discrimination (Introduction). It then describes the impact of homophobia and discrimination on the development of social identity among gay and lesbian youth and on the coming-out process of gay men and lesbians in our society.

The chapter continues with a discussion of how a hostile environment, and the effects of that environment on social identity and the coming-out process, contributes to vulnerability to HIV infection among men who have sex with men. This is followed by a consideration of how homophobia affects gay and bisexual men with HIV/AIDS in such areas as testing and confidentiality, disclosure and concealment of HIV status, employment, and social support or isolation.

The chapter then discusses how homophobia and heterosexism have resulted in weaknesses and failings in the delivery of health services to gay men and lesbians and in the design of research into gay and lesbian experience and the HIV epidemic among men who have sex with men - weaknesses and failings that have had an impact on our knowledge of and response to the HIV epidemic among gay men, bisexuals and lesbians. The chapter concludes with an analysis of how homophobia and discrimination have affected government and institutional responses to HIV/AIDS.

Introduction

AIDS in the World "proposed that vulnerability could be considered on three interdependent levels: personal, programmatic, and societal."³²² In *AIDS in the World II*, Mann and Tarantola describe these levels as follows:³²³

- *Personal vulnerability* to HIV/AIDS focuses on the various factors in an individual's development or environment that render him/her more or less vulnerable, such as physical and mental development, knowledge and awareness, behavioural characteristics, life skills, and social relations.
- *Programmatic vulnerability* focuses on the contributions of HIV/AIDS programs toward reducing and increasing personal vulnerability. This includes information and education, health and social services, and human rights programs.
- *Societal vulnerability* focuses directly on the contextual factors that define and constrain personal and programmatic vulnerability. This includes such issues as political structures, gender relationships, attitudes to sexuality, religious beliefs, and poverty.

Stigma and discrimination operate at all of these levels:

- At the *societal* level stigma and discrimination on the basis of race, gender, sexual orientation, drug use, criminal status or imprisonment results in economic, political, legal and social disadvantages that marginalize people, render them more vulnerable to HIV infection or disease progression, and deprive them of appropriate programs and services.
- At the *programmatic* level stigma and discrimination can lead to programs not being available or being offered in ways that do not empower, respect the dignity of, or meet the needs of people with HIV/AIDS or people vulnerable to HIV infection.
- At the *personal* level stigma and discrimination are experienced directly in day-to-day occurrences with family, friends, service providers, and the public, as well as indirectly in

the conditions created by discrimination at the societal level and the limitations imposed by discrimination at the programmatic level.

An analysis of the impact of stigma (in particular, homophobia) and discrimination on gay men, bisexuals, and lesbians in the context of the HIV epidemic requires a consideration of all three of these levels and of the interactions among them. For example, societal attitudes about homosexuality, expressed both in prevailing heterosexual assumptions and in negative or hostile views toward homosexuals, shape the environment in which gay men, bisexuals and lesbians recognize and define their social identity. These attitudes also affect the extent to which educational curricula and programs, health and social services, and research recognize, support, and respond to the needs of gay men, bisexuals, and lesbians. At the personal level, therefore, gay men, bisexuals, and lesbians experience homophobia and discrimination as expressed in the prevailing messages in the media and the social environment; in the attitudes and behaviours of family members, peers, and authorities; and in the availability or lack of availability of programs and services that recognize their sexual and social identities and their health and social needs.

The sections that follow in this chapter describe the nature and the impact of homophobia and discrimination at the societal, programmatic, and personal levels on gay men, bisexuals, and lesbians. The discussion highlights, in particular, how homophobia and discrimination contribute, directly and indirectly, to vulnerability to HIV infection among men who have sex with men, discrimination and social isolation for those who are living with HIV/AIDS, and lack of adequate health and social services, research, and HIV/AIDS programming for gay men, bisexuals and lesbians.

Development of Social Identity among Gay and Lesbian Youth

For young people, adolescence is a period of self-definition directed to the affirmation of social identity.³²⁴ This identity is composed of many elements that involve one's social, professional and sexual life. Young people attracted by others of the same sex have experiences that differ from the heterosexual majority. Their desires are difficult to express in a heterosexual environment.³²⁵ Without being able to speak of their desires, they can feel isolated.

Within family and school structures, among peers and in society in general, references are above all heterosexual. Parents and siblings are the first models with whom the child identifies. Attitudes to homosexuality can favour the positive social construction of the young person or, on the contrary, have catastrophic consequences.

Several studies have shown that few young people reveal their sexual orientation to their parents, but

when they do so, even fewer benefit from parental support.³²⁶ A qualitative study involving 26 gay youth in Montréal found that that most of the youths who came out left the family home.³²⁷ Some youth, upon coming out, are even banished from the family home. Many youth suffer violence in their family environment.³²⁸

Most school systems are no more capable than the family of supporting young gay men and lesbians. Many teachers lack knowledge of how to deal with homosexuality, and many are not free from discriminatory and heterosexist attitudes, leaving homosexuality out of their discourse, taking for granted that all their students are heterosexual.³²⁹ Moreover, the vast majority of textbooks do not mention the historical and cultural contributions of gay men and lesbians, and this reinforces the absence of role models for young gay men and lesbians.

The extent of stigma and discrimination that exists in some learning institutions was documented by a study carried out in US colleges which showed that one respondent in three thought that their institution would gain by having no gay men or lesbians; 80 percent of respondents had already made discriminatory remarks about them.³³⁰

In such a hostile environment, gay and lesbian youth often feel that they have to hide their attraction to members of their own sex from their peers, and act out roles dictated by society, to protect themselves against discrimination.³³¹ A Montréal support project for young men and women attracted to people of the same sex showed that 64.5 percent of males and 32.3 percent of females were afraid of being rejected because of their sexual orientation; 50.0 and 32.3 percent respectively were afraid of being found out.³³² As a result, gay and lesbian youth construct their social identity without homosexual socialization, without the benefit of identification with older gay men and lesbians, and without the freedom of open relationships among heterosexual peers.

The pressures on gay and lesbian youth surface in disproportionately high rates of suicides and suicide attempts. In a report on suicide among young people, public health departments in the US reported that young gay men and lesbians accounted for 30 percent of all teen suicides.³³³ Homosexual youth attempt suicide two to three times more often than youth in general.³³⁴ The majority of suicide attempts take place before the age of 20.³³⁵

Leaving home also exposes gay and lesbian youth to risk. Studies suggest that a disproportionate number of gay youth end up on the street, where, as a review of the literature notes, "the risks of drug abuse, sexual abuse, violence, HIV/AIDS and other disease transmission, and suicide increase dramatically."³³⁶

Recommendations

Given the connections between factors affecting the development of social identity of gay men and lesbians and the coming-out process for gay men and lesbians, recommendations related to the above are included in the recommendations in the next section.

The Coming-Out Process: Social and Psychological Difficulties

In the current social context, the process of coming out creates discontinuity between "ordinary" social life and homosexual socialization. Coming out makes it possible to free oneself from social constraints. However, it also demonstrates the limits of this freedom by confronting the person with the various manifestations of discrimination.³³⁷

Generally, one can say that sexual orientation may be experienced in various ways that may change over the course of life: rejection, leading a double life, the construction of a homosexual environment, or integration into a gay milieu. Thus, homosexuality can be denied, accepted, affirmed, or claimed outright.³³⁸

The coming-out process depends on many social factors that can positively or negatively influence it, including level of education, socioeconomic status, size of urban centre, parental attitudes, and quality of peer relationships.³³⁹ Some things favour the coming-out process by breaking through isolation and making reconciliation between social identity and sexual orientation possible, for example migration to urban centres, frequenting places where gay men and lesbians meet, the existence of a support network and, for young people, going to university. Other things may slow down the coming-out process, such as living in semi-urban and rural areas where there are limited gay networks, and belonging to less-advantaged socioeconomic milieus.³⁴⁰

Various studies have shown how difficult it can be for people to come out to others. In one such study, undertaken in Québec among men who have sex with men, 70 percent of participants responded that their homosexual friends knew about their sexual orientation, but only 43 percent responded that their families knew, and even fewer, 38 percent, that their workplace colleagues knew.³⁴¹ Similar results were found in studies carried out in Europe and elsewhere.³⁴²

Bisexual men may find it even more difficult to come out, fearing rejection and discrimination not only from family and workplace colleagues, but also from their sexual partners. A study of more than 1500 bisexual men in Ontario showed that 56 percent had not disclosed their sexual orientation to their male partners, 58 percent had not disclosed it to their female partners, and 71 percent had not disclosed it to members of their families.³⁴³

For some people, it is necessary to negotiate the discontinuity between their private and public lives by adopting strategies of avoidance or of denial, for example by living openly in a heterosexual relationship and hiding their sexual relations with people of the same sex. Men who have sex with men, but who don't identify themselves as gay, homosexual or bisexual, may have sexual relations with other men while claiming that they are members of the heterosexual community.³⁴⁴ In other cases, there may be discontinuity between the life desired by the individual and what is actually possible.³⁴⁵

In contexts where anti-homosexual discourse is strong, people may feel guilty about their own sexual orientation. This is called internalized homophobia, in which discrimination becomes integrated, sometimes even before one becomes aware of one's sexual orientation.³⁴⁶ For many, the distress felt has a negative impact on self-affirmation.³⁴⁷ Other people use failure as a strategy for avoiding having to deal with problems they face because of their sexual orientation.³⁴⁸

Recommendations³⁴⁹

25. Research should be supported on the process of coming out in Canada and the psychological and social difficulties that it may entail, in order to develop approaches for assisting gay men and lesbians - and particularly gay and lesbian youth - in their coming-out process and for improving their emotional well-being.

26. Ministries of education, school boards, and school staff should include education about homosexuality in health and sex education at the intermediate and secondary levels, and such education should be provided in a non-judgmental, respectful, and supportive manner.

27. Teachers and others involved in schools, centres and shelters should be educated about homosexuality in order to provide them with the skills needed to offer support to young gay men and lesbians.

28. Secondary and post-secondary educational institutions should support the development of support groups for young gay men and lesbians within their institutions in order to help them through, among other things, the coming-out process.

29. Funding should be provided to community organizations in order to develop self-esteem and self-affirmation workshops for gay men and lesbians.

Vulnerability to HIV Infection

Since the beginnings of the epidemic, many gay men have changed their behaviour by adopting safer-sex practices. For example, a comparison of two cohorts of gay men in Vancouver - one recruited between 1982 and 1984 (the Vancouver Lymphadenopathy AIDS Study), the other recruited since 1995 (the Vanguard Project) - shows that there has been a decline in the frequency of high-risk sexual behaviours over the decade.³⁵⁰ In Canada and the rest of the world, the proportion of men who have unprotected anal intercourse has decreased, and there is increasing use of condoms.

At the same time, a significant proportion of gay and bisexual men (particularly young men)³⁵¹ continue to engage in risky sexual behaviour.³⁵² The coming-out process is itself associated with risky behaviour. A qualitative study involving 26 gay youth in Montréal found that all of those who had come out to their parents (15 youth) had receptive anal intercourse just after telling their parents, mostly without a condom. The study also found that the number of sexual partners tended to increase after coming out and that most of the youths who came out left the family home.³⁵³ Less education and lower income appear to be associated with unprotected anal sex.³⁵⁴ In addition, some studies show that respondents in semi-urban and rural areas use protection during anal sex less than those in large cities.³⁵⁵

Vulnerability to HIV infection (as well as other risks to health) is not a matter of sexual behaviours alone. These behaviours are part of a complex of social and psychological phenomena that place gay and bisexual men at risk. The Vanguard Project, mentioned above, found that, among 147 young gay and bisexual men, 18 percent had experienced domestic violence, 11 percent had experienced gay bashing, 25 percent had experienced sexual abuse, 55 percent had seriously considered suicide, and 33 percent had attempted suicide. Twenty-two percent had been diagnosed with a mental disability or mood disorder, most commonly depression.³⁵⁶ The authors conclude:

A disturbing proportion of young [men who have sex with men] report having considered suicide or made suicide attempts, which is consistent with high levels of depression. Various other forms of violence appear to be common for young [men who have sex with men]. The relationship between violence and HIV requires further investigation. "long with other forms of psychologic distress - including depression, substance abuse and homophobia - violent life experiences likely impact negatively on self-esteem and negotiating skills, which could in turn lead to heightened vulnerability to HIV infection."³⁵⁷

Similarly, a survey of 1314 bisexual men in Ontario found that 26.4 percent of the men had a history of nonconsensual sex and that, among those who had had sex with both men and women in the year prior to the survey (1013), men with a history of nonconsensual sex were significantly more likely to report unsafe sex with both male and female partners.³⁵⁸

Homophobia has a severe impact on people's ability to protect themselves. As Toonen has said:

If I live in a world that is homophobic and heterosexist, which does its very best to isolate me from my peers and keep me from any knowledge or acknowledgment that my gayness is valid, or even exists outside of my head and heart, then of course I am going to feel worthless and have low self esteem. I will believe that I am fundamentally flawed or bad or wrong, and alas too often become involved in self destructive behaviour ranging from isolating myself from people, through to drug and alcohol abuse, and suicide. ... One of the strongest examples of homophobia impacting on the lives of gay men, including HIV prevention, is the lack of basic information about gay issues, gay identity, gay sex, and gay community in schools, including a lack of information about HIV and safer sex issues relevant to gay youth.³⁵⁹

Group-related factors such as one's sense and degree of belonging, of being committed, to the gay community also influence the practice of safer sex. The effects of discrimination - such as difficulties around self-affirmation, the non-recognition of sexual orientation - hinder the adoption of safer-sex behaviours.³⁶⁰ Conversely, the sense of belonging to the gay community contributes to the development of a better self-image, which leads to the practice of safer sex.³⁶¹

Many men do not identify with the gay community out of fear of discrimination, psychological or geographical isolation, and other factors. Unsafe practices appear to be more common among bisexual than among homosexual men³⁶² and even more common among men who do not identify as either homosexual or bisexual.³⁶³ While a number of prevention programs have been set up in places where gay men socialize, not all men who have sex with men frequent those places and can be reached through such programs.

Recommendations

30. The number of new HIV infections among men who have sex with men, particularly young gay men, remains high, but relatively little funding for education, prevention, research and support is available. Governments and research agencies should ensure that funding is provided at levels that correspond to the historical and continuing HIV epidemic among men who have sex with men.

31. Multidisciplinary research should be carried out on less-known, less-reached groups, in particular, youth, the socioeconomically disadvantaged, intravenous drug users, bisexual men, and those who do not identify themselves as either homosexual or bisexual.

32. Governments and agencies should develop comprehensive programs that integrate access to the means of protecting oneself from HIV infection with

information and affirmation of sexual orientation.

Some of these programs should not be limited to the gay community but be implemented for the general population in order to reach men who do not identify themselves as being homosexual or bisexual.

HIV Testing and Confidentiality

For men who have sex with men, whether or not they identify as gay or bisexual, taking an HIV-antibody test has both personal and social consequences. The decision to take the test may involve overcoming a number of fears, including the fear of being infected with HIV, of having infected others, of illness or death resulting from HIV infection, of disclosure as a gay or bisexual man or as a person with HIV, or of stigma or discrimination based on HIV status or sexual orientation.

Toward the end of the 1980s, as the prospects for treatment improved, gay and bisexual men were encouraged to be tested. At the same time, AIDS organizations pressed for wider access to anonymous testing in order to assure people of complete confidentiality. Even so, a national survey of gay and bisexual men in Canada in 1991-92 found that the probability of expressing an intention to take an HIV antibody test varied between 2 percent and 94 percent, and that an individual's personal evaluation of the consequences of taking the test was the most important variable in determining the probability of expressing an intention to take it.³⁶⁴ The authors describe the significance of their findings as follows:

The intention to take the test is mainly affected by attitudes. According to the theoretical framework adopted for this study, "attitude" is defined as a personal evaluation of the consequences of adopting a given behaviour. Such factors as the possibility of having one's name on a government list or having one's career or insurance affected define one's attitude to taking the test. Perceived lack of anonymity seems to be a dominant attitudinal determinant.³⁶⁵

Numerous studies suggest that availability of anonymous testing encourages people to come forward to be tested, particularly those who are at greatest risk for HIV infection.³⁶⁶ Of particular significance for gay and bisexual men is the finding of a study on the effect of a decision to discontinue anonymous testing in 82 of 100 counties in North Carolina in 1991. There was a 12.4 percent decrease in testing of gay men in counties that ended anonymous testing; gay and bisexual men accounted for 10 percent of all tests in counties that retained anonymous testing, but 4 percent of all tests in counties that discontinued anonymous testing.³⁶⁷ As long as the social environment is hostile to gay and bisexual men, HIV testing programs must take into account the risks - perceived as well as actual - that an HIV test entails for gay and bisexual men.

Recommendations

33. Policies and programs for HIV testing should make provisions for the fears and risks that men who have sex with men experience in taking an HIV test.

34. The HIV testing options available to men who have sex with men should include anonymous testing.

Disclosure and Concealment of HIV Status

I have always hidden my homosexual tendencies from my family and friends. To now come out and say I am gay and I have AIDS, it's a double stigma. Unfortunately, the stigma is attached to you at the time you need support, you are afraid of dying, and you are hurting pretty badly. I am better off passing as normal.³⁶⁸

This observation from a gay man living in Newfoundland is a reminder that for gay and bisexual men disclosure of HIV status is a "double-edged sword." As the authors of a study of disclosure among gay men observe,

It may open up the opportunity to receive social support. However, it may also lead to added stress, due to stigmatization, discrimination and disruption of social relationships. Conversely, concealing one's HIV status from significant others can be stressful in itself and can interfere with obtaining and adhering to potentially critical medical treatments. Concealment can also have negative effects on significant others' well-being, since they may experience guilt, confusion or anger when they find out about the individual's illness (especially if this occurs after the individual is very sick or has died).³⁶⁹

Gay men with HIV/AIDS are more likely to disclose their HIV status to their lover or their closest friends, whom they perceive to be more helpful and supportive, and less likely to disclose to their family, co-workers or employer.³⁷⁰ The reasons for not disclosing include fear of discrimination (particularly at work) and the desire to conceal one's homosexuality. As one man put it, "My parents don't know I'm gay."³⁷¹ Disclosure of HIV-status and sexual orientation to one's family often occur at the same time:

The level of denial and crisis in families who were not aware of a son's homosexuality until a diagnosis of AIDS may be fairly high. Among men who have already revealed

their sexual orientation to their families, the stigma of a diagnosis of AIDS may reopen old wounds as family members are forced by the crisis of the illness to once again confront and express their feelings regarding sexual orientation. Disclosure of homosexuality to parents is often more difficult than disclosure to others because parental reaction is usually negative and the family perceives the disclosure as a crisis. Depending on their value system, parents may apply stereotypes about homosexuality to their son, perceiving him as a potential child molester or a sinner condemned to everlasting punishment. Also, parents may fear that others in their social network will apply similar negative values to the whole family, leading to isolation and ostracism.³⁷²

Disclosure may be particularly problematic for bisexual men or heterosexual men, if they are divulging previous same-sex activity for the first time:

At the time I told my wife, my fiancée, I told her about me having experienced being with a man before and so this was the first time this subject had even come into the light. She didn't have any suspicion or inclination so it was kind of hard to deal with.³⁷³

Not all families, however, respond negatively.³⁷⁴ It is significant that one gay man gauged his family's likely response to his HIV status according to their prior response to his sexual orientation:

I didn't really have that much fear they wouldn't accept me because they knew from a very young age that, you know, from thirteen that I was gay. ... They were very, very supportive right from the very beginning.³⁷⁵

Caregivers of gay or bisexual men with HIV/AIDS are also adversely affected by the stigma of HIV/AIDS and homosexuality. As one study found, going public as a caregiver can mean harassment, rejection, and the loss of jobs, friends and housing.³⁷⁶ In some families and communities, caregivers may go to great lengths to deny the presence of HIV/AIDS and avoid association with AIDS service organizations:

The family of a gay man living with HIV/AIDS in a smaller Canadian province wanted nothing to do with him. When he was ill, they were told he was dying of cancer. His mother was aware that he was dying of AIDS and arranged for billeting in a larger city in that province with the help of an AIDS service organization. She paid for the services in cash, and also made a cash donation after his death, because she did not want her credit union to know that she was making contributions to an AIDS service organization.³⁷⁷

The Impact of Social Support or Isolation

Stigma, and the resulting stress, isolation, and lack of social support, have significant negative impacts on the health of people with HIV/AIDS.³⁷⁸ Research has found that social support is associated with psychological well-being among people with HIV/AIDS.³⁷⁹ Those who feel stigmatized by HIV/AIDS - both those infected and affected by the disease - and lack the supports they consider helpful are more likely to experience symptoms of depression.³⁸⁰ There is also some evidence that stress has a negative effect on the human immune system, and that social support can moderate the effects of stress on the immune system.³⁸¹

The study on disclosure of HIV status among gay men, discussed above, found that men at every stage of HIV infection reported relatively high levels of anxiety and depression. There was a significant association between lower levels of depression and anxiety and the perceived helpfulness of friends, lovers, colleagues and employers.³⁸² The authors of the study comment as follows:

The beneficial effects of social support for gay men confronting HIV have been documented. Significant others can provide HIV-positive individuals with a wide range of valuable resources - both tangible and emotional (for example, information about treatment options, financial assistance, sick care, sharing feelings, reassurance that one is loved and valued). However, before it is in the interest of HIV-positive individuals to disclose their status to others, they must feel assured that the benefits of doing so will outweigh the potential costs. Safeguards against discrimination and stigmatization of HIV-infected individuals are an important first step.³⁸³

Stigma and discrimination associated with HIV/AIDS and homosexuality also have an effect on the lovers and families of gay or bisexual men with HIV/AIDS. A qualitative study, noted above, of the experiences of caregivers of people with HIV/AIDS in Seattle, found that one of the main features of their experience was the stigma they felt, both the stigma of AIDS and the stigma of homosexuality.³⁸⁴ The authors report that "[g]ay caregivers who were less open about their sexual orientation usually were very cautious about going public, especially outside of the gay community," while parents often "felt guilty about not being able to prevent their child's homosexuality or drug use, and consequently, their AIDS."³⁸⁵ The benefits of going public included gaining the support and assistance of others, changing public norms regarding AIDS and sexual orientation, and (for gay caregivers) increased integration into the gay community.

Recommendations

35. Support programs for people with HIV/AIDS should include components addressing the psychosocial aspects of living with HIV/AIDS that are specific to the experience of men who have sex with men and the complications of secrecy and disclosure in environments that are hostile to homosexuality.

36. Education programs on HIV/AIDS should be developed to reduce the stigmas associated with HIV/AIDS and with homosexuality, as well as to create a more supportive environment for gay and bisexual men, their caregivers, and their families of origin.

Employment and HIV/AIDS

Gay and bisexual men, as noted above, are less likely to disclose their HIV status to co-workers and employers than to lovers and friends.³⁸⁶ The association between fear of AIDS and aversion to homosexuality means that disclosing HIV status may mean encountering homophobic attitudes or remarks.³⁸⁷ As one gay man recounted:

One day on the floor where we were discussing this whole issue of AIDS and homosexuality and that kind of thing, one person said, they should all be isolated in a commune or shot. Now this is a nurse I worked with for a year and a half, shoulder to shoulder...³⁸⁸

AIDS may be used to harass gay men:

I heard they caught wind that I was gay. I had a pop or coffee sitting there. "Don't forget that he has AIDS."³⁸⁹

In one case, a gay man was laid off from his job as a caretaker for a large condominium when his employer concluded, incorrectly, that he was HIV-positive because he had been ill.³⁹⁰ Knowledge that one is HIV-positive or that one's partner is HIV-positive can also lead to loss of employment for gay men, who may be fired or may resign because they fear discrimination.³⁹¹

In a study of 389 HIV-positive men who reported having sex with men, conducted in Los Angeles in 1991-92, 52 percent said their employer was aware of their sexual orientation, 28 percent that their employer was not aware, and 20 percent did not know if their employer was aware or not.³⁹² Gay men were significantly more likely to say that their employer was aware of their sexual orientation (60 percent vs 34 percent). European-American gay men were more likely to have employers who were aware of their sexual orientation than Latino or African-American gay men, and gay or bisexual employers were more likely than heterosexual employers to be aware of the sexual orientation of a gay employee. Men who had been diagnosed for more than four years, men experiencing HIV-related symptoms, men whose employers were aware of their sexual orientation, and men whose employers

were gay or bisexual were significantly more likely to disclose their HIV status to their employer.³⁹³ The majority (60 percent) thought that things would stay almost the same at work if they disclosed their HIV status, but 24 percent thought that they would be fired, and 12 percent thought they would be asked to do a different kind of work. The actual consequences for those who had disclosed their HIV status were less negative than the anticipated consequences; 88 percent said things stayed almost the same, 3 percent (4 of 138 men) were fired, and 6 percent (8 of 138 men) were asked to do a different kind of work.

The authors remark:

The strongest predictor of HIV status disclosure was being out [at] work. ... Perhaps gay and bisexual men who were hiding their sexual orientation from their employers chose not to disclose their HIV status for fear their homosexuality or bisexuality would be suspected or detected. Alternatively, these men in a double closet at work may have had relationships with their employers in which these types of disclosures were seen as too intimate or inappropriate. ... Future studies are needed to assess which disclosure is more likely to come first or if dual disclosures are common.³⁹⁴

The authors also observe, commenting on the fact that the anticipated consequences of disclosure were worse than the actual consequences:

Although these results may appear somewhat encouraging to men who are considering disclosing their HIV status to their employers, a caveat applies: the non-disclosers, had they informed their employers, may not have experienced as positive a response. They may have accurately anticipated potential negative reactions.³⁹⁵

A recent survey of people with HIV/AIDS in Québec found that about half of those who were working had disclosed their HIV-status, and that of these one in five had problems with their employer.³⁹⁶ The authors note that there are three types of "silence" at work - silence about sexual orientation, silence about HIV status, and silence about HIV medications. They report that those who are currently not working would rather not return to their previous employer because of the level of stress and discrimination and the attitude of their employer. Such people would prefer to work in a context that is more open to sexual orientation, HIV seropositivity, and combination therapy.

Discrimination in the workplace on the basis of sexual orientation is prohibited by human rights legislation in all jurisdictions except Alberta, Prince Edward Island, and the Northwest Territories. However, as discussed above, the difficulty in making a human rights complaint is that discriminatory attitudes are often subtle, and that it is not always easy to prove that a particular decision was based on sexual orientation, disability, or indeed any specific prohibited ground of discrimination. In addition, the complaints procedure is time-consuming, slow in providing redress, and emotionally draining, thereby discouraging individuals from lodging or pursuing their complaints.

Recommendations

37. Employers should be encouraged to develop workplace policies on HIV/AIDS and non-discrimination on the grounds of sexual orientation, to implement educational programs on HIV/AIDS and sexual orientation in the workplace, and to communicate clearly the obligations of employers and employees regarding HIV/AIDS and sexual orientation as set out in human rights legislation.

38. Government agencies and human rights commissions should work to ensure that employers develop workplace policies and implement educational programs in accordance with the spirit as well as the letter of human rights legislation.

