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# Outlaws or In-laws?: Successes and Challenges in the Struggle for LGBT Equality

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John Fisher\*

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In this lecture, the author canvasses the successes and challenges faced by Canadian sexual minorities over the last two decades. He traces the important role of the Canadian Charter of Rights and Freedoms in achieving equality for lesbians, gays, bisexuals, and transgendered (“LGBT”) people. The value of the Charter in this struggle has not, however, been restricted to the courts, for, as the author illustrates, Charter challenges have also been an impetus for legislative action.

Through a review of recent cases, the author points out that while the Charter has been an appropriate tool in the struggle for formal equality, in many cases, LGBT people have still not attained substantive equality. This, he asserts, requires that courts and legislators contextualize their decisions and their policies to reflect the reality faced by LGBT people. Contextualization is particularly important for creating an inclusive society, where members outside of the mainstream are not left behind. According to the author, it remains to be seen whether the Charter is a sufficiently flexible vehicle to protect the full diversity of LGBT communities.

Dans cette allocution, le conférencier passe en revue les réussites et les défis auxquels ont été confrontées les minorités sexuelles du Canada dans les dix dernières années. Il retrace le rôle primordial de la Charte canadienne des droits et libertés en faveur de l'égalité des personnes lesbiennes, gaies, bisexuelles et transgenres. Il constate par ailleurs que la pertinence de la Charte dans cette marche vers la reconnaissance n'a pas été confinée aux tribunaux. Comme l'illustre le conférencier, les recours fondés sur la Charte ont aussi encouragé la mise en œuvre d'initiatives législatives.

Dans sa revue de la jurisprudence récente sur la question, le conférencier constate qu'en dépit des progrès accomplis vers l'égalité formelle grâce à la Charte, les personnes gaies, lesbiennes, bisexuelles et transgenres ne bénéficient toujours pas de l'égalité substantive. Pour y parvenir, l'auteur croit que les tribunaux et les législateurs doivent tenir davantage compte, dans leurs décisions et leurs politiques, de la réalité des personnes gaies, lesbiennes, bisexuelles et transgenres. Cette mise en contexte permettrait en particulier de créer une société plus inclusive, dont les membres non majoritaires ne seraient pas écartés. Selon le conférencier, il reste donc à voir si la Charte est un instrument suffisamment flexible pour protéger la pleine diversité des communautés gaies, lesbiennes, bisexuelles et transgenres.

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## Introduction

This is an exciting and challenging time in the struggle for lesbian, gay, bisexual, and transgendered (“LGBT”) equality. When I was asked to present this lecture, I was just stepping down after ten years with the national organization, EGALE Canada (“EGALE”), to work on international LGBT issues, so it was a natural time for me to reflect on the changes we have seen over the past ten years, as well as future directions for our communities.

While we have seen many successes in areas such as human rights protection, relationship recognition and, most recently, same-sex marriage—to the point where we are squarely recognized as legal in-laws—there also remain a number of areas in which we are regarded as legal outlaws, such as censorship, criminalization of LGBT sexualities, and transgendered rights.

The purpose of this discussion is to examine both the successes that have been achieved and the challenges that still remain in the struggle for LGBT equality, in order to consider some of the ways in which the Charter has served our communities well and some of its limitations as a vehicle for advancing social justice.

### I. Historical Overview

In the early history of our country, the law was not a tool for equality, but a source of repression of LGBT sexualities.<sup>1</sup> From 1892 to 1969, for example, certain forms of gay male sexual expression were criminalized, and gay men were vulnerable to indefinite incarceration as “dangerous sexual offenders”. Between 1952 and 1977, “homosexuality” was a ground on which prospective immigrants could be denied entry into Canada and lesbian, gay, and bisexual immigrants were subject to the threat of deportation.

In previous decades, lesbians, gays, and bisexuals were treated as mentally ill and were subjected to conversion “therapies”, including electroshock treatment. In 1973, the American Psychiatric Association concluded that homosexuality was no longer a mental illness, and homosexuality was removed from the Diagnostic and Statistical Manual of Mental Disorders. Even today, however, transgendered people are subject to psychiatric diagnosis under the Diagnostic and Statistical Manual.

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<sup>1</sup> References for the historical information presented in this section are collated in EGALE’s factum (prepared by Cynthia Petersen, solicitor for the Intervener) to the Supreme Court of Canada in *Egan v. Canada* ([1995] 2 S.C.R. 513, 124 D.L.R. (4th) 609 [*Egan* cited to S.C.R.]), in support of the principle that sexual orientation is an analogous ground of discrimination. The Court relied upon much of this information in *Egan, ibid.* at paras. 173-77. See also John Fisher, *Outlaws and Inlaws: Your Guide to LGBT Rights, Same-Sex Relationships and Canadian Law* (Ottawa: EGALE Canada, 2004) for additional information on the historical treatment of LGBT people and same-sex relationships.

LGBT people have been excluded from a number of aspects of public life. For example, in the 1960s more than 8,000 gays and lesbians were investigated by the RCMP. The federal government paid a Carleton University researcher to design what became known as the “fruit machine”, to help identify Canadians who were gay or lesbian.<sup>2</sup> During this period, approximately one hundred and fifty lesbian and gay federal civil servants resigned or were dismissed from their employment. LGBT people were not permitted, until the early 1990s, to participate openly in the armed forces.

LGBT people have suffered similar discrimination in the private sector, in areas such as employment and housing, and in many jurisdictions we were not afforded the protection of human rights laws. LGBT people have been the targets of hate-motivated crimes and have frequently been deprived of adequate police protection. We have been subjected to verbal harassment and have been victimized by anti-lesbian, anti-gay, and anti-trans violence, in some cases resulting in death.

LGBT people have also endured numerous damaging stereotypes, such as the myths that we are sexual predators, child molesters, and unfit parents. We have been stereotyped as unloving and incapable of personal commitment. Same-sex relationships have consequently been devalued and treated as unworthy of recognition and respect.

In the past, same-sex partners were systematically excluded from numerous federal, provincial, and territorial statutes in areas such as family, immigration, tax, pension, and inheritance laws. The exclusion from these statutes has marginalized the individual partners in same-sex relationships and stigmatized our children. The absence of legal protection has had consequences far beyond the immediate denial of a benefit: the denial of equality can undermine self-confidence and self-esteem, and inhibit the ability of LGBT people to live full lives and be open with those dear to us.

## II. More Recent Developments

Much has changed in the ten years since I began working with EGALE on federal LGBT issues. Ten years ago, sexual orientation was not included in the *Canadian Human Rights Act*,<sup>3</sup> there was no protection in hate crimes legislation, and not a single federal statute recognized same-sex relationships.

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<sup>2</sup> Philip Hannan, “The Feds and the Fruit Machine” *Capital Xtra!* (25 March 1994) 11.

<sup>3</sup> *Canadian Human Rights Act*, R.S.C. 1985, c. H-6. Many provinces and territories had acted to prohibit sexual orientation discrimination, however, beginning with Quebec in 1977 (*Charter of Human Rights and Freedoms*, R.S.Q., c. C-12, s. 10).

Even the Supreme Court of Canada had not yet recognized sexual orientation as an analogous ground of discrimination under section 15 of the *Canadian Charter of Rights and Freedoms*.<sup>4</sup>

Ten years ago, I attended the 1994 International Year of the Family conference in Montreal, where, of course, there was no mention of same-sex families. Being somewhat new to LGBT advocacy in those days, I rather timidly approached the microphone and suggested that lesbians and gays have families too, which are entitled to equal recognition, only to be told that “this is a conference about families, not the promotion of homosexuality.”

What a difference ten years makes! Last year, Nunavut added sexual orientation to its human rights legislation,<sup>5</sup> with the result that sexual orientation discrimination is now prohibited in every jurisdiction of Canada, federally, provincially, and territorially. In 2002, the Northwest Territories became the first jurisdiction in Canada to add “gender identity” to its human rights legislation, ensuring that transgendered people are explicitly protected from discrimination.

