

*ONE PLUS ONE: A STUDY OF THE
LEGAL RECOGNITION OF LESBIAN COUPLES*

Legislative initiatives affecting lesbians have been few and far between. As a result of social prejudices, lesbians tend to keep a low profile, and many live their love lives "in the closet." They face a variety of situations where they have neither the same rights nor the same responsibilities or options as heterosexual couples. Furthermore, suggesting their rights be legally recognized sparks varying reactions. Although laws have been purged of openly discriminatory provisions based on sex in recent years, the legislative void with regard to lesbian couples raises serious questions.

1. Homosexuality and the Law: Historical Evolution

Over a century ago when it was suggested that a paragraph forbidding homosexual acts between women be included in new legislation, Queen Victoria declared she had no knowledge of such acts and refused to sign the bill were the passage not deleted. Sexual relations and love between women were inconceivable at the time. In 1967, the Omnibus bill was introduced. Although the sections on sodomy and gross indecency were maintained, the bill limited their application by rendering them inoperative when such acts occurred in private between consenting adults. After decriminalization, the fight for public visibility became one of the prime focuses of gay and lesbian activism during the 70s. In 1977, Québec became the first jurisdiction in North America to include in its Charter a provision declaring that all persons are entitled to the recognition and exercise of their rights and freedoms free from discrimination based on sexual orientation.

— **Consolidation and the Struggle for Same Sex Spousal Rights**

In the 80s, numerous groups and projects were set up to develop and promote lesbian identity as well as to support and bring together members of the lesbian community. Gays and lesbians in other provinces, notably Ontario and British Columbia, were using the courts to demand certain rights, but in Québec, legal

challenges were hampered by article 137 of the Charter, which allowed for distinctions or exclusions based on sexual orientation in matters of pension, retirement, insurance and all other forms of benefit plans. Demands for the repeal of article 137 grew in the early 90s and in December 1992, following the murder of a number of homosexuals in the Montréal area, the Committee on Violence of the Table de concertation des lesbiennes et des gais du Grand Montréal called for a public inquiry into violence and discrimination against the gay and lesbian communities. After holding public consultations, the Commission des droits de la personne (CDP) tabled its report in 1994. Report recommendations included:

- the adoption of a regulation permitting members of same sex couples to benefit from pension plans, insurance regimes and all other benefits packages;
- a comprehensive legislative review in view of adopting a law to give same sex spouses the same rights as heterosexual common law spouses; and
- examining the possibility of setting up a voluntary registry for the purpose of recognizing common law spousal status of individuals in same sex and heterosexual relationships.

In 1996, the National Assembly passed Bill 133 abrogating Charter article 137, which had permitted distinctions and exclusions based on sexual orientation in various benefit plans. Just recently, on June 18, 1998, Québec's Minister of Justice announced government plans for a comprehensive overhaul of provincial legislation as it pertains to common law spouses in same sex and heterosexual relationships.

2. Portrait of the Lesbian Population

Lesbians do not constitute a homogenous population. They are young and old, rich and poor, and come from various national, ethnic and cultural backgrounds. Nobody knows how many lesbians live in Québec.

Given the lack of available data, the results of foreign studies have sparked controversy over the actual percentage of lesbians in the population. According to some accounts, lesbians who do go public in the workplace are often perceived by their colleagues solely in terms of their sexuality. They are no longer viewed just as people, but as "women who sleep with women."

— **Sexual Identity or the Relationship to Sexual Identity**

According to a number of authors, many lesbians do not base their social identity on their sexuality, but rather on their love relationship with another woman. The discovery that one's sexual orientation differs from that of the majority can be difficult, notably for adolescents fearful of hostile reactions from family and friends. Homosexual integration often takes place in isolation. "Coming out of the closet" is an existential question for lesbians.

— **Family Life**

An American study has shown that 20 % of lesbians are mothers, and most have had their children within a heterosexual union. Obtaining child custody following the breakup of a heterosexual relationship can be difficult for lesbians. Marginalization, lack of status, and ignorance mean that members of such families may be socially isolated. Although limited, research results suggest that children of lesbian parents are not disadvantaged and do better when their mothers are in good psychological health and living with their partners.

— **Lesbian Couples**

As is the case for heterosexual couples, relationships between same sex couples vary depending on several factors: age, social status, ethnic origin and childcare responsibilities. Same sex couples establish relationships for the same reason heterosexuals do, and their lives as couples are as stable and satisfying as those of their heterosexual counterparts. However, their relationships appear more egalitarian than those of heterosexual couples, in part because, in almost all same sex relationships, both partners are income earners.