Health and Social Services

Accessibility of services implies not only that they be free and available where people live but also that they be socially and culturally adapted to the particular needs of the various user groups. Discriminatory attitudes, ignorance about homosexuality, a pathologizing approach to homosexual orientation, and the assumption that patients as a whole are heterosexual, lead gay men and lesbians to use health services less or to fear using them.³⁹⁷

Generally, the discrimination that gay men and lesbians face has a negative effect on access to information and education, health and social services, with a particularly negative effect on the more marginalized members of the communities, who need greater support.³⁹⁸

Lesbians: An "Unseen" Population

With regard to lesbians, Ramsay has said that, although

many lesbian health problems are the same as those of heterosexual women, our experience with the health care system is radically different. ... For the most part, lesbians must deal with health professionals who know very little about us and the realities of our lives, and who can be quite open about their contempt for us. This makes us feel powerless and vulnerable. ... The result is that many of us do not seek health care when we need it because we are afraid of being ignored, isolated, or abused.³⁹⁹

Adams reports that many lesbians firmly believe that their health care would suffer if their doctor knew that they were gay.⁴⁰⁰ Furthermore, most health-care professionals regularly assume that their patients are heterosexual and rarely ask otherwise. Nor do they take the time to use more inclusive language, which would create a safe environment for a lesbian to disclose her sexuality. Ramsay comments:

If lesbians are unable to come out, we are not free to ask for the information we need to help us maintain good health. If health professionals want to make an adequate assessment of the physical and mental health of their patients, they need to know who we are, and they need to have some understanding of the realities of being a lesbian in a heterosexist and homophobic world. They need to receive adequate education and training regarding sexual orientation, but they do not.⁴⁰¹

Impact on Prevention and Treatment of HIV Infection

When health-care professionals assume that their patients are heterosexual and neglect to explore areas of health that are specifically relevant to gay and bisexual men or lesbians, opportunities for prevention, testing, and early treatment of HIV infection are missed. A study of 300 physicians attending AIDS-related continuing education courses in Ohio between 1987 and 1989 found that only 42.4 percent routinely took a history of sexually transmitted diseases, only 24.7 percent routinely assessed the risk of transmitting or acquiring HIV, and only 17.6 percent routinely took a history of sexual orientation.⁴⁰² Parallel studies were conducted at the same time among gay men. Less than half (41.6 percent of 573 men) had discussed their sexual orientation with their personal physician. When asked why they had not, 74 percent responded that they were never asked.⁴⁰³

Similarly, a more recent study undertaken in Québec revealed that physicians just entering the system seem ill at ease in evaluating their patients' risks with regard to HIV. The physicians find it more difficult to question gay men and lesbians about their sex lives than heterosexuals, and they tend more to ask questions about drug use than about their patients' sex lives. When the subject of sex is brought up, the information gathered is inadequate to evaluate the risks of HIV transmission: only one in five doctors questioned his/her patients about anal intercourse.⁴⁰⁴

This kind of discomfort with and avoidance of issues specific to the health of gay men and lesbians among recently trained physicians points to a failure in existing medical school curricula and clinical training. The Québec Human Rights Commission has criticized the lack of training with respect to gay and lesbian issues in the health-care network and in university studies.⁴⁰⁵ There is a scarcity of courses on gay and lesbian issues in curricula for medical studies, nursing sciences, and the social sciences as a whole, including sexology departments. Ramsay poses the question: How can someone "earn any kind of health-oriented degree without ever once receiving positive information on sexual orientation or on

how to address homophobia?"⁴⁰⁶

Moreover, in providing HIV/AIDS-related care to gay and bisexual men or lesbians, the training that is required goes beyond identifying risks, recognizing symptoms, and prescribing medicine. Since so many of the aspects of the HIV epidemic, and an individual's experience of HIV disease, are social, the training that health-care professionals require includes an understanding of the psychosocial dimensions of gay, bisexual, and lesbian identity and of HIV/AIDS, as well as a knowledge of the theoretical principles of health promotion and population health

In order to address these shortcomings, change is necessary:

Change begins by talking and listening. It continues with the formation of joint community advisory committees that include all the players - lesbian, gay, and straight. It must look at partnerships. It must involve the removal of institutionalized homophobia within the health care system. It ultimately must recognize the validity of lesbian and gay health issues, and examine how to include these as part of on-going hospital services. Academically-oriented community health services must mean more than microscopes and magnifying glasses. If the goal of improving health in Canada is to be taken seriously, then we must develop and implement inclusive strategies which promote and enhance active involvement for all communities in decision-making around their health.⁴⁰⁷

Recommendations

39. All curricula in medicine, nursing sciences and the social sciences should include a component on sexuality in general and on homosexuality in particular, and adopt a multidisciplinary approach to health problems.

40. All health-care workers should be provided with adequate training to give them the skills to work with gay men, lesbians, bisexuals, and transgendered people.

41. All federal and provincial health departments and ministries should adopt a policy of accessibility to care and services for gay men, lesbians, bisexuals, and transgendered people.

Behavioural Research

It is imperative that efforts to prevent HIV transmission be informed and directed by research. In the absence of sufficient understanding, interventions will not achieve their full potential effect. To achieve a sufficient understanding of the HIV epidemic among men who have sex with men and among lesbians, however, what is required is a research program that is sensitive to diversity in identity and sexual behaviours, and that investigates risks to health within the social context of sexual identity and sexual activity.

In this regard, there have been a number of weaknesses to date in epidemiological and behavioural research on men who have sex with men. (The social sciences have hardly begun to consider issues related to lesbians in the context of HIV/AIDS.) These weaknesses can, in many ways, be traced back, initially, to avoidance or neglect of the reality of gay, bisexual, or lesbian experience within the general population, and, subsequently, to limited or reductionist approaches to gay, bisexual, and lesbian sexual identity and sexual activity.

First, behavioural research on the general population has rarely dealt with sexual orientation. Researchers have taken for granted, as is often the case in health and social services, that the population is first and foremost heterosexual. In addition, the stigma associated with homosexuality has inhibited or prevented researchers from investigating homosexuality openly in studies and surveys of the general population.

Second, the purpose of much of the early behavioural research among gay men was to measure changes in behaviour from an epidemiological perspective. In most of this research, the individual was considered independently of his environment and isolated actions were emphasized, without taking underlying factors into account.⁴⁰⁸

Third, there is a tendency in research to consider that gay men form a homogeneous group whose members are defined solely on the basis of their sexual orientation. However, a number of studies show that some subgroups seem particularly vulnerable to HIV infection: youth, the socioeconomically disadvantaged, men who live outside the major urban centres, and those who do not self-identify as either homosexual or bisexual men.⁴⁰⁹ It is precisely these subgroups on which little information is available.

Fourth, sexual relationships between people of the same sex are rarely considered as social phenomena and very often strictly as behaviours. Relationships between people of the same sex are often considered strictly from a sexual point of view, neglecting their affective, emotive and loving aspects. Stripped of emotion, sexual relationships are considered as existing in themselves, independently of the society in which they are lived and thus independently of that society's resistance to gay men and lesbians. When sexual acts are seen strictly as behaviours, stripped of their social roots, they are considered to be easily changed. So issues such as the negotiating the use of condoms between partners, or same-sex domestic violence, are barely dealt with. Domestic violence is seen as an issue that has to be dealt with, but it is often left out of research based on behaviours. Differences in status and power relationships, factors that influence the adoption and maintenance of safer-sex behaviours, are also rarely recognized in

behavioural research.⁴¹⁰

Fifth, some criteria used in research are designed strictly for purposes of measuring the development of the epidemic rather than understanding it. For example, in the early 1990s, the notion of relapse made its appearance. This notion does not highlight the reasons that lead some people to not always behave safely, but rather the falling back on risk behaviours.⁴¹¹

Sixth, research does not take into account discrimination vis-à-vis gay men and lesbians. Stigma and discrimination may lead individuals not to accept their sexual orientation and others to hesitate to affirm it, including when answering research questionnaires. Certain factors relating to the homosexual condition itself - the negative recognition of sexual orientation, rejection by the heterosexual environment, and resulting psychological difficulties - are associated with unsafe sexual practices and should be taken into account more often in behavioural research.

Finally, early behavioural research developed independently of the individuals concerned. Researchers were subsequently more action-oriented on most health issues. In the fight against HIV/AIDS, it is necessary to improve the links between universities and the communities and to rely on the expertise of gay men and lesbians.

Recommendations

42. A sexual orientation component should be integrated into research on the general population that deals with health and well-being.

43. Multidisciplinary research should be undertaken on the social environment of gay and bisexual men, self-affirmation and empowerment, based on the participation of men who have sex with men, to better evaluate and understand the impact of discrimination on the spread of HIV.

44. Systematic, two-way transfer of knowledge and skills between health-care networks, the research community and gay and bisexual men and lesbians, from the development of research protocols to the implementation of concrete measures, needs to be ensured.

Government and Institutional Responses to HIV/AIDS

It has been said that the phenomenon of HIV/AIDS is unique because "even as it has represented a clear and overwhelming threat to our public health and our national stability, it has simultaneously received less public attention and a more ambivalent governmental response than any other public emergency of a comparable dimension in our century."⁴¹² In the United States, President Ronald Reagan made his first public mention of the word "AIDS" in a speech delivered on 31 May 1987, nearly seven years after the illness had first appeared. On that date, AIDS had been diagnosed in over 36,000 men, women, and children in the US, and had already claimed over 20,000 lives. In contrast, only two days after the outbreak of Legionnaire's Disease had been announced, the President of the United States had been photographed holding an emergency meeting in the Oval Office to deal with the outbreak. The House of Representatives began emergency hearings into possible causes of Legionnaire's Disease only three months after the initial outbreak of the illness. By contrast, the first House of Representatives hearings on AIDS began on 9 May 1983, nearly two years after the disease first appeared in the US. By the end of the first 12 months of the AIDS epidemic, the Centers for Disease Control had spent a total of US\$1 million investigating and fighting the illness. By the end of the first 12 months following the appearance of Legionnaire's Disease, the CDC had spent a total of US\$9 million fighting it. Two years into the AIDS epidemic, and with 634 cases, *The New York Times* had printed only six articles on the epidemic, none of them on the front page. This is in contrast to the 33 articles - 11 of them on the front page - that *The New York Times* had printed during the first 30 days of the Legionnaire's Disease outbreak, when the illness's death toll had reached 24.

Governments Slow to Respond to a "Gay" Disease

Just how important was the association of HIV/AIDS with gay men and other stigmatized "risk groups" and the lethargic public response to the epidemic? One can get a partial answer by returning to the example of *The New York Times* coverage of AIDS issues:

In 1983, infected individuals finally began to be discovered outside of the previously identified "risk groups" of gay men, intravenous drug users, hemophiliacs, Haitians, and immigrants; around the same time, scientists realized that individuals could carry and transmit the virus without exhibiting any physical indications of HIV infection themselves. In other words, the disease could strike anyone. Coverage of the AIDS epidemic by the New York Times suddenly skyrocketed. From a total of only six news stories on AIDS throughout all of 1981 and 1982, Times coverage jumped to almost daily stories beginning in mid-1983. The year 1983 became the year that America discovered the AIDS epidemic - two years and literally hundreds of deaths after it had first appeared. *Life* magazine's famous "Now No One Is Safe From AIDS" cover appeared in 1985. Even now, the only comprehensive governmental initiative to address the AIDS-care needs of the American public is named after a child - Ryan White - who, although indisputably a true American hero, was also considered an "innocent victim" of the epidemic by virtue of his having received the virus through a contaminated blood transfusion.⁴¹³

In Canada, governments were equally slow to take AIDS seriously or to recognize that it is different from other diseases: "Many administrative officials relied on routines established for earlier epidemics, not asking for more than modest budgetary increases until the late 1980s." Early on, elected politicians were typically more than ready to avoid dealing with AIDS themselves and to let ordinary administrative routines take their course.⁴¹⁴

In the *Final Report* of the Commission on the Blood System in Canada,⁴¹⁵ Justice Krever provided extensive evidence of the effect that homophobia had on the swiftness of the public health response to HIV/AIDS.⁴¹⁶ The Report examines how AIDS emerged in Canada and how the public health system responded. It documents in extensive detail the various public health initiatives undertaken at the federal and provincial levels to alert Canadians about the emergence of AIDS and to help prevent the spread of HIV, showing that the public health response was very inconsistent and, in some parts of the country, non-existent for many years after the epidemic began.

Justice Krever examined in particular public health efforts to alert gay communities across Canada to the emergence of HIV/AIDS. He documented some rare examples where provinces and municipalities supported early efforts of local gay and lesbian organizations to reach the members of gay communities with messages about HIV/AIDS. However, Justice Krever concluded that this was the exception rather than the rule: "In most provinces, however, senior public health officials were reluctant to give financial assistance to the educational work of such organizations, in part because of the sexual orientation of their members."⁴¹⁷ Justice Krever illustrates this comment with the following:

For example, in February 1984 the Minister of Health of Saskatchewan received a letter from the board of directors of the Gay Community Centre of Regina inviting him to attend a conference in March at which physicians, psychiatrists, and other health care workers could present information about AIDS. The board asked the Minister to welcome participants and to explain the government's position on controlling AIDS. On a copy of the letter in the departmental files, the words "go to hell" appear in handwriting.⁴¹⁸

Similarly, in British Columbia, the Ministry of Health refused funding requests from AIDS Vancouver to support the production of pamphlets about AIDS for gay men. The position of the Ministry, quoted in the *Final Report* from an internal Ministry newsletter, was that funding such pamphlets "might imply total endorsement of the contents which included various sexually explicit slang terms and a general advocacy of homosexuality."⁴¹⁹ As stated by the Canadian AIDS Society,

[t]hese are just two examples of what was a widespread problem across the country. One of the main purposes of CAS' participation in the Krever Inquiry was to ensure that this evidence was presented and that the effect this rampant homophobia had on the swiftness of the public health response to HIV/AIDS was clearly documented. Public health across Canada was slow to respond to HIV/AIDS because of attitudes towards those it was affecting. The price of this slowness was the rapid spread of the epidemic, including

contamination of the blood system. Krever concludes in his report that Canada failed to take advantage of the window of opportunity it had in the early 1980s to move swiftly in response to the emergence of HIV/AIDS and to contain the growth of the epidemic. Homophobia played a significant role in this failure.⁴²⁰

Clearly, the stigmatization of gay and lesbian sexuality and relationships undermined the ability to respond effectively during the early years of the HIV epidemic. Governments did not want to acknowledge that a problem existed, much less discuss activities such as anal intercourse, which they viewed as shameful. The stigma surrounding same-sex sexual practices and gay identity represented an enormous obstacle in any efforts to reach and inform gay men about HIV.

The Evolution of Canada's Response

Generally, in Canada, the evolution of public policy on AIDS has been characterized as moving through three distinct stages.⁴²¹ The first began in the early 1980s, as many politicians and officials ignored the epidemic or responded very cautiously. The second began in mid 1985, when Rock Hudson's illness became public knowledge, greatly intensifying public interest and concern in Canada, and when the development of HIV blood tests raised new issues for debate. In this period, Canadian governments began to make significant but usually ad hoc commitments to AIDS programs. As the number of AIDS cases increased, community groups grew in size and proliferated, with new militant voices broadening the range and intensity of criticism directed at government inactivity. The third began in the spring of 1988, when the pressure on all levels of government to develop coherent AIDS strategies was dramatically increased by the protests of community group activists at the National AIDS Conference:

On May 17, 1988, Jake Epp was burned in effigy. In a country not usually given to such public dramas - a country with a tradition of political reserve and accommodation - the attack on the federal minister of health and welfare was a turning point in the AIDS epidemic in Canada.⁴²²

More recently, a fourth phase began, characterized by a "normalization" of AIDS policy and the possibility that it may be integrated into other areas of health education and care. The biggest challenge has become to secure continued government commitment and funding for HIV/AIDS. After many years of hesitation, governments in Canada created distinctive administrative units to respond to AIDS, acknowledging that the epidemic raises special issues and poses special dilemmas. But government support for special HIV/AIDS programs and units has been disappearing and HIV/AIDS "exceptionalism" is increasingly seen as a thing of the past. In many ways, this may be due to the fact, as expressed by participants at Canada's first national workshop on gay and lesbian legal issues and HIV/AIDS, that HIV/AIDS is still affecting and likely will continue to disproportionately affect the "others" - disadvantaged communities from which the majority of Canadians and their governments can disassociate themselves.

A "No-Win" Situation for Gay Men

It is striking that the HIV/AIDS epidemic received little attention when in the early 1980s it was thought that it only affected gay men. It received a lot of attention and increased funding when, in the mid 1980s, it was seen as threatening the "general population." Then commitment and funding for HIV/AIDS started decreasing when it appeared that the epidemic would affect the "general population" less than was anticipated in the mid 1980s.

As the response to the epidemic oscillated in this way, gay men have found themselves in a no-win situation. Initially, they had to emphasize that AIDS was not a gay disease, so that governments would take the disease seriously and allocate funding to research and prevention efforts. They feared even greater discrimination and coercive measures directed against them if AIDS continued to be perceived as a gay disease. Since the early 1990s, however, gay men have had to "reclaim" AIDS, because efforts have been increasingly and disproportionately directed at other groups of the population, leaving gay men with still very high numbers of new infections but relatively little funding for prevention efforts. There has been a de-gaying of AIDS in research and in public health, in the interests of getting the message across to the general population, often under the pretext of not increasing discrimination.⁴²³ The results speak for themselves: to date, financing of research and preventive education concerning gay men has never reached an acceptable level in relation to the rate of infection among gay men.

Dejowski, talking about the situation in the US, has pointed out how legislation to prevent the transmission of HIV in the US has sometimes become enmeshed in the political agendas and personal moral philosophies of legislators. According to him, the result has been the shaping of a prevention strategy that is at odds with the findings of health behaviour research, and that forces the implementation of programs that are likely to have minimal effect on one of the populations most at risk of contracting the disease - gay men.⁴²⁴

Programmatic Failings Due to Homophobia

At the national workshop organized by the Joint Project, participants pointed out many ways in which homophobia impacts on government and institutional responses to HIV/AIDS:

- *Commitment:* Because HIV/AIDS primarily affects marginalized populations, governments are less committed to fighting the disease. More than fifteen years after the beginning of the epidemic, the general impression is that, if HIV/AIDS has become a lesser political priority, this is mainly because the disease still affects a disproportionate

number of gay men, drug users and members of other minorities.

- *Provincial and federal funding*: The dwindling commitment is having a major impact on the willingness of provincial and federal governments to allocate dedicated and sufficient funding for HIV/AIDS-related activities. Another concern is that inappropriate and misleading comparisons with other diseases, such as cancer, are often used by those who claim that AIDS receives adequate or even too much funding. Closer analysis of these comparisons reveals that they are flawed: often AIDS, a preventable disease, is compared with non-preventable diseases. In many cases, the total AIDS Strategy funding, which includes funding for prevention efforts, is compared with research-related funding for other diseases, without including funding for prevention efforts that may come out of different budgets.
- *School systems*: The refusal of many school systems to provide positive education about gay and lesbian sexuality is a clear example of how homophobia impacts on young gay and lesbian people's ability to protect themselves from contracting HIV.
- *Prison systems*: The refusal of many provincial - and, until 1992, federal - prisons to make condoms available to prisoners has at least in part been justified by the unwillingness of authorities to "condone homosexual activity." As a result, prisoners and their partners outside prison are unnecessarily exposed to the risk of contracting HIV.

Participants at the national workshop on gay and lesbian legal issues and HIV/AIDS pointed out that homophobia and discrimination hamper the prevention of HIV not only in gay communities, but also in the general population, where many still see HIV/AIDS as fundamentally a gay disease. This perception has a number of consequences:

- In the public's mind, HIV/AIDS is linked "**to the populations most affected by it**, rather than to the **specific risk behaviors that transmit it**."⁴²⁵ As a result, the public may have a highly erroneous perception of what constitutes risk of HIV transmission. One US study found, for example, that almost half of respondents thought that there was a serious risk of transmission through sexual relations between two uninfected gay men.⁴²⁶
- Someone who does not consider him/herself a member of one of the disease's "officially recognized risk groups or at-risk populations" will have a false sense of security.⁴²⁷ This was evidenced by one Canadian study that found that 60 percent of respondents said that homosexual men were at greater risk of contracting HIV infection than other groups.⁴²⁸ This view has been confirmed in other Canadian studies.⁴²⁹
- The association between HIV/AIDS and homosexuality has hampered the efforts of some non-gay communities to generate their own responses to the epidemic. Because of the stigma associated with homosexuality, it has been difficult for individuals and

communities to acknowledge publicly that the HIV epidemic is affecting them, and to organize in response to the epidemic. People do not wish to be publicly associated with a disease that, in their own mind or the mind of others, is a "gay" disease.

Recommendations

45. Phase III of the National AIDS Strategy should explicitly acknowledge the historic and continuing magnitude and impact of the HIV epidemic among gay and bisexual men, and ensure that funding for programs to respond to this epidemic is commensurate with its magnitude and impact.

46. Phase III of the National AIDS Strategy should specifically state how it will address the continuing HIV epidemic among men who have sex with men in policies and programs relating to:

- **human rights and discrimination;**
- **public education;**
- **prevention of HIV transmission;**
- **community development;**
- **care, treatment and support of people with HIV/AIDS;**
- **epidemiological surveillance; and**
- **research.**

47. Phase III of the National AIDS Strategy should ensure that policies and programs relating to the HIV epidemic among women specifically address issues pertaining to lesbian women.

Conclusion

In the fight against the HIV epidemic in Canada and in the world, the gains have been few, precious, and

hard won. One of those gains has been the mobilization of the gay and lesbian communities to educate their members about HIV/AIDS, to develop innovative programs that would support people in exploring and expressing their sexual and social identity more safely, and to advocate on behalf of the needs of gay men, bisexuals and lesbians in human rights, health and social services, and HIV/AIDS programming. The fact that the rate of HIV infection has slowed among the generation of gay and bisexual men that was first affected by the epidemic is in part a testimony to the effectiveness of these efforts. The fact that the rate of HIV infection remains high among younger gay and bisexual men indicates that more remains to be done.

We now recognize that preventing the transmission of HIV is complex. It is not simply a matter of knowledge, attitudes, and behaviours, important as correct knowledge, sustained motivation, and, ultimately, safe behaviours are. Preventing the transmission of HIV is also about creating the environments in which people are free to acknowledge their sexual identity, to seek information and get information, to experience the support of peers and role models, to receive services that fit (rather than exclude) their experiences, to see themselves written into (rather than out of) culture, knowledge, and society. For gay and bisexual men and for lesbians, preventing HIV transmission requires preventing and eliminating discrimination based on sexual orientation.

The gay and lesbian community, AIDS service organizations, human rights commissions and advocates, and others have worked hard to eliminate discrimination based on sexual orientation. This *Report* recounts what has been achieved, after long struggles, in the law and in the courts. When it comes to preventing transmission of HIV, however, a universal, concerted effort is required. The relationship between the HIV epidemic among men who have sex with men and discrimination against gay men, bisexuals and lesbians at the societal, programmatic and personal levels has made this abundantly clear. HIV is transmitted among men who have sex with men not just because of unsafe sex. It is transmitted because homosexual or bisexual identity is not acknowledged, permitted, and supported as a natural development of human personality. It is transmitted because families, communities, and society tolerate or support, implicitly or explicitly, aggression, abuse, and violence against gay men and lesbians. It is transmitted because schools have failed to provide appropriate education and cultivate supportive environments for gay and bisexual youth. It is transmitted because health-care providers and researchers have failed, because of insufficient awareness and inappropriate assumptions, to ask the right questions. It is transmitted because governments have been slow publicly to support programs directed specifically to men who have sex with men, and because politicians continue to attack the programs that currently exist.

Chapter 2 of this Report underscores the imperative of anti-discrimination and protective laws for gay and bisexual men and lesbians, as called for by the Second International Consultation on HIV/AIDS and Human Rights:

Anti-discrimination and protective laws should be enacted to reduce human rights violations against men having sex with men, including in the context of HIV/AIDS, in order, *inter alia*, to reduce the vulnerability of men who have sex with men to infection by HIV and to the impact of HIV/AIDS. These measures should include providing penalties

for vilification of people who engage in same-sex relationships, giving legal recognition to same-sex marriages and/or relationships and governing such relationships with consistent property, divorce and inheritance provisions. The age of consent to sex and marriage should be consistent for heterosexual and homosexual relationships. Laws and police practices relating to assaults against men who have sex with men should be reviewed to ensure that adequate legal protection is given in these situations.⁴³⁰

Chapter 3 of this Report stresses the need, also noted by the Second International Consultation on HIV/AIDS and Human Rights,⁴³¹ for education, training, and programming that will change discriminatory attitudes in the community, at school, in the workplace, among professionals and in research, in order to create environments that will decrease the risks to health, including HIV infection, among people who are not heterosexual and that will support gay men, bisexuals and lesbians living with HIV/AIDS.

Fifteen years after the first case of AIDS was reported in Canada, it is no longer a question of what is required. It is a question of the will to do what is required.

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FOOTNOTES

³²² J Mann et al, eds. *AIDS in the World*. Cambridge, MA: Harvard University Press, 1992, as described in Mann & Tarantola, supra, note 81, at 441.

³²³ For a more detailed analytical framework of these three levels of vulnerability, applied particularly to young people, see Mann & Tarantola at 455-457.

³²⁴ K Morrison, A Vassal. Les hommes gais, le sida et la science. In: *Le sida*. Montréal: Gaétan Morin (forthcoming).

³²⁵ DF Morrow. Social work with gay and lesbian adolescents. *Social Work* 1993; 38(6): 655-660.

³²⁶ V Uribe, KM Harbeck. Addressing the needs of lesbians and gay and bisexual youth: The origin of

Project 10 and school based intervention. *Journal of Homosexuality* 1991; 22(3/4): 1100-1109; M Goggin, J Sotiropoulos. Sex in silence: A national study of young gays. X International Conference on AIDS, Yokohama, Japan, August 1994.

³²⁷ Y Jalbert. The Coming Out Process among Gay Youth and the Impact on the Health Services. 6th Annual Canadian Conference on HIV/AIDS Research, 22-25 May 1997. *Canadian Journal of Infectious Diseases* 1997; 8(Suppl A): 13A. Abstract no 121.

³²⁸ ES Hetrick, AD Martin. Developmental issues and their resolutions for gay and lesbian adolescents. *Journal of Homosexuality* 1987; 14(1/2): 25-43.

³²⁹ National Community AIDS Partnership. *A Generation at Risk. A Background Report on HIV Prevention and Youth*. Washington DC, 1993.

³³⁰ AR D'Augelli. Preventing mental health problems among lesbian and gay college students. *The Journal of Primary Prevention* 1993; 13(4): 245-261.

³³¹ AR D'Augelli. Lesbians and gay male undergraduates' experiences of harassment and fear on campus. *Journal of Interpersonal Violence* 1992; 7: 383-395.

³³² J Otis, B Ryan, N Chouinard. Profil des jeunes à leur entrée au groupe de support du Projet 10 - Document de travail. Montréal: Régie régionale de la Santé et des Services sociaux, January 1997. The Project 10 initiative extended to other Canadian cities (Halifax, Windsor, Winnipeg and Kamloops) in order to develop recommendations for a best-practices model that takes regional differences into account in work with gay, lesbian and bisexual youth.

³³³ CR Fikar. Gay teens and suicide. *Pediatrics* 1992; 89: 519-520.

³³⁴ K Whitlock. *Bridges of Respect: Creating Support for Lesbian and Gay Youth* (1989), referred to in: CL Dempsey. Health and Social Issues of Gay, Lesbian and Bisexual Adolescents. *The Journal of Contemporary Human Services* 1994; 75(3): 160-167.

³³⁵ D'Augelli, supra, note 330.