Full step-parent and third party adoptions by same-sex couples are now permitted in British Columbia,<sup>6</sup> Manitoba,<sup>7</sup> Newfoundland and Labrador,<sup>8</sup> the Northwest Territories,<sup>9</sup> Nova Scotia,<sup>10</sup> Ontario,<sup>11</sup> Quebec,<sup>12</sup> Saskatchewan,<sup>13</sup> and the Yukon

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<sup>4</sup> Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act, 1982* (U.K.), 1982, c. 11.

<sup>5</sup> *Human Rights Act*, S.N. 2003, c. 12, s. 7; *Human Rights Act*, S.N.W.T. 2002, c. 18.

<sup>6</sup> *Adoption Act*, R.S.B.C. 1996, c. 5, s. 5(1).

<sup>7</sup> *The Charter Compliance Act*, S.M. 2002, c. 24.

<sup>8</sup> *Adoption Act*, S.N.L. 1999, c. A-2.1, s. 20, as am. by *An Act to amend the Adoption Act*, S.N.L. 2002, c. 13, s. 10.

<sup>9</sup> Bill 5, *An Act to amend the Adoption Act and the Family Law Act*, S.N.W.T. 2002, c. 6, received Royal Assent on 19 June 2002. Bill 5 provides that it does not affect the *Aboriginal Custom Adoption Recognition Act*, S.N.W.T. 1994, c. 26. This act and related case law (see e.g. *Re Tagornak Adoption Petition*, [1984] 1 C.N.L.R. 185 (N.W.T.S.C.)) do not appear to limit the ability of same-sex couples to adopt in accordance with Aboriginal custom.

<sup>10</sup> Adoption laws in Nova Scotia were extended by the court in *Re M. (S.C.)* (2001), 194 N.S.R. (2d) 362, 202 D.L.R. (4th) 172 (S.C. (Fam. Div.)). As a result of this decision, same-sex couples in Nova Scotia now have the equal right to adopt, though the government has not yet updated the actual adoption statute to reflect this change.

<sup>11</sup> This has been the case since the decision in *Re K.* (1995), 23 O.R. (3d) 679, 125 D.L.R. (4th) 653. Subsequently, Ontario enacted *An Act to amend certain statutes because of the Supreme Court of Canada decision in M. v. H.*, S.O. 1999, c. 6. This legislation amends subsection 146(4) of the *Child and Family Services Act* to permit adoption “by any other individuals that the court may allow, having regard to the best interests of the child” (s. 6(c)). Although somewhat ambiguous, this provision must be interpreted in light of the earlier court judgment, which ruled that it is unconstitutional to deny same-sex couples the equal right to adopt.

<sup>12</sup> Arts. 546, 555 C.C.Q.

<sup>13</sup> *The Adoption Act, 1998*, S.S. 1998, c. A-5, 2, ss. 17, 23. The opposite-sex definition of spouse was changed by *The Miscellaneous Statutes (Domestic Relations) Amendment Act, 2001* (No. 2), S.S. 2001, c. 50, s. 2.

Territory.<sup>14</sup> Alberta permits step-parent adoptions by same-sex couples,<sup>15</sup> but does not yet permit same-sex couples to adopt the child of a stranger. This means that same-sex couples are now permitted to adopt children in every province and territory of the country, except New Brunswick, Nunavut, Prince Edward Island, and, to some extent, Alberta, and it is clear that the laws of these provinces will ultimately be extended, either through political amendment or through a constitutional challenge.<sup>16</sup>

A sequence of rulings by the Supreme Court of Canada paved the way for human rights protection and same-sex relationship recognition, culminating in the landmark 1999 judgment, *M v. H*,<sup>17</sup> in which the Court ruled by a majority of eight to one that the equality guarantees in the Charter require the equal treatment of same-sex relationships in Ontario's *Family Law Act*.<sup>18</sup> The Court also granted Ontario six months to change its laws, suggesting that it might wish to do so comprehensively. As made clear by Iacobucci J., the Court's decision would "affect numerous other statutes that rely upon a similar definition of the term 'spouse.'" He suggested that "[t]he legislature may wish to address the validity of these statutes ... [and] ought to be given some latitude in order to address these issues in a more comprehensive fashion."<sup>19</sup>

Since that time, many governments across Canada have taken the hint, and embarked on programs of wholesale legislative reform. In 2000, for example, the *Modernization of Benefits and Obligations Act*<sup>20</sup> extended some sixty-eight federal laws to recognize same-sex relationships. In addition, there are currently four Canadian provinces that have enacted some form of registered partnership or civil union regime, each of which has its own unique features:

- Nova Scotia was the first Canadian jurisdiction to adopt a registered domestic partnership regime,<sup>21</sup> on 30 November 2000. Couples have the choice to register in order to have access to a more complete set of rights and responsibilities than those accorded to common-law couples;

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<sup>14</sup> It should be noted, though, that the situation in the Yukon territory is somewhat ambiguous, since the Yukon's adoption legislation allows "spouses" to adopt, but does not define "spouse": *Children's Act*, R.S.Y. 1986, c. 22, s. 79.

<sup>15</sup> *Miscellaneous Statutes Amendment Act, 1999*, S.A. 1999, c. 26, s. 4, s. 25.

<sup>16</sup> Adoption cases brought by same-sex parents have already been successful in Ontario, Nova Scotia, and Alberta: see *Re K.*, *supra* note 11; *Re M. (S.C.)*, *supra* note 10; *Re A* (1999), 253 A.R. 74, 181 D.L.R. (4th) 300, 1999 ABQB 879.

<sup>17</sup> [1999] 2 S.C.R. 3, 43 O.R. (3d) 254.

<sup>18</sup> R.S.O. 1990, c. F.3.

<sup>19</sup> *M v. H*, *supra* note 17 at para. 147.

<sup>20</sup> S.C. 2000, c. 12.

<sup>21</sup> *Law Reform (2000) Act*, S.N.S. 2000, c. 29; *Justice Administration Amendment (2001) Act*, S.N.S. 2001, c. 5.

- Quebec’s civil union regime<sup>22</sup> is deliberately designed to match as closely as possible the ceremonial formalities of marriage. Couples who enter a civil union assume comprehensive rights and responsibilities; common-law couples have much more limited recognition;
- Manitoba’s registered partnership regime, which has received Royal Assent but is not yet in force,<sup>23</sup> recognizes all common-law couples after they have lived together for up to three years. By registering their relationship, however, couples can avoid the waiting period and have instant recognition regardless of how long they have been together. Unlike in Nova Scotia and Quebec, there is otherwise no difference between the rights and responsibilities of registered couples and those of common-law couples.
- Alberta’s partnership regime<sup>24</sup> is unique in Canada. Alberta has chosen to recognize all “adult interdependent partners”, regardless of whether they are in a conjugal relationship or not. This means that siblings, caregivers, and others can potentially have legal rights and responsibilities. Conjugal couples are automatically treated as “adult interdependent partners” after they have lived together for three years, or they can assume these rights and responsibilities sooner, by entering into a written agreement.

Other Canadian jurisdictions have also extended their relationship statutes to include same-sex partners.<sup>25</sup> And, of course, the past year has seen tremendous progress in the struggle for the equal right to marry, with appeal courts in Ontario, British Columbia, and Quebec each unanimously affirming that it is an unconstitutional violation of Charter equality guarantees to deny same-sex couples the right to marry, a position also recently adopted by the Yukon Territory Supreme Court.<sup>26</sup> The federal government decided not to appeal these cases, and on 9 October

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<sup>22</sup> *An Act instituting civil unions and establishing new rules of filiation*, S.Q. 2002, c. 6.

