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# SAME SEX SPOUSAL RECOGNITION IN ONTARIO:

## Declarations and Denials: A Class Perspective

PATRICIA LEFEBOUR\*

### RÉSUMÉ

L'auteure explique que, si la définition juridique de conjoint est élargie de façon à inclure les conjoints de même sexe, ceux qui vivent de prestations d'aide sociale subiront une baisse de leur revenu alors que ceux de la classe moyenne en bénéficieront. Cette réduction de prestations pourrait avoir de graves répercussions, particulièrement lorsque l'un des conjoints est atteint de SIDA ou souffre de problèmes de santé ou d'un handicap. Les récentes décisions de la cour relatives à la reconnaissance des conjoints de même sexe sont à l'étude.

### I. INTRODUCTION

Canadian courts and tribunals have disposed of a number of cases dealing with sexual orientation in recent months. However, the latest judicial pronouncements on the status of gay and lesbian couples in Canada may be described as indeterminate. While an Ontario human rights tribunal decided that the exclusion of a same sex partner from family coverage under an employee benefits plan constituted discrimination<sup>1</sup>, the Supreme Court of Canada held that denial of bereavement leave to a civil servant to attend the funeral of his partner's

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\* Copyright ©1993 Patricia LeFebour. Patricia LeFebour is an articling student at the firm of Weir & Foulds. This paper was written during an articling rotation at the Advocacy Resource Centre for the Handicapped (ARCH). The views expressed in this paper do not represent the views of the Advocacy Resource Centre for the Handicapped.

1. *Leshner v. Ontario (Attorney General)* (1993, (Board of Inquiry) [unreported] [hereinafter *Leshner*]

father was not discrimination on the basis of family status<sup>2</sup>. In another case, the Federal Court of Appeal held that a gay couple was not discriminated against because of disqualification to a spousal allowance under the *Old Age Security Act*<sup>3</sup>.

The Ontario government, following *Leshner*, has announced its plans to introduce an 'Omnibus bill' through which same sex spousal recognition will be granted. This bill will affect approximately 79 provincial acts. The Ontario government has yet to introduce this bill although a private member's bill has been introduced<sup>4</sup>.

As part of the growing movement towards the achievement of same sex spousal benefits, the Coalition for Lesbian and Gay Rights in Ontario (CLGRO) has issued a brief<sup>5</sup> which outlines the rationale for recognizing same sex partners in the definition of spouse. CLGRO also reviewed a variety of legislative changes which would be necessitated by such a change in definition.

This paper is an attempt to analyse the expanded definition of spouse from an income class perspective. It is suggested that the inclusion of gay and lesbian couples in the definition of marital status will have a polarizing result. Employment-related benefits will pass to those lesbians and gays whose partners receive these benefits through their employment. However, for those whose source of income is social assistance, the recognition of same sex

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2. *Canada (Attorney General) v. Mossop* (1993), 149 N.R. 1 (S.C.C.).
  3. *Egan v. Canada* (1991), 87 D.L.R. (4th) 320 (Fed. Ct. T.D.), affirmed Fed. C.A.. This case is being appealed to the Supreme Court of Canada. Interestingly enough, in another decision of the Federal Court of Appeal it was held that married couples do not constitute a disadvantaged group relative to common-law heterosexual couples for the purposes of the *Income Tax Act*. (*Schachtschneider v. Canada* (July 6, 1993) App. No. A-1190-91 (Fed.C.A.).
  4. *An Act to Amend the Human Rights Code (Sexual Orientation) 1993 Bill 45*, 1st Reading June 8, 1993. Note that this bill, if it is passed, will include sexual orientation as a prohibited ground of harassment. It will also remove the words "of the opposite sex" in the definition of marital status in the *Human Rights Code*. Among other things, these changes will compel private sector companies to extend coverage under employment benefit plans to same sex partners of employees. The bill was introduced by Tim Murphy, the Liberal Member in the Toronto riding of St. George - St. David.
  5. Coalition for Lesbian and Gay Rights in Ontario, brief "Happy Families: The Recognition of Same-Sex Spousal Relationships" *Press Release* April 1992 [hereinafter CLGRO brief]. See also a recent study by the Ontario Law Reform Commission, unpublished as of December 1993. It recommends amendments to Ontario's Family Law Act to include same sex spouses.

spouses will represent a reduction in benefits received. This reduction in benefits, it will be argued, will pose serious problems especially where one or both of the partners is HIV positive or where the couple experience other serious disability or health problems<sup>6</sup>.

This paper will also examine the test suggested by CLGRO for determining whether two cohabiting adults, regardless of sexual orientation are 'spouses'. The CLGRO model is one of de facto dependency<sup>7</sup>. It will be advanced in this paper that this approach may be problematic from a feminist perspective.