³³⁶ Health Canada. *The Experiences of Young Gay Men in the Age of HIV*. Ottawa: Minister of Supply and Services, 1996, at 15.

³³⁷ SK Telljohann, JH Price. A qualitative examination of adolescent homosexuals' life experiences: Ramifications for secondary school personnel. *Journal of Homosexuality* 1993; 26(1): 41-56.

³³⁸ M Pollak. *Les homosexuels et le sida. Sociologie d'une épidémie*. Paris: AM Métailié, 1988.

339 Ibid.

340 GW Dowsett, MD Davis, RW Connell. Working class homosexuality and HIV/AIDS prevention: Some recent research from Sydney, Australia. *Psychology and Health* 1992; 6: 313-324; RW Connell, GW Dowsett, P Rodden et al. Social class, gay men and AIDS Prevention. *Australian Journal of Public Health* 1991; 15(3): 178-189; RW Connell, MD Davis, GW Dowsett. A bastard of a life: Homosexual desire and practice among men in working-class milieux. *Australian and New Zealand Journal of Sociology* 1993; 29(1): 112-136.

341 Godin et al, supra, note 27.

342 F Gruet, F Dubois-Arber. *Les homosexuels - Étude 1992*. Institut universitaire de médecine sociale et préventive, Unité d'évaluation des programmes de prévention. Lausanne, 1993; M-A Schiltz. *Les homosexuels masculins face au sida: Enquêtes 1991-1992*. Paris: Centre de mathématiques et d'analyse sociale, CNRS, 1993.

343 D Allman, T Myers. The bisex survey: Investigating bisexual men in Ontario. 10th Annual British Columbia Conference on HIV/AIDS, Vancouver, 1997.

344 M Bartos, J McLeod, P Nott. *Meanings of Sex between Men*. Australia: Australian Federation of AIDS Organisations, 1993. With regard to this discontinuity between homosexual relationships and the heterosexual milieu, in several ethnocultural communities repressive attitudes to homosexual people are pervasive. T Diaz, SY Chu, P Frederick et al. Sociodemographics and HIV risk behaviors of bisexual men with AIDS: Results from a multistate interview project. *AIDS* 1993; 7: 1227-1232.

345 For example, an Australian study of socioeconomically disadvantaged men shows that many of them wish to have a long-term relationship in spite of that being extremely rare, given the rather conservative social environment (Connell, supra, note 340).

346 AD Martin, S Hetrick. The stigmatization of gay and lesbian adolescents. *Journal of Homosexuality* 1988; 15(1/2): 163-183; GJ Remafedi. Fundamental issues in the care of homosexual youth. *Medical Clinics of North America* 1990; 74(5): 1169-1177.

347 J Hunter, R Schaecher. Lesbian and gay youth. In: MJ Rotheram-Borus, J Bradley, N Obolensky (eds). *Planning to Live: Evaluating and Treating Suicidal Teens in Community Settings*. Tulsa: University of Oklahoma Press, 1990, at 297-316.

348 C Anacabe, M Shriver. Outreach to gay and bisexual male street kids in San Francisco. VIII International Conference on AIDS, Amsterdam, July 1992; RB Hays, S Kegeles, TJ Coates. Community level HIV prevention program for young gay men. X International Conference on AIDS, Yohokama,

Japan, August 1994; Hetrick & Martin, *supra*, note 328; GJ Remafedi. Cognitive and behavioral adaptation to HIV/AIDS among gay men and bisexual adolescents. *Journal of Adolescent Health* 1994; 15(2): 142-148; Uribe & Harbeck, *supra*, note 326; RC Savin-Williams. Verbal and physical abuse as stressors in the lives of lesbians, gay males and bisexual youths: Associations with school problems, running away, substance abuse, prostitution and suicide. *Journal of Consultation in Clinical Psychology* 1994; 62: 262-269.

³⁴⁹ In the review just noted, *supra*, note 336, Health Canada did not state its own priorities on the issue, but reported those of three major studies: MJC King, RP Beazley, WK Warren et al. *Canada Youth & AIDS Study*. Toronto: Runge Press, 1988; CA O'Brien et al. *No Safe Bed: Lesbian, Gay and Bisexual Youth in Residential Services*. Toronto: Central Toronto Youth Services, 1993; L Treadway, J Yoakman. Creating a safer school environment for lesbian and gay students. *Journal of School Health* 1992; 62(7): 352-357. The recommendations that follow are based in part on the conclusions of these studies.

³⁵⁰ PGA Cornelisse et al. A Comparison of Risk Factors for HIV Transmission Between Two Cohorts of Gay Men (1982-84 vs. 1995). XI International Conference on AIDS, Vancouver, 1996. Abstract no Tu. C.2393.

³⁵¹ J de Wit et al. Risk for HIV-infection among young gay men: Sexual relations, high risk behavior and protection motivation. XI International Conference on AIDS, Vancouver, 1996; RS Gold, MJ Skinner. Situational factors and thought processes associated with unprotected intercourse in young gay men. *AIDS* 1992; 6: 1021-1030; RB Hays, SM Kegeles, TJ Coates. High HIV risk taking among young gay men. *AIDS* 1992; 4: 901-907; JA Kelly, JS St-Lawrence, TL Brasfield et al. AIDS risk behavior patterns among gay men in small Southern cities. *American Journal of Public Health* 1990; 80(4): 416-419; MJ Rotheram-Borus, C Koopman. Sexual risk behavior, AIDS knowledge and beliefs about AIDS among predominantly minority gay and bisexual male adolescents. *AIDS Education and Prevention* 1991; 3: 305-312; MJ Rotheram-Borus, H Reid, M Rosario. Factors mediating changes in sexual HIV risk behaviors among gay and bisexual male adolescents. *American Journal of Public Health* 1994; 84: 1938-1946.

³⁵² *Ibid*; Strathdee, *supra*, note 26; A Dufour et al. Risk Behaviour and HIV Incidence among Omega Cohort Participants: Preliminary Data. 6th Annual Canadian Conference on HIV/AIDS Research, May 22-25, 1997. *Canadian Journal of Infectious Diseases* 1997; 8(Suppl A): 23A. Abstract no. 201; T Myers et al. Bisexual Men and HIV in Ontario: Sexual Risk Behaviour with Men and with Women. 6th Annual Canadian Conference on HIV/AIDS Research, May 22-25, 1997. *Canadian Journal of Infectious Diseases* 1997; 8(Suppl A): 23A. Abstract no. 203. For evidence of continuing high risk behaviour in the United States, see LA Valleroy et al. HIV and Risk Behaviour Prevalence among Young Men Who Have Sex with Men Sampled in Six Urban Counties in the USA. XI International Conference on AIDS, Vancouver, July 7-12, 1996. Abstract no Tu.C.2407. See also M Bochow, F Chiarotti, P Davies et al. Sexual behaviour of gay and bisexual men in eight European countries. *AIDS Care* 1994; 6(5): 533-550; Myers et al, *supra*, note 61; P Weatherburn et al. *and Bisexual Men in England The Sexual Lifestyles of Gay and Wales*. Project Sigma. London: HMSO, 1992.

³⁵³ Y Jalbert. The Coming Out Process among Gay Youth and the Impact on the Health Services. 6th Annual Canadian Conference on HIV/AIDS Research, May 22-25, 1997. *Canadian Journal of Infectious Diseases* 1997; 8(Suppl A): 13A Abstract no 121.

³⁵⁴ Myers et al, supra, note 61; JA Kelly, SC Kalichman, MR Kauth et al. Situational factors associated with AIDS risk behavior lapses and coping strategies used by gay men who successfully avoid lapses. *American Journal of Public Health* 1991; 81(10): 1335-1339. For young men, see Hays, Kegeles & Coates, supra, note 348; GF Lemp, AM Hirozama, D Givertz et al. Seroprevalence of HIV and risk behaviors among young homosexual and bisexual men. *Journal of the American Medical Association* 1994; 272(6): 449-454. Several Australian studies show that socioeconomically disadvantaged men have a greater number of partners and a higher percentage have anal sex (Bartos et al, supra, note 344; Dowsett et al, supra, note 340).

³⁵⁵ Kelly et al, supra, note 351.

³⁵⁶ SL Martindale et al. Evidence of Psychologic Distress in a Cohort of Young Gay/Bisexual Men. 6th Annual Canadian Conference on HIV/AIDS Research, 22-25 May 1997. *Canadian Journal of Infectious Diseases* 1997; 8(Suppl A): 8A. Abstract no 102. These findings are comparable to those of other studies on the risks faced by gay youth, as reviewed in Health Canada, supra, note 336 at 12-13.

³⁵⁷ Ibid.

³⁵⁸ See C Strike et al. Nonconsensual Sex and Unsafe Sexual Behaviour: Results from the Bisex Survey. 6th Annual Canadian Conference on HIV/AIDS Research, 22-25 May 1997. *Canadian Journal of Infectious Diseases* 1997; 8(Suppl A): 14A. Abstract no 124.

³⁵⁹ Toonen, supra, note 8.

³⁶⁰ Dowsett et al, supra, note 340; Gold & Skinner, supra, note 351; DO Perkins, J Leserman, C Murphy et al. Psychosocial predictors of high-risk sexual behavior among HIV-negative homosexual men. *AIDS Education and Prevention* 1993; 5: 141-152; Schiltz, supra, note 342.

³⁶¹ S Kippax, J Crawford, B Connell et al. The importance of gay community in the prevention of HIV transmission: a study of Australian men who have sex with men. In: P Aggleton, P Davies, G. Hart (eds). *AIDS: Rights, Risk and Reason*. London: The Falmer Press, 1992, at 103-118; TG Heckman, JA Kelly, KJ Sikkema et al. Differences in HIV risk characteristics between bisexual and exclusively gay men. *AIDS Education and Prevention* 1995; 7(6): 504-512; A Messiah, E Mouret-Fourme et al. Sociodemographic characteristics and sexual behavior of bisexual men in France: Implications for HIV prevention. *American Journal of Public Health* 1995; 85(11): 1543-1547.

³⁶² Heckman et al, *ibid*; Messiah et al, *ibid*; P Weatherburn, DS Reid, PM Davies, Behaviourally

bisexual men in the U.K.: sexual practices, disclosures & implications. XI International Conference on AIDS, Vancouver, 1996.

³⁶³ Bartos et al, *supra*, note 344.

³⁶⁴ Myers et al, *supra*, note 61 at 57. In a subsequent report of the findings, the researchers report that study participants with a positive attitude toward being tested had a 40.45 times greater likelihood of intending to be tested compared with those with a negative attitude. Low and high intenders differed on each one of the four items included in the "Reasons for not taking the test" scale: "I do not want to know," "I do not want my name on a government list," "It could affect my career or insurance," and "It could affect my relationships." See G Godin et al. Understanding the Intention of Gay and Bisexual Men to Take the HIV Antibody Test. *AIDS Care* 1997; 9(1): 31-41.

³⁶⁵ Myers et al, *ibid* at 71.

³⁶⁶ *HIV Testing and Confidentiality: A Discussion Paper*, *supra*, note 315, at 60-63, citing extensive literature at nn 164 and 165.

³⁶⁷ I Hertz-Picciotto et al. HIV Test-Seeking Before and After Restriction of Anonymous Testing in North Carolina. *American Journal of Public Health* 1996; 86(10): 1446-1450.

³⁶⁸ M Laryea, L Gien. The Impact of HIV-Positive Diagnosis on the Individual, Part 1: Stigma, Rejection, and Loneliness. *Clinical Nursing Research* 1993; 2(3): 245-266 at 254.

³⁶⁹ RB Hays et al. Disclosing HIV Seropositivity to Significant Others. *AIDS* 1993; 7(3): 425-431 at 425.

³⁷⁰ *Ibid* at 417-428; G Kadushin. Gay Men with AIDS and their Families of Origin: An Analysis of Social Support. *Health and Social Work* 1996; 21(2): 141-149 at 143, and the literature cited there; JM Simoni et al. Disclosing HIV Status and Sexual Orientation to Employers. *AIDS Care* 1997; 9(5): 589-599 at 591, and the literature cited there.

³⁷¹ *Ibid* at 429-430.

³⁷² Kadushin, *supra*, note 370 at 143-144, and the literature cited there.

³⁷³ Adam & Sears, *supra*, note 64 at 105.

³⁷⁴ *Ibid* at 102-106.

³⁷⁵ *Ibid* at 95.

³⁷⁶ GM Powell-Cope, MA Brown. Going Public as an AIDS Family Caregiver. *Social Science and Medicine* 1992; 34(5): 571-580 at 575.

³⁷⁷ Reported in de Bruyn, *supra*, note 5.

³⁷⁸ As a national study concluded almost a decade ago: see Federal Centre for AIDS Working Group on HIV Infection and Mental Health. *Ending the Isolation. HIV Disease and Mental Health in the Second Decade*. Ottawa: Minister of Supply and Services, 1992, at 52.

³⁷⁹ For a concise summary of the literature, see G Green. Stigma and Social Relationships of People with HIV: Does Gender Make a Difference? In L Sherr et al, eds. *AIDS as a Gender Issue: Psychosocial Perspectives*. London: Taylor and Francis, 1996, 46-63 at 48.

³⁸⁰ Hays et al, *supra*, note 369; MS Miles et al. Personal, Family, and Health-Related Correlates of Depressive Symptoms in Mothers with HIV. *Journal of Family Psychology* 1997; 11(1): 23-34; A Demi et al. Effects of Resources and Stressors on Burden and Depression of Family Members who Provide Care to an HIV-Infected Woman. *Journal of Family Psychology* 1997; 11(1): 35-48.

³⁸¹ J Littrell. How Psychological States Affect the Immune System: Implications for Interventions in the Context of HIV. *Health and Social Work* 1996; 21(4): 287-295; G Kadushin. Gay Men with AIDS and their Families of Origin: An Analysis of Social Support. *Health and Social Work* 1996; 21(2): 141-149 at 143; S Cohen, TA Wills. Stress, Social Support, and the Buffering Hypothesis. *Psychological Bulletin* 1985; 98(2): 310-357.

³⁸² Hays, *supra*, note 369 at 427-429.

³⁸³ *Ibid* at 430.

³⁸⁴ Powell-Cope & Brown, *supra*, note 376 at 578-579.

³⁸⁵ *Ibid* at 575-576.

³⁸⁶ *Supra*, note 369.

³⁸⁷ JB Pryor et al. Fear and Loathing in the Workplace: Reactions to AID-infected Co-Workers. *Personality and Social Psychology Bulletin* 1991; 17(2): 133-139.

³⁸⁸ Adam & Sears, *supra*, note 64 at 125.

³⁸⁹ *Ibid*.

³⁹⁰ Reported in de Bruyn, *supra*, note 5.

³⁹¹ Adam & Sears, *supra*, note 64 at 132-133.

³⁹² JM Simoni et al. Disclosing HIV Status and Sexual Orientation to Employers. *AIDS Care* 1997; 9(5): 589-599.

³⁹³ See Adam & Sears, *supra*, note 64 at 119 for similar reports.

³⁹⁴ Simoni et al, *supra*, note 392 at 595.

³⁹⁵ *Ibid* at 596.

³⁹⁶ Y Jalbert, R Masson. Trithérapie et retour au travail: oui mais... Résultat d'un sondage québécois. Montréal: Coalition des organismes communautaires québécois de lutte contre le sida, 1997. A similar rate of disclosure was found in a study of people living with HIV/AIDS in Newfoundland in 1991-92, where, out of 25 people, 10 were employed and, of these, 4 had disclosed their HIV status. Of these 4, one was laid off and another fired as a result of telling their employer. See Laryea & Gien, *supra*, note 368 at 254.

³⁹⁷ See, eg, G Mallon. Gay and no place to go: Assessing the needs of gays and adolescents in out-of-home care settings. *Child Welfare* 1992; 71(6): 547-556, cited in Health Canada, *supra*, note 336; GM Herek, J Cogan. *AIDS & Stigma. A review of the Scientific Literature*. Public Media Center, Ford Foundation and Joyce Mertz-Gilmore Foundation, at 25.

³⁹⁸ JM Mann. *Towards a New Strategy for AIDS*. Cambridge: Global AIDS Policy Coalition, 1993; RS Parker. Empowerment, community mobilization and social change. XI International Conference on AIDS, Vancouver, July 1996.

³⁹⁹ H Ramsay. Lesbians and the Health Care System. Invisibility, Isolation and Ignorance - You Say You're a What? *Canadian Woman Studies* 14(3): 22-27 at 23, with reference to ML Adams. You're All Right So Long As You Act Nice: Lesbians' Experience of North American Health Care System. *Fireweed*, Spring 1989.

⁴⁰⁰ *Ibid*.

⁴⁰¹ Ramsay, *supra*, note 399 at 23.

⁴⁰² LH Calabrese et al. Physicians' Attitudes, Beliefs, and Practices Regarding AIDS Health Care

Promotion. *Archives of Internal Medicine* 1991; 151(6): 1157-1169.

⁴⁰³ Ibid at 1160.

⁴⁰⁴ N Haley, B Maheux, M Rivard et al. *STD/HIV Prevention by Newly-Trained Family Physicians*. Québec, 1994.

⁴⁰⁵ Québec Human Rights Commission, supra, note 131. In response, the Québec department of health and social services (MSSS) produced and distributed a paper reporting on the state of the services it provides (Direction de la Planification et de l'Évaluation. *Santé, bien-être et homosexualité. Éléments de problématique et pistes d'intervention*. Québec: MSSS, 1996). The document notes that the *Politique de la Santé et du Bien-être* (MSSS, 1992) provides for accessibility for everyone, including vulnerable groups. The ministry's position is based on the following principles: eliminate all discrimination in the provision of services; recognize the legitimacy of the aspirations of gay men, lesbians and bisexuals for a better situation; and promote respect for these groups and their differences. However, in practice, problems persist.

⁴⁰⁶ Supra, note 399 at 23. Concern over prejudice against patients with HIV/AIDS has recently led to the development of teaching modules called Sex, Drugs & HIV. See: Sex, drugs & HIV. *Canadian Medical Association Journal* 1996; 155: 767.

⁴⁰⁷ Ramsay, supra, note 399 at 26.

⁴⁰⁸ C Donovan, C Mearns, R McEwan et al. A review of the HIV-related sexual behavior of gay men and men who have sex with men. *AIDS Care* 1994; 6(5): 605-617.

⁴⁰⁹ P Weatherburn, AJ Hunt, PM Davies et al. Condom use in a large cohort of homosexually active men in England and Wales. *AIDS Care* 1991; 3: 31-41.

⁴¹⁰ Morrison & Vassal, supra, note 324.

⁴¹¹ PM Davies, P Weatherburn, AJ Hunt et al. The sexual behaviour of young gay men in England and Wales. *AIDS Care* 1992; 4(3): 259-273; G Hart, M Boulton, R Fitzpatrick et al. Relapse to unsafe sexual behaviour among gay men: A critique of recent behavioral HIV/AIDS research. *Sociology of Health and Illness* 1992; 14: 216-232.

⁴¹² Public Media Center. *The Impact of Homophobia and Other Social Biases on AIDS*. San Francisco: The Center, 1995, at 9. The following examples are taken from this report.

⁴¹³ Ibid at 17.

⁴¹⁴ DM Rayside, EA Lindquist. Canada: Community Activism, Federalism, and the New Politics of Disease. In: R Bayer, DL Kirp (eds). *AIDS in the Industrialized Democracies. Passions, Politics, and Policies*. New Brunswick, New Jersey: Rutgers University Press, 1992, 49-98 at 49.

⁴¹⁵ See supra, note 10.

⁴¹⁶ The following summary has been adapted from a Canadian AIDS Society Advocacy Alert. Federal Government Releases Krever Report. Ottawa: The Society, 12 December 1997.

⁴¹⁷ *Final Report*, vol 2, supra, note 10 at 571.

⁴¹⁸ Ibid.

⁴¹⁹ Ibid.

⁴²⁰ Supra, note 416 at 5.

⁴²¹ Rayside & Lindquist, supra, note 414 at 49.

⁴²² Ibid.

⁴²³ C Patton. *Inventing AIDS*. London: Routledge, 1990; D Altman. *Power and Community: Organizational and Cultural responses to AIDS*. London: Taylor and Francis, 1994; S Watney. *Practices of Freedom: Selected Writings on HIV-AIDS*. Durham: Duke University Press, 1994.

⁴²⁴ EF Dejowski. Federal Restrictions on AIDS Prevention Efforts for Gay Men. *Saint Louis University Public Law Review* 1989; 8: 275-298.

⁴²⁵ *The Impact of Homophobia*, supra, note 412 at 23 (emphasis in the original).

⁴²⁶ GM Herek, JP Capitanio. Public reactions to AIDS in the United States: A Second decade of stigma. *American Journal of Public Health* 1993; 83: 574-577.

⁴²⁷ *The Impact of Homophobia*, supra, note 412 at 23.

⁴²⁸ M Ornstein. *AIDS in Canada: Knowledge, Behaviour and Attitudes of Adults*. Toronto: University of Toronto Press, 1989.

⁴²⁹ King et al, supra, note 349.

⁴³⁰ United Nations Commission on Human Rights. *Second International Consultation on HIV/AIDS and Human Rights (Geneva, 23-25 September 1996)*. 20 January 1997 (document no. E/CN.4/1997/37), at 38.

⁴³¹ See the guidelines and specific suggestions under the heading "Promotion of a Supportive and Enabling Environment" - too numerous to list here - at *ibid*, 42-46.

Gay and Lesbian Issues and HIV/AIDS: Final Report

by John Fisher, Ralf Jürgens, Anne Vassal, Robert Hughes

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SUMMARY OF RECOMMENDATIONS

Recommendations

The recommendations in this Report do not propose a quick fix or offer easy answers to the many problems raised by HIV/AIDS. Nor do they suggest that the impact on human rights is the only consideration in designing public health policy. But they do argue that the fight against discrimination and for respect of the dignity of all people needs to be treated "as seriously as science, medicine, and public health,"⁴³² recognizing that HIV and AIDS have disproportionately affected vulnerable populations, including gay men, at least in part because of their vulnerability and the discrimination they have been subjected to. While prevention campaigns, public health measures and the other interventions that have been undertaken to reduce the spread of HIV have been and continue to be important, they often do not address the underlying problems that cause vulnerability to HIV. These recommendations do. Some require only minor changes in laws. Other require changes in attitudes that can only be achieved in the longer term. They all require a commitment to fight HIV/AIDS, rather than the people most affected by it and their behaviours, and to fight bigotry and prejudice in society. They are not directed at giving gay men and lesbians special rights. Rather, they recognize that discrimination, although it has diminished and although certain rights have been extended to gay men and lesbians, remains pervasive and that gay men and lesbians deserve to be treated with equal respect, as a matter of justice and, in the context of HIV/AIDS, because this would help reduce the spread of HIV and allow us to better care for those living with HIV/AIDS.

Gay Men, Lesbians and the Law

Criminal Law

1. Section 159 of the *Criminal Code* should be revised to update its language and structure

and to bring it into conformity with the Charter. In particular:

- there should be a uniform age of consent for anal and vaginal intercourse;
- consensual activity in private should not be criminal, regardless of the number of adults present; and
- no special defence should apply to those who are married.

2. Police education programs must address discriminatory attitudes that lead to the unequal application of criminal laws.

3. Legislation should be introduced to ensure that discriminatory attitudes cannot be used to justify homophobic violence by forming the legal foundation for a "provocation" defence.

4. Serious consideration must be given to adding "sexual orientation" to the list of grounds on which the advocacy of genocide is prohibited.

Censorship

5. Customs legislation and practice regarding the seizure of materials deemed to be obscene should be reviewed, particularly the doctrine of "prior restraint," which gives Customs officers free reign to exercise discriminatory attitudes without proper accountability.

6. Education workshops should be undertaken to ensure that Customs officers recognize their legal and constitutional duty not to discriminate in making decisions about what is or is not "obscene."

7. The government of Canada should acknowledge its responsibility for suppressing for many years safer-sex information that could have helped educate the gay community about safer sex practices. This acknowledgment would help to redress the public prejudice that gay men are "to blame" for HIV.

8. School boards need to ensure that young people receive a balanced education, including appropriate recognition of the contributions to Canadian society, literature and history of gay men and lesbians. School curricula should not suppress acknowledgment of the existence of lesbians and gay men but should recognize the diversity of human relationships and family forms. Age-appropriate information about safer sex should address sexual practices between people of the same sex in a non-judgmental way.

Discrimination

9. All provincial and territorial human rights acts need to include protection against discrimination on the ground of sexual orientation, to provide uniform protection from discrimination for gay men and lesbians across Canada.

10. Human rights acts should be changed to include clauses explicitly providing that discrimination is prohibited on multiple grounds of discrimination, to ensure that human rights legislation adequately addresses the overlap between HIV discrimination and sexual orientation discrimination, as well as other areas of overlap. Human rights acts should also explicitly prohibit discrimination on perceived grounds and discrimination based on the irrational fear of contracting an illness or disease.

11. All human rights legislation should explicitly protect transgendered people from discrimination.

12. Human rights protections in legislation must be accompanied by meaningful education programs, including the development of brochures, posters, workplace and public awareness campaigns to ensure that discriminatory attitudes can be redressed over time.

13. Human rights commissions should review all provincial, territorial or federal legislation and encourage governments to change discriminatory legislation so that it conforms to the standards required by the Charter and human rights statutes.

14. Employers and unions should ensure that workplace policies clearly specify that sexual orientation discrimination, prejudicial jokes and comments, and harassment are not permitted in the workplace. Personnel managers should be fully aware of their legal responsibilities, policies should be included in employment manuals, and training workshops should be held in workplaces. Staff and union members responsible for dealing with sexual harassment complaints should be appropriately sensitized to the dynamics of the interactions between heterosexuals and lesbians and gay men.

15. Employment equity legislation should ensure that information-gathering and education provisions apply to gay men and lesbians.

Same-Sex Benefits

16. Programs that confer rights and/or responsibilities on heterosexual spouses need to be examined in light of their purpose and redrafted to ensure that all those who fit within that purpose are covered, whether the relationship is same-sex or opposite-sex and, in some cases, whether or not a person is in a relationship.

Children and Parenting

17. In every province, legislation should be introduced to permit same-sex adoptions. In addition, provisions specifying that a person's sexual orientation, gender identity or HIV status is irrelevant to his/her parenting abilities should be introduced to help reduce arbitrariness in judicial decision-making.

18. Judicial education programs on sexual orientation and homophobia are necessary for all areas of the law, but particularly for child custody and access cases, where there is considerable judicial discretion in determining the best interests of the child.

19. Education programs on sexual orientation and homophobia need to be part of the basic training of social and child-care workers to ensure that their decisions are not influenced by discriminatory attitudes.

Immigration

20. The "family class" must be extended in the Immigration Regulations to permit lesbians and gay men to sponsor a same-sex partner to immigrate to Canada.

21. The current system, according to which immigration applicants who are found to be HIV-positive are assessed as "medically inadmissible," should be changed so that people with HIV/AIDS or other conditions will not automatically be excluded from immigrating. A new system should take the individual circumstances of each case into account, weigh the costs against the benefits of allowing a particular person to immigrate, and take humanitarian concerns into account.

22. A law needs to be introduced to enable Canadians to be tried in Canada for crimes allegedly committed abroad, whenever it appears that a fair trial could not be obtained in the country in which the crime is alleged to have been committed.

Incapacity, Wills, and Estate Litigation

23. All provinces and territories that do not currently have legislation providing for an effective means for the appointment of a representative for health-care decisions should adopt such legislation.