<sup>23</sup> Through a series of three statutes (*An Act to Comply with the Supreme Court of Canada Decision in M v. H*, S.M. 2001, c. 37; *The Charter Compliance Act*, S.M. 2002, c. 24; and *The Common-Law Partners’ Property and Related Amendments Act*, S.M. 2002, c. 48), Manitoba has extended to common-law partners, including those of the same sex, the rights and responsibilities of married couples. The first two of these statutes have already been proclaimed in force, providing same-sex couples with a significant number of rights and responsibilities. The third statute, the *Common-Law Partners’ Property and Related Amendments Act*, deals with property issues (such as property division upon relationship breakdown and inheritance rights) and also creates a system of registered partnerships. This statute received Royal Assent on 9 August 2002, but has not yet been proclaimed in force.

<sup>24</sup> *Adult Interdependent Relationships Act*, S.A. 2002, c. A-4.5. This Bill received Royal Assent on 4 December 2002 and came into effect on 1 June 2003.

<sup>25</sup> For example, British Columbia has systematically extended the definition of “spouse” to include same-sex couples through statutes such as the *Definition of Spouse Amendment Act, 1999*, S.B.C. 1999, c. 29 and the *Definition of Spouse Amendment Act, 2000*, S.B.C. 2000, c. 24.

<sup>26</sup> *EGALE Canada Inc. v. Canada (A.G.)* (2003), 225 D.L.R. (4th) 472, 107 C.R.R. (2d) 1, 2003 BCCA 406; *Halpern v. Canada (A.G.)* (2003), 65 O.R. (3d) 161, 225 D.L.R. (4th) 529 (C.A.);

2003, the Supreme Court refused to allow anti-gay intervenors to appeal. As a result, the right of same-sex couples to marry is now squarely recognized in three provinces and one territory, representing more than seventy-five per cent of the Canadian population.

Although we still await a final resolution of same-sex couples' right to marry in other jurisdictions across the country, through either adoption of a federal statute or continued litigation, both the Quebec Court of Appeal and the Yukon Territory Supreme Court recognized in recent judgments that the definition of marriage is federal, and that the recent legal changes to the definition should apply equally across the country.<sup>27</sup>

Equal recognition of our relationships has not always been advantageous for the partners involved. For example, a partner's income is often considered in determining who is eligible for social assistance or other government benefit programs. Whether or not this includes a same-sex partner will depend on the laws of the particular province or territory. In Alberta, for example, a lesbian woman with four children had her disability benefit reduced by six hundred dollars per month after she and her partner were recognized as one of the province's first adult interdependent relationships.<sup>28</sup>

As laws have gradually changed, and more and more LGBT people have felt able to be out and open about their sexual orientation and gender identity, there has been a deepening public awareness that the myths and stereotypes often perpetrated against LGBT people are inaccurate. Whole future generations of Canadians will grow up, never knowing a time when same-sex couples could not get married. It seems from this brief history that our status as legal in-laws is firmly entrenched—in some cases, whether we want it or not!

### III. Courts or Legislatures: How Have These Changes Come About?

The Charter has clearly played a leading role in these developments. All too often Parliament and the provincial legislatures have preferred to defer to the courts to address issues that are thought to be politically contentious—with the same politicians frequently complaining about “judicial activism” when the courts fulfill their responsibility to apply the Charter to remedy discriminatory laws.

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*Hendricks c. Québec (Procureur général)*, [2002] R.J.Q. 2506 (Sup. Ct.), aff'd *La Ligue Catholique pour les Droits de l'Homme c. Hendricks*, [2004] J.Q. no 2593 (C.A.) (QL); *Dunbar v. Yukon*, 2004 YKSC 54, McIntyre J.

<sup>27</sup> *La Ligue Catholique pour les Droits de l'Homme c. Hendricks*, *ibid.* at paras. 19-28; *Yukon v. Dunbar*, *ibid.* at paras. 22-23.

<sup>28</sup> Tom Babin, “Same-Sex Legislation Leads to Cutbacks in Couple's Support” *FFWD Weekly* 8:33 (24 July 2003), online: FFWD <<http://www.ffwdweekly.com/Issues/2003/0724/news1.htm>>.



Lobbying alone has rarely resulted in proactive political progress. On those occasions when legislative or policy change has been instigated by Parliament, it has frequently only occurred when the government has been faced with imminent legal challenges to a law or policy that could not be rationally sustained in the courts. For example:

- Challenging the ban on homosexuals in the armed services:

In 1992, Michelle Douglas challenged the ban on lesbians and gays serving in the armed forces. Although the federal government had previously defended its policy vigorously, it agreed to change the policy only on the very day of trial;<sup>29</sup>

- Recognizing “sexual orientation” as a prohibited ground of discrimination in the *Canadian Human Rights Act*:

In 1985, a Parliamentary committee travelled across Canada, hearing public submissions on how Canada’s laws should be changed to comply with the equality guarantees of the Charter. In its landmark report, “Equality for All”, the committee recommended in 1985 that the *Canadian Human Rights Act* be amended to include “sexual orientation” as a prohibited ground of discrimination.<sup>30</sup> In 1986, the Government of Canada published its response to the committee’s report, pledging to take “whatever measures are necessary” to prohibit sexual orientation discrimination.<sup>31</sup> Nonetheless, despite persistent lobbying by EGALE and promises by successive ministers of justice, no further action was taken until Charter litigation was launched against the federal government. The Ontario Court of Appeal ruled in *Haig v. Canada*<sup>32</sup> in 1992 that “sexual orientation” must be read into the act as a prohibited ground of discrimination. The federal government did not appeal that ruling, but it was not until 1996 that the *Canadian Human Rights Act* was finally amended by Parliament to explicitly include “sexual orientation”.

- Challenging anal sex as obscenity in customs policies:

For years, Canada Customs had detained lesbian and gay materials at the border. Policy memorandum D-911 set out the classes of material designated “obscene”. This included all depictions or descriptions of anal sex. As a result, even safer sex materials were detained or censored, at a time when access to the information could have saved lives by informing the gay

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<sup>29</sup> *Douglas v. Canada*, [1992] 1 F.C.J. No. 948 (T.D.) (QL).

<sup>30</sup> Canada, *Equality for All: Report of the Parliamentary Committee on Equality Rights* (Ottawa: Queen’s Printer, 1985).

<sup>31</sup> Department of Justice Canada, *Toward Equality: The Response to the Report of the Parliamentary Committee on Equality Rights* (Ottawa: Minister of Supply and Services Canada, 1986) at 13.

<sup>32</sup> (1992), 9 O.R. (3d) 495, 94 D.L.R. (4th) 1 (C.A.).

community about steps that would help reduce the risk of HIV. Canada Customs' systemic targeting of LGBT materials and bookstores was challenged by the LGBT bookstore Little Sisters in the case of *Little Sisters v. Canada*.<sup>33</sup> It was only at trial that the federal government withdrew depictions of anal sex from its list of obscene materials, although it otherwise continued to defend its practices.

- Challenging the exclusion of same-sex partners from the family class for immigration purposes:

When Canadian Christine Morrissey tried to sponsor her Irish-American partner, Bridget Coll, to immigrate to Canada, Immigration Canada refused to process the application, on the basis that the "family class" was limited to married, heterosexual couples, and there were no grounds on which the same-sex partner of a Canadian could be sponsored to immigrate.<sup>34</sup> On 14 January 1992, Morrissey filed a constitutional challenge to Canadian immigration laws, arguing that the immigration regulations discriminated on the basis of sexual orientation. In October 1992, Immigration Canada granted Coll residency as an independent applicant. This meant that Morrissey and Coll could live together in Canada, but enabled Immigration Canada to maintain its discriminatory policy.

Early in 1993, twenty lesbian and gay Canadians filed complaints with the Canadian Human Rights Commission over the refusal of Canadian immigration law to recognize their relationships. Immigration Canada then began granting same-sex partners permanent residence on "humanitarian and compassionate" grounds, which enabled the usual selection criteria to be waived on a case-by-case basis, but continued to exclude same-sex partners from the family class. It was not until 2001 that the current *Immigration and Refugee Protection Act*<sup>35</sup> finally recognized same-sex partners as members of the family class.