— **The Economic Sphere: Education and Income**

In general, data on the educational background of lesbians seems to indicate a higher level of education

than in the general female population. There is no data available on lesbian incomes in Québec, but they are probably lower than those of gay men since women generally earn less than men. The comparison between lesbian income and that of heterosexual women is harder to establish. Although lesbians suffer the consequences of heterosexism in the workplace, they more often than not face fewer childrearing responsibilities.

3. The Québec Legal Framework

Lesbians form couples, have children, want children, break off relationships, work, retire, and die from natural or accidental causes like everyone else. However, lesbians and same sex couples do not have the same rights, obligations and responsibilities as heterosexual couples.

— **Child Custody**

Some lesbians have had children over the course of a marriage or common law relationship. In the event of a breakup, provisions must be made for child custody. Under the Divorce Act and the Civil Code, the child's interest is the main criterion for determining custody. Although a mother's homosexuality is not in itself an obstacle to gaining custody, her sexual identity is negatively perceived.

— **Motherhood**

Any person of legal age, whether single or living with another person, may adopt a child. The Civil Code stipulates that adoption may only occur in the interests of the child and according to the conditions provided for by law. Although the charters of rights forbid discrimination on the basis of sexual orientation, the limited number of children up for adoption suggests that couples corresponding to traditional conceptions of a normal family are more likely to have their applications approved. From a legal perspective, artificial insemination is not explicitly denied lesbians at this time. Certain health facilities hold that insemination is a therapeutic intervention to address male infertility in stable, heterosexual relationships. However, a few Québec doctors offer insemination services to lesbians, or lesbians can elect to perform insemination themselves.

— **Lesbian Couples**

Same sex marriages are explicitly forbidden under the Québec Civil Code, which states that marriage may only be contracted between a man and a woman. This

exclusion means, among other things, that lesbian couples cannot sign marriage contracts, that their family residences are unprotected, and that they are under no obligation to provide support to each other during their lives together. In the event of a breakup, there are no provisions for the division of family assets, the dissolution of the matrimonial regime, or support payments. In the event of the death of a partner, the surviving spouse has no right to a share of family assets, nor to any compensatory allowance or financial compensation. In the absence of a will, a lesbian spouse will not inherit her partner's estate. However, like heterosexual common law spouses, lesbian couples can use various legal instruments (contracts, wills, etc.) to counter the nonapplication of certain provisions of the Québec Civil Code.

— **The Exclusion of Lesbian Couples In Specific Legislation**

Many laws take into account the fact that people live as couples. In general, laws concerning social insurance and social assistance plans exclude same sex couples. In fact, the government recognizes a responsibility for heterosexual couples, but not for same sex couples. This has a number of consequences for same sex couples in the application of the law.

— **Social Insurance Plans**

Several social insurance plans are designed to replace revenue lost as a result of insured risks (Québec pension plan, private retirement plans, worker's compensation, automobile insurance). Benefits go first to the person insured and are transferred to the next-of-kin in the event of death. Since these laws do not recognize same sex couples, their members do not enjoy the same rights as their heterosexual counterparts. As a result, same sex spouses do not have access to the benefits paid to surviving spouses under the terms of these plans. However, in some circumstances, surviving spouses may benefit from certain rights on other grounds.

— **Social Assistance Plans**

Social assistance in the form of welfare, financial aid for students, and legal aid is designed to help people in need. In this case, lack of legal recognition for same sex couples has its advantages. Indeed, a lesbian may be eligible for various forms of social assistance unavailable to a heterosexual woman in the same circumstances. For example, a lesbian with a partner may be eligible for welfare, whereas the eligibility of a heterosexual woman in the same situation depends on the income of her spouse.

— **Taxation**

Although Québec's income tax system is individually based, the Income Tax Act contains a number of provisions that take spouses into account. Lesbian couples are explicitly excluded from the definition of spouse in the Taxation Act. Recognition of lesbian couples would have financial consequences, especially for those with low incomes or dependent children.

— **Other Social Measures**

Other laws take into account the presence of spouses to confer rights, determine benefits payable, or impose obligations.

The benefit plan established under the Family Allowance Act provides for family allowances that vary depending on family makeup and income. Given plans to increase benefits for those with sole responsibility for dependent children, nonrecognition of lesbian spouses represents a financial advantage for low-income lesbians. Moreover, lesbian couples are not covered by the Prescription Drug Insurance Act, which means that lesbians are under no obligation to enroll their partners in their group insurance plans. Furthermore, the Labour Standards Act sets various minimum rights for workers. Here again, lesbian spouses are not recognized under the law.