24. All provinces and territories should provide that same-sex partners have the same rights (1) of inheritance in cases of intestacy; and (2) to apply for administration of an estate, as heterosexual married spouses.

The Impact of Stigma and Discrimination

25. Research should be supported on the process of coming out in Canada and the psychological and social difficulties that it may entail, in order to develop approaches for assisting gay men and lesbians - and particularly gay and lesbian youth - in their coming-out process and for improving their emotional well-being.

26. Ministries of education, school boards, and school staff should include education about homosexuality in health and sex education at the intermediate and secondary levels, and such education should be provided in a non-judgmental, respectful, and supportive manner.

27. Teachers and others involved in schools, centres and shelters should be educated about homosexuality in order to provide them with the skills needed to offer support to young gay men and lesbians.

28. Secondary and post-secondary educational institutions should support the development of support groups for young gay men and lesbians within their institutions in order to help them through, among other things, the coming-out process.

29. Funding should be provided to community organizations in order to develop self-esteem and self-affirmation workshops for gay men and lesbians.

30. The number of new HIV infections among men who have sex with men, particularly young gay men, remains high, but relatively little funding for education, prevention, research and support is available. Governments and research agencies should ensure that funding is provided at levels that correspond to the historical and continuing HIV epidemic among men who have sex with men.

31. Multidisciplinary research should be carried out on less-known, less-reached groups, in particular, youth, the socioeconomically disadvantaged, intravenous drug users, bisexual men, and those who do not identify themselves as either homosexual or bisexual.

32. Governments and agencies should develop comprehensive programs that integrate access to the means of protecting oneself from HIV infection with information and affirmation of sexual orientation.

Some of these programs should not be limited to the gay community but be implemented for the general population in order to reach men who do not identify themselves as being homosexual or bisexual.

33. Policies and programs for HIV testing should make provisions for the fears and risks that men who have sex with men experience in taking an HIV test.

34. The HIV testing options available to men who have sex with men should include anonymous testing.

35. Support programs for people with HIV/AIDS should include components addressing the psychosocial aspects of living with HIV/AIDS that are specific to the experience of men who have sex with men and the complications of secrecy and disclosure in environments that are hostile to homosexuality.

36. Education programs on HIV/AIDS should be developed to reduce the stigmas associated with HIV/AIDS and with homosexuality, as well as to create a more supportive environment for gay and bisexual men, their caregivers, and their families of origin.

37. Employers should be encouraged to develop workplace policies on HIV/AIDS and non-discrimination on the grounds of sexual orientation, to implement educational programs on HIV/AIDS and sexual orientation in the workplace, and to communicate clearly the obligations of employers and employees regarding HIV/AIDS and sexual orientation as set out in human rights legislation.

38. Government agencies and human rights commissions should work to ensure that employers develop workplace policies and implement educational programs in accordance with the spirit as well as the letter of human rights legislation.

39. All curricula in medicine, nursing sciences and the social sciences should include a component on sexuality in general and on homosexuality in particular, and adopt a multidisciplinary approach to health problems.

40. All health-care workers should be provided with adequate training to give them the

skills to work with gay men, lesbians, bisexuals, and transgendered people.

41. All federal and provincial health departments and ministries should adopt a policy of accessibility to care and services for gay men, lesbians, bisexuals, and transgendered people.

42. A sexual orientation component should be integrated into research on the general population that deals with health and well-being.

43. Multidisciplinary research should be undertaken on the social environment of gay and bisexual men, self-affirmation and empowerment, based on the participation of men who have sex with men, to better evaluate and understand the impact of discrimination on the spread of HIV.

44. Systematic, two-way transfer of knowledge and skills between health-care networks, the research community and gay and bisexual men and lesbians, from the development of research protocols to the implementation of concrete measures, needs to be ensured.

45. Phase III of the National AIDS Strategy should explicitly acknowledge the historic and continuing magnitude and impact of the HIV epidemic among gay and bisexual men, and ensure that funding for programs to respond to this epidemic is commensurate with its magnitude and impact.

46. Phase III of the National AIDS Strategy should specifically state how it will address the continuing HIV epidemic among men who have sex with men in policies and programs relating to:

- human rights and discrimination;
- public education;
- prevention of HIV transmission;
- community development;
- care, treatment and support of people with HIV/AIDS;
- epidemiological surveillance; and
- research.

47. Phase III of the National AIDS Strategy should ensure that policies and programs relating to the HIV epidemic among women specifically address issues pertaining to lesbian women.

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FOOTNOTE

⁴³² Gostin & Lazzarini, *supra*, note 81 at xv.

Gay and Lesbian Issues and HIV/AIDS: Final Report

by John Fisher, Ralf Jürgens, Anne Vassal, Robert Hughes

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Academic Literature

Alonzo, AA. NR Reynolds. Stigma, HIV and AIDS: An Exploration and Elaboration of a Stigma Trajectory. *Social Science and Medicine* 1995; 41(3): 303-315.

Altmann, D, K Humphry. Breaking Boundaries: AIDS and Social Justice in Australia. *Social Justice* 1989; 16(3): 158-166.

D'Augelli, AR. Lesbians and gay male undergraduates' experiences of harassment and fear on campus. *Journal of Interpersonal Violence* 1992; 7: 383-395.

D'Augelli, AR. Preventing mental health problems among lesbian and gay college students. *The Journal of Primary Prevention* 1993; 13(4): 245-261.

Blendon, RJ, K Donelan. Discrimination against People with AIDS: The Public's Perspective. *New England Journal of Medicine* 1988; 319(15): 1022-1026.

Bochow, M, F Chiarotti, P Davies et al. Sexual behaviour of gay and bisexual men in eight European countries. *AIDS Care* 1994; 6(5): 533-550.

Boyer, D. Male prostitution and homosexual identity. *Journal of Homosexuality* 1989; 17(1/2): 151-183.

Calabrese, LH et al. Physicians' Attitudes, Beliefs, and Practices Regarding AIDS Health Care Promotion. *Archives of Internal Medicine* 1991; 151(6): 1157-1169.

Calzavara, LM, RA Coates, K Johnson et al. Sexual behavior changes in a cohort of male sexual contacts of men with HIV disease: A three-year overview. *Canadian Journal of Public Health* 1991; 82: 150-156.

Cohen, S, TA Wills. Stress, Social Support, and the Buffering Hypothesis. *Psychological Bulletin* 1985; 98(2): 310-357.

Connell, RW, GW Dowsett, P Rodden et al. Social class, gay men and AIDS Prevention. *Australian Journal of Public Health* 1991; 15(3): 178-189.

Connell, RW, MD Davis, GW Dowsett. A bastard of a life: Homosexual desire and practice among men in working-class milieux. *Australian and New Zealand Journal of Sociology* 1993; 29(1): 112-136.

Dejowski, EF. Federal Restrictions on AIDS prevention Efforts for Gay Men. *Saint Louis University Public Law Review* 1989; 8: 275-298.

Davies, PM, P Weatherburn, AJ Hunt et al. The sexual behaviour of young gay men in England and Wales. *AIDS Care* 1992; 4(3): 259-273.

Demi, A et al. Effects of Resources and Stressors on Burden and Depression of Family Members who Provide Care to an HIV-Infected Woman. *Journal of Family Psychology* 1997; 11(1): 35-48.

Diaz, T, SY Chu, P Frederick et al. Sociodemographics and HIV risk behaviors of bisexual men with AIDS: Results from a multistate interview project. *AIDS* 1993; 7: 1227-1232.

Donovan, C, C Mearns, R McEwan et al. A review of the HIV-related sexual behavior of gay men and men who have sex with men. *AIDS Care* 1994; 6(5): 605-617.

Dowsett, GW, MD Davis, RW Connell. Working class homosexuality and HIV/AIDS prevention: Some recent research from Sydney, Australia. *Psychology and Health* 1992; 6: 313-324.

Ducharme, T. Preparing for Legal Epidemics: An AIDS Primer for Lawyers and Policy Makers. *Alberta Law Review* 1988; 25(1): 471-520.

Dufour, A et al. Risk Behaviour and HIV Incidence among omega cohort participants: Preliminary Data. 6th Annual Canadian Conference on HIV/AIDS Research, May 22-25, 1997. *Canadian Journal of*

Infectious Diseases 1997; 8(Suppl A): 23A. Abstract no. 201.

Fikar, CR. Gay teens and suicide. *Pediatrics* 1992; 89: 519-520.

Fish, TA, BJ Rye. Attitudes toward a Homosexual or Heterosexual Person with AIDS. *Journal of Applied Psychology* 1991; 21: 651-667.

Gilmore, N, MA Somerville. Stigmatization, Scapegoating and Discrimination in Sexually Transmitted Diseases: Overcoming 'Them' and 'Us.' *Social Science and Medicine* 1994; 39(9): 1339-1358.

Girard, P. From Subversion to Liberation: Homosexuals and the Immigration Act 1952-1977. *Canadian Journal of Legal Studies* 1987; 24(2): 1-27.

Godin, G et al. Understanding the Intention of Gay and Bisexual men to Take the HIV Antibody Test. *AIDS Care* 1997; 9(1): 31-41.

Gold, RS, MJ Skinner. Situational factors and thought processes associated with unprotected intercourse in young gay men. *AIDS* 1992; 6: 1021-1030.

Gold, RS, MJ Skinner. Desire for unprotected intercourse preceding its occurrence: The case of young gay men with anonymous partners. *International Journal of STD and AIDS* 1993; 4(6): 326-329.

de Graaf, R, I Vanwesenbeedk, G van Zessen et al. Male prostitutes and safe sex: Different settings, different risks. *AIDS Care* 1994; 6(3): 277-288.

Green, R. Give Me Your Tired, Your Poor, Your Huddled Masses (of Heterosexuals): An Analysis of American and Canadian Immigration Policy. *Anglo-American Law Review* 139.

Hart, G, M Boulton, R Fitzpatrick et al. Relapse to unsafe sexual behaviour among gay men: A critique of recent behavioral HIV/AIDS research. *Sociology of Health and Illness* 1992; 14: 216-232.

Hausermann, J. International Law, Advocacy, and Human Rights in the Context of AIDS. *Pediatric AIDS and HIV Infection: Fetus to Adolescent* 1992; 3(5): 248-250.

Hays et al. Disclosing HIV Seropositivity to Significant Others. *AIDS* 1993; 7(3): 425-431.

Hays, RB, SM Kegeles, TJ Coates. High HIV risk taking among young gay men. *AIDS* 1992; 4: 901-907.

Herek, GM, JP Capitanio. Public reactions to AIDS in the United States: A second decade of stigma. *American Journal of Public Health* 1993; 83(4): 574-577.

- Hertz-Picciotto, I et al. HIV Test-Seeking Before and After Restriction of Anonymous Testing in North Carolina. *American Journal of Public Health* 1996; 86(10): 1446-1450.
- Hetrick, ES, AD Martin. Developmental issues and their resolutions for gay and lesbian adolescents. *Journal of Homosexuality* 1987; 14(1/2): 25-43.
- Heckman, TG, JA Kelly, KJ Sikkema et al. Differences in HIV risk characteristics between bisexual and exclusively gay men. *AIDS Education and Prevention* 1995; 7(6): 504-512.
- Hogg, RS et al. Lower Socioeconomic Status and Shorter Survival Following HIV Infection. *The Lancet* 1994; 344: 1120-1124.
- Jackson, LA et al. HIV-Positive Women Living in the Metropolitan Toronto Area: Their Experiences and Perceptions Related to HIV Testing. *Canadian Journal of Public Health* 1997; 88(1): 18-22.
- Jalbert, Y. The Coming Out Process among Gay Youth and the Impact on Health Services. 6th Annual Canadian Conference on HIV/AIDS Research, 22-25 May 1997. *Canadian Journal of Infectious Diseases* 1997; 8(Suppl A): 13A. Abstract no. 121.
- Johnson, SD. Models of Factors Related to Tendencies to Discriminate Against People with AIDS. *Psychological Reports* 1995; 76(2): 563-572.
- Jones, DJ, NC Sheppard. AIDS and Disability Discrimination in and Beyond the Classroom. *Dalhousie Law Journal* 1989; 12(1): 103-130.
- Kadushin, G. Gay Men with AIDS and their Families of Origin: An Analysis of Social Support. *Health and Social Work* 1996; 21(2): 141-149.
- Kelly, JA, JS St-Lawrence, TL Brasfield et al. AIDS risk behavior patterns among gay men in small Southern cities. *American Journal of Public Health* 1990; 80(4): 416-419.
- Kelly, JA, SC Kalichman, MR Kauth et al. Situational factors associated with AIDS risk behavior lapses and coping strategies used by gay men who successfully avoid lapses. *American Journal of Public Health* 1991; 81(10): 1335-1339.
- Krueger, LE et al. Poverty and HIV Seropositivity: The Poor are More Likely to Be Infected. *AIDS* 1990; 4(8): 811-814.
- Kruks, G. Gay and lesbian homeless/street youth: Special issues and concerns. *Journal of Adolescent Health* 1991; 12(7): 515-518.

- Laryea, M, L Gien. The Impact of HIV-Positive Diagnosis on the Individual, Part 1: Stigma, Rejection, and Loneliness. *Clinical Nursing Research* 1993; 2(3): 245-266.
- Lemp, GF, AM Hirozama, D Givertz et al. Seroprevalence of HIV and risk behaviors among young homosexual and bisexual men. *Journal of the American Medical Association* 1994; 272(6): 449-454.
- Lemp, GF et al. HIV Seroprevalence and Risk Behaviors among Lesbians and Bisexual Women in San Francisco and Berkeley. *American Journal of Public Health* 1995; 85(11): 1549-1552.
- Le Poire, BA. Attraction toward and Nonverbal Stigmatization of Gay Males and Persons with AIDS: Evidence of Symbolic over Instrumental Attitudinal Structures. *Human Communication Research* 1994; 21(2) 241-279.
- Littrell, L. How Psychological States Affect the Immune System: Implications for Interventions in the Context of HIV. *Health and Social Work* 1996; 21(4): 287-295
- Mallon, G. Gay and no place to go: Assessing the needs of gays and adolescents in out-of-home care settings. *Child Welfare* 1992; 71(6): 547-556
- Mann, J, L Gostin, S Gruskin et al. Health and human rights. *Health and Human Rights* 1994; 1(1): 6-22.
- Martin, AD, S Hetrick. The stigmatization of gay and lesbian adolescents. *Journal of Homosexuality* 1988; 15(1/2): 163-183.
- Martindale, SL et al. Evidence of Psychologic Distress in a Cohort of Young Gay/Bisexual Men. 6th Annual Canadian Conference on HIV/AIDS Research, 22-25 May 1997. *Canadian Journal of Infectious Diseases* 1997; 8(Suppl A): 8A. Abstract no. 102.
- Messiah, SUP , E Mouret-Fourme et al. Sociodemographic characteristics and sexual behavior of bisexual men in France: Implications for HIV prevention. *American Journal of Public Health* 1995; 85 (11): 1543-1547.
- Myers, T et al. Bisexual Men and HIV in Ontario: Sexual Risk Behaviour with Men and with Women. 6th Annual Canadian Conference on HIV/AIDS Research, May 22-25, 1997. *Canadian Journal of Infectious Diseases* 1997; 8(Suppl A): 23A. Abstract no. 203.
- Miles, MS et al. Personal, Family, and Health-Related Correlates of Depressive Symptoms in Mothers with HIV. *Journal of Family Psychology* 1997; 11(1): 23-34.
- Mitchell, CN. A Justice-Based Argument for the Uniform Regulation of Psychoactive Drugs. *McGill Law Journal* 1986; 31: 212-263.

- Morrow, DF. Social work with gay and lesbian adolescents. *Social Work* 1993; 38(6): 655-660.
- Myers, T et al. Variations in Sexual Orientations Among Men Who have Sex with Men, and their Current Sexual Practices. *Canadian Journal of Public Health* 1995; 86(6): 384-388.
- Nonn, E et al. Dimensions identitaires, appartenance à la communauté gaie et prévention contre le virus du SIDA. Sixième conférence canadienne annuelle de la recherche sur the VIH/SIDA, 22-25 mai, 1997. *Journal canadien des maladies infectieuses*. 1997; 8 (Suppl A): 9A. Abstract no. 104.
- Nonn, E et al. Construction de l'échantillon à partir d'une population difficile à définir: Diversité versus représentativité. Sixième conférence canadienne annuelle de la recherche sur le VIH/SIDA, 22-25 mai, 1997. *Journal canadien des maladies infectieuses* 1997; 8 (Suppl A): 9A. Abstract no. 107.
- O'Brien, RC. Discrimination: The Difference with AIDS. *Journal of Contemporary Health Law and Policy* 1990; 6: 93-125.
- Paul, JP, R Stall, KA Bloomfield. Gays and Alcoholism. *Epidemiologic and clinical issues. Alcohol Health and Research World* 1991; 15(2): 151-160.
- Perkins, DO, J Leserman, C Murphy et al. Psychosocial predictors of high-risk sexual behavior among HIV-negative homosexual men. *AIDS Education and Prevention* 1993; 5.
- Peters, L et al. Public Reactions Towards People with AIDS: An Attributional Analysis. *Patient Education and Counseling* 1994; 24(3): 323-335.
- Petersen, C. A Queer Response to Bashing: Legislating Against Hate. *Queen's Law Journal* 1991; 16(2): 237.
- Pollak, M, M-A Schiltz. Les homosexuels français face au sida. Modifications des pratiques sexuelles et émergence de nouvelles valeurs. *Anthropologie et Sociétés* 1991; 15(2/3): 53-65.
- Powell-Cope, GM, MA Brown. Going Public as an AIDS Family Caregiver. *Social Science and Medicine* 1992; 34(5): 571-580
- Prieur, A. Norwegian gay men: Reasons for continued practice of unsafe sex. *AIDS Education and Prevention* 1990; 2(2): 109-115.
- Pryor, JB et al. Fear and Loathing in the Workplace: Reactions to AIDS-Infected Co-Workers. *Personality and Social Psychology Bulletin* 1991; 17(2): 133-139.
- Pryor, JB et al. The Instrumental and Symbolic Functions of Attitudes toward Persons with AIDS.

Journal of Applied Social Psychology 1989; 19(5): 377-404.

Raiteri, R et al. Seroprevalence, risk factors and attitude to HIV-1 in a representative sample of lesbians in Turin. *Genitourinary Medicine* 1994; 70(3): 200-205.

Ramsay, H. Lesbians and the Health Care System. Invisibility, Isolation and Ignorance - You Say You're a What? *Canadian Woman Studies* 14; 3: 22-27.

Remafedi, GJ. Cognitive and behavioral adaptation to HIV/AIDS among gay men and bisexual adolescents. *Journal of Adolescent Health* 1994; 15(2): 142-148

Remafedi, GJ. Fundamental issues in the care of homosexual youth. *Medical Clinics of North America* 1990; 74(5): 1169-1177.

Rotheram-Borus, MJ, C Koopman. Sexual risk behavior, AIDS knowledge and beliefs about AIDS among predominantly minority gay and bisexual male adolescents. *AIDS Education and Prevention* 1991; 3: 305-312.

Rotheram-Borus, MJ, H Reid, M Rosario. Factors mediating changes in sexual HIV risk behaviors among gay and bisexual male adolescents. *American Journal of Public Health* 1994; 84: 1938-1946.

Savin-Williams, RC. Verbal and physical abuse as stressors in the lives of lesbians, gay males and bisexual youths: Associations with school problems, running away, substance abuse, prostitution and suicide. *Journal of Consultation in Clinical Psychology* 1994; 62: 262-269.

Schechter, MT et al. Higher Socioeconomic Status is Associated with Slower Progression of HIV Infection Independent of Access to Health Care. *Journal of Clinical Epidemiology* 1994; 47(1): 59-67.

Schechter, MT, KJP Craib, B Willoughby et al. Patterns of sexual behavior and condom use in a cohort of homosexual men. *American Journal of Public Health* 1988; 78: 1535-1538.

Sex, Drugs & HIV. *Canadian Medical Association Journal* 1996; 155: 767.

Simoni, JM et al. Disclosing HIV Status and Sexual Orientation to Employers. *AIDS Care* 1997; 9(5): 589-599.

Somerville, MA, AJ Orkin. Human Rights, Discrimination and AIDS: Concepts and Issues. *AIDS* 1989; 3(Suppl 1): S283-S287.

Strathdee, SA, et. al. HIV prevalence, incidence and risk behaviours among a cohort of young gay/bisexual men. 6th Annual Canadian Conference on HIV/AIDS Research, 22-25 May 1997. *Canadian*

Journal of Infectious Diseases 8 (1997; Suppl. A): 24A.

Strike C et al. Nonconsensual Sex and Unsafe Sexual Behaviour: Results from the Bisex Survey. 6th Annual Canadian Conference on HIV/AIDS Research, 22-25 May 1997. Canadian Journal of Infectious Diseases 1997; 8(Suppl A): 14A. Abstract no. 124.

Stripp, H, D Kerr. Determinants of Public Opinion About AIDS. Public Opinion Quarterly 1989; 53: 98-106.

Telljohann, SK, JH Price. A qualitative examination of adolescent homosexuals' life experiences: Ramifications for secondary school personnel. Journal of Homosexuality 1993; 26(1): 41-56.

Tindall, B, G Tillett. HIV-Related Discrimination. AIDS 1990; 4(Suppl 1): S251-S256.

Treadway, L, J Yoakman. Creating a safer school environment for lesbian and gay students. Journal of School Health 1992; 62(7): 352-357.

Uribe, V, KM Harbeck. Addressing the needs of lesbians and gay and bisexual youth: The origin of Project 10 and school based intervention. Journal of Homosexuality 1991; 22(3/4): 1100-1109.

Weatherburn, P, AJ Hunt, PM Davies et al. Condom use in a large cohort of homosexually active men in England and Wales. AIDS Care 1991; 3: 31-41.

Reports, Discussion Papers, Policy Statements, Guidelines and Recommendations

ACON. Gay Men's Education Strategy 1995-1997. Sydney: AIDS Council of New South Wales, 1994.

Bartlett, WC. AIDS: Legal Issues. Ottawa: Library of Parliament Research Branch, Current Issue Review 93-7E, 14 April 1994 (revised 19 April 1995).

Bartos, M, J McLeod, P Nott. Meanings of Sex between Men. Australian Federation of AIDS Organisations, 1993.

British Columbia Civil Liberties Association. AIDS Discrimination in Canada. A Study of the Scope and Extent of Unfair Discrimination in Canada against Persons with AIDS and Those Known or Feared to Be HIV Positive. Vancouver: BC Civil Liberties Association, 1989.

Bruner. Out of the Closet: Study of Relations between the Homosexual Community and the Police.

Report to Mayor Arthur Eggleton and the City of Toronto.

Canadian AIDS Society. Canada's National AIDS Strategy: Where is the Leadership? A Critical Analysis 15 Years into the Epidemic. Ottawa: The Society, 1995

Canadian AIDS Society. Homophobia, Heterosexism and AIDS. Creating a More Effective Response to AIDS. Ottawa: The Society, 1991.

Canadian AIDS Society Advocacy Alert. Federal Government Releases Krever Report. Ottawa: The Society, 12 December 1997.

The Canadian Disability Rights Council. Final Brief on the Proposed Amendments in Bill C-86 to Sections 19(1)(a) and (b). Winnipeg: The Council.

Centre for Human Rights, Geneva. Report of an International Consultation on AIDS and Human Rights. Geneva, 26-28 July 1989. New York: United Nations, 1991 (HR/PUB/90/2).

Cohen, R, LS Wiseberg. Double Jeopardy - Threat to Life and Human Rights. Discrimination against Persons with AIDS. Cambridge, MA: Human Rights Internet, 1990.

Curren, T. Current Issue Review: AIDS 85-15E. Research Branch, Library of Parliament, 23 October 1985. Revised 12 March 1993.

Department of Justice. Working Against Discrimination - The Amendment to the Canadian Human Rights Act: The Facts. Ottawa: The Department, May 1996.

de Bruyn, T. HIV/AIDS and Discrimination: A Discussion Paper. Montréal: Canadian HIV/AIDS Legal Network & Canadian AIDS Society, 1998.

Direction de la Planification et de l'Évaluation. Santé, bien-être et homosexualité. Éléments de problématique et pistes d'intervention. Québec: MSSS, 1996.

Direction de la Santé publique. Priorités nationales de santé publique 1997-2002. Québec: MSSS, 1997.

Discrimination and Violence Encountered by Lesbian, Gay and Bisexual New Brunswickers. New Brunswick Coalition for Human Rights Reform, 1990.

EGALE brief to the House of Commons Standing Committee on Justice and Legal Affairs, re: Bill C-41. 1 December 1994.

Elliott, R. Criminal Law and HIV/AIDS: Final Report. Montréal: Canadian HIV/AIDS Legal Network

& Canadian AIDS Society, 1997.

Federal Centre for AIDS Working Group on HIV Infection and Mental Health. Ending the Isolation. HIV Disease and Mental Health in the Second Decade. Ottawa: Minister of Supply and Services, 1992.

findlay, b. et al. Finding Our Place: The Transgendered Law Reform Project. Vancouver: The High Risk Project, Law Society of British Columbia, April 1992.

Fisher, J. The Impact of the Supreme Court Decision in Egan v Canada upon claims for the equal recognition of same sex relationships, prepared for EGALE, September 1993.

Fuenzalida-Puelma, H et al (eds). Ethics and Law in the Study of AIDS. Pan American Health Organization Scientific Publication, No. 530.

Godin, G, J Carsley, K Morrison et al. Les comportements sexuels et l'environnement social des hommes ayant des relations sexuelles avec d'autres hommes (Enquête québécoise: Entre hommes 91-92). Québec, Ministère de la santé et des services sociaux, Université Laval, Hôpital général de Montréal, COCQ-sida et Société canadienne du sida: 1993. English summary available as Between Men: Sexuality and Social Environment in the Age of AIDS.

Goundry, SA. Rights in the Context of Health Care: Access to Health Care for Persons Living with HIV and AIDS, prepared for EGALE, June 1993.

Gruet, F, F Dubois-Arber. Les homosexuels - Étude 1992. Institut universitaire de médecine sociale et préventive, Unité d'évaluation des programmes de prévention. Lausanne, 1993.

Guidelines on HIV/AIDS and Human Rights. Geneva: UNAIDS and United Nations High Commissioner for Human Rights/ Centre for Human Rights, 1997. Reprinted in part in Canadian HIV/AIDS Policy & Law Newsletter 1997; 3(2/3): 1.

Haley, N, B Maheux, M Rivard et al. STD/HIV Prevention by Newly-Trained Family Physicians. Québec, 1994.

Health Canada. AIDS in Canada - Quarterly Surveillance Update. Ottawa, May 1997.

Health Canada. HIV/AIDS Epi Update: HIV and AIDS Among Men who Have Sex with Men. Ottawa, November 1997.

Health Canada. The Experiences of Young Gay Men in the Age of HIV. Ottawa: Minister of Supply and Services, 1996.

Herek, GM, J Cogan. AIDS & Stigma. A review of the Scientific Literature. Public Media Center, Ford Foundation and Joyce Mertz-Gilmore Foundation.

Hite, S. The Hite Report. New York: Dell, 1976.

House of Commons Parliamentary Committee on Equality Rights. Equality for All. Ottawa: The Committee, 1985.

Nova Scotia Public Interest Research Group. Proud but Cautious: Homophobic Abuse and Discrimination in Nova Scotia, 1994.

International Lesbian and Gay Association. Annual Report 1997. 4 (October-December).