#### IV. Formal Versus Substantive Equality in LGBT Charter Litigation

Based on this summary of legislative response to legal action, it is apparent that the Charter has not only served as a vital tool for advancing equality before the courts, but also as a mechanism by which governments have ultimately felt compelled to change discriminatory laws and policies when it has been clear that such laws and

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<sup>33</sup> *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, [2000] 2 S.C.R. 1120, 193 D.L.R. (4th) 193 [*Little Sisters*].

<sup>34</sup> See "Immigration" chapter in Fisher, *supra* note 1; for information on Canadian immigration for same-sex partners, see online: LEGIT <<http://www.legit.ca>>.

<sup>35</sup> S.C. 2001, c. 27. The new legislation received Royal Assent on 1 November 2001 and came into effect on 28 June 2002.

policies were unlikely to withstand judicial scrutiny. At the same time, there are many areas in which we remain legal outlaws. This invites the questions: what kinds of legal challenges have been successful, which have not, and why?

The same-sex marriage challenges, for example, while they have certainly generated the most publicity, are not particularly complex legally. They represent fairly straightforward applications of established Charter principles. Section 15 of the Charter prohibits discrimination in the application of the law: people in opposite-sex relationships can marry the partner of their choice; people in same-sex relationships, until recently, could not. The Ontario Superior Court of Justice unanimously ruled on 12 July 2002 that the common-law definition restricting marriage to opposite-sex couples violates the section 15 equality guarantees of the Charter, undermines the human dignity of lesbians, gays, and bisexuals, and cannot be justified by the government:

The restriction against same-sex marriage is an offence to the dignity of lesbians and gays because it limits the range of relationship options available to them. The result is they are denied the autonomy to choose whether they wish to marry. This in turn conveys the ominous message that they are unworthy of marriage. For those same-sex couples who do wish to marry, the impugned restriction represents a rejection of their personal aspirations and the denial of their dreams.<sup>36</sup>

This same conclusion has now been reached by a total of sixteen judges in three provinces and one territory.<sup>37</sup>

Perhaps one of the reasons for the success of the marriage cases is that the restriction on same-sex marriage constitutes a denial of formal equality, where same-sex couples are denied a benefit available to opposite-sex couples. The same is true of many of the other leading LGBT equality cases, ranging from *Egan v. Canada*,<sup>38</sup> in which a same-sex couple was denied the old age security spousal allowance available to opposite-sex couples, to *M v. H*, which dealt with the exclusion of same-sex

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<sup>36</sup> *Halpern v. Canada (A.G.)* (2002), 60 O.R. (3d) 321, 215 D.L.R. (4th) 223 at para. 261 (Sup. Ct. J. (Div. Ct.)), cited with approval by the BC Court of Appeal in *EGALE Canada Inc. v. Canada (A.G.)*, *supra* note 26 at para. 130.

<sup>37</sup> That is, three judges in the Ontario Superior Court, three judges in the Ontario Court of Appeal, three judges in the BC Court of Appeal, one judge in the Quebec Superior Court, five judges in the Quebec Court of Appeal, and one judge in the Yukon. Although not included in the above count, even Pitfield J. in the Supreme Court of British Columbia (*EGALE Canada Inc. v. Canada (A.G.)*, [2001] 11 W.W.R. 685, 19 RFL (5th) 59, 2001 BCSC 1365) concluded that the denial of the right to marry constituted a section 15 violation, although he would have upheld the violation under section 1. While Charter rights do not depend upon a numbers game, the degree of unanimity in both trial level and appeal courts since Pitfield J.'s initial ruling does underline the extent to which courts have found the denial of same-sex marriage to be a clear violation of Charter principles.

<sup>38</sup> *Supra* note 1. Although the Court ultimately upheld the rights violation by a narrow five to four majority under section 1, *Egan* nonetheless established the principle that sexual orientation is an analogous ground of discrimination under section 15 and that it is a violation of section 15 to deny same-sex couples equal relationship benefits.

partners from the spousal support provisions of Ontario's *Family Law Act*, to the adoption cases,<sup>39</sup> which have dealt with the fact that same-sex couples have been denied the ability to adopt available to opposite-sex couples. In each of these cases, the law on its face has excluded same-sex couples, usually through definitions of "spouse" that impose an "opposite-sex" requirement, or in the case of marriage, a definition that limits access to the institution to "one man and one woman".

Where we have been less successful, however, is in cases where the discrimination is less overt, where the law is neutral on its face, but is applied in a way that systemically discriminates against LGBTs.

As long ago as the first section 15 equality case to reach the Supreme Court of Canada, *Andrews v. Law Society of British Columbia*,<sup>40</sup> the Supreme Court rejected the similarly situated test and affirmed that the Canadian vision of equality is one that embraces difference and pluralism rather than one that requires everyone to be the same. As McIntyre J. wrote: "It was a wise man who said that there is no greater inequality than the equal treatment of unequals."<sup>41</sup> Nonetheless, it is clear that courts have been far less willing to find a law discriminatory when it is facially neutral.<sup>42</sup> The *Little Sisters* decision makes an interesting case study, since it involves a law that incorporates a definition of "obscenity" that does not, in and of itself, single out LGBTs for discriminatory treatment, but was nonetheless found to have consistently been applied across a number of years in a way that systemically discriminated against LGBT materials and booksellers.

## V. Little Sisters Book and Art Emporium: A Case Study

Little Sisters Book and Art Emporium ("Little Sisters") is a Vancouver bookstore that caters to the lesbian, gay, and bisexual communities of that city. The inventory is broad and includes LGBT literature, periodicals, travel information, academic studies, HIV/AIDS safer sex advisory material, and LGBT erotica, although the Supreme Court of Canada made it clear that it was "not in the nature of a 'XXX Adult' Store."<sup>43</sup>

Because the bookstore imported large quantities of material from the US, the incoming materials were subject to inspection by Canada Customs ("Customs") officers. While Little Sisters' foreign suppliers generally called for payment within thirty days of shipment, Customs would frequently detain shipments resulting in delays, sometimes for many months. Materials would often be seized or returned to

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<sup>39</sup> *Re K.*, *supra* note 11; *Re M. (S.C.)*, *supra* note 10; *Re A.*, *supra* note 16.

<sup>40</sup> [1989] 1 S.C.R. 143, 56 D.L.R. (4th) 1 [*Andrews*].

<sup>41</sup> *Ibid.* at 164, citing *Dennis v. United States*, 339 U.S. 162 (1950) at 184, Frankfurter J.

<sup>42</sup> One exception is *Vriend v. Alberta* ([1998] 1 S.C.R. 493, 156 D.L.R. (4th) 385), in which the Supreme Court of Canada recognized that the exclusion of "sexual orientation" from Alberta's human rights legislation was not "neutral" since it had a disproportionate impact upon lesbians, gays, and bisexuals.

<sup>43</sup> *Little Sisters*, *supra* note 33 at para. 1.

the vendor on the basis that they were “obscene”, within the meaning of the *Customs Act*. Books that other stores could import without difficulty would be detained when shipped to Little Sisters. Even HIV/AIDS literature was seized for being “obscene”.

Little Sisters was rarely given reasons for the delay, seizure, or return. As a result, for over fifteen years prior to the case, Little Sisters was engaged in ongoing battles with Canada Customs. Little Sisters initiated legal action alleging that: they had been discriminated against on the ground of sexual orientation, their freedom of expression rights had been violated, the pattern of ongoing arbitrary detentions reflected systemic shortcomings inherent in the statutory regime, and the legislation itself should therefore be struck down as unconstitutional.

After hearing extensive evidence at trial, BC Supreme Court Justice Smith found that Canada Customs had improperly misclassified, confiscated, prohibited, delayed, and destroyed material imported by Little Sisters.<sup>44</sup> He found that this treatment was a product of systemic causes, including under-funding and poor training of Customs officers. He further found that these failings had a differentially severe impact upon small and specialty bookstores and, specifically, that they were caused “by the systemic targeting of Little Sisters’ importations in the [Vancouver] customs mail centre.”<sup>45</sup>

Justice Smith held, however, that the Customs legislation did not violate subsection 15(1) of the Charter. Although the law had a disproportionately negative effect on gays, lesbians, and bisexuals because of the importance of the literature to these communities, he concluded that “homosexual obscenity is proscribed because it is obscene, not because it is homosexual.” As such, it did not discriminate on the basis of sexual orientation.

