

# TRAVELLING BRIEF

## Recent Canadian developments in queer law



The past 18 months have been a momentous period in the evolution of Canadian queer law. Lesbian and gay issues have been at the forefront of legal thought, in a mixed bag of positive and negative developments from the courts and legislatures.

### The Supreme Court and sexuality

In May 1995, the Supreme Court handed down its judgment on sexuality and the Canadian Charter of Rights and Freedoms in the case of *Egan and Nesbit* — and what a judgment it is. Lesbian and gay commentators hardly know whether to hail it as a landmark victory or a resounding defeat.

Jim Egan and Jack Nesbit had been partners for 46 years. In 1986, on reaching age 65, Egan received old age security and income supplement. On reaching age 60, Nesbit applied for a spousal allowance under the *Old Age Security Act*. His application was rejected because he and Egan did not fall within the definition of 'spouse' in the Act, which was restricted to people of the opposite sex. The Supreme Court had to decide whether this definition violated Egan's and Nesbit's equality rights (if any) under s.15(1) of the Canadian Charter, which states:

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

The Court unanimously agreed that sexual orientation is to be read into s.15 as an 'analogous' ground, as it is a personal characteristic like those specifically enumerated. By a majority of 5 to

4, it then held that the denial of benefits to same-sex couples under the Act was discriminatory, infringing s.15(1): in so doing, the Court gave a new meaning to the term 'spouse'.

L'Heureux-Dubé J, in the majority, stated that same-sex couples 'are a highly socially vulnerable group, in that they have suffered considerable historical disadvantage, stereotyping, marginalization and stigmatization within Canadian society'. She concluded that the protection of, and respect for, human dignity are at the heart of s.15. Cory J noted that the historic disadvantage suffered by homosexuals has been widely documented and found sexual orientation to be more than simply a 'status' of an individual, being demonstrated in an individual's choice of a partner. He considered that the distinction drawn by the Act was made solely on the basis of sexual orientation and not on grounds of need or merit, and hence constituted discrimination; further, the legislation reinforced prejudicial attitudes based on a faulty stereotype of homosexuals as unable and unwilling to form lasting, caring, mutually supportive relationships with economic interdependence in the same manner as heterosexual couples.

However, in spite of this breakthrough, the Court went on to reject Egan's and Nesbit's claim by a majority of 5 to 4. Sopinka J, who had found the *Old Age Security Act* prima facie discriminatory, concluded that the Act was 'saved' by the Charter's general justificatory provision, s.1, which states that the Charter 'guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society'.

Sopinka J reasoned unconvincingly that governments must have flexibility in extending social benefits and do not have to be pro-active in recognising new social relationships. He found that the Act struck a proper balance in providing financial assistance to those shown to be in the greatest need and considered it legitimate for a government to make choices between disadvantaged groups. In contrast, the dissenting judges on this issue stated

that discrimination on the basis of sexuality meant that the allowance was not rationally connected to its legislative goal of the mitigation of poverty among 'elderly households'. Section 1 of the Charter could not save s.15 as it was not relevant to a proportionate extent to this pressing and substantial objective.

The *Egan* case has been interpreted by the Manitoba Supreme Court in *Vogel*, as granting 'spousal status under the law by the slimmest of possible majorities, with all the attendant (but as yet undefined) rights and responsibilities'. Some lawyers believe the decision does not bode well for gays and lesbians because the Court seems to have given politicians and employers an excuse not to grant homosexuals equal benefits. However, Egan and Nesbit put the most positive face on the decision and its implications for future political and legal strategies. They wrote in a letter to the Canadian journal *Xtra!*:

... we are entirely delighted with the ruling... The court unanimously agreed that 'sexual orientation' must be read into the Charter of Rights as a prohibited ground of discrimination. In short, the Supreme Court has opened the door to an era of litigation. Both federal and provincial governments must accept that any law that creates inequalities between same- and opposite-sex relationships is discriminatory.

A number of Court victories have already occurred, based on this constitutional protection.

### The floodgates open...

#### *Spousal benefits*

In *Vogel*, decided three weeks after the *Egan* decision, the Manitoba Court of Appeal unanimously held that the denial of spousal benefits under government employment benefits plans to same-sex partners is discriminatory under Manitoba's Human Rights Code, which expressly covers discrimination on the basis of sexual orientation as well as on marital or family status.

Chris Vogel had worked for the Manitoba Government since 1973. He and Richard North had been partners since 1972, and in 1974 were married by Winnipeg's Unitarian Church, although the Registrar of Vital Statistics

refused to register their certificate of marriage. As in *Egan*, the denial of spousal benefits was expressly based on sexual orientation. While the Court did not have to decide whether it was discriminatory on the basis of 'marital or family status', it noted that the Supreme Court's re-definition of the word 'spouse' in *Egan* 'opens the door to the re-assessment of the biological and social realities that have been, until now, fundamental to the family or marital status'.