Janus, SS, CL Janus. The Janus Report on Sexual Behavior. New York: John Wiley & Sons, 1993.

Jürgens, R. Legal and Ethical Issues Raised by HIV/AIDS. Literature Review and Annotated Bibliography. Montréal: Canadian HIV/AIDS Legal Network & Canadian AIDS Society, 1995.

Jürgens, R. Legal and Ethical Issues Raised by HIV/AIDS: Project Report (1 June - 15 October 1995). Montréal: Canadian AIDS Society and Canadian HIV/AIDS Legal Network, 1995.

Jürgens, R, M Palles. HIV Testing and Confidentiality: A Discussion Paper. Montréal: Canadian HIV/AIDS Legal Network & Canadian AIDS Society, 1997.

King, MJC, RP Beazley, WK Warren et al. Canada Youth & AIDS Study. Toronto: Runge Press, 1988.

Krever, The Honourable Mr. Justice H. Commission of Inquiry on the Blood System in Canada: Final Report. Volumes 1-3. Ottawa: Minister of Public Works and Government Services Canada, 1997.

Mann, JM. Human Rights and Priorities for HIV/AIDS Prevention and Care in the 1990s. In: Rights and Humanity, Global Expert Meeting, AIDS: A Question of Rights and Humanity. Presentations and background papers. The Hague, 21-24 May 1991.

Matiation, S. Discrimination, HIV/AIDS, and Aboriginal People: A Discussion Paper. Montréal: Canadian HIV/AIDS Legal Network, 1998.

Myers, T, G Godin, L Calzavara et al. The Canadian Survey of Gay and Bisexual Men and HIV Infection: Men's Survey. Ottawa: Canadian AIDS Society, 1993.

National Advisory Committee on AIDS. HIV and Human Rights in Canada. Ottawa: The Committee, 1992.

National Community AIDS Partnership. *A Generation at Risk. A Background Report on HIV Prevention and Youth.* Washington DC, 1993.

National Gay & Lesbian Task Force. *Anti-Gay Violence. Victimization and Defamation in 1989.* Washington DC, 1990.

New Brunswick Coalition for Human Rights Reform. *Discrimination and Violence Encountered by Lesbian, Gay and Bisexual New Brunswickers.* The Coalition, 1990.

New South Wales Anti-Discrimination Board. *Discrimination - The Other Epidemic. Report of the Inquiry into HIV and AIDS Related Discrimination.* The Board, 1992.

O'Brien, CA et al. *No Safe Bed: Lesbian, Gay and Bisexual Youth in Residential Services.* Toronto: Central Toronto Youth Services, 1993.

Otis, J, B Ryan, N Chouinard. *Profil des jeunes à leur entrée au groupe de support du Projet 10 - Document de travail.* Montréal: Régie régionale de la Santé et des Services sociaux, January 1997.

Pepper, D and Holland. *Moving Toward a Distant Horizon. The Final Report of the Action Plan Project funded by the Ottawa Police Services Board, June 1993 - March 1994.* Ottawa, April 1994.

Public Media Center. *The Impact of Homophobia and Other Social Biases on AIDS.* San Francisco: The Center, 1995.

Québec Human Rights Commission. *De l'illégalité à l'égalité: Rapport de la consultation publique sur la violence et la discrimination envers les gais et lesbiennes.* Montréal: The Commission, 1994.

Remis, R, AC Vandal, P Leclerc. *La situation du sida et de l'infection au VIH au Québec, 1994.* Québec, Unité des maladies infectieuses de l'hôpital général de Montréal, Direction de la santé publique de Montréal-centre, 1996.

Royal Society of Canada. *AIDS: A Perspective for Canadians - Summary Report and Recommendations.* Ottawa: The Society, 1988.

Royal Society of Canada. *AIDS: A Perspective for Canadians - Background Papers.* Ottawa: The Society, 1988.

Schiltz, M-A. *Les homosexuels masculins face au sida: Enquêtes 1991-1992.* Paris: Centre de mathématiques et d'analyse sociale, CNRS, 1993.

Spira, A, N Bajos and the ACSF group. *Les comportements sexuels en France.* Paris: La Documentation

français (Coll. des Rapports officiels), 1993.

Towards Equality: The Response to the Report of the Parliamentary Committee on Equality Rights. Ottawa: Government of Canada, 1986.

Transgenderists, Transexuals and Transvestites and the CHRA. Canadian Human Rights Commission, Policy and Planning Branch, 9 September 1992.

UNAIDS. Protocol for the Identification of Discrimination against People Living with HIV. Geneva: UNAIDS, 1996.

UNAIDS. The UNAIDS Guide to the United Nations Human Rights Machinery for AIDS Service Organizations, People Living with HIV/AIDS, and Others Working in the Area of HIV/AIDS and Human Rights. Geneva: Joint United Nations Programme on HIV/AIDS, 1997.

United Nations Commission on Human Rights. Second International Consultation on HIV/AIDS and Human Rights (Geneva, 23-25 September 1996). 20 January 1997 (document no. E/CN.4/1997/37).

Vassal, A, J Fisher, R Jürgens, R Hughes. Gay and Lesbian Legal Issues and HIV/AIDS: A Discussion Paper. Montréal: Canadian HIV/AIDS Legal Network & Canadian AIDS Society, 1997.

Weatherburn, P et al. The Sexual Lifestyles of Gay and Bisexual Men in England and Wales. Project Sigma. London: HMSO, 1992.

The Wolfenden Report. Report of the Committee on Homosexual Offences and Prostitution. American Edition. New York: Lancer Books, 1964.

Books and Articles

Adam, B. Winning Rights and Freedoms in Canada. In: A Hendriks, R Tielman, E van der Veen (eds). The Third Pink Book. Buffalo: Prometheus, 1993, at 25-37.

Adam, BD, A Sears. Experiencing HIV: Personal, Family and Work Relationships. New York: Columbia University Press, 1996.

Adams, ML. You're All Right So Long As You Act Nice: Lesbians' Experience of North American Health Care System. Fireweed, Spring 1989.

Altmann, D. Power and Community: Organizational and Cultural Responses to AIDS. London: Taylor

and Francis, 1994.

Anderson, DA. Lesbian and gay adolescents: social and developmental considerations. In: G Unks (ed.). *The Gay Teen: Educational Practice and Theory for Lesbian, Gay and Bisexual Adolescents*. New York: Routledge, 1995, at 17-28.

Beeby. Mounties Staged Massive Hunt for Gay Males in Civil Service. *Globe and Mail*, 24 April 1992, at A1.

Blake, L. Transgender Inclusion: A Concern about Grounding of Complaints. *TransEqual*, 1997.

Books Banned after "Gay Agenda" Complaints. *Globe and Mail*, 20 November 1997, at A1.

Bora, J. Remember Remington's? *Xtra!* 16 Jan 1997 at 13.

Brady, D, S Laframboise, b findlay. Transgendered People, Discrimination, and HIV/AIDS. *Canadian HIV/AIDS Policy & Law Newsletter* 1996; 2(3): 6-7.

Casswell, D. *Lesbians, Gay Men and Canadian Law*. Emond Montgomery Publications Ltd, 1996.

Chrétien defends right of anti-gay MP to speak. Media clipping, 28 September 1994.

Crane, P. *Gay Men and the Law*. London: Pluto Press, 1982.

Cernetig, M. Protect Transexuals, B.C. Panel Urges. *Globe and Mail*, 19 January 1998, at A9.

Dahl, D. Bias in the Criminal Justice System - the "Homosexual Panic Defence." *The Vancouver Sun*, 28 December 1995.

Ellis, R, P Engelmann. HIV/AIDS and the Military in Canada. *Canadian HIV/AIDS Policy & Law Newsletter* 1995; 1(3): 1, 14-15.

FitzSimons, D et al (eds). *The Economic and Social Impact of AIDS in Europe*. London: National AIDS Trust, 1995.

Gay Fathers - Some of their Stories, Experience and Advice. Gay Fathers of Toronto, 1981.

Gay Rights Activists File Petition. *Globe and Mail*, 4 August 1997, at A4.

Goodman, Lakey, Lashof & Thorne. *No Turning Back: Lesbian and Gay Liberation for the Eighties*. 1983.

- Gostin, LO, Z Lazzarini. *Human Rights and Public Health in the AIDS Pandemic*. New York: Oxford University Press, 1997.
- Hate slaying of gay man stuns Montreal. *Globe and Mail*, 4 December 1992, at A1.
- Hays, M. Quebec Goes Hawaiian. [Montréal] *Mirror*, 15 January 1998, at 3.
- Hunter, J, R Schaecher. Lesbian and gay youth. In: MJ Rotheram-Borus, J Bradley, N Obolensky (eds). *Planning to Live: Evaluating and Treating Suicidal Teens in Community Settings*. Tulsa: University of Oklahoma Press, 1990, at 297-316.
- Jalbert, Y, R Masson. *Trithérapie et retour au travail: oui mais ... Résultat d'un sondage québécois*. Montréal: Coalition des organismes communautaires québécois de lutte contre le sida, 1997.
- Jürgens, R. HIV-Specific Criminal Offence Proposed. *Canadian HIV/AIDS Policy & Law Newsletter* 1996; 2(2): 1, 26-27.
- Jürgens, R. Immigration Policy May Be Reviewed to Require Routine HIV Testing of Immigrants. *Canadian HIV/AIDS Policy & Law Newsletter* 1997; 3(2/3): 16-18.
- Kennedy, EG. Letter to the Editor of the *Kingston Whig-Standard*, 1992.
- Kinsey, AC, WB Pomeroy, CE Martin. *Sexual Behavior in the Human Male*. Philadelphia: Saunders, 1948.
- Kinsman, G. *The Regulation of Desire: Sexuality in Canada*. Montréal: Black Rose Books, 1987.
- Kippax, S, J Crawford, B Connell et al. The importance of gay community in the prevention of HIV transmission: a study of Australian men who have sex with men. In: P Aggleton, P Davies, G. Hart (eds). *AIDS: Rights, Risk and Reason*. London: The Falmer Press, 1992, at 103-118.
- Kirby, M. Human Rights and the HIV Paradox. *Lancet* 1996; 348: 1217-1218. Reprinted in *Canadian HIV/AIDS Policy & Law Newsletter* 1997; 3(2/3).
- Lett. Gay rights will spark civil war: MP. *Winnipeg Free Press*, 9 May 1996.
- Lever, J. Lesbian Sex Survey. The 1995 Advocate Survey of Sexuality and Relationships: The Women. *The Advocate*, 22 August 1995, 23-30.
- Lever, M. *Les B-chers de Sodome*, Paris, Fayard, 1985.

Man jailed 7 years for waiter's slaying. *Ottawa Citizen*, 3 April 1990.

Mann, JM. *Towards a New Strategy for AIDS*. Cambridge: Global AIDS Policy Coalition, 1993.

Mann, JM, DJM Tarantola (eds.). *AIDS in the World II: Global Dimensions, Social Roots, and responses*. New York: Oxford University Press: 1996.

Mann, JM, DJM Tarantola, TW Netter (eds). *AIDS in the World*. Cambridge: Harvard University Press: 1992.

Married lesbians challenging the status quo. *The Point!* November 1997, at 5.

McCarthyism Ottawa Style. *Capital Xtra!* 25 March 1994, at 11.

McInnes. B.C. Passes Legislation Redefining Term "Spouse." *Globe and Mail*, 23 July 1997, at A7.

McLeod, DW. *Lesbian and Gay Liberation in Canada: A Selected Chronology, 1964-1975*. Toronto: ECW Press/Homewood Books, 1996.

Mitchell. Gay rights and Alberta just don't mix. *Globe and Mail*, 25 July 1997, at A4.

Morrison, K, A Vassal. *Les hommes gais, le sida et la science*. In: *Le sida*. Montréal: Gaétan Morin (forthcoming).

No educational value: MP plans "major scale" attack on safer-sex info. *Capital Xtra!* 20 May 1994, at 1.

Ornstein, M. *AIDS in Canada: Knowledge, Behaviour and Attitudes of Adults*. Toronto: University of Toronto Press, 1989.

Patrick. Gay men led fight against tainted blood: Krever report exonerates gay community from accusations. *Capital Xtra!* No. 52, 12 December 1997, at 11.

Patterson, D. Québec Court Finds Asymptomatic HIV Infection a Charter "Handicap." *Canadian HIV/AIDS Policy & Law Newsletter* 1994; 1(1): 1, 3-4.

Plant, R. *The Pink Triangle. The Nazi War against Homosexuals*. New York: Holt, 1986.

Patton, C. *Inventing AIDS*. London: Routledge, 1990.

Pollak, M. *Les homosexuels et le sida. Sociologie d'une épidémie*. Paris: AM Métailié, 1988.

Public Media Center. *The Impact of Homophobia and Other Social Biases on AIDS*. San Francisco: The Center, 1995.

Rayside, DM, EA Lindquist. *Canada: Community Activism, Federalism, and the New Politics of Disease*. In R Bayer, DL Kirp (eds). *AIDS in the Industrialized Democracies. Passions, Politics, and Policies*. New Brunswick, New Jersey: Rutgers University Press, 1992, 49-98.

Russnell. Report defends gay men as parents. *Edmonton Journal*, September 1997.

Sanders, D. Drawing Lines on Lesbian and Gay Rights. *Hansard*, 18 November 1992.

Sher, L et al. *AIDS as a Gender Issue: Psychosocial Perspectives*. London: Taylor and Francis, 1996.

Solomon, N. Risky Business. Should Lesbians Practice Safer Sex? *OUT/LOOK Spring 1992*: 47-52

Still, L. Homophobe who killed gay handed five-year sentence. *The Vancouver Sun*, 29 June 1995.

Tielman and de Jonge. Country-by-Country Survey: A worldwide inventory of discrimination and liberation of lesbians and gay men. In: *Second International Lesbian and Gay Association Pink Book*, 1988 185 at 211.

Toonen, N. Homophobia and HIV. [Australian] *National AIDS Bulletin* December 1992/January 1993: 35-37 at 36.

Watney, S. *Practices of Freedom: Selected Writings on HIV-AIDS*. Durham: Duke University Press, 1994.

Whitlock, K. *Bridges of Respect: Creating Support for Lesbian and Gay Youth* (1989), referred to in: CL Dempsey. Health and Social Issues of Gay, Lesbian and Bisexual Adolescents. *The Journal of Contemporary Human Services* 1994; 75(3): 160-167.

Wilson, S. Recent Developments in Immigration Law. *Canadian HIV/AIDS Policy & Law Newsletter* 1994; 1(1): 9-10.

Wilson. Reform MP Under Fire for Anti-Gay Comment. *Victoria Times-Colonist*, 1 May 1996, at A1.

Legislation

Federal

Criminal Code. RSC 1985 c C-46, as amended.

Canadian Human Rights Act. RSC 1985 c H-6, as amended.

Canadian Immigration Act. RSC 1985 c I-2, as amended.

Provincial

British Columbia Human Rights Act. SBC 1984 c 22, amended 1992 c 43 and 1993 c 27.

Manitoba Human Rights Act. SM 1974 c 65.

Saskatchewan Human Rights Act. SS 1979 c S-24.1

Other Resources: Abstracts, Presentations, Studies, Articles on Websites

AIDS Committee of Ottawa. Safer Sex Information for Women Who Have Sex with Women.

Allman, D, T Myers. The bisex survey: Investigating bisexual men in Ontario. 10th Annual British Columbia Conference on HIV/AIDS, Vancouver, 1997.

Anacabe, C, M Shriver. Outreach to gay and bisexual male street kids in San Francisco. VIII International Conference on AIDS, Amsterdam, July 1992.

Censored Sexualities. Brochure of the Repeal the Youth Law Campaign, 29 June 1994.

Cornelisse, PGA et al. A Comparison of Risk Factors for HIV Transmission Between Two Cohorts of Gay Men (1982-84 vs. 1995). XI International Conference on AIDS, Vancouver, 1996.

Garmaise, D. The Role of Prejudice and Discrimination in AIDS (address to a public forum on AIDS Awareness and Responsibility: Bigotry and Education in Canadian Society, McGill AIDS Centre, Montréal, 1 December 1993). Ottawa: Canadian AIDS Society, 1993.

Goggin, M, J Sotiropoulos. Sex in silence: A national study of young gays. X International Conference on AIDS, Yokohama, Japan, August 1994.

Hays, RB, S Kegeles, TJ Coates. Community level HIV prevention program for young gay men. X International Conference on AIDS, Yohokama, Japan, August 1994.

Huskins, B, Chair of the Canadian AIDS Society. News Release of 15 September 1995.

Jalbert, Y. Perception du risque face au VIH/sida et son impact sur l'utilisation des services de santé chez les jeunes hommes homosexuels âgés de 16 à 20 ans de Montréal. Doctoral dissertation, Department of Social and Preventive Medicine, University of Montréal.

Mann, JM. Prochaine étape: le sida, les communautés et les droits de la personne. Deuxième conférence internationale sur la prise en charge extra-hospitalière. Montréal, May 1995.

McCann T. Sexual Orientation, HIV/AIDS, and Discrimination. Presentation given at the seminar on AIDS and the Law, Faculty of Law, McGill University, 13 March 1995.

Pamphlet of The League Against Homosexuals (1980), reproduced in Gay Fathers - Some of Their Stories, Experience and Advice. Gay Fathers of Toronto, 1981.

Parker, RS. Empowerment, community mobilization and social change. XI International Conference on AIDS, Vancouver, July 1996.

Plante and Gaudreault. Le projet de loi 133: Un pas de plus vers l'égalité. Brief of the Comié, national des jeunes du Parti québécois submitted to the Commission des institutions in the context of the study of Bill 133, Loi modifiant la Charte des droits et libertés de la personne et d'autres dispositions législatives, February 1996.

Samis, S. An Injury to One is an Injury to All: Heterosexism, Homophobia and Anti-Gay/Lesbian Violence in Greater Vancouver. MA (Sociology) thesis, Simon Fraser University, 1994.

Schiltz, MA, P Adam. The influence of personal and generational factors on the incidence of HIV and STDs among young gay and bisexual men in France. XI International Conference on AIDS, Vancouver, 1996.

Stoddard, TB. AIDS and Human Rights: The Lessons So Far. Presentation at the plenary session of the VIII International Conference on AIDS, Amsterdam, July 1992.

Stokes, JP et al. Comparing Gay and Bisexual Men on Sexual Behaviours and Attitudes Relevant to HIV/AIDS. XI International Conference on AIDS, Vancouver, 7-12 July 1996. Abstract no. Tu.C. 2404.

Tann, M. Recent HIV/AIDS developments among men who have sex with men. X International Conference on AIDS, Yokohama, 1994.

Valleroy, LA et al. HIV and Risk Behaviour Prevalence among Young Men Who Have Sex with Men Sampled in Six Urban Counties in the USA. XI International Conference on AIDS, Vancouver, July 7-12, 1996. Abstract no. Tu.C.2407.

Weatherburn, P, DS Reid, PM Davies, Behaviourally bisexual men in the U.K.: sexual practices, disclosures & implications. XI International Conference on AIDS, Vancouver, 1996.

de Wit, J et al. Risk for HIV-infection among young gay men: Sexual relations, high risk behavior and protection motivation. XI International Conference on AIDS, Vancouver, 1996.

Yan, P, J Huntley, D Sutherland. Estimation of the historical age-specific HIV incidence in Canada. Abstract no. Tu.C.573. XI International Conference on AIDS, Vancouver, 1996.

Cases

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Gay and Lesbian Issues and HIV/AIDS: Final Report

by John Fisher, Ralf Jürgens, Anne Vassal, Robert Hughes

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A Short History of Discrimination against Gay Men and Lesbians

This historical review provides a short (and far from comprehensive) summary of developments in the field of lesbian and gay equality in Canada. It is intended to provide a convenient overview only; most of the developments are described in more detail in the various chapters of this report. The review first gives a cursory overview of some early developments that occurred between 1965 and 1986, then a more detailed account of events that have marked the past decade.

Early Developments

For many years, hostility toward lesbians and gay men prevailed, homosexual activity constituted a criminal offence, and little happened in Canadian courts and legislatures to address issues related to sexual orientation. Things started to change only in 1965, when a man, Everett Klippert, acknowledged to police that he was gay, had had sex with men over a 24-year period, and was unlikely to change. In view of the fact that his sexual orientation was viewed by psychiatrists as "incurable," Klippert was incarcerated for life in 1967 as a "dangerous sex offender."¹

In response to Klippert's case, Pierre Trudeau made his now-famous comment that "the State has no place in the bedrooms of the nation," and two years later the *Criminal Code* was amended to allow for certain kinds of same-sex sexual activity.

Gradually, other changes in the areas of law and policy occurred:

- Some legal cases are reported in the early 1970s on issues surrounding custody of and access to children. The courts occasionally expressed the view that homosexuality in itself does not constitute a bar to an award of custody.²
- In 1977 Québec became the first province in Canada to include protection against discrimination on the basis of sexual orientation in its *Charter of Human Rights and Freedoms*. As a result, a Québec court found in 1979 that a Chicoutimi newspaper's refusal to publish an advertisement for a meeting of gays was in violation of the Québec Charter.³ In 1980 another court found that a refusal to rent school facilities to a homosexual association was in violation of the Charter.⁴
- In 1978 "homosexuality" was removed from the list of inadmissible classes in the new *Immigration Act*.
- In 1979 the Supreme Court of Canada found that the *Vancouver Sun's* refusal to publish an advertisement for a gay newspaper, the *Gay Tide*, was not in violation of British Columbia's *Human Rights Act*.⁵
- In February 1981, over 3000 people demonstrated in the streets of Toronto after the Toronto police raided several gay bathhouses in the city.
- In 1982 Canada's new constitution was proclaimed. However, its equality-rights guarantees did not come into force until 17 April 1985.
- Early in 1985, a parliamentary committee on equality rights was created by the House of Commons. The committee tabled its report on 25 October 1985 and in March 1986 the government responded to it by saying:

The government believes that one's sexual orientation is irrelevant to whether one can perform a job or use a service or facility. The Department of Justice is of the view that the Courts will find that sexual orientation is encompassed by the guarantees in Section 15 of the *Charter*. The government will take whatever measures are necessary to ensure that sexual orientation is a prohibited ground of discrimination in relation to all areas of federal jurisdiction.

In addition, in response to the committee's recommendation that the *Criminal Code* be amended to ensure that the minimum age for consensual sexual activity be made uniform, without distinction based on sexual orientation, the government amended the *Criminal Code* in 1985.

1986-1997: Eleven Years of History

1986

- Sexual-orientation protection was included in the Ontario *Human Rights Code*.
- In the US, the Supreme Court made its ruling in *Bowers v Hardwick*,⁶ affirming that individual states have the right to make laws declaring private sexual activity by consenting adults a crime.

Michael Hardwick worked in a gay bar in Atlanta, Georgia. He left late one night holding an open can of beer. A police officer spotted him and gave him a summons for violating a municipal ordinance. Hardwick forgot to show up in court and a warrant was issued. Hardwick later remembered the summons, reported to the court, paid the fine and was told the warrant would be quashed. Weeks later a police officer turned up at Hardwick's apartment at 8:30 am with the warrant, which he hadn't bothered to check on. He was let in by a friend of Hardwick's. The officer found Hardwick in bed with another man performing mutual oral sex. Interrupted at the most intimate of moments, Hardwick asked "what are you doing in my bedroom?" The officer replied that he had caught him "in the act of sodomy" and arrested Hardwick and his friend.

Lawyers approached Hardwick, feeling that his was the perfect test case with which to challenge the sodomy laws, which carried a possible penalty of up to 20 years in jail. The case almost did not go ahead because the district attorney's office did not want the challenge and refused to proceed. However, Hardwick's lawyers forced the issue.

In the case, George Washington University law professor David Robinson Jr presented a brief arguing that, because of the emerging AIDS epidemic, states had a compelling interest in criminalizing oral and anal sex.

- On 1 May, the Minister of Health announced a five-year, \$39 million plan to support activities dealing with AIDS in Canada.⁷
- In July, Lyndon LaRouche, a right-wing extremist, introduced Proposition 64, an initiative designed to quarantine people with AIDS and bar those suspected of being HIV-positive from certain jobs, in California. Proposition 64 was defeated by a large margin in November.
- In Canada, lovers Peter Biggs and Joseph Cole were evicted from their Vancouver apartment when their landlord discovered that Biggs was HIV-positive. The two men started legal proceedings to challenge the eviction.

1987

- Manitoba and Yukon included sexual orientation in their human rights acts.
- On 1 March the Canadian Public Health Association launched its AIDS information public relations campaign.⁸
- HIV-positive people were banned from entering the United States. This had and continues to have a big impact on Canadians living with HIV, since more Canadians than people of any other nationality seek to enter the United States each year.⁹
- In March the first chapter of ACT-UP was formed in New York. By the end of the year ACT-UP chapters had been formed in many other cities in North America.
- In June the *New York Times* agreed, for the first time, to use the word "gay."
- In August US gay organizations, including the National Gay and Lesbian Task Force and the Human Rights Campaign Fund, conditionally endorsed voluntary HIV-antibody testing, backing away from their original opposition to all testing.
- In British Columbia the gay community and its supporters were fighting Bill 34, the *Health Statute Amendment Act 1987*. The main concern for the gay community was the government's intention to amend the Act to allow for the isolation or quarantine of "a class

of persons" with a reportable communicable disease. The clear intent of the government proposal was to target gay men. A large lobby put pressure on the government, resulting in an amendment to Bill 34 prior to its proclamation that removed the words "class of persons."

1988

- By 1988 there were over 50,000 reported cases of AIDS in the US, and almost 400 new cases every week.
- Proposition 69, another AIDS quarantine initiative by Lyndon LaRouche, was put on the California ballot and defeated.
- In Canada, the denial of employment benefits to same-sex partners continued.¹⁰
- On 27 April 1988 the Royal Society of Canada issued 48 recommendations for action on HIV/AIDS issues.¹¹
- AIDS Action Now! was formed in Toronto, inspired by New York's ACT-UP, to undertake advocacy efforts on HIV/AIDS issues, including approval of new drugs, anonymous HIV testing, and adequate participation of people living with HIV/AIDS in decisions regarding them.
- Svend Robinson, New Democratic MP, publicly confirmed that he was homosexual. The media had long known that Robinson was gay and was regularly gay-baited in the House of Commons. However, it never recorded the gay-baiting, and even *Hansard* left no public record of the taunting. After Robinson came out, the jibes ended.¹²
- The decision on the complaint of Biggs and Cole - the first case of discrimination on the basis of HIV-positivity to be adjudicated by a human rights tribunal in Canada - was rendered. At issue was whether HIV infection is to be considered a "physical disability" under the BC *Human Rights Act*. The Council held that (1) HIV-positivity constitutes a disability; and (2) discrimination against persons associated with persons living with HIV/AIDS or perceived to be members of so-called "high-risk groups" is also prohibited.¹³

1989

- A Canadian human rights tribunal held that Brian Mossop had suffered discrimination on the basis of family status when he was refused bereavement leave to attend his lover's father's funeral.¹⁴ The case was appealed to the Federal Court.
- On 9 May Kevin Brown, a Vancouver AIDS activist, died. Brown was one of the three founders of the Vancouver Persons With AIDS Coalition and had lobbied hard for the release of drugs, in particular AZT. The *Vancouver Sun* quoted one of Brown's doctors as saying: "At a time when very few people had the courage to do it, he had the guts to go public." Before he died, Brown launched a case against the Province of British Columbia, suing it for its refusal to cover AZT under the province's Pharmacare program.