Justice Smith concluded that the Customs legislation did infringe subsection 2(b) of the Charter. This breach was, in his opinion, justified under section 1. He held that the objective of the legislation was to protect society from the harm caused by the dissemination of obscene materials and that this objective was pressing and substantial. Nevertheless, Justice Smith stated that the gravity of the systemic failures in the administration of the Customs regime warranted a subsection 24(1) remedy. As such, he made a declaration that the relevant provisions of the Customs legislation “have been construed and applied in a manner contrary to ss. 2(b) and s. 15(1) of the Charter ...”

Little Sisters appealed to the BC Court of Appeal. The decision of the court was split, two to one, with Justice MacFarlane writing the majority opinion (with Justice Hall concurring) and Justice Finch (now Chief Justice) in dissent.<sup>46</sup> Justice

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<sup>44</sup> *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)* (1996), 131 D.L.R. (4th) 486, 18 B.C.L.R. (3d) 241 (S.C.).

<sup>45</sup> *Ibid.* at para. 282.

<sup>46</sup> *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)* (1998), 160 D.L.R. (4th) 385, 125 C.C.C. (3d) 485 (B.C.C.A.).

MacFarlane held that the Customs legislation did not offend subsection 15(1) either on its face, or in effect. If applied correctly, he held, the legislation prohibits material not because it is homosexual in nature, but because it is obscene. Justice MacFarlane also agreed with the trial judge's section 1 justification of the subsection 2(b) infringement. He emphasized, however, that whether or not material is "obscene" is a question to be determined by the general—not lesbian, gay and bisexual—community standards.

Justice Finch, in dissent, would have allowed the appeal and declared that the customs legislation was unconstitutional insofar as it was used to prohibit the importation of gay and lesbian materials. He distinguished the Supreme Court's decision in *R. v. Butler*,<sup>47</sup> which dealt with the tests for "obscenity" under the Criminal Code in the context of heterosexual materials, because: (1) the Customs legislation is a system of prior restraint as opposed to a punitive scheme like the Criminal Code, and (2) unlike *Little Sisters*, *Butler* did not involve subsection 15(1) discrimination issues.

*Little Sisters* appealed to the Supreme Court of Canada. Two decisions were rendered. The majority was composed of Chief Justice McLachlin and Justices L'Heureux-Dubé, Gonthier, Major, Bastarache, and written by Justice Binnie. They held that, with the exception of a reverse onus provision, the legislation was constitutional. The minority decision, which dissented in part, was written by Justice Iacobucci and included Justices Arbour and LeBel. They decided that the whole scheme was unconstitutional and that the Customs obscenity provisions should be struck down.

On the issue of whether the Customs legislation was discriminatory, the majority affirmed the trial judge's finding that *Little Sisters* had been subject to differential treatment when compared to importers of heterosexually explicit material. The majority also held that this differential treatment was on the basis of enumerated or analogous grounds under subsection 15(1) and that this treatment violated the appellants' sense of self-worth and human dignity. As Binnie J. stated:

the Customs treatment was high-handed and dismissive of the appellants' right to receive lawful expressive material which they had every right to import. When Customs officials prohibit and thereby censor lawful gay and lesbian erotica, they are making a statement about gay and lesbian culture, and the statement was reasonably interpreted by the appellants as demeaning gay and lesbian values. The message was that their concerns were less worthy of attention and respect than those of their heterosexual counterparts.<sup>48</sup>

It is interesting to note that, even on the analysis of the majority, all branches of the section 15 test appeared to be made out (differential treatment, based on an analogous ground, resulting in the demeaning of human dignity). However, just as they would

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<sup>47</sup> [1992] 1 S.C.R. 452, 89 D.L.R. (4th) 449.

<sup>48</sup> *Little Sisters*, *supra* note 33 at para. 123.

decide on the issue of procedural flaws leading to infringements of subsection 2(b) rights, the majority concluded that the source of the discrimination was the actions of officials and the manner in which the system was implemented, not the legislation itself.

In the Court's view, the legislation called for the obscenity test—a test that, the majority felt, if properly implemented, should not adversely affect gays, lesbians, and bisexuals—to be applied to all materials equally, regardless of the subject matter or of the sexual orientation of the importers and consumers. The legislation had not offended subsection 15(1). It was the misuse of the legislative scheme that gave rise to the discrimination. As such, no declaration of unconstitutionality could be made with respect to the legislation. The minority agreed with this analysis. They too found that there had been discrimination, but that the legislation was not at fault. Rather, as stated by Iacobucci J., “the *Butler* test does not distinguish between materials based on the sexual orientation of the individuals involved or characters depicted. It seems to me that the *Butler* test applies equally to heterosexual, homosexual, and bisexual materials.”<sup>49</sup>

The Court was clearly uncomfortable with the appellants' argument that the decision in *Butler* could be distinguished because it was made in the context of heterosexual non-textual materials, and that gay and lesbian sexual imagery and text is qualitatively different from heterosexual sexually explicit materials because of the different role it plays in relation to gay and lesbian identity, dignity, self-worth, community formation, health, and education.

The core issue on which the majority of the Court differed from the minority was in its consideration of the appellants' argument that the Customs regime was inherently flawed such that it was incapable of being applied in a manner consistent with expression rights. Some of the problems identified by members of the Court with the current customs regime included:

- inadequate training of customs officers;
- insufficient understanding by Customs officers of the legal tests (e.g., need for “harm incompatible with proper functioning of society”, artistic merit defence);
- insufficient knowledge of “community standards” and the culture the materials were intended for;
- discriminatory attitudes that influence Customs determinations;
- discriminatory targeting of LGBT community establishments;
- a presumption of obscenity, rather than a presumption in favour of free expression;

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<sup>49</sup> *Ibid.* at para. 194.

- overbroad discretion, resulting in subjective decision-making by Customs officers;
- lack of time, staff, expertise, and resources to give materials proper consideration or make proper determinations;
- lack of adequate guidelines;
- no reasons given for a seizure or detention of materials;
- no ability for an importer to provide evidence or make submissions on an initial determination;
- insufficient consideration given to books or other textual materials;
- undue processing delays, coupled with few statutory time frames;
- material damaged, even when released as non-obscene;
- no database of currently permitted or prohibited materials;
- cost, time, and resource drain on importers; and
- a statutory reverse onus provision, requiring importers to prove that detained materials are not obscene.

The majority nonetheless held that, with the exception of the reverse onus provision, all of these failures that impacted upon subsection 2(b), albeit egregious, were attributable to the implementation and administration of the Customs regime, rather than to the legislation itself. The majority distinguished cases such as *R. v. Morgentaler*,<sup>50</sup> *Hunter v. Southam*,<sup>51</sup> and *R. v. Bain*,<sup>52</sup> all of which involved statutes that created procedures that had, in their implementation, violative effects and were ruled unconstitutional. In these cases, the majority reasoned, the legislation conferred a power that was amenable to abuse. In this case, the appellants were complaining of an absence of sufficiently protective legislation. As such, the legislation was capable of being applied constitutionally. While the implementation was flawed and, as such, adversely affected the appellants' subsection 2(b) rights, the legislation was not at fault and, therefore, could not be ruled unconstitutional on the basis of these failings.

The only portion of the legislation ruled unconstitutional by the majority was the reverse onus provision. As a result, the onus would in future be on the state to prove that materials are obscene, not on the importer to disprove obscenity.

The majority also "read in" procedural safeguards in order to redeem flaws inherent in the legislation and its application. For example, Binnie J. addressed the

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<sup>50</sup> [1988] 1 S.C.R. 30, 44 D.L.R. (4th) 385.