In short, from a strictly monetary standpoint, recognition of same sex unions has its advantages and inconveniences. Advantages include, among others, access to survivor's benefits under a number of plans along with the possibility of using fiscal rollover measures and certain tax credits. In contrast, recognition means a loss of access to welfare and legal aid on an individual basis and, for those with children, a possible reduction in family allowance payments as well as a reduction in or loss of certain tax credits.

4. Treatment of Lesbian and Gay Couples in Other Jurisdictions

The status of gay and lesbian couples varies from province to province and country to country. In some jurisdictions, particularly those where human rights are not respected, homosexuality is severely repressed. At the other end of the spectrum are countries with legislative provisions that recognize same sex couples.

— **The Federal Government**

In June 1996, the Canadian Human Rights Act designated sexual orientation as unacceptable grounds for discrimination. In addition, in November 1995, the federal Treasury Board changed its policy to accord

same sex partners access to certain benefits previously limited to heterosexual spouses. Moreover, in 1998, the Ontario Court of Appeal ruled in the *Rosenberg* case that the definition of «spouse» in the Income Tax Act must be interpreted to include same sex spouses for the purposes of pension plan registration. The federal government did not appeal the ruling.

— The Other Provinces

Sexual orientation is illegal grounds for discrimination under human rights legislation in every province except Alberta. However, following the Supreme Court's ruling in the *Vriend* case, Alberta law must now be interpreted to include sexual orientation. As employers, several provincial governments recognize same sex couples. Just recently, changes in survivor's pension benefits for public sector employees were announced in three provinces. On the legislative front, Ontario was the first province to table an inclusive bill on the recognition of same sex couples. The bill was defeated by nine votes in a free vote. Ontario has also been the stage for a number of important legal decisions concerning same sex couples. Lastly, the British Columbia legislature recently amended the definitions of spouse and parent in its Family Relations Act to recognize same sex spouses.

— Other Countries

The Scandinavian countries are generally considered to be at the leading edge when it comes to recognizing same sex couples' rights. Other countries, notably the Netherlands and France, have also recognized same sex couples' rights or are looking into doing so. In 1989, Denmark became the first country to pass a law on nationally registered partnerships. This law gives gays and lesbians who so wish a status equivalent to that of married couples, excluding the right to religious marriage, adoption and insemination. Norway and Sweden emulated Denmark and recognized same sex couples in 1993 and 1994 respectively. And the Netherlands recently amended its legislation to allow same sex couples to establish registered partnerships virtually identical to marriage.

Internationally, the European Parliament adopted a resolution—albeit a nonexecutory one—in 1994 encouraging member countries to abolish all legislation criminalizing homosexual relations or making them legal grounds for discrimination. In this perspective, it asked the Commission of the European Communities to make recommendations on the equality of gay and lesbian rights. At the Beijing Conference, a number of delegations urged that sexual orientation at least be mentioned as additional grounds for discrimination.

5. Different Points of View Regarding State Recognition of Same Sex Couples

Opinions regarding the recognition of the rights and responsibilities of same sex couples vary. Gay and lesbian parenting is also the subject of debate, particularly with respect to child custody, adoption and artificial insemination.

— Arguments Against the Recognition of Same Sex Couples

Various arguments have been raised against the recognition of same sex couples. In the eyes of the Catholic Church, heterosexual marriage is the sole rightful place for the sexual expression of love. Others essentially view homosexuality as an anomaly that undermines family rights. Some politicians have declared that society is not ready to extend the rights accorded heterosexuals to homosexuals. In the area of family law, certain people have claimed that having rights and obligations for spouses is only meant to serve the needs of women and consequently only applies to heterosexual unions. Others point out that, even though not all heterosexual couples have children, the couple is the only social unit that has the capacity to procreate and that generally takes responsibility for childrearing. In this capacity, it deserves support from the legislator in meeting its needs.

— Arguments in Favor of the Recognition of Same Sex Couples

Other points of view are favorable to the recognition of same sex couples. The United Church of Canada seeks to understand and support homosexuals who engage in long-term relationships, and is considering how best to do this. Moreover, a good portion of the population of Québec favors giving gay and lesbian couples the same rights as their heterosexual counterparts. It would appear that the exclusion of same sex couples from government legislation no longer reflects contemporary social values. Some argue that from a fiscal equity standpoint, gays and lesbians pay taxes and therefore contribute to social programs. Although unmarried and childless heterosexual couples are eligible for the social protection these programs offer, homosexual couples are not. As a result, same sex spouses end up subsidizing heterosexual couples.