1990

- The New Brunswick Coalition for Human Rights Reform released a major report about discrimination faced by lesbian and gay New Brunswickers.¹⁵
- In March a boycott of the VI International Conference on AIDS in San Francisco was declared because of the US policy barring HIV-positive travelers.
- Canadians continued to be refused entry into the US. Examples included James Saccary, who was interrogated and banned from the US when found to be carrying a safer-sex pamphlet, and Ross Waddell, who was refused entry to see the Names Project quilt in Washington, DC.
- The third gay games, Celebration 90, were held in Vancouver. The games received national and international media coverage. HIV-positive participants were allowed into Canada as visitors, and no medical tests were required by immigration authorities.
- The Federal Court of Appeal dismissed an appeal by the Commissioner of Correctional Services from the 1989 decision of the Federal Court allowing Timothy Veysey to participate with his partner in the family visiting program for inmates in federal prisons.¹⁶
- The case of *Brown v British Columbia (Minister of Health)* was heard in the BC Supreme Court. The Court held that the province's refusal to fully fund AZT treatment was not discriminatory. Nevertheless, negative publicity in the media and lobbying by the gay community and its supporters led to a change of policy by the provincial government, which announced that, although the Court did not force it to do so, it would now fully fund AZT. In the Court's decision, Mr Justice Coultas recognized the extent of discrimination against gay men and lesbians in Canada:

The history of western civilization records that from biblical times to our own, homosexuals have been subjected to discrimination because of their sexual orientation. As with other forms of discrimination, it is unjust for it fails to take into account individual merits, character or accomplishment. The form and extent of it is uglier, the cry more shrill since the onset of AIDS.¹⁷

1991

- In the fall of 1987, Eric Smith, a teacher living with HIV, had been removed from his classroom and reassigned to non-teaching duties after a medical secretary disclosed that Smith had tested positive for HIV. While Smith immediately refused the reassignment, he eventually accepted a three-year educative position on the Nova Scotia Task Force on AIDS.¹⁸ At the end of the three-year period, in 1991, a group of parents in Nova Scotia threatened to set up their own school system if Smith was allowed back into the classroom. While the parents recognized that HIV is not spread through casual contact, they objected to having their children exposed to a gay "role model."¹⁹
- In August, as a result of a case brought by Timothy Knodel, the British Columbia Supreme Court extended Medicare coverage to same-sex partners,²⁰ declining to follow an earlier Ontario decision against Karen Andrews.²¹
- In September, the Ontario Supreme Court ruled in *Haig v Canada* that the *Canadian Human Rights Act* was discriminatory because it did not include sexual orientation as a prohibited ground of discrimination. The federal government appealed this decision to the Ontario Court of Appeal.
- In December, the Federal Court held that Jim Egan and John Nesbit were not entitled to the spousal allowance under the *Old Age Security Act* because they did not fit the definition of spouse in the Act even though they had lived together for 44 years. The case eventually made it to the Supreme Court of Canada.²²

1992

- "Sexual orientation" was added to the human rights codes of New Brunswick and British Columbia.

- In January, Christine Morrissey filed a Charter challenge to the *Immigration Regulations* for their failure to include same-sex partners in the family class, after Immigration Canada had refused to accept her sponsorship application of Bridget Coll. Immigration Canada has since granted Coll permanent resident status as an independent applicant.
- In February, Manitoba's Court of Queen's Bench heard the case of Chris Vogel and Richard North. It held that homosexual couples are not entitled to spousal benefits in collective agreements between the province and civil servants, saying that "[a] common law relationship does not include a homosexual relationship and therefore it does not give to one homosexual partner the status of spouse and therefore that of dependant."²³ Vogel and North appealed from this decision.
- In April, Jorge Inaudi, a gay man from Argentina, won his claim for Convention Refugee Status.²⁴
- In August, the Ontario Court of Appeal ruled in *Haig v Canada* that the failure to include sexual orientation in the *Canadian Human Rights Act* is discriminatory and that the protection should be read into the Act so that it is applied as though sexual orientation were included.²⁵ The government decided not to appeal the decision, and then Justice Minister Kim Campbell announced that the government would take the necessary steps to explicitly include sexual orientation in the *Canadian Human Rights Act*.
- In September, Michael Leshner won a human rights complaint in Ontario when the tribunal ruled that Leshner's partner was entitled to pension benefits. The tribunal held that "[p]rotection under the Human Rights Code for gays and lesbians in Ontario extends to protect the relationship as well as the individuals who are gay or lesbian."²⁶
- In October, Michelle Douglas, a lesbian member of the Canadian Armed Forces who had alleged that her dismissal from the Forces constituted discrimination on the basis of sexual orientation, won her case when the Forces admitted that their policy excluding gay men and lesbians from the military was discriminatory. A settlement of \$100,000 was reached and the Forces changed their policy, allowing gay men and lesbians to be members of the Forces.
- In November, the British Columbia Workers' Compensation Board awarded survivor's compensation to the lesbian partner of a deceased worker.²⁷
- Courts in Ontario and British Columbia heard cases with regard to property disputes between same-sex couples that had terminated their relationships. Both courts ruled that the couples had been in a relationship for a sufficient period of time to warrant a division of property in a fair and equitable manner, following the laws that had developed with

regard to common law couples.²⁸

- On 9 December 1992, then Minister of Justice Kim Campbell introduced Bill C-108, which would have added "sexual orientation" to the *Canadian Human Rights Act*, but at the same time would have restricted the definition of "marital status" to opposite-sex couples.

1993

- Saskatchewan added "sexual orientation" to its *Human Rights Act* as a prohibited ground of discrimination.
- In *Clinton v Ontario Blue Cross*, the Ontario Human Rights Commission ruled on 14 July that Ontario Blue Cross and York County Hospital must extend benefits to the same-sex partner of Elizabeth Clinton, and awarded \$4000 in compensation.²⁹ The case was appealed to the Ontario Divisional Court by Blue Cross and the appeal was allowed. The Court found that the tribunal had erred in its interpretation of the relevant provisions. An argument under s 15 of the Canadian Charter had not been raised and the Court declined to permit counsel for Clinton to raise such an argument because there had not been notice to the Attorney General.³⁰
- Egan and Nesbit lost their case in the Federal Court of Appeal.³¹ The Court held that the denial of the "spouse's allowance" to same-sex couples under the *Old Age Security Act* was not discriminatory since the legislation excluded "non-spouses" and same-sex relationships could never be "spousal" in nature. Egan and Nesbit appealed to the Supreme Court of Canada.
- The *Mossop* case, heard by a human rights tribunal in 1989, made it to the Supreme Court of Canada, which ruled that the denial of bereavement leave to a gay partner was not discrimination based on family status under the *Canadian Human Rights Act*.³² The Court was split four to three. The majority view was that same-sex couples were not included in "family status." However, the Court noted that if s 15 of the Charter had been argued the decision might have been different. In contrast, Justices L'Heureux-Dubé and MacLachlin, both women, found that the term "family status" was broad enough to include same-sex couples living together in a long-term relationship. Justice Cory agreed. L'Heureux-Dubé J said:

It is possible to be pro-family without rejecting less traditional family forms. It is not anti-family to support protection for non-traditional families.

The traditional family is not the only family form, and non-traditional family forms may equally advance true family values.³³

- The Supreme Court of Canada confirmed the decision in *Inaudi*, ruling that individuals fearing prosecution owing to sexual orientation belonged to a group defined by an innate characteristic and were therefore entitled to refugee status based on "membership in a particular social group."³⁴
- In *Lorenzen v Treasury Board*, the Public Service Staff Relations Board ruled on 24 September that denial of employment-related family and bereavement leave to gay partners violated the collective agreement.³⁵
- In *Thwaites*,³⁶ a Canadian human rights tribunal held that the dismissal of Simon Thwaites, a gay man living with HIV, from the Canadian Armed Forces was discriminatory.

1994

- Humans Against Homophobia (HAH!), released *Proud but Cautious*, an important report on discrimination against gay men and lesbians in Nova Scotia.³⁷
- On 8 March, in *Guevremont*,³⁸ a grievance against Canada Post, an arbitrator held that the denial of an employment-related claim for medical expenses incurred by a same-sex partner was in violation of the collective agreement.
- In Alberta, *Vriend* was decided by the Alberta Court of Queen's Bench.³⁹ Delwin Vriend was dismissed from his job as a laboratory worker at a religious college because he was gay. The provincial Human Rights Commission could not deal with his complaint because sexual orientation is not included in Alberta human rights legislation, and Vriend had to go to court. The Court held that failure to include sexual orientation in the Alberta human rights legislation, the *Individual Rights Protection Act*, contravened s 15 of the Canadian Charter. The Government of Alberta appealed this decision.
- On 17 May, then Ontario Attorney General Marion Boyd introduced legislation (Bill 167) that would have provided same-sex couples with rights and obligations equal to opposite-sex common law couples. If the legislation had been adopted, it would have had the effect of amending the definition of spouse in 79 statutes. However, the Bill barely survived first reading. In the face of massive opposition the NDP government watered it down, removing in particular its most controversial aspect, the right to adopt.

Nevertheless, the vote was lost on 9 June by 68 to 59. Two main factors led to the defeat of the Bill: the decision of the NDP government to allow a free vote on the legislation, and the "flip-flop" of Liberal leader Lyn McLeod, who had written to the Premier promising her support for same-sex benefits legislation, and then whipped her caucus to vote against the Bill when it was introduced. The defeat resulted in raucous demonstrations outside the Legislature and elsewhere. Police and security guards sent in to contain the demonstrations wore rubber gloves, a telling reminder of the ignorance, bigotry, and irrational fear still faced by gay people.

- In June, the Québec Human Rights Commission, after extensive hearings, issued a report that made 41 recommendations for changes in laws and institutions to end discrimination against lesbians and gay men. The hearings had been held amid growing concern over the murders of 14 gay men in Montréal in the three years preceding the hearings, as well as a series of assaults on gay men and lesbians and complaints of police brutality during protests by homosexuals. Among the 41 recommendations, the report recommends that all Québec laws should be changed so that homosexual couples have the same rights and social benefits as heterosexual common law spouses.⁴⁰
- On 23 November, an arbitrator in *Canadian Telephone Employees' Association and Bell Canada* held that the denial of employment-related spousal benefits constituted unlawful discrimination and breach of the collective agreement.⁴¹

1995

- In May, the Supreme Court of Canada released its ruling in *Egan and Nesbit*.⁴² The case concerned the right to claim a spousal pension under the *Old Age Security Act*. Egan and Nesbit were denied the remedy they sought. However, the Court was split on a number of issues. All nine justices agreed that sexual orientation is a protected ground and that the protection extends to partnerships of lesbians and of gay men. Five of the justices agreed that the *Old Age Security Act* was discriminatory within the meaning of s 15, while four said it was not discriminatory for legislation to prefer "traditional families." However, one of the five who held that the *Old Age Security Act* was discriminatory found that the legislation was saved under s 1 of the Charter, holding that restriction of the legislation to heterosexuals was a reasonable limit prescribed by law. Even though the case was lost, the decision that gay men and lesbians and their partnerships are protected is of enormous importance.
- Also in May, a challenge to the higher age of consent for anal intercourse was heard in the Ontario Court of Appeal. The case was ultimately successful and the higher age of consent was ruled unconstitutional.⁴³

- In June the Manitoba Court of Appeal issued its judgment in *Vogel*.⁴⁴ The 13-year-long battle of partners Vogel and North ended in victory: the Court found that since the inclusion of sexual orientation in the *Human Rights Code*, in Manitoba the complaint of discrimination for denial of spousal benefits by the province had to proceed. The Court referred the matter back to an adjudicator to determine whether or not discrimination had occurred in the circumstances of the case.
- In August, in British Columbia Tracey Potter and Sandra Benson won their human rights complaint against a doctor who had refused them artificial insemination in 1993. The Human Rights Council ruled that the refusal constituted discrimination on the grounds of sexual orientation.⁴⁵
- In September, the House of Commons voted on M-264, a private member's motion by openly gay Bloc Québécois MP Réal Ménard, calling upon Parliament to recognize same-sex relationships. The motion was defeated by an overwhelming majority.
- The House of Commons passed Bill C-41, a bill requiring increased penalties for crimes motivated by hatred on certain grounds, including sexual orientation. For the first time, lesbians and gay men were recognized in a positive way in federal legislation.
- In a landmark ruling, four lesbian couples in Ontario each won the right to jointly adopt the biological child of one of the partners to the relationship.⁴⁶

1996

- The federal government passed Bill C-33, adding "sexual orientation" to the *Canadian Human Rights Act*. This left only Newfoundland, Prince Edward Island, Alberta and the Northwest Territories without human rights protections for lesbians and gay men.
- The Alberta Court of Appeal overturned the lower court decision in *Vriend*⁴⁷ and ruled that "sexual orientation" should not be read into the Alberta *Individual Rights Protection Act*. The ruling has been appealed to the Supreme Court of Canada.
- The federal government extended medical, leave and related benefits to government employees following the ruling in *Moore and Akerstrom v Canada*.⁴⁸
- The judgment of the BC Supreme Court in *Little Sisters Book and Art Emporium et al v Minister of Justice and Attorney General of Canada et al* was issued.⁴⁹ The judge ruled

that Canada Customs had frequently applied the *Customs Tariff* and the *Customs Act* in a discriminatory fashion, unduly restricting the entry of gay and lesbian materials into Canada.

- British Columbia became the first jurisdiction in the world to enact legislation permitting a person to adopt the biological child of a same-sex partner.
- The Ontario Court of Appeal affirmed a ruling that a lesbian could sue her ex-partner for spousal support upon termination of the relationship.⁵⁰
- A Hawaii court ruled that the prohibition on same-sex marriage is unconstitutional in the state of Hawaii. The decision has been appealed to the Hawaii Supreme Court.⁵¹
- Prime Minister Jean Chrétien, when questioned by a high school student, expressed his lack of support for gay marriage, saying "I'm not very comfortable with that, because I don't know how that works in a society."

1997

- A human rights adjudicator ruled in the *Vogel* case that the Government of Manitoba must extend equal employment benefits to same-sex employees.⁵² The Government announced that it would accept the ruling and extend the benefits.
- Newfoundland enacted legislation adding "sexual orientation" to its human rights legislation. This left Prince Edward Island, Alberta and the Northwest Territories as the only three Canadian jurisdictions that do not protect gay men and lesbians from discrimination. Activists in Prince Edward Island began organizing to hold the Premier to a promise to include "sexual orientation" in the PEI Human Rights Act.
- The *Vriend v Alberta* case was heard by the Supreme Court of Canada, and judgment was reserved. If successful, "sexual orientation" will be read into Alberta's human rights legislation.
- An Ontario Court ruled in *Kane v Axa Insurance* that Ontario's Insurance Act was unconstitutional for explicitly denying certain survivor's benefits to same-sex spouses.⁵³ The Ontario Government has appealed the ruling.
- Government Bill S-5 was introduced and passed in the Senate. If passed by the House of Commons, Bill S-5 will amend the Canadian Human Rights Act in various ways,

including an explicit prohibition on discrimination based on multiple grounds (eg, sexual orientation and family status), an increase in damages available for pain and suffering, and an extension of the ability of employers to develop programs to alleviate the position of disadvantaged groups on grounds such as sexual orientation. Some equality groups have expressed concern, however, that Bill S-5 also codifies a defence enabling employers to avoid their obligation to accommodate the needs of disadvantaged groups if doing so would cause them "undue hardship" based on factors such as "cost." The concern is that this could result in a price tag being placed on equality rights.

- The *Rosenberg and CUPE* case was heard before the Ontario Court of Appeal. The Court will rule in 1998 on the constitutional validity of the provisions in the federal Income Tax Act that prohibit registration of pension plans treating same-sex spouses equally with opposite-sex spouses.
- British Columbia enacted legislation treating same-sex spouses equally with opposite sex spouses for all purposes relating to maintenance, custody and support.
- The British Columbia Human Rights Commission held public hearings on a number of proposed changes to the provincial human rights legislation, including the explicit addition of "gender identity" as a prohibited ground of discrimination. The public hearings saw a broad-scale mobilization of the transgendered community within British Columbia.
- School boards in British Columbia and Alberta moved to ban the use of books dealing with lesbian and gay issues in a positive way. The decision of the Surrey school board is being challenged in the Courts.
- The *M v H* case, dealing with lesbian spousal support, was appealed by the Ontario Government to the Supreme Court of Canada for hearing in February 1998.
- The government of Alberta reaffirmed its decision to prohibit gay men and lesbians from fostering children, a decision being challenged by lesbian foster mother Ms T.

Sexual Orientation Cases

This is a non-exhaustive case listing that provides brief summaries of decisions by Canadian courts and tribunals dealing with sexual orientation issues. The listing was developed and is maintained by the Library of Parliament. The version reprinted here is current as of 24 January 1997. Updated versions will be available at www.egale.ca/~egale or by contacting EGALE at 306-177 Nepean St, Ottawa, ON, K2P 0B4. Tel: (613) 230-1043, fax: (613) 230-9395.

Age of Consent to Sexual Activity

R. v. L. (L.A.) (1986), 24 C.R.R. 158 (Ont. Prov. Ct. (Fam. Div.)) (in pre-*Andrews* case, court finding denying defence of consent to charge of buggery [under previous *Criminal Code* section] on basis of age violates section 15 of *Charter*: no mention of sex of partner or of sexual orientation)

R. v. Robinson (1988), 4 W.C.B. (2d) 178 (case digest) (Ont. Dist. Ct.) (in pre-*Andrews* case, court finding denial of defence of consent to charge of buggery under previous section of *Criminal Code* not violating section 15: no mention of sex of partner or of sexual orientation)

R. v. H. (D.) (1989), 64 Alta. L.R. (2d) 414 (case digest) (Alta. Prov. Ct.) (court finding section of *Criminal Code* not violating section 15, as justifiable protection of unmarried children: no mention of sex of partner or of sexual orientation)

R. v. Schnare, February 15, 1990 (N.S. Prov. Ct.) (court finding section of *Criminal Code* not discriminating against gays: details not known, case not available for review)

R. c. Roy, [1995] R.J.Q. 282 (C.Q.), decision under appeal, Appeal No. 500-10-000304-947 (section 159 of *Criminal Code* not infringing Charter section 7, subsections 11*d*) or 15(1): court finding that in absence of evidence, unable to find sexual orientation an analogous ground under the Charter, that sexual orientation innate characteristic or that accused member of disadvantaged group)

Halm v. Canada, [1995] 2 F.C. 331 (T.D.), decision under appeal, Appeal No. A-171-95 (court setting aside deportation order against individual convicted of sodomy in U.S. on basis that equivalent section of *Criminal Code*, upon which validity of deportation order dependent, in violation of section 15 on of Charter on grounds of age and sexual orientation)

R. v. M. (C.) (1995), 23 O.R. (3d) 629, 30 C.R.R. (2d) 112 (Ont. C.A.), affirming (1992), 75 C.C.C. (3d) 556, 11 C.R.R. (2d) 363 (Ont. Ct. (Gen. Div.)) [lower court decision based solely on Charter section 7] (majority: section 159 denial of defence of consent in respect of criminal charge of engaging in anal intercourse with consenting person aged 14 to 18 years violating section 15 of Charter on basis of age only; concurring minority: section 15 violation based primarily on sexual orientation, age and marital status grounds engaged solely through their relationship to sexual orientation: section 159 declared of no force or effect)

R. v. Jewell and Gramlick, Doc. CA C18639, C18641, July 21, 1995 (Ont. C.A.) (court quashing convictions under section 159 of homosexual hebephile [attraction to mid-adolescent males] on basis of decision in *C. (M.)*)

R. v. McGowan (1995), 102 C.C.C. (3d) 461 (Ont. Ct. (Prov. Div.)) (in obscenity case involving homosexual activities, including anal intercourse, between and with fourteen year old males, court noting that under *C. (M.)* decision, anyone 14 or over can consent to most forms of non-exploitive sexual conduct without criminal consequences)

R. v. Keen, Doc. CA M18146, May 13, 1996 (Ont. C.A.) (court denying application for extension of time to file notice of appeal against sentences imposed in July 1994 upon conviction of numerous offences, including anal intercourse, on basis, *inter alia*, that as matter had been finally judicially decided before section 159 declared of no force and effect in *C. (M.)*, change in law not applicable: no mention of age of victim or sexual orientation)

Customs

Little Sisters Book and Art Emporium v. Canada (Minister of Justice) (1996), 131 D.L.R. (4th) 486 (B.C. S.C.), decision under appeal, Appeal No. CA 21811 (court finding that although provisions of the *Customs Act* and *Tariff* authorizing "prior restraint" or seizure of material imported by gay bookstore not infringing Charter guarantees under subsection 2(b) and section 15, plaintiffs entitled to declaration that relevant provisions construed and applied by Customs officials in violation of those sections [court subsequently granting plaintiff bookstore an interim injunction to enjoin continued policy of systematic inspection by Customs: 134 D.L.R. (4th) 293 (B.C.S.C.)])

Dangerous Sexual Offender

Klippert v. The Queen, [1967] S.C.R. 822 (Court upholding male accused's sentence as dangerous sexual offender for unspecified acts of "gross indecency" with consenting men)

Discrimination in Employment, Services and Accommodation

Re Damien and Ontario Human Rights Commission (1976), 12 O.R. (2d) 262 (H.C. (Div. Ct.)) (court declining to entertain arguments as to Commission's jurisdiction to deal with complaint of discrimination on grounds of sex [meaning sexual orientation] in relation to dismissal until employer granted status in proceedings: no ruling dealing with substantive jurisdictional question in authorities consulted)

Board of Governors of the University of Saskatchewan v. Saskatchewan Human Rights Commission

(1976), 66 D.L.R. (3d) 561 (Sask. Q.B.) (Human Rights Commission prevented from investigating employment-related complaint based on sexual orientation because ground of "sex" limited to gender)

Gay Alliance Toward Equality v. Vancouver Sun (1979), 97 D.L.R. (3d) 577 (S.C.C.) (newspaper's refusal to publish advertisement for gay paper not in violation of British Columbia *Human Rights Act*)

Following the addition of "sexual orientation" to the *Charte des droits et libertés de la personne du Québec* in 1977, a number of complaints on that ground were resolved in favour of the complainants, either through mediation by the Commission des droits de la personne du Québec, or through court action. These include:

Commission des droits de la personne du Québec c. Le Progrès du Saguenay Ltée. et Paul Bergeron, File No. 150-02-000354-79, April 24, 1979, unreported (C.P.Q.) (CDPQ instituting court action seeking damages on behalf of Centre homophile d'aide et de libération Inc., having found newspaper's refusal to publish advertisement of second Congress of Gays in violation of Québec *Charte des droits et libertés de la personne*: matter settled out of court)

L'Association A.D.G.Q. c. La Commission des écoles catholiques de Montréal (1979), 112 D.L.R. (3d) 230, [1980] C.S. 93 (C.S.Q.) (refusal to rent school facilities to homosexual association in violation of Québec *Charte des droits et libertés de la personne*)

CDPQ mediation of a student's complaint alleging a teacher had awarded a failing grade owing to his sexual orientation resulting in the college awarding a passing grade (File M-M-02, 131-1, April 30, 1980)

Mediation of a complaint based on a Montreal newspaper's refusal of an ad for a gay club resolved with agreement on the form of the ad (File M-M-02, 325-1, September 7, 1980)

Damages awarded to two male teachers dismissed because of their sexual orientation and to two female teachers dismissed because they were perceived as lesbians (*Droits et libertés*, vol. 5, no. 5, May-June 1982 [Bulletin of the CDPQ])

C.D.P.Q. v. Anglsberger (1982), 3 C.H.R.R. D/892 (C.P.Q.) (damages awarded to transsexual man refused service in a restaurant [decision based on "civil status" or "état civil"])

CDPQ intervention resulting in restaurant compensating two waiters alleging harassment by the restaurant manager on the basis of sexual orientation (File no. M-M-02, 509-1, 510-1 [date not indicated in reference])

An experienced caregiver refused an employment interview because he was gay awarded damages by the CDPQ (File no. M-NO 01, 263-1 [date not indicated in reference])

A gay couple forbidden from dancing together in a "straight" club awarded monetary compensation (File

no. Q-Q 01, 018-1, 019-1 [date not indicated in reference])

Santa Claus association agreeing to modify an ad calling for recruits without homosexual tendencies (File no. M-M 00, 040-257 [date not indicated in reference])

Stiles v. Canada (1986), 3 F.T.R. 234 (T.D.), decision affirmed A-271-86 (procedural ruling upholding plaintiff's right to bring section 15 *Charter* challenge against denial of transfer from R.C.M.P. to C.S.I. S.: in October 1988, with plaintiff's consent, court order issued dismissing action)

Sylvestre v. Canada, [1986] 3 F.C. 51 (section 7 *Charter* challenge to dismissal from armed forces unsuccessful)

Bordeleau v. Canada (1989), 32 F.T.R. 21 (T.D.) (procedural ruling upholding plaintiff's right to bring action, including section 15 *Charter* challenge, against dismissal from armed forces: action discontinued April 1994)

Brown v. British Columbia (Minister of Health) (1990), 48 C.R.R. 137 (B.C.S.C.) (although sexual orientation within scope of *Charter* section 15, province's refusal to fully fund AZT treatment not discriminatory)

Canada (Minister of National Defence) v. Canada (Security Intelligence Review Committee), T-763-90, March 29, 1990, [1990] F.C.J. No. 278 (Q.L.) (F.C.T.D.) (court dismissing application to prohibit S.I.R. C. from investigating complaint of member of armed forces related to revocation of security clearance based on her sexual orientation)

Ms. M.D. Douglas and Chief of the Defence Staff, File No. 1170/Douglas, August 11, 1990 (Security Intelligence Review Committee) (committee finding respondent erred in not concluding that armed forces policy of denial of security clearance on basis of homosexuality inconsistent with subsections 2 (d) and 15(1) of the *Charter* [see also *Douglas v. Canada* [1993], below])

Haig and Birch v. Canada (1992), 94 D.L.R. (4th) 1 (Ont. C.A.) (plaintiff Birch prevented from lodging complaint related to employment in armed forces owing to absence of sexual orientation in *Canadian Human Rights Act*: section 15 *Charter* challenge to contest that omission successful)

Douglas v. Canada, [1993] 1 F.C. 264 (T.D.) (section 15 *Charter* challenge related to release from employment in armed forces: parties settling for declarations that plaintiff's section 15 rights denied, and that armed forces policy contrary to the *Charter*)

Jan Waterman and the Ontario Human Rights Commission v. National Life Assurance Company of Canada et al. (1993), 18 C.H.R.R. D/176 (Ont. Board of Inquiry) (complaint under Ontario *Human Rights Code* arising from denial of permanent employment upheld)

Bruce Coles and Brian O'Neill v. Ministry of Transportation and Pat Jacobson, File no. 92-018/09, October 1994 (Ont. Bd. of Inquiry) (same-sex couples to be treated on same basis as heterosexual common law couples by provincial transportation ministry, e.g., *re* registering co-ownership of vehicle)

Crozier v. Asselstine (1994), 22 C.H.R.R. D/244 (Ont. Bd. of Inquiry) (board allowing employee complaint alleging harassment on basis of sexual orientation, reasoning that such harassment constitutes discrimination on ground of sexual orientation)

A. v. Colloredo-Mansfeld (No. 3) (1994), 23 C.H.R.R. D/328 (Ont. Bd. of Inquiry) (board finding complaint of harassment on ground of sexual orientation in relation to tenancy not within jurisdiction, on basis that relevant provision of *Human Rights Code* does not include sexual orientation among prohibited grounds of harassment)