<sup>51</sup> [1984] 2 S.C.R. 145, (*sub nom. Canada (Combinés Investigation Act Director of Investigation & Research) v. Southam*), 11 D.L.R. (4th) 641.

<sup>52</sup> [1992] 1 S.C.R. 91, 87 D.L.R. (4th) 449.



fact that the legislation failed to set any statutory time limits for a redetermination under subsection 60(3) or section 63 of a finding of obscenity, other than requiring that the decision be made “with all due dispatch”. Binnie J. simply interpreted this to mean that the decision should be made within thirty days,<sup>53</sup> thereby supplying the time limit that the legislation itself had failed to establish.

By tinkering with specific aspects of the legislation, such as the failure to prescribe time limits and the reverse onus provision, the majority was able to avoid assessing the systemic flaws inherent in the statutory regime viewed in its entirety.

The minority, on the other hand, traced all of the violations to the Customs legislation itself. Iacobucci J. stated that:

the issue is ... not solely whether the Customs legislation is capable of being applied constitutionally, as Binnie J. suggests. Instead, the crucial consideration is that the legislation makes no reasonable effort to ensure that it will be applied constitutionally to expressive materials. It lacks an adequate process to ensure that s. 2(b) rights are fully considered and respected. The Customs legislation’s failure in this regard practically invites violations of the right to free expression, which is exactly what has happened. It is the inevitable result of leaving the protection of fundamental *Charter* rights solely to the good faith discretion of delegated power.<sup>54</sup>

The minority felt that adequate legislative safeguards to protect freedom of expression were essential if the state were to demonstrate that the legislation minimally impaired *Charter* rights.

On the question of remedy, the majority recognized that there had been extensive *Charter* violations that arose as a product of the operation of the Customs regime. Binnie J. for the majority maintained the declaratory remedy imposed by the trial judge. He also stated that the findings in the decision “should provide the appellants with a solid platform from which to launch any further action in the Supreme Court of British Columbia should they consider that further action is necessary.”<sup>55</sup> He held that in an action challenging a finding of obscenity, costs will usually be awarded against the Crown if it loses the obscenity issue, and emphasized that “costs can be awarded on a more generous scale” if the court feels that Customs officials have acted oppressively.<sup>56</sup>

The minority rejected the majority’s declaratory relief as being insufficient. As Iacobucci J. put it succinctly: “Given [the fact that there were] grave systemic problems, in the administration of the law ... the primarily declaratory remedy relied on by [the majority] is simply inadequate. Systemic problems call for systemic

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<sup>53</sup> *Little Sisters*, *supra* note 33 at paras. 92-94.

<sup>54</sup> *Ibid.* at para. 211.

<sup>55</sup> *Ibid.* at para. 158.

<sup>56</sup> *Ibid.* at para. 107.

solutions.”<sup>57</sup> The minority would, therefore, have declared the obscenity provision in the Customs legislation to be of no force and effect and would have suspended this declaration of invalidity for eighteen months in order to allow the government time to remedy the Customs scheme.

## VI. Contextualizing Inequality

As the above discussion demonstrates, there are a number of noteworthy features in *Little Sisters*. In particular, there is a striking absence of queer contextualization in the way the Court approached the case. Notwithstanding clear findings of fact by the trial judge, affirmed by the Supreme Court, that the legislation results in systemic discrimination against LGBT materials and bookstores and had undermined the dignity of the appellants and the LGBT communities generally, all legal tests applied in the case effectively “screened out” LGBT realities in assessing whether LGBT materials meet the definition of obscenity, or in articulating community standards of tolerance.

The majority judgment states that the legislation “properly implemented” or “properly administered”<sup>58</sup> is not unconstitutional. This overlooks the reality of the appellants’ experience, which is that systemic flaws prevent the legislation from being properly implemented in a manner consistent with the Charter. As the minority points out, the state must justify “the actual infringement on rights occasioned by the impugned legislation, not simply that occasioned by some hypothetical ideal of the legislation.”<sup>59</sup>

Furthermore, although the Court identified the systemic nature of the problem, it failed to provide a systemic remedy, instead leaving it up to individual booksellers to continue to pour resources into challenging individual seizures under essentially the same legal regime as the one that gave rise to systemic and repeated Charter violations. Not surprisingly, Customs seizures of materials destined for Little Sisters has continued, and the bookstore finds itself back in court, continuing to challenge similar practices.

Similar concerns are raised by other cases in which contextual analysis is necessary for a complete understanding of the community interests involved. For example, the “bawdy house” provisions of the Criminal Code have increasingly been used by the police to target LGBT establishments and bathhouses.

Under subsection 197(1) of the Criminal Code, a “common bawdy-house means a place that is

- (a) kept or occupied, or

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<sup>57</sup> *Ibid.* at para. 253.

<sup>58</sup> *Ibid.* at paras. 150, 153.

<sup>59</sup> *Ibid.* at para. 219.

(b) resorted to by one or more persons, for the purpose of prostitution or the practice of acts of indecency ... ”<sup>60</sup>

Subsection 210(1) of the Criminal Code prohibits anyone from keeping a common bawdy house, and subsection 210(2) prohibits anyone from being “found”, without lawful excuse, in a common bawdy house, which criminalizes people merely for being present, regardless of their actual conduct.<sup>61</sup> In a case dealing primarily with heterosexual prostitution, the offence of keeping a common bawdy house was held not to infringe the freedom of expression guarantees in subsection 2(b) of the Charter of Rights, nor to be so vague as to violate the fundamental justice requirements of section 7 of the Charter.<sup>62</sup>

Much like the “obscenity” provisions in the Customs regime, the “indecency” test in the bawdy house provisions is neutral on its face, subjective in its application, depends on “community standards of tolerance”,<sup>63</sup> and has been used to target LGBT establishments and practices.

As long ago as the early 1980s,<sup>64</sup> these provisions were used to justify police raids on gay bathhouses, but they have also been applied in more recent years. In March of 1996, for example, Toronto police launched a surprise raid on the gay strip club, Remingtons, arresting nineteen men on public indecency and bawdy house charges.<sup>65</sup> Police in Montreal also raided the gay strip club Taboo on 9 May 2003, arresting twenty-three dancers, four clients, and seven managers on charges including public indecency, being found in a common bawdy house, and keeping a common bawdy house.<sup>66</sup> As recently as 3 August 2004, authorities with Hamilton’s “Multi-Agency Task Force” raided a number of establishments, including a gay bathhouse, arresting two patrons for alleged acts of indecency.<sup>67</sup>

The Calgary police raided Goliath’s, a gay bathhouse, on 12 December 2002. They arrested thirteen patrons, charging them with being “found in a common bawdy-house”. Also arrested were managers and employees who were charged with “keeping a common bawdy-house”. All but one of the patrons arrested chose to accept a plea bargain, but one of the men is instead challenging the constitutional validity of the

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<sup>60</sup> *Criminal Code*, R.S.C. 1985, c. C-46.

<sup>61</sup> *Ibid.*

<sup>62</sup> *Reference Re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, [1990] 1 S.C.R. 1123, [1990] 4 W.W.R. 481.

<sup>63</sup> *R. v. Tremblay*, [1993] 2 S.C.R. 932 at paras. 61-63, 106 D.L.R. (4th) 413.

<sup>64</sup> See *R. v. Pisces Health Spa Ltd.* (1981), 63 C.C.C. (2d) 427 (Alta. C.A.); *R. v. Woszczyzna* (1983), 6 C.C.C. (3d) 221 (Ont. C.A.).

<sup>65</sup> See Jill Bora, “Remember Remington’s?” *Xtra!* 319 (16 January 1997) 13.

<sup>66</sup> See Paul Gallant, “Montreal Cops Bust Strippers” *Xtra!* (15 May 2003), online: xtra.ca <<http://www.xtra.ca/site/toronto2/arch/body1397.shtm>>.