It remains to be seen whether the *Egan* and *Vogel* decisions will help Jim Bigney, an employee of the federal Department of National Defence, who was finally granted 61 hours leave to care and grieve for his partner of 13 years (dying of AIDS-related causes), 14 months after the leave was requested and long after his partner had died. The Canadian Government has refused to budge in its resistance to Bigney's claim to his partner's pension benefits.

#### Age of consent

In the context of deportation proceedings, Judge Reed of the Federal Court has held that a Criminal Code section which sets the age of consent to anal intercourse at 18, compared to the age of consent for other sexual activity at 14, is unconstitutional. The Court found that sexual orientation was covered by the Charter. On the basis of statistical evidence, the section had a disparate impact on homosexual males and hence was discriminatory. It was also age discrimination.

The Government tried to rely on s.1 of the Charter to justify the discrimination, partly on the ground that the section was intended to protect young people from HIV transmission. However, the singularly well-informed Court held that HIV is spread by a number of activities, of which anal sex is the least frequent method of transmission. Further, it noted, *unprotected* sex is the cause of HIV transmission, not the sexual activity itself. Therefore, the section did not rationally relate to the objective it was allegedly designed to achieve and its effects were not proportional to that alleged objective.

#### Same sex adoption

Section 15 of the Charter was again invoked when, in a well reasoned, sensitive judgment, Ontario Provincial Court Judge Nevins held in *Re K* that legislation preventing gay and lesbian couples from adopting children was unconstitutional. The legislation only per-

mitted joint applications by 'spouses', defined as people of the opposite sex. Judge Nevins granted adoption orders to four lesbian couples. In all cases, one of the lesbian partners was the child's birth mother.

As in *Egan*, Nevins J found sexual orientation to be within the scope of s.15 of the Charter. He found that discrimination existed as homosexual couples living in conjugal relationships were denied opportunities, benefits and advantages available to the rest of the population.

Further, the discrimination was not justifiable under s.1 of the Charter. Having regard to arguments based on the 'best interests of the children', Nevins noted:

when one reflects on the seemingly endless 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 caring and committed parents, who might happen to be lesbian or gay, is nothing short of ludicrous.

Judge Nevin's reasoning also opens the door to same-sex couple adoptions of children who are not the birth child of either partner.

The Judge did what Ontario's legislature was unwilling to do in 1994, when it failed to pass a Bill proposed but only weakly supported by the ruling (ALP-like) New Democratic Party. In contrast, British Columbia's NDP amended its adoption rules in February 1995 to permit single people, including lesbians and gays, to adopt.

The Ontario Bill provided for the extension of all rights and obligations to same-sex spouses in the same manner as exist for unmarried opposite-sex spouses. However, 12 NDP members crossed party lines on an open vote, leading to the Bill's defeat. Interestingly, disapproval of the Government's handling of the Bill and its defeat and a feeling in segments of the gay and lesbian community that they had been manipulated, appeared to play a part in the NDP's resounding defeat at the polls in June this year by the Progressive Conservative Party. The PCP campaigned on an anti-(queer, immigration, welfare, equal opportunity, feminist) agenda, bolstered by pro-white-middle-class-angry-straight-male, 'commonsense revolution' rhetoric. Post-election

analysis concluded that politicised, motivated lesbians and gays will vote to 'punish' politicians who are not supportive of their rights, but that the balance of the population are oblivious to gay issues once an election rolls around.

### Federal legislative developments

The Canadian Liberal Government has also taken a timid approach to amending the Canadian *Human Rights Act*. Although it has for some time promised to include sexual orientation among the protected grounds, a 15-year-old recommendation by the Canadian Human Rights Commission that sexual orientation be included in federal human rights statutes has still not been implemented. Of particular importance may be Prime Minister Chretien's personal commitment (or otherwise) to the legislation and his assessment of the political kudos or cost associated with it. By disciplining back-benchers who voted against the government's firearms and sentencing Bills, Chretien has shown he has the leadership qualities necessary to secure the passage of controversial Bills if he is determined.

The Government has pushed through 'hate crimes' sentencing legislation. The new provision states that when a crime is motivated by hatred against the victim's perceived race, religion, sex or sexual orientation, the court must take this into consideration in imposing an increased sentence. The provision stirred up a frenzy of homophobic rhetoric among MPs, including several from the government caucus. One Liberal MP said that it could protect people who have sex with children, dead bodies and animals, and a paedophile beaten up in the street by an irate father could claim he or she was the victim of a hate crime. An Opposition member said that gaybashing is exaggerated and is just as likely to be perpetrated by gay men as it is by straights: 'There's a lot of jealousy, they have a lot of short-term relationships, they are vengeful and their health isn't very good', he is reported to have said.

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