Re Cami Automotive Inc. and C.A.W., Local 88 (1994), 45 L.A.C. (4th) 71 (Arbitrator) (in relation to grievance allowed in part on other grounds, arbitrator finding harassment on basis of sexual orientation not covered by Ontario *Human Rights Code* and, even if ground were proscribed, matter not within jurisdiction as neither union nor company responsible for harassment of grievor)

Bertrand c. Hôpital Général Juif, [1994] R.J.Q. 2087 (T.D.P.Q.) (tribunal's first ruling to deal with complaint based on sexual orientation finding that while isolated incident in bad taste, not constituting violation of prohibition in Québec *Charte des droits et libertés de la personne* against harassment on that ground)

Grace v. Mercedes Homes Inc. (1995), 23 C.H.R.R. D/350 (Ont. Bd. of Inquiry) (board dismissing complaints of gay couple alleging discrimination in housing accommodation)

Potter v. Korn (1995), 23 C.H.R.R. D/319 (B.C. C.H.R.), application for judicial review dismissed (1996), 134 D.L.R. (4th) 437, *sub nom. Korn v. Potter* (B.C.S.C.) (council finding lesbian couple discriminated against by doctor's refusal to provide artificial insemination services)

Commission des droits de la personne du Québec v. Camping & plage Gilles Fortier Inc., J.E. 95-287 (T.D.P.Q.) (tribunal finding campground policy denying accommodation to two or more adults of same sex unless part of a family group indirectly discriminating on basis of sexual orientation, since by definition all gay and lesbian couples excluded)

Vriend v. Alberta (1996), 132 D.L.R. (4th) 595, 25 C.H.R.R. D/1 (Alta. C.A.), reversing (1994), 20 C.H.R.R. D/358 (Alta. Q.B.), leave to appeal to the Supreme Court of Canada granted, File No. 25285 (majority: omission of sexual orientation from *Individual Rights Protection Act* not a violation of section 15 of the Charter, constitutionality of Act not dependent on perfect emulation of section 15; dissent: Legislature's omission tantamount to approving ongoing discrimination against homosexuals and in violation of section 15)

In January 1996, it was reported that a gay rights group ? Humans Against Homophobia -? had filed a complaint with the Nova Scotia Human Rights Commission, alleging that a Halifax coffee shop had discriminated against gay couples in at least two "homophobic" incidents [according to officials at the Nova Scotia Human Rights Commission, privacy considerations preclude their divulging any information concerning complaints, including as to whether a complaint has been lodged]

Family Law

Case v. Case (1974), 18 R.F.L. 132 (Sask. Q.B.) (court finding homosexuality a factor to be considered but not a bar to award of custody - custody awarded to father as opposed to lesbian mother living with same-sex partner)

North et al. v. Matheson (1975), 20 R.F.L. 112 (Ont. Co. Ct.) (application for order requiring registration of same-sex marriage denied)

K. v. K. (1976), 23 R.F.L. 58 (Alta. Prov. Ct.) (court awarding custody to lesbian mother living with same-sex partner)

D. v. D. (1978), 3 R.F.L. (2d) 327 (Ont. Co. Ct.) (court awarding custody of children to bisexual father)

Bernhardt v. Bernhardt (1979), 10 R.F.L. (2d) 32 (Man. Q.B.) (court not awarding lesbian mother in a relationship custody of child wishing to stay with her)

B. v. B. (1980), 16 R.F.L. (2d) 7 (Ont. Prov. Ct.) (court awarding custody of daughter to lesbian mother living with same-sex partner on basis that in the child's best interest)

Bezaire v. Bezaire (1981), 20 R.F.L. (2d) 358 (Ont. C.A.) (court finding homosexuality not in itself a ground for refusing to award custody: the best interests of the child and the effect of parents' life-style on those interests are determinative - custody of children awarded to father rather than lesbian mother)

Monette c. Sylvestre, [1981] C.S. 731 (homosexuality not in itself an obstacle to parental custody rights)

Palmer v. Palmer (1981), 15 Sask. R. 20 (Sask. Q.B.) (custody removed from unemployed father having homosexual tendencies and awarded to recovered alcoholic mother living with stable man)

Johnston c. Rochette (1982), 3 C.H.R.R. D/1133 (C.S.Q.) (court finding provision in separation agreement prohibiting lesbian mother's access to children while partner present in violation of Québec *Charte des droits et libertés de la personne*: provision struck down)

Cloutier c. Trudel, [1982] C.S. 951 (court denying custodial father's application to prevent lesbian mother's access to daughters while any other woman present, no indication that mother would incite children to adopt sexual orientation she had chosen)

Droit de la famille - 14, File no. 750-12-002454-82, December 22, 1982 (C.S.Q.) (court finding homosexuality in no way indicating lesbian mother unable to fulfil role: custody awarded to her)

Droit de la famille - 31 (1983), 34 R.F.L. (2d) 127 (C.S.Q.) (court granting divorce against both parties owing to father's adultery and mother's homosexuality: court finding homosexuality not in itself a ban to the award of custody, but constituting a negative element in present case - custody awarded to father)

M. v. M. (1984), 42 R.F.L. (2d) 55 (P.E.I.S.C.) (marriage annulled on basis that wife transsexual, a fact not known at time of marriage)

Elliott v. Elliott (1984), 25 A.C.W.S. (2d) 304 (B.C.S.C.) (court awarding custody to father engaged to be married rather than to lesbian mother living in discreet homosexual relationship)

Carson v. Carson (1985), 46 R.F.L. (2d) 102 (N.B.Q.B.) (court denying access to gay father convicted of sexually assaulting male victim; father's conduct not relevant, however, to division of matrimonial property)

Worby v. Worby (1985), 48 R.F.L. (2d) 369 (Sask. Q.B.) (court denying overnight access to father living with same-sex partner for as long as life-style in effect)

Anderson v. Luoma (1986), 50 R.F.L. (2d) 127 (B.C.S.C.) (claim for maintenance refused, constructive trust principles applied to divide assets of same-sex couple)

Boucher v. Boucher (1986), 72 N.B.R. (2d) 100 (N.B. Q.B.) (court denying custody to father with criminal record for homosexual acts and fired for homosexual activities, in part because steady employment not guaranteed owing to homosexual behaviour)

Daller v. Daller (1988), 18 R.F.L. (3d) 53, 22 R.F.L. (3d) 96 (Ont. C.A.) (court declining to remove child from lesbian mother's custody on basis that homosexual relationship not having detrimental effect and not in child's best interest to grant father's claim for custody)

P.B. v. P.B., April 6, 1988 (Ont. Prov. Ct. (Fam. Div.)) (court delaying overnight access for gay father cohabiting with same-sex partner and ordering partners to sleep in separate rooms during overnight access)

Saunders v. Saunders (1989), 20 R.F.L. (3d) 368 (B.C. Co. Ct.) (gay father sleeping with partner during child's visits denied overnight access on basis that not in child's best interests to be exposed to "unnatural" relationship)

L. (M.B.C.) v. C. (E.W.) (1989), 89 N.S.R. (2d) 309 (N.S. T.D.) (court upholding family court recommendation to end pedophile father's custody and prevent access)

E.(A.) v. E.(G.), September 22, 1989 (Nfld. S.C.) (court granting access to discreet gay father cohabiting with partner, but delaying overnight access to allow grandparents to get used to situation)

B. v. A. (1990), 29 R.F.L. (3d) 258 (Ont. Master) (court finding transsexual not having undergone surgical genital alteration not a "man" within definition of "spouse" in Ontario *Family Law Act* and therefore not entitled to interim support under Act)

Monk v. Doan (1990), 94 Sask Rev. 316 (Sask. Q.B.) (custody granted to lesbian aunt whose cohabitation with long-term partner conducted in discreet and dignified way)

Brunet v. Davis, [1992] O.J. No. 1586 (Q.L.), Action No. 4633/89, April 16, 1992, unpublished (Ont. Ct. (Gen. Div.)) (court dividing property of same-sex couple)

C.(L.) v. C.(C.) (1992), 10 O.R. (3d) 254 (Ont. Ct. (Gen. Div.)) (application for declaration of nullity of marriage between women granted)

Forrest v. Price (1992), 48 F.L.R. 72 (B.C.S.C.) (court dividing property of same-sex couple)

Robertson v. Geisinger (1991), 36 R.F.L. (3d) 261 (Sask. Q.B.) (court granting custody to lesbian mother as opposed to gay father on basis of child's best interest)

S. v. S., Doc. Cranbrook 02278, July 9 and November 30, 1992 (B.C. S.C.) (although lesbianism by itself not rendering mother unfit for custody, court denying custody to lesbian mother wanting to relocate, since children upset by marriage breakdown, wife not in a stable relationship and no way of knowing what kind of relationships she would establish or how they would affect children)

Sleeth v. Wasserlein, 36 R.F.L. (3d) 278 (B.C.S.C.) (court ruling settlement agreement between same-sex partners on breakdown of relationship not tainted by compulsion or mistake constituting valid enforceable contract)

Layland v. Ontario (Minister of Consumer and Commercial Relations) (1993), 104 D.L.R. (4th) 214 (Ont. Ct. (Gen. Div.)), decision under appeal, Appeal No. C 15711, *sub nom. Schoucervou C. et al. (formerly Layland) v. Ontario (M.C.C.R.)* (majority: common law limitation of marriage to persons of opposite sex not in violation of section 15 of the Charter; dissent: the common law does not prohibit same-sex marriages in Canada, restricting marriage to heterosexual couples infringes section 15 on basis of sexual orientation)

K. (Re) (1995), 23 O.R. (3d) 679 (Ont. Ct. (Prov. Div.)) (court finding opposite sex definition of

"spouse" in *Child and Family Services Act* under which same-sex couples prevented from making joint applications for adoption an infringement of section 15 of the Charter and not saved by section 1, court expanding definition of "spouse" by "reading in" same-sex terms)

Ghidoni v. Ghidoni, Doc. Nanaimo 5920/009596, 11 October 1995 (B.C.S.C.) (court ordering joint custody by consent to mother and "transvestite or transsexual" father on basis, *inter alia*, of expert evidence that father's "gender disorder" not detrimental to his having custody)

Ouellet v. Ouellet, Doc. A5602/94, 9 May 1996 (Ont. Ct. (Gen. Div.)) (court partially granting bisexual mother's custody application on basis, *inter alia*, that sexual orientation only relevant to degree it affects or is likely to affect children's well-being)

M. v. H. Doc. CA C23867, C25140, 18 December 1996 [1996] O.J. No. 4419 (Q.L.) (Ont. C.A.), affirming, 132 D.L.R. (4th) 538, 35 C.R.R. (2d) 123 (Ont. Ct. (Gen. Div.)), (interlocutory rulings reported at (1994), 20 O.R.(3d) 70, 50 R.F.L. (3d) 92 (Ont. Ct. (Gen. Div.)) (parties conceding opposite-sex definition of "spouse" in *Family Law Act* preventing same-sex partners from applying for spousal support violation of section 15 of the Charter, majority of court finding exclusion not justified under section 1 and issuing declarations replacing opposite-sex terms in definition), issuing suspended order severing and replacing opposite sex terms in definition: remedy to take effect in one year barring legislative activity to ensure constitutionality)

Hate-Motivated Crime

R. v. Atkinson, Ing and Roberts (1979), 43 C.C.C. (2d) 342 (Ont. C.A.) (court increasing sentences issued by trial judge following three unprovoked "gay-bashing" assaults)

Hate Propaganda

League for Human Rights B'Nai Brith Canada (Midwest Region) v. Manitoba Knights of the Ku Klux Klan (1993), 18 C.H.R.R. D/406 (C.H.R.T.) (tribunal noting *Haig* decision reading in sexual orientation as proscribed ground in *Canadian Human Rights Act* and finding recorded telephone messages at issue likely to incite hatred on numerous grounds, including sexual orientation)

John Payzant and Canadian Human Rights Commission and Tony McAleer, Canadian Liberty Net and Harry Vaccaro, T.D. 4/94, January 27, 1994, unreported (C.H.R.T.), application for judicial review dismissed (1996), 132 D.L.R. (4th) 672 (F.C.T.D.) *sub nom McAleer v. Canada (Human Rights Commission)* (tribunal finding telephonic messages likely to incite hatred on basis of sexual orientation,

complaints of discrimination upheld: first federal tribunal decision under *Canadian Human Rights Act* based solely on sexual orientation)

Immigration and Refugee

Sherwood Atkinson (Sheri de Cartier), 5 Immigration Appeal Cases 185 (1972) (deportation order of post-operative transsexual [male to female] charged with pursuing sexual activities with male upheld under provision of pre-1978 *Immigration Act* barring entry into Canada of persons practising "homosexuality")

Vulpen v. Minister of Employment & Immigration, File No. V79-6100, August 29, 1980 (Immigration Appeal Board), reversed A-179-81, 1982 (F.C.A.) (Board finding transsexual sponsoree same sex as husband, and therefore not his spouse within meaning of immigration regulations)

The case of *Morrissey and Coll v. Canada*, filed in Federal Court in January 1992, raised a Charter challenge to the *Immigration Act's* exclusion of gay and lesbian partners under "family class" sponsorship provisions. In September 1992, immigration officials granted the foreign partner permanent residency as an independent applicant, thus avoiding Charter litigation. The *Carrott and Underwood* case, a second Charter challenge on the "family class" issue initiated in February 1992, was also resolved out of court.

Jorge Inaudi, April 9, 1992, No. T91-04459 (Convention Refugee Determination Division (?CRDD") of Immigration and Refugee Board) (refugee status granted)

Canada (Attorney General) v. Ward, [1993] 2 S.C.R. 689 (Court ruling that membership in a "particular social group" as a basis for a Convention refugee claim extends to groups defined by an innate, unchangeable characteristic, including sexual orientation)

Artur Lasha, May 1994 (CRDD) (refugee status granted)

Pizarro v. Minister of Employment and Immigration (1994), 75 F.T.R. 120 (F.C.T.D.) (court allowing judicial review application and setting aside CRDD decision finding claimant's homosexuality did not make him a member of a particular social group for purposes of Convention refugee claim, on basis that matter effectively put beyond doubt by Supreme Court of Canada *Ward* decision, matter returned to CRDD)

Dykon v. Minister of Employment and Immigration (1994), 87 F.T.R. 98 (T.D.) (Court allowing judicial review application and setting aside decision of CRDD finding claimant had not been persecuted on basis of homosexuality, matter returned to CRDD with direction that Board find claimant to be

Convention refugee)

Jose Luis Ortigoza, January 1995 (CRDD) (refugee status granted)

Tchernilevski v. Minister of Citizenship and Immigration, IMM-5088-94, June 9, 1995, [1995] F.C.J. No. 894 (Q.L.) (F.C.T.D.) (court dismissing judicial review application and upholding CRDD decision denying refugee status on basis unlikely claimant would be persecuted because of his homosexuality if returned to Moldova)

Zhu v. Canada (Minister of Citizenship and Immigration) IMM-33-95, October 20, 1995, [1995] F.C.J. No. 1396 (Q.L.) (F.C.T.D.) (court dismissing application for judicial review of negative humanitarian and compassionate decision in respect of which government arguing sufficient account taken of applicant's sexual orientation)

Polyakov v. Minister of Citizenship and Immigration, IMM-1140-95, February 9, 1996, [1996] F.C.J. No. 300 (Q.L.) (F.C.T.D.) (court dismissing judicial review application and upholding CRDD decision denying refugee status to claimant alleging fear of persecution on ground of sexual orientation on basis of lack of credibility)

L.J. v. Minister of Citizenship and Immigration, IMM-2833-95, July 29, 1996, [1996] F.C.J. No. 1042 (Q.L.) (F.C.T.D.) (court dismissing judicial review application and upholding CRDD decision denying refugee status on ground of (1) lack of objective basis to fear persecution in Trinidad owing to lesbianism (2) negative credibility findings)

In early 1995, officials at the Immigration and Refugee Board advised of additional refugee claims related to sexual orientation concerning which they are unable, however, to provide details owing to the confidential nature of such claims. From discussion with counsel active in immigration and refugee law, it would appear that a significant number of claimants raise sexual orientation as a basis for fear of persecution. As of early 1995, the majority originated in Central and South American countries, with similar claims originating in Algeria, Turkey, Poland, Pakistan, Bangladesh, Romania and Russia. Information available at that time suggested most such claims are heard in Montreal, with the next greatest number originating in St. John's, Newfoundland. It was suggested that from two-thirds to three-quarters of these claims are successful.

Same-Sex Benefits

Chris Vogel v. Government of Manitoba (1983), 4 C.H.R.R. D/1654 (Man. Bd. of Adjudication) (denial of employment-related dental plan coverage to same-sex partner found not to violate Manitoba *Human Rights Code* [see also *Vogel v. Manitoba* (1995) below])

C.U.P.E. v. Canada Post, File No. 86-4-C-11, March 27, 1986 (Arbitration Bd.) (Board finding that under collective agreement, lesbian partner neither immediate "family" nor "common law spouse")

Re Carleton University and C.U.P.E., Loc. 2424 (1988), 35 L.A.C. (3d) 96 (Arbitration Bd.), application for judicial review dismissed June 4, 1990 (Ont. Div. Ct.) (grievance alleging improper denial of employment-related benefits denied)

Andrews v. Ontario (Minister of Health) (1988), 49 D.L.R. (4th) 584 (H.C.) (denial of dependant coverage under provincial health insurance legislation not in violation of section 15 of the Charter)

Mossop v. Canada (Secretary of State), [1993] 1 S.C.R. 554 (4-3), affirming [1991] 1 F.C. 18 (F.C.A.), reversing (1989), 10 C.H.R.R. D/6064 (C.H.R.T.) (denial of bereavement leave not discrimination based on family status under [pre-*Haig*] *Canadian Human Rights Act*)

Re Canada (Treasury Board and Indian and Northern Affairs) and Watson (1990), 11 L.A.C. (4th) 129 (Public Service Staff Relations Board) (Board dismissing grievance alleging denial of bereavement leave on basis of sexual orientation in violation of collective agreement)

Veysey v. Canada (Commissioner of the Correctional Service), [1990] 1 F.C. 321 (T.D.), affirmed without discussion of Charter issue (1990), 47 C.R.R. 394n (F.C.A.) (denial of conjugal visits to gay prison inmate in violation of section 15 of the *Charter*)

Knodel v. British Columbia (Medical Services Commission) (1991), 58 B.C.L.R. (2d) 356 (B.C.S.C.) (exclusion of homosexual couples from definition of "spouse" in provincial health insurance regulations in violation of section 15 of the Charter)

Re Parkwood Hospital and McCormick Home and London and District Service Workers' Union (1992), 24 L.A.C. (4th) 149 (Arbitration Bd.) (Board dismissing grievance alleging denial of family benefits on basis of sexual orientation in violation of collective agreement)

Leshner v. Ontario (No. 2) (1992), 16 C.H.R.R. D/184 (Ont. Bd. of Inquiry) (denial of employment-related pension and other benefits permitted by Ontario *Human Rights Code*, but provision

Nielsen v. Canada (Human Rights Commission), [1992] 2 F.C. 561 (T.D.) (court dismissing application to quash Tribunal decision to delay hearing of complaint pending *Mossop* decision of Supreme Court of Canada: court finding denial of employment-related dental plan coverage to same-sex partner not violating *Canadian Human Rights Act* on basis of sex or marital status, while sexual orientation not prohibited ground under Act [see also *Nielsen v. Canada Employment and Immigration Commission*, 95 CLLC, below])

Hewens and Treasury Board (Public Works), File No. 166-2-22732, November 25, 1992 (Public Service Staff Relations Board) (denial of employment-related marriage leave for purpose of marriage ceremony

with same-sex partner not in violation of collective agreement)

Lorenzen v. Treasury Board (Environment Canada) (1993), 38 L.A.C. (4th) 29, *sub nom Re Canada (Treasury Board - Environment Canada) and Lorenzen*, (Public Service Staff Relations Board) (denial of employment-related family and bereavement leave violating collective agreement and [post-*Haig*] *Canadian Human Rights Act*)

Canada Post Corporation and Public Service Alliance of Canada, Guévremont grievance, No. 20101-CR-93-004, March 8, 1994 (Arbitrator) (arbitrator finding previous negative arbitration decision denying grievance "clearly wrong" [see (1993), 34 L.A.C. (4th) 104], denial of employment-related claim for medical expenses incurred by same-sex partner in violation of collective agreement, incorporating the terms of the [post-*Haig*] *Canadian Human Rights Act*)

Ontario Blue Cross v. Ontario (Human Rights Comm.) (1994), 21 C.H.R.R. D/342 (Ont. Ct. (Gen. Div.), Div. Ct.) reversing (1993), 18 C.H.R.R. D/377 (Ont. Bd. of Inquiry) (court finding denial of employment-related family benefits to same-sex partner not violating Ontario *Human Rights Code* on basis of sexual orientation)

Re University of Lethbridge and University of Lethbridge Faculty Assn. (1994), 48 L.A.C. (4th) 242 (Arbitrator) (denial of employment-related medical and dental benefits to same-sex partner in violation of provision in staff agreement prohibiting discrimination "in regard to terms or conditions of employment" on basis of sexual orientation, undefined terms "family coverage" and "dependents" in schedule to agreement to be interpreted to include same-sex benefits)

Canadian Telephone Employees' Association (CTEA) v. Bell Canada (1994), 43 L.A.C. (4th) 172 *sub nom Re Bell Canada and CTEA* (Arbitrator) (denial of employment-related spousal benefits constituting unlawful discrimination [post-*Haig*] in breach of the collective agreement)

Canadian Broadcasting Corporation v. Canadian Media Guild (Local 213 of the Newspaper Guild) (1995), 45 L.A.C. (4th) 353 *sub nom Re Canadian Broadcasting Corp.* (Arbitrator) (denial of spousal benefits to same-sex partner of gay employee in violation of collective agreement's prohibition of sexual orientation discrimination: employer directed to rid benefit plans of discrimination on that basis)

Egan v. Canada, [1995] 2 S.C.R. 513, affirming result in [1993] 3 F.C. 401, 15 C.R.R. (2d) 310 (F.C. A.), [1992] 1 F.C. 687 (T.D.) (court's first same-sex benefits ruling: unanimous finding that sexual orientation an analogous ground under section 15 of the Charter; majority finding that opposite sex definition of "spouse" in *Old Age Security Act* discriminatory; different majority finding that discrimination, if any, justified under section 1)

Vogel v. Manitoba (1995), 23 C.H.R.R. D/173 (Man. C.A.), reversing (1992), 90 D.L.R. (4th) 84 (Man. Q.B.) and setting aside decision of Man. Board of Adjudication (1992), 16 C.H.R.R. D/233 ([post-*Egan*] court finding denial of various employment spousal benefits discriminatory under provincial Code;

matter returned to adjudicator for determination as to whether distinctions in benefit plans on basis of sexual orientation justified as "bona fide and reasonable" under Code [in June 1996, adjudicator issuing interlocutory ruling authorising government lawyers to adduce additional evidence in this regard when hearing upon merits takes place])

Nielsen v. Canada Employment and Immigration Commission, 95 CLLC 145,213 (F.C.T.D.) (court dismissing application for judicial review of Canadian Human Rights Commission decision not to pursue complaint arising from denial of same-sex benefits filed prior to the 1992 "reading in" of sexual orientation into the *Canadian Human Rights Act* by the Ontario Court of Appeal)

Rosenberg v. Canada (Attorney General) (1995), 127 D.L.R. (4th) 738, 25 O.R. (3d) 612 (Ont. Ct. (Gen. Div.)), decision under appeal, Appeal No. C 22807 (court dismissing section 15 Charter challenge to opposite sex definition of "spouse" in the *Income Tax Act* having effect of preventing registration of pension plans providing for same-sex partners: court finding case indistinguishable from *Egan* both as to discrimination under section 15, and as to justification under section 1)

Re Metro Toronto Reference Library and C.U.P.E., Local 1582 (1995), 51 L.A.C. (4th) 69 (Arbitration Panel [2-1]) (denial of employment-related bereavement leave owing to opposite sex definition of "spouse" in collective agreement, incorporating definition in *Family Law Reform Act* and successor *Family Law Act*, in violation of Charter, Ontario *Human Rights Code* and collective agreement's prohibition against discrimination "for any reason or factor not pertinent to employment")

Yarrow and Treasury Board (Agriculture and Agri-Food Canada), February 5, 1996 (Public Service Staff Relations Board) (denial of employment-related bereavement leave on basis of opposite sex definition of "common law" spouse in Master Agreement violation of [post-*Haig*] *Canadian Human Rights Act* and contrary to anti-discrimination provision of Master Agreement [Treasury Board announcing in November 1995 that it would recognize same-sex relationships for purposes of some benefits, including bereavement leave])

Moore and Akerstrom v. Canada (Treasury Board), T.D. 8/96, [1996] C.H.R.D. No. 8 (Q.L), June 13, 1996 (C.H.R.T.), application for judicial review of portions of Tribunal order File No. T-1677-96 (opposite sex definitions of "spouse" that deny employment benefits to same-sex partners discriminatory under [post-*Haig*] *Canadian Human Rights Act*; government ordered to cease applying discriminatory provisions in collective agreements or other joint policies or plans, including health and dental care plans [In July 1996, Treasury Board announced intention to comply with "cease and desist" order for purposes of medical and dental benefits. In September 1996, interim application to stay contested requirements of Tribunal order refused by Federal Court])

Laessoe v. Air Canada, T.D. No. 10/96, September 13, 1996 (C.H.R.T.), application for judicial review File No. T-2215-96 (company policy not to extend same-sex survivor pension benefits not discriminatory under *pre-Bill C-33 Canadian Human Rights Act*, *Haig* decision not definitively adding sexual orientation to Act, company's pension program should not be held to a higher standard than that

applied to federal government programs by the Supreme Court of Canada in *Egan* decision)

Dwyer v. Toronto (Metropolitan), File No. BI-0056-93, Decision No. 96-0033, September 27, 1996 (Ont. Bd. of Inquiry) (because opposite sex definitions of "spouse" and "marital status" in Ontario *Human Rights Code* in violation of section 15 of Charter and not saved by section 1, similar definition of "spouse" in *Municipal Act, Municipality of Metropolitan Toronto Act* and *Pension Benefits Act* infringing (constitutionally corrected) Code; Province of Ontario directed to apply "read down" *Municipal Act* definition of "spouse" to include same-sex partners of municipal employees with employment benefits - including pension benefits, contingent upon a modified definition of spouse in federal *Income Tax Act* - and to notify all municipalities of this interpretation)

According to information obtained from personnel at the Department of Human Resources Development Canada, five section 15 Charter challenges to the opposite sex definition of "spouse" in the *Canada Pension Plan* are currently working their way through the administrative review hierarchy applicable under that Act. The names of the complainants may not, apparently, be made public at these early stages in the proceedings. Twelve additional challenges are not yet scheduled.