<sup>67</sup> See Paul Gallant, “Hamilton Bathhouse Raided” *Xtra!* (4 August 2004), online: xtra.ca <<http://www.xtra.ca/site/toronto2/html/hamiltonbath.shtm>>.

bawdy house provisions. The managers have also pleaded not guilty, in a case being heard separately.<sup>68</sup>

In a newspaper report of the hearing against those charged with keeping a common bawdy house, it is apparent that the Crown is advancing the position that there is no discrimination because similar treatment would have been applied to a heterosexual establishment:

[Crown David] Torske says the bath house violates the community standards of decency because men looking for a partner would lie naked in one of the small bedrooms and fondle themselves, that gay pornography was shown on the TV, in the common room and that the concession stand sold lubricants and condoms.

...

He said similar charges would have been laid had the bath house catered to heterosexuals.<sup>69</sup>

It is not at all self-evident, however, that the homosexual and heterosexual contexts can be meaningfully equated. A heterosexual massage parlour may engage issues of prostitution or exploitation of women, whereas in the context of a gay bathhouse, men pay for entry into the premises where they may engage in consensual sex, usually coming in through a locked main door (above which, in the Calgary case, a neon sign even bore the words “Gay Premises”).

There is no question that police raids on “queerspaces” such as a gay bathhouse constitute a fundamental assault on our identity and consensual expression of our sexuality. This was particularly apparent in a raid by police on the “Pussy Palace”, a lesbian bathhouse night in Toronto (although that raid was brought under liquor licencing regulations rather than using the bawdy house provisions of the Criminal Code). In that case, Justice Hryn condemned the use of male police officers in a raid on a lesbian bathhouse event as “analogous to a strip search” and emphasized that “the male police officers knew the female patrons were in various states of undress and in a highly sexualized atmosphere.”<sup>70</sup> The court found that the female patrons were “upset, frightened, embarrassed, and felt violated, intimidated and shocked.”<sup>71</sup> He excluded all evidence obtained ruling that this was one of those “clearest of cases” where the police conduct “shows blatant disregard for the qualities of humanness which all of us share.”<sup>72</sup> Although the focus of the Pussy Palace case was on the use of male police officers in relation to matters of women’s intimate sexuality, concerns arise whenever vulnerable groups are subject to excessive policing of their consensual sexual conduct.

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<sup>68</sup> See *e.g. R. v. Zakreski*, [2004] A.J. No. 595 (Prov. Ct. J.) (QL).

<sup>69</sup> “Bawdy House Trial Begins” Calgary.cbc.ca (1 April 2004), online: CBC.ca <[http://calgary.cbc.ca/regional/servlet/View?filename=ca\\_goliath20040401](http://calgary.cbc.ca/regional/servlet/View?filename=ca_goliath20040401)>.

<sup>70</sup> *R. v. Hornick*, [2002] O.J. No. 1170 at para. 108 (Ct. J.) (QL), Hryn J.

<sup>71</sup> *Ibid.* at para. 80.

<sup>72</sup> *Ibid.* at para. 132.

The particular impact of state law or conduct on disadvantaged communities risks becoming subsumed into a broader de-gendered inquiry so long as we are required to construct an artificial equivalent “other” space for heterosexuals to see if police would have treated such an establishment “the same” way, an approach that is difficult to reconcile with the Court’s rejection of the similarly situated test,<sup>73</sup> or the requirement of a contextualized approach to section 15 equality issues.

As one observer of the Calgary trial has noted:

There has been no context given, the officers (all presumably heterosexual men) had no understanding of what they were looking at or the context within which such environments exist. ...

...

Various comments about how dark it was, hot warm it was, about used condoms in the trashcans in the rooms, public lewd masturbation in the porn tv room. One investigator even wrote “the tour of this den of iniquity is now over” in his notes!!

But of course, they are not biased or targeting the gay men’s community ...<sup>74</sup>

Nor is it only cases involving LGBT sexualities that create concerns regarding the need for contextualization. In *Trinity Western University v. British Columbia College of Teachers*,<sup>75</sup> the BC College of Teachers refused to approve a training program for public school teachers run by a private evangelical university, Trinity Western University (“TWU”) on the basis that the university required students entering the program to sign an undertaking to refrain from behaviours that are “biblically condemned. These include but are not limited to ... sexual sins including premarital sex, adultery, [and] homosexual behaviour ...”<sup>76</sup>

The Supreme Court of Canada found in favour of TWU by a majority of eight to one (with L’Heureux-Dubé J. dissenting), and held that no evidence had been presented to suggest that graduates of TWU were more likely to discriminate on the ground of sexual orientation than graduates of other teacher training programs. Absent such evidence, the Court felt that any particular incidents involving discriminatory behaviour could be addressed by appropriate disciplinary action if and when they arose.

While it is true that no evidence was presented to enable the Court to conclude that graduates of TWU are more likely to discriminate than other graduates, it is disturbing that the Court did not more fully recognize either the systemic obstacles faced by LGBT youth in schools or the proactive role that teachers are expected to fulfill as role models. The latter was acknowledged in *Ross*:

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<sup>73</sup> *Andrews*, *supra* note 40.

<sup>74</sup> E-mail from Stephen Lock, gay activist and EGALE board member (2 April 2004).

<sup>75</sup> [2001] 1 S.C.R. 772, 199 D.L.R. (4th) 1 [*Trinity Western*].

<sup>76</sup> *Ibid.* at para. 4.

A school is a communication centre for a whole range of values and aspirations of a society. In large part, it defines the values that transcend society through the educational medium. The school is an arena for the exchange of ideas and must, therefore, be premised upon principles of tolerance and impartiality so that all persons within the school environment feel equally free to participate. As the Board of Inquiry stated, a school board has a duty to maintain a positive school environment for all persons served by it.<sup>77</sup>

If the focus is exclusively on the specific actions of individual graduates, then the concerns of the College of Teachers can, of course, be addressed by individual disciplinary action against specific graduates. Viewed in a broader context, however, it becomes apparent that the Court's more limited approach fails to take into account the reality of LGBT youth struggling to deal with issues of self-acceptance in an often hostile public education system. Much of this context, and relevant studies, were presented by EGALÉ in its factum before the Court:

Many lesbians, gays and bisexuals, particularly youth, internalise the prevailing message that they are not normal and consequently suffer insecurity, depression, and shame. ...

In the educational context, the suppression of references to lesbians, gays and bisexuals creates a learning environment in which young people are raised unaware of the diversity of families in Canadian society, and where the contributions of lesbians, gays and bisexuals to Canadian history, art, literature, culture, family and social life are systemically ignored or devalued. Young people coming to terms with their sexual orientation may find themselves torn between risking rejection, discrimination and abuse by "coming out" as lesbian, gay or bisexual, or concealing their identity and feelings, leading to loneliness, alienation and shame. ...

These messages of exclusion and "not belonging" are internalized by youth who may later grow up to identify as lesbian, gay or bisexual, and create problems such as a lack of self esteem, a high risk of parental rejection, peer abuse, homelessness, school dropout, drug abuse, unsafe sexual behaviour and prostitution. One of the most serious and tragic consequences of the lack of adequate social support is the disproportionately high rate of suicide and attempted suicide for young lesbians, gays and bisexuals, a factor recognized by the Supreme Court of Canada.<sup>78</sup>

...

Because lesbian, gay, and bisexual youth are almost always "minorities" in their own families, they do not enter the school environment with the same

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<sup>77</sup> *Ross v. New Brunswick School District No. 15*, [1996] 1 S.C.R. 825 at para. 42, 171 N.B.R. (2d) 321.

<sup>78</sup> *Egan*, *supra* note 1 at 601; See also Health Canada, *The Experiences of Young Gay Men in the Age of HIV: A Review of Literature* (Ottawa: Canada, 1996) at 12-13, 19-20; Ian T. Kroll & Lorne B. Warneke, "The Dynamics of Sexual Orientation & Adolescent Suicide: A Comprehensive Review and Development Perspective" (Calgary, 1995) 1-5; *Being Out: Lesbian, Gay, Bisexual, & Transgender Youth in BC: An Adolescent Health Survey* (Burnaby, B.C.: McCreary Centre Society, 1999) at 6.

level of family support and understanding that other members of minority groups do. Thus schools are an important second line of support for students dealing with issues of sexuality, and can counter the effect of a hostile family environment. The risk of suicide and other social problems such as homelessness and unhealthy relationship patterns increase when youth have no sources of support or even tolerance.