Some believe that legislators should support and encourage the recognition and stability of all couples. Judges have indicated that government refusal to grant recognition may have a highly prejudicial impact on group members' feelings of personal value and dignity. The distinction between heterosexual and homosexual couples is tantamount to discrimination because it reinforces the stereotype that gays and lesbians are

incapable of maintaining lasting relationships. Others have pointed to recent jurisprudence indicating that members of same sex couples can develop economic dependence. Legislation on the division of assets after a breakup should therefore also apply to same sex couples.

— **Criticism of the Fight for Recognition of Same Sex Couples**

Certain critics of the struggle to obtain recognition of same sex couples argue that the family is an oppressive institution and that it is wrong to seek its benefits. The struggle for family status is seen as having a deradicalizing effect and as an attempt to assimilate into heterosexual "coupledom." From this standpoint, same sex couples' attempts to obtain rights on the basis of their similarities to heterosexual couples risk creating a hierarchy of relationships between those that fit the traditional family mold and those that do not. The lesbian feminist position views the family more as an institution that oppresses women.

— **Variable Recognition for Same Sex Couples**

One author has suggested that when defining spousal status, laws should attempt to identify the characteristics of relationships that are relevant to the law's purpose by acknowledging that there exists a diversity of intimate relationships and by seeking to treat each kind in an equitable fashion. For example, in the area of family law, the Ontario Law Reform Commission has adopted an approach that varies with sexual orientation. The Commission recommended that heterosexual common law spouses have the same rights and obligations as their duly married counterparts, but refused to extend the recommendation to same sex couples living together. However, the Commission did recommend that same sex spouses be able to register their partnerships.

— **Views on Lesbian Parenting**

Lesbians may wish to adopt a child, get pregnant through artificial insemination or gain custody of their children following a breakup. Available research indicates that fears about how well-adjusted the children of homosexual parents are have no empirical grounding. However, there are reservations about the various avenues to parenthood. In the case of artificial insemination, some argue that it is a medical act intended to remedy specific medical conditions—masculine infertility or the risk of hereditary or genetic disease. As for medically assisted procreation, some believe that it is discriminatory to refuse artificial insemination to a woman because she is single or lesbian.

The Road Ahead...

From Queen Victoria's profession of ignorance to the creation of the Réseau des lesbiennes du Québec in June 1997, lesbians have come a long way. Society is more accepting of homosexuality and lesbianism, which has become somewhat more visible. Just recently, the Québec government announced plans for a comprehensive overhaul of provincial legislation in order to review its application to common law spouses in same sex and heterosexual relationships.

Recognition of same sex couples in social legislation raises certain questions, such as:

- Should spousal status be requested by one of the partners in a union or imposed by the government?

The government is also considering a mechanism that would ensure social and legal recognition for common law marriages and give them civil effect. This option also raises important questions:

- What would be the rights and obligations ensuing from such a union?
- Would this new form of union be available to all common law spouses including heterosexuals? If so, what would be the consequences of creating a new form of marital status?

Lastly, we must ask whether it is not appropriate to broaden the debate and review the various laws one by one to define their objectives and the types of relationships they recognize.

Over the upcoming months, the Conseil du statut de la femme plans to pursue its reflection on the legal recognition of lesbian couples. Given the complexities of the issue, the Council must take the following points into account:

- A change in the status of same sex couples could help reduce prejudice toward lesbians.
- Reform should be equitable for all women regardless of marital status, as well as for their children.
- Feminists have varying points of view regarding the legal recognition of lesbian couples.

- Reform should be comprehensive and not conducted on a piecemeal basis so as to avoid incoherency and injustice. In this sense, the Council must also take into account the fact that the government's reflection covers both same sex and heterosexual spouses.

The Council is aware of the different circumstances and conditions heterosexual and lesbian women face. Indeed, a minority existence can lead to discriminatory treatment. The Council undertook this research prior to the June 1998 ministerial declaration in hopes that the results of this study and those to come will contribute to the debate.

The Publication

Une plus une : recherche sur la reconnaissance légale des couples de lesbiennes, [written and researched by Guylaine Bérubé], Conseil du statut de la femme, August 1998, 94 p.

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Synthesis

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