Holmwood claim, decision of Worker's Compensation Board of British Columbia, November 1992 (lesbian partner recognised for survivor benefits [according to the Freedom of Information Office of the B.C. Workers' Compensation Board, access to the reasons for decision in this case is precluded under provincial legislation governing freedom of information and privacy matters])

Svend Robinson complaint to Canadian Human Rights Commission of June 1994, based on denial of employment-related benefits by House of Commons [personnel at the Canadian Human Rights Commission have indicated that this complaint does not appear to have been referred to tribunal, and that further information concerning the status of the complaint is precluded by privacy considerations]

In addition to the tribunal adjudication in the Moore and Akerstrom and Laessoe cases, a number of complaints that had also originally been referred to tribunal by the Canadian Human Rights Commission have since been settled. These include:

- the complaint of the Gay and Lesbian Organisation of Bell Employees (GLOBE) related to Bell's refusal to amend its benefit plan to cover same-sex partners [according to personnel at the Commission, the settlement precludes release of information concerning its terms]
- the complaint of August Abrahms against the Bank of Montreal for extending benefits to heterosexual couples only [according to a Commission Press Release of July 1995, the complaint was "effectively [settled]" by the Bank of Montreal's policy decision to extend same-sex benefits including health care, dental care, accident and survivor income insurance, as well as pension benefits equivalent to those available to opposite-sex partners]

- Jin Hong's complaint against the Canadian Broadcasting Corporation related to the latter's denial of benefits to her same-sex partner [according to personnel at the Commission, the settlement precludes release of information concerning its terms]

Other

R. v. Taylor (1982), 135 D.L.R. (3d) 291 (Ont. C.A.) (court allowing gay man's appeal from conviction for indecent assault on 13-year-old male and ordering new trial, on bases that in first trial, evidence of accused's homosexuality not admissible to prove guilt and seriously prejudicial, that trial judge erred in considering accused's admission of homosexuality of probative value on question of guilt)

R. v. Wilson (1990), 59 C.C.C. (3d) 432 (B.C. C.A.) (court allowing male accused's appeal from conviction of touching male child for sexual purpose and ordering new trial on basis that first trial conducted unfairly owing to Crown counsel's inappropriate cross-examination of accused and witnesses to leave impression that accused gay)

Valiquette c. Gazette (The), [1991] R.J.Q. 1075 (C.S.Q), decision under appeal, Appeal No. 500-09-000529-917, decision reserved (court awarding \$37,500 in moral and exemplary damages for violation of deceased plaintiff's right to privacy under provincial *Charte des droits et libertés de la personne* owing to publication of news article about teacher with AIDS in which plaintiff easily recognizable as subject of story, nature of illness revealed and speculation as to sexual orientation aroused)

Nuosci v. Canada (Human Rights Commission), T-2396-91, December 17, 1991 (F.C.T.D.), affirmed A-19-92, March 7, 1994 (F.C.A.) (court dismissing judicial review application seeking to quash Canadian Human Rights Commission decision to dismiss gay man's complaint related to dismissal from R.C.M.P. **on basis of HIV positive status**)

Thwaites v. Canada (Armed Forces) (1993), 19 C.H.R.R. D/259 (Can. Hum. Rts. Trib.), judicial review application to quash Tribunal decision dismissed (1994), 21 C.H.R.R. D/224 (F.C.T.D.) (complaint of discrimination **on ground of disability** upheld in relation to 1989 discharge of HIV-positive gay member of armed forces)

Kippen v. Big Brothers Assn. of Winnipeg Inc. (1993), 20 C.H.R.R. D/483 (Manitoba Bd. of Inquiry) (in preliminary ruling, board finding itself with jurisdiction over gay man's complaint arising from volunteer organisation's denial of full participation in its programs [according to Department of Justice in Manitoba, no further decision in this case, parties seeking resolution by other means])

Geller v. Reimer (1994), 21 C.H.R.R. D/156 (Sask. Bd. of Inquiry) (denial of permit for Gay Pride parade limiting complainants' freedom of expression and right to peaceful assembly under Saskatchewan

Human Rights Code on basis of sexual orientation)

Oliver v. Hamilton (City) (No. 2) (1995), 24 C.H.R.R. D/298 (Ont. Bd. of Inquiry) (refusal of mayor to proclaim Gay Pride Week discriminatory on basis of sexual orientation)

R. v. Paterson, Doc. Vancouver CC931929, 20 March 1995, [1995] B.C.J. No. 1032 (Q.L.) (B.C. S.C.) (in first degree murder trial, court ordering publication ban of identity of three gay witnesses on basis that public revelation of names likely to cause serious personal harm in society treating homosexuality as matter of choice rather than fact)

R. c. P. (D.), File No. C.A. Québec 200-10-000105-937 (C.A.Q.) (court dismissing appeal from conviction for sexual assault in which appellant arguing trial judge should have allowed defence to question victim about his sexual orientation, on basis that matter irrelevant in light of accused's denial of any sexual misbehaviour)

Newfoundland (Human Rights Commission) v. Newfoundland (Minister of Employment and Labour Relations) (1995), 24 C.H.R.R. D/144 (Nfld. S.C. T.D.), decision under appeal, Appeal No. 1996, no. 63 (absence of sexual orientation from prohibited grounds of discrimination in Newfoundland *Human Rights Code* violation of section 15 of the Charter and not saved by section 1)

In October 1996, it was reported that the Saskatchewan Human Rights Commission dismissed (1) Christopher Lefler's complaint against the University of Saskatchewan alleging discrimination based on sexual orientation arising from the removal of his art from a student exhibition; (2) similar complaints lodged against the Saskatchewan Arts Board. Lefler has announced his intention to appeal. The Commission did find grounds for the complaint that the university interfered with Lefler's freedom of expression [according to personnel at the Saskatchewan Commission, as no adjudication has occurred in relation to Lefler's complaints, no decision is available]

Jeffs, 1993 decision of the Board of Referees under *Unemployment Insurance Act*, decision under appeal (lesbian relationship constituting just cause for leaving employment to relocate: contrary decision reached in 1991 decision based on similar fact situation: Case number VI 059, May 10, 1991)

A Summary of Lesbian and Gay Rights in Each Jurisdiction

The treatment of gay men and lesbians varies significantly from one jurisdiction to another. The following section provides a brief snapshot of the current treatment of gay men and lesbians in each

jurisdiction of Canada.

Federal

In 1992, the federal government removed the prohibition on lesbians and gay men serving in the military, as a result of a Court challenge in *Douglas v Canada*.

In 1995, the federal government amended the *Criminal Code* to provide increased penalties for crimes motivated by hatred on certain grounds, including sexual orientation. This means that hate crimes such as lesbian and gay bashing will now receive more severe penalties.

In 1996, the government amended the *Canadian Human Rights Act* to explicitly prohibit discrimination based on sexual orientation.

In June 1996, the federal government responded to the decision of a human rights tribunal in *Moore & Akerstrom v Canada* and extended many same-sex benefits to federal employees. A number of benefits, such as pension benefits, have not yet been extended, and the law still prohibits same-sex marriage.

In 1996, the BC Supreme Court held in *Little Sisters Book and Art Emporium v Canada* that Canada Customs systematically discriminates against lesbian and gay materials imported into Canada.

Some scope exists for the same-sex partner of a lesbian or gay Canadian to immigrate to Canada, although lesbians and gay men do not yet have the "automatic right" available to heterosexuals who wish to sponsor an opposite-sex spouse or fiancé(e).

Alberta

Alberta has not yet amended its human rights legislation to prohibit discrimination against lesbians, gays and bisexuals.

In 1991, Kings College dismissed gay employee Delwin Vriend, claiming that his continued employment violated their religious policy against homosexuality. Vriend launched a legal challenge to have "sexual orientation" read into the Alberta *Individual Rights Protection Act*. He was successful before the Alberta Court of Queen's Bench, but in 1996 this decision was overturned by the Alberta Court of Appeal, which ruled that the Alberta government was entitled to exclude gays and lesbians from the scope of human rights protection. The *Vriend v Alberta* case has now been appealed to the Supreme Court of Canada, where it was argued in November 1997.

In 1997, the Alberta government announced that lesbians, gays and bisexuals will no longer be eligible to foster children. This decision is being challenged by lesbian foster mother Ms T.

British Columbia

In 1992, BC amended its human rights legislation to include sexual orientation as a prohibited ground of discrimination.

The British Columbia government has also extended same-sex benefits to provincial employees.

The *Health Care (Consent) and Care Facility (Admission) Act* would enable lesbians, gays and bisexuals to make medical decisions on behalf of a same-sex partner who is incapacitated, but this legislation has not yet been declared in force.

BC adoption legislation was amended in November 1996 to permit same-sex couples to adopt.

The BC government amended the definition of "spouse" in the *Family Relations Act* and the *Family Maintenance Enforcement Act* to accord to same-sex couples the same custody, maintenance and support rights and responsibilities as those accorded to heterosexual couples, and to allow same-sex couples to register agreements relating to cohabitation and property division.

The BC government announced that it will be reviewing all provincial legislation with a view to eliminating discrimination against same-sex couples.

The Surrey School Board is being challenged in court for banning lesbian and gay school resources.

BC is taking steps to add "gender identity" to its human rights legislation to explicitly protect transgendered people from discrimination.

Manitoba

Manitoba included "sexual orientation" in its human rights legislation as a prohibited ground of discrimination in 1987. In 1995 the Manitoba Court of Appeal ruled in *Vogel v Manitoba* that it is discriminatory for the government to deny equal workplace benefits to its lesbian and gay employees, and sent the case back to a human rights adjudicator for reconsideration. On 24 November 1997, the adjudicator affirmed that equal benefits should be extended to lesbian and gay employees, and the

Manitoba government announced that it would accept the adjudicator's ruling.

New Brunswick

New Brunswick amended its human rights legislation to prohibit sexual orientation discrimination in 1992. The New Brunswick government has extended workplace benefits to lesbian and gay provincial employees. Provincial legislation does not yet accord equal family law rights and responsibilities to lesbians and gays.

Newfoundland

In 1995, a Newfoundland court ruled that "sexual orientation" must be read into the Newfoundland *Human Rights Act*. On 9 December 1997, the government of Newfoundland affirmed this decision by amending the legislation to prohibit sexual orientation discrimination. The Newfoundland government has not yet extended equal workplace benefits to lesbian and gay provincial employees.

Nova Scotia

Nova Scotia amended its human rights legislation to prohibit sexual orientation discrimination in 1991. The Nova Scotia government has extended workplace benefits to lesbian and gay provincial employees. Provincial legislation does not yet accord equal family law rights and responsibilities to lesbians and gays.

Northwest Territories

The human rights legislation of the Northwest Territories does not yet prohibit sexual orientation discrimination, although lesbians, gays and bisexuals working in areas of federal jurisdiction are protected by the recent amendment to the *Canadian Human Rights Act*. The government of the Northwest Territories has extended equal workplace benefits to lesbian and gay government employees.

The government of the Northwest Territories is conducting a review of its family law legislation. The recently formed lesbian, gay and bisexual rights organization Out North testified in support of changes

to the definition of "spouse" to include same-sex couples, but the government refused to change the legislation.

Ontario

"Sexual orientation" was added to the Ontario *Human Rights Code* in 1986. The *Code* still contains an "opposite sex" definition of "marital status," although this definition was ruled unconstitutional by a human rights tribunal in 1992.

The Ontario Government introduced Bill 167 in 1994; this Bill would have amended the definition of "spouse" in 79 provincial statutes to include those in same-sex relationships, but the legislation was defeated on 9 June 1994.

The Ontario government has extended equal workplace benefits to gays and lesbians.

The *Substitute Decisions and Consent to Treatment Act* has been amended to permit lesbians, gays and bisexuals to make medical decisions on behalf of a same-sex partner who is incapacitated.

Ontario courts have ruled that the definition of "spouse" in provincial adoption legislation must be extended to permit lesbians and gays to adopt their partner's children.

The Ontario Court of Appeal ruled that spousal support provisions must be extended to include gays and lesbians. This decision is currently under appeal to the Supreme Court of Canada.

Prince Edward Island

Prince Edward Island human rights legislation does not yet prohibit sexual orientation discrimination. The PEI government has recently announced its intention to review its *Human Rights Act*; community initiatives are planned to lobby for amendments to prohibit discrimination against lesbians, gays and bisexuals during the review process. A letter from the premier of PEI indicates an intention to include "sexual orientation" in the legislation.

Québec

Québec amended its human rights legislation to prohibit sexual orientation discrimination in 1977. Until 1996, article 137 of the Québec Charter permitted discrimination on the ground of sexual orientation in certain areas such as insurance and pension plans. This provision was repealed by Bill 133 in June of 1996. No steps have yet been taken, however, to require the equal recognition of same-sex relationships.

Saskatchewan

Saskatchewan included "sexual orientation" in its human rights legislation as a prohibited ground of discrimination in 1993. Same-sex benefits have been extended to employees in some provincial Crown corporations, but no other steps have yet been taken by the government to recognize same-sex couples equally under provincial law.

Yukon

Yukon amended its human rights legislation to prohibit sexual orientation discrimination in 1987. The Yukon government has extended equal workplace benefits to lesbian and gay government employees. Other territorial legislation does not yet accord equal family law rights and responsibilities to lesbians and gays.

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FOOTNOTES

¹ *Klippert v the Queen*, [1967] SCR 822.

² *Case v Case* (1974), 18 RFL 132; *K v K* (1976), 23 RFL 58; *D v D* (1978), 2 RFL (2d) 327; *B v B* (1980), 16 RFL (2d) 7.

³ *Centre Homophile d'Aide de Libération inc v Le Progrès du Saguenay ltée* (1979), unreported (Prov Ct, Chicoutimi, Québec).

⁴ *Association A.D.G.Q. v Commission des écoles catholiques de Montréal*, [1980] CS 93 (CSQ).

⁵ *Gay Alliance Toward Equality v Vancouver Sun*, [1979] 2 SCR 435.

⁶ 106 S Ct 2841 (1986).

⁷ T Curren. Current Issue Review: AIDS 85-15E. Research Branch, Library of Parliament, 23 October 1985. Revised 12 March 1993.

⁸ *Ibid.*

⁹ B Adam. Winning Rights and Freedoms in Canada. In: A Hendriks, R Tielman, E van der Veen (eds). *The Third Pink Book*. Buffalo: Prometheus, 1993, at 25-37.

¹⁰ *Carleton University and CUPE Local 2424* (1988), 35 LAC (3d) 96 (Arbitration Decision), MW Wright; *Andrews v Ontario (Minister of Health)* (1988), 49 DLR (4th) 584.

¹¹ Royal Society of Canada. *AIDS: A Perspective for Canadians - Summary Report and Recommendations*. Ottawa: The Society, 1988; Royal Society of Canada. *AIDS: A Perspective for Canadians - Background Papers*. Ottawa: The Society, 1988.

¹²D Sanders. Drawing Lines on Lesbian and Gay Rights. 18 November 1992.

¹³*Biggs & Cole v Hudson* (1988), 9 CHRR D/5391 (BC Human Rights Council).

¹⁴10 CHRR D/6064 (CHRT).

¹⁵ New Brunswick Coalition for Human Rights Reform. *Discrimination and Violence Encountered by Lesbian, Gay and Bisexual New Brunswickers*. The Coalition, 1990.

¹⁶ *Veysey v Canada (Commissioner of the Correctional Service)*, [1990] 1 FC 321 (TD), affirmed without discussion of Charter issue (1990), 47 CRR 394 (FCA) (denial of conjugal visits to gay prison inmate in violation of section 15 of the Charter).

¹⁷ *Brown v BC (Ministry of Health)* 1990, 42 BCLR 2nd (294) at 309.

¹⁸ DJ Jones, NC Sheppard. *AIDS and Disability Discrimination in and Beyond the Classroom*.

Dalhousie Law Journal 1989; 12(1): 103-130 at 103-4.

¹⁹ DM Rayside, EA Lindquist. Canada: Community Activism, Federalism, and the New Politics of Disease. In: R Bayer, DL Kirp (eds). *AIDS in the Industrialized Democracies. Passion, Politics, and Policies*. New Brunswick, New Jersey: Rutgers University Press, 1992, 49-98 at 90, with reference.

²⁰ *Knodel v British Columbia (Medical Services Commission)* (1991), 58 BCLR (2d) 356 (BCSC).

²¹ *Andrews v Ontario (Minister of Health)* (1988), 49 DLR (4th) 584 (HC).

²² *Egan v Canada*, [1995] 2 SCR 513, affirming result in [1993] 3 FC 401, 15 CRR (2d) 310 (FCA), [1992] 1 FC 687 (TD).

²³ *Vogel v Manitoba* (1992) 90 DLR (4th) 84.

²⁴ *Jorge Inaudi*, Immigration and Refugee Board, 9 April 1992, No T91-04459.

²⁵ *Haig and Birch v Canada* (1992), 94 DLR (4th).

²⁶ *Leshner v Ontario* (No 2) (1992), 16 CHRR D/184.

²⁷ *Re Holmwood*, November 1992, Workers' Compensation Board of British Columbia.

²⁸ *Brunet v Davis* (1992), OJ 1586 (QL), Action No 4633/89 (unreported); *Forrest v Price* (1992), 48 FLR 72.

²⁹ *Clinton v Ontario Blue Cross* (No 2) (1993), 18 CHRR D/377.

³⁰ *Ontario Blue Cross v Ontario Human Rights Commission* (1994), OJ No 903.

³¹ *Egan v Canada*, [1993] 3 FC 401, 15 CRR (2d) 310 (FCA).

³² *Mossop v Canada (Secretary of State)*, [1993], 1 SCR 554.

³³ *Ibid.*

³⁴ *Canada (Attorney General) v Ward*, [1993] 2 SCR 689.

³⁵ *Lorenzen v Treasury Board (Environment Canada)*, File Nos 166-2-23963 and 166-2-24000, 24 Sept

1993.

³⁶ *Thwaites v Canada (Armed Forces)* (1993), 19 CHRR D/259.

³⁷ Humans Against Homophobia. *Proud but Cautious: Homophobic Abuse and Discrimination in Nova Scotia*. Nova Scotia Public Interest Research Group, 1994.

³⁸ Canada Post Corporation and Public Service Alliance of Canada, Guevremont grievance, No 20101-CR-93-0004, 8 March 1994.

³⁹ *Vriend v Alberta* (1994), Alta LR (3d) 286; [1994] 6 WWR 414 (QB).

⁴⁰ Québec Human Rights Commission. *De l'illégalité à l'égalité: Rapport de la consultation publique sur la violence et la discrimination envers les gais et lesbiennes*. Montréal: The Commission, 1994.

⁴¹ *Canadian Telephone Employees' Association v Bell Canada* (1994), 43 LAC (4th) 172.

⁴² [1995] 2 SCR 513.

⁴³ *R v Carmen M* (1995), 23 OR (3d) 629, per Goodman, Catzman and Abella JJA.

⁴⁴ *Chris Vogel, Richard North et al v Manitoba* (1995) 6 WWR at 513.

⁴⁵ *Potter v Korn* (1995), 23 CHRR D/319 (BCCHR).

⁴⁶ *Re K* (1995), 23 OR (3d) 679.

⁴⁷ (1996) 181 AR 16 (Alta CA).

⁴⁸ *Moore v Canada (Treasury Board)*, [1996] CHR D No 8 (CHRT).

⁴⁹ (1996), 131 DLR (4th) 486 (BCSC).

⁵⁰ *M v H* (1997) 31 OR (3d) 417 (Ont CA).

⁵¹ *Baehr v Miike* (1996) WL 694,235 (Hawaii Circuit Ct).

⁵² See Sexual Orientation Cases, under "Same-Sex Benefits," *infra*.

⁵³ See **Sexual Orientation Cases, under Same-Sex Benefits, infra.**

Gay and Lesbian Issues and HIV/AIDS

by John Fisher, Ralf Jürgens, Anne Vassal, Robert Hughes

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APPENDICES B & C

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[Appendix C](#)

Appendix B

[Phase I](#)

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[The Project Partners](#)

The Joint Network/CAS Project on Legal and Ethical Issues Raised by HIV/AIDS

The Joint CAS/Network Project on Legal and Ethical Issues Raised by HIV/AIDS started in January 1995 with a five-month development initiative and entered into its second phase in June 1995.

Phase I

During Phase I (January to May 1995), the following activities and initiatives were undertaken:

- Existing resources addressing legal and ethical issues raised by HIV/AIDS were researched and documented. These resources have been evaluated and listed in an annotated bibliography, and included in a literature review.¹
- Key legal and ethical issues raised by HIV/AIDS in Canada were assessed and prioritized. After extensive meetings with over sixty persons living with HIV/AIDS, representatives from community-based organizations, lawyers, academics and government policy analysts active in the

HIV/AIDS area, a list of eight topics was drawn up that includes legal and ethical issues identified as immediate priorities by the persons and organizations consulted. These are as follows:

- (1) legal issues raised by HIV/AIDS in prisons;
 - (2) criminal law and HIV/AIDS;
 - (3) gay and lesbian legal issues;
 - (4) testing and confidentiality;
 - (5) discrimination;
 - (6) access to health care;
 - (7) drug laws and policies;
 - (8) laws and policies regulating prostitution.
- A detailed plan for the production of resource documents on these issues was developed.
 - Key people living with HIV/AIDS, representatives from community-based organizations, lawyers, academics, and government policy analysts active in the HIV/AIDS field were identified who would be potential participants in the preparation of the resource documents.
 - The Project Coordinator contacted and met with a wide variety of governmental and non-governmental organizations, institutions and professional associations, to seek partnership support for the Project.

Phase II

After completion of Phase I, funding was obtained from the AIDS Care, Treatment and Support Unit, Health Canada, the HIV/AIDS Prevention and Community Action Programs, Health Canada, the Correctional Service of Canada, and Justice Canada, to undertake Phase II of the Project. The goals of Phase II are to:

- stimulate discussion on the local, regional and national levels on legal and ethical issues raised by HIV/AIDS;
- develop a series of discussion papers on the eight priority legal and ethical issues identified during the development initiative;
- organize a series of workshops on these issues across Canada; and
 - produce comprehensive resource documents on these issues that will assist Canada in its efforts to prevent the further spread of HIV and to care for those infected and affected by it.

As of March 1998, the Project had started working on legal issues raised by HIV/AIDS in prisons,

criminal law and HIV/AIDS, gay and lesbian legal issues, and testing and confidentiality; had organized workshops on criminal law and HIV/AIDS, on gay and lesbian legal issues, on HIV testing and confidentiality, and on HIV/AIDS and discrimination; and had produced the following resources:²

- *HIV/AIDS in Prisons: A Discussion Paper* (November 1995)
- *Criminal Law and HIV/AIDS: A Discussion Paper* (April 1996)
- Bill C-8 - The Impact of Canada's Drug Laws on the Spread of HIV (April 1996)
- *HIV/AIDS in Prisons: Final Report* (September 1996)
- HIV Testing and Confidentiality: A Discussion Paper (March 1997)
- Criminal Law and HIV/AIDS: Final Report (March 1997)
- Gay and Lesbian Legal Issues: A Discussion Paper (July 1997)
- HIV Testing and Confidentiality: Final Report (March 1998)
- Gay and Lesbian Legal Issues: Final Report (March 1998)
- HIV/AIDS and Discrimination: A Discussion Paper (March 1998)
- *Canadian HIV/AIDS Policy & Law Newsletter* (vol 1, nos 1-4; vol 2, nos 1-4; vol 3, no 1)
- News from the Joint Project (issue 1, July 1995; issue 2, October 1995; issue 3, May 1996)

Most of these resources, and more information about the Joint Project, are also on the Internet: <http://www.aidslaw.ca>

The Project Partners

Canadian HIV/AIDS Legal Network

The Network is the only national, community-based, charitable organization in Canada working in the area of policy and legal issues raised by HIV/AIDS. It was formed in November 1992 with the mandate to advance education and knowledge about legal, ethical, and policy issues raised by HIV/AIDS, and to promote responses to HIV infection and AIDS that respect human rights.

The Network provides services to persons living with HIV/AIDS, to those affected by the disease, and to persons working in the area by educating about, facilitating access to, and creating accurate and up-to-date legal materials on HIV/AIDS. It links people working with or concerned by relevant social and legal issues in order to limit the spread of HIV and to reduce the impact on those affected by HIV infection and AIDS.

In October 1994, the Network launched the *Canadian HIV/AIDS Policy & Law Newsletter*. The Newsletter is devoted to addressing the many legal, ethical and policy issues raised by HIV/AIDS. From the beginning, it has provided extensive coverage of issues raised by HIV/AIDS in prisons, in Canada and internationally. It serves as a means of educating policy-makers, lawyers and any other people with

an interest in issues raised by HIV/AIDS about legal and policy developments, but also as a means of stimulating much-needed discussion about these issues.

Canadian AIDS Society

The Canadian AIDS Society is a national coalition that supports community action on HIV/AIDS issues in Canada. The Society represents more than 100 community-based organizations across the country, providing the bulk of education, support and advocacy programs and services for individuals and communities affected by HIV/AIDS.

The role of the Society is to speak as the national voice and to act as a national forum for a community-based response to HIV infection and AIDS. The Society also undertakes advocacy on behalf of people affected by HIV and AIDS, acts as a resource on HIV and AIDS issues for its member organizations, and coordinates community-based participation in a national strategy to combat HIV and AIDS. The Society carries out this role through national initiatives in prevention education, treatment, care and support.

FOOTNOTES

¹ R Jürgens. *Legal and Ethical Issues Raised by HIV/AIDS: Literature Review and Annotated Bibliography*. Canadian AIDS Society and Canadian HIV/AIDS Legal Network. Montréal, 1995.

² For more information, see "News from the Joint Project," issues 1, 2, and 3 (July 1995, October 1995, and May 1996); and R Jürgens. *Legal and Ethical Issues Raised by HIV/AIDS: Project Report* (1 June - 15 October 1995). Montréal: Canadian AIDS Society and Canadian HIV/AIDS Legal Network, 1995.

Appendix C

Workshop Participants

| | |
|-------------------|-----------------------------------|
| Barry Adam | University of Windsor |
| Betty Anderson | Voices of Positive Women, Toronto |
| Russell Armstrong | Canadian AIDS Society, Ottawa |
| Sheena Campbell | Village Clinic, Winnipeg |

| | |
|-------------------|--|
| Patrick Delandes | Séro Zéro, Montréal |
| Greg Eades | AIDS Vancouver |
| Douglas Elliott | Elliott & Kim, Toronto |
| John Fisher | Equality for Gays and Lesbians Everwhere (EGALE), Ottawa |
| Bruno Grenier | Saint-Pierre, Grenier, Montréal |
| Wilson Hodder | AIDS Coalition of Nova Scotia |
| Rogert Hughes | Sminth & Hughes, Vancouver |
| Réal Ménard | Member of Parliament, Montréal |
| LaVerne Monette | Ontario Aboriginal AIV/AIDS Strategy, Toronto |
| Vinh-Kim Nguyen | McGill University and Montreal General Hospital, Montréal |
| David Pepper | Ottawa/Carleton REgional Police Service, Ottawa |
| Noel Saint-Pierre | Saint-Pierre, Grenier, Montréal |
| Terry Stewart | St John, NB |
| David Thompson | AIDS Community Care, Montréal |
| Murray Thorpe | HIV/AIDS Prevention & Community Action Programs, Health Canada, Ottawa |
| Ralph Wushke | AIDS Saskatoon |

Observers

| | |
|----------------|---------------------------------------|
| Ricardo Castro | HIV Law Project, New York, NY, U.S.A. |
| Joclyn Rowe | St Mary's Hospital, Montréal |

Staff

| | |
|-------------------------|---|
| Bruno Guillot-Hurtubise | Joint Project, Legal & Ethical Issues, Montréal |
| Ralf Jürgens | Joint Project, Legal & Ethical Issues, Montréal |
| Elsie Wagner | Joint Project, Legal & Ethical Issues, Montréal |

Key Commentators

Barry Adam University of Windsor
Douglas Elliott Elliott & Kim, Toronto
John Fisher EGALE, Toronto

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