The impact of discrimination has been most noted in the educational context, especially for lesbian, gay and bisexual students. Isolation has been identified as “the most relentless feature in the lives of most gay, lesbian and bisexual youth.” The environmental factors contributing to isolation have been found to include lack of services, homophobia and denial of human rights protections, lack of adult role models, hostile school environments, rejection by religious groups, neglect by child welfare agencies and lack of training and awareness. The attitudes contributing to these severe difficulties are a direct result of insufficient support within the public education system.<sup>79</sup>

As Bruce MacDougall notes: “The most important factor in the perpetuation of homophobia and the marginalization of homosexuals, including self-hatred in homosexuals, is the intense indoctrination in heterosexism that children experience. A great deal of this indoctrination occurs in educational institutions.”<sup>80</sup>

This is the broader systemic context against which the concerns of the BC College of Teachers must be considered. To what extent will an LGBT student, struggling with harassment, seeking to overcome isolation, perhaps even contemplating suicide, feel able to approach a teacher whom he or she knows has signed a statement that homosexuality is sinful and biblically condemned? If teachers are to be role models and communicators of values, what message is sent by a public school teacher training program, even one administered by a private university, which maintains as an entry criterion the condemnation of homosexuality? While teachers may be entitled to their private beliefs, is the BC College of Teachers not at least entitled to be concerned when values inconsistent with the values of the public school system are formally built into a teachers training program? Is it enough to expect teachers merely to refrain from acts of discrimination, rather than being positive role models by proactively contributing to an environment of pluralism and respect? Is the BC College of Teachers not entitled to expect that teachers will go further than merely not being part of the problem, but will also be part of the solution?

Much of this context was incorporated into the lone dissenting judgment of L’Heureux-Dubé J.<sup>81</sup> It is, however, a matter of concern that the broader systemic

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<sup>79</sup> *Trinity Western*, *supra* note 75 (Factum of the Intervenor, EGALE Canada, S.C.C. No. 2 7168 at paras. 10-15) [references omitted].

<sup>80</sup> Bruce MacDougall, “Silence in the Classroom: Limits on Homosexual Expression and Visibility in Education and the Privileging of Homophobic Religious Ideology” (1998) 61 Sask. L. Rev. 41; See also Elaine Lowe, ed., *Safe Spaces: HIV Prevention for Gay, Lesbian and Bisexual Youth* (Ottawa: Canadian Public Health Association, 1998) at 5-8.

<sup>81</sup> *Trinity Western*, *supra* note 75 at para. 81ff.

context was not referred to in the judgment of the majority, which instead focused exclusively on the narrow issue of teachers' individual behaviours.

## VII. Systemic Discrimination and Remedial Issues

There is a close link between a court's approach to systemic discrimination under section 15 and issues of remedy. If a court fails to recognize the problem as systemic, it is likely that the remedy granted will be a narrow one that may address the immediate issue before the court, but fails to address the core problem.

As noted previously, the remedy ultimately granted in *Little Sisters* did little to address the broader flaws inherent in the system itself, notwithstanding the Court's acknowledgement of a broad pattern of systemic discrimination in the disproportionate targeting of LGBT materials and bookstores. In practice, many materials are likely to simply be released by Customs on a case-by-case basis if challenged—which does nothing to preclude a further seizure of the next shipment.

Similarly, in *Trinity Western*, the Court's remedy was to recognize that specific discriminatory acts by teachers could be the subject of disciplinary action, but not to address the core conditions that might give rise to discriminatory conduct, such as a training program based on discriminatory values.

A further example is the case of *Chamberlain v. Surrey School District No. 36*,<sup>82</sup> in which the Supreme Court of Canada held that the Surrey School Board ("the Board") had no basis to prohibit the use of books depicting same-sex families in the classroom. The remedy requested by the appellants was that the Board be directed to approve the books for use. The Court found in favour of the appellants at every step of the analysis until it came to the remedy, when the Court merely directed the Board to reconsider the materials, even though the Board itself had acknowledged that the only reason the books had been disallowed was their same-sex content, a factor found by the Court not to be justifiable.

Upon reconsideration, the Board refused to approve the books a second time, because according to one commentator, they found fault with the books' "grammar [and] punctuation" and had concerns that "kids whose families objected to homosexuality in the book weren't portrayed equally with kids who thought that having two moms or two dads was OK."<sup>83</sup>

In each of these cases—*Little Sisters*, *Trinity Western*, and *Chamberlain*—the narrow focus of the remedy granted by the Court places the onus on members of a disadvantaged group to relitigate a systemic issue time and again whenever they are confronted with a discriminatory act.

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<sup>82</sup> [2002] 4 S.C.R. 710, 221 D.L.R. (4th) 156 [*Chamberlain*].

<sup>83</sup> "B.C. School Board Rejects Same-Sex Books" CTV.ca (13 June 2003), online: CTV.ca: <[http://www.ctv.ca/servlet/ArticleNews/story/CTVNews/1055503912453\\_7/?hub=TopStories](http://www.ctv.ca/servlet/ArticleNews/story/CTVNews/1055503912453_7/?hub=TopStories)>.



### **Conclusion: Future Directions**

As this discussion illustrates, courts and legislatures have dealt successfully with many of the “easy” cases of LGBT discrimination, often using the Charter as an invaluable tool. Human rights protection, relationship recognition, even the right to marry—notwithstanding its social controversy—have all been advanced through the relatively straightforward application of established legal principles dealing with denial of formal equality.

We are now entering an era in which more complex issues arise, challenging courts to look beyond facially neutral laws and recognize the systemic discrimination inherent in their application, requiring courts to contextualize section 15 equality claims in order to provide more nuanced analysis of the impact of laws and policies upon disadvantaged communities, requiring them to fashion remedies that deal with the root of the problem, rather than just its superficial symptoms.

We are also learning about the limitations of section 15. Although section 15 inevitably involves a comparative exercise, in the absence of a fully contextual approach, courts are invited, for example, to compare police raids on gay bathhouses with raids on heterosexual massage parlours, even though the nature, function, and role of each within their respective communities may be quite different.

Of all the Charter provisions, section 15 has served as the primary vehicle for advancing LGBT issues in the courts, but so long as courts give limited effect to section 15 as a means of redressing systemic inequality, we may well see greater prominence accorded in future litigation strategies to other Charter sections, such as section 2 or section 7, whose role in enabling us to express and affirm our sexuality and identities has not yet been fully explored.

Just as we move into these more complex areas, so too the LGBT communities are being challenged to recognize our own diversity. Many members of the LGBT communities see the struggle to end discrimination as a struggle to belong. Critics of the directions adopted by LGBT community organizations have characterized the same-sex marriage challenges, for example, as essentially assimilationist, while more conservative elements within our own communities often disparage those who seek to affirm issues of sex and sexuality as elements of gay identity. More marginalized members of our own communities risk being left out of mainstream struggles, be they people in non-traditional relationships, those on social assistance, those whose experience of sexual orientation discrimination is compounded by other factors such as race or disability, or transgendered, transsexual, or intersex people whose legal rights remain largely unrecognized.

In my view, the responsibility of our community organizations is to maximize the opportunity of all members of our communities to celebrate their identity free from discrimination in a manner consistent with their personal aspirations, whether they be mainstream or on the margins. Those who wish to marry should have that equal choice, just as those who celebrate their sexuality through consensual activity in a community bathhouse should be free to do so without state criminalization of their consensual expression.

Whether the Charter is a sufficiently flexible vehicle to protect the full diversity of our communities, however, remains to be seen.

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