This paper will conclude that the recognition of same sex partners in the definition of spouse will have material benefits for certain gays and lesbians. However, it will be suggested that the distribution of benefits and burdens will be divided along class lines. That is, the benefits will be directed primarily to middle and upper income same sex couples while the burdens will be borne by lesbian and gay couples who rely on social assistance. Some of these issues may be addressed within the broader context of the adequacy of social assistance. However, this does not diminish the need for lesbian and gay communities to weigh the benefits of having their relationships legally recognized against the costs of social conformity.

## II. RECENT CASELAW ON SAME SEX SPOUSES

Three recent cases have fundamentally altered the jurisprudential (as opposed to the political) recognition of same sex spouses. In *Leshner*, the Board of Inquiry held that the denial of family coverage for employment-related benefits to a same sex couple was unacceptable under the *Charter*, although it was permissible under the *Human Rights Code*. In *Mossop*, the Supreme Court of Canada held that denying bereavement leave to a federal civil servant to attend the funeral of his partner's father was not discrimination on the basis of family status under the *Canadian Human Rights Code*. Finally, in *Egan*, the Federal Court of Appeal upheld a decision that a homosexual couple constituted a 'non-spousal' unit and was not discriminated against relative to heterosexual couples for the purpose of receiving old age security benefits.

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6. For example, it has been reported that lesbians face a higher risk of breast cancer than do heterosexual women. Moreover, for a gay couple living with HIV/AIDS, the reduction or elimination of social assistance benefits translates directly into higher health care costs. A drug card, which provides free prescription medication, is made available to social assistance recipients. Therefore, being declared as ineligible for family benefits precludes the eligibility for a drug card.
  7. CLGRO brief, *supra*, note 5 page 41.

### The Leshner Decision

In this case, the Board of Inquiry dealt with a complaint filed by Michael Leshner, a Crown Attorney with the Ontario government. As a government employee, he was entitled to a benefit package to which he contributed. These benefits included dental care, extended medical care, and pension benefits<sup>8</sup>. Mr. Leshner had made a request that his benefit plan coverage be amended from single coverage to family coverage thereby including his partner of more than ten years, Michael Stark. This request was refused<sup>9</sup>.

Subsequently to Mr. Leshner's request, there was a change in government policy effective January 1, 1991, whereby family coverage for insured and non-insured benefits would be extended to same sex partners of Ontario government employees. However, Mr. Leshner was informed that restrictions in the federal *Income Tax Act* precluded the extension of survivor benefits in the pension plan to same sex partners. Hence, Mr. Leshner was compelled to seek redress under Ontario's human rights legislation on the basis of discrimination on grounds of marital status and sexual orientation.

The Board of Inquiry held that the denial of employee benefits and survivor's pension to Mr. Leshner's same sex partner constituted discrimination in employment on the basis of sexual orientation. Two of the three members of the Board found that while the denial of benefits is permitted under the *Human Rights Code*<sup>10</sup>, this denial was "unsustainable"<sup>11</sup> in light of the *Charter*. The third member of the Board found that the denial itself was not permissible under the *Code*.

In describing the nature of the relationship between Mr. Leshner and Mr. Stark, the Board was careful to note that their relationship was not to be seen as "descriptive or prescriptive in relation to other same-sex relationships"<sup>12</sup>. In this regard, the Board stated:

... we do not wish to be regarded as developing or utilizing a functional or reshold test by which same-sex conjugal relationships may be recognized. ... Nor is it necessary for same-sex relationships to mirror the idealized model perceived with respect to a heterosexual conjugal relationship.<sup>13</sup>

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8. *Leshner, supra*, note 1, at 4.

9. Mr. Stark is employed and belongs to a benefit plan through his employer. However, his benefit package was "inferior" to those provided to Mr. Leshner. See *Leshner, supra*, note 1, at 11.

10. *Human Rights Code*, R.S.O. 1990, c.H-19 [hereinafter "the Code"].

11. *Leshner, supra*, note 1, at 3.

12. *Ibid.* at 6-7.

The Board found that the exclusion of lesbian and gay employees from the eligibility of survivor benefits for their partners would contribute "to their being inherently unequal"<sup>14</sup>. In the Board's view, the extension of benefits to same sex partners of employees would not "undermine society or the state's interest in promoting and sustaining families and relationships between its citizens"<sup>15</sup>.

The Board recognized that the exclusion of gay and lesbian relationships from the 'marital status' definitions in the *Code* and other legislation was, in itself, a form of discrimination on the basis of sexual orientation. However, the Board conceded that its role was not to usurp the "clear language of the legislature"<sup>16</sup>. Therefore, the Board of Inquiry decided that the language of the *Code* permitted the exclusion of same sex partners.

One of the arguments raised by the Ontario government was that the motivation for implementing employment-related benefits was the historical inequality of women. The Board of Inquiry in *Leshner* noted that these benefits were originally intended to address the "model of the male worker with dependents outside the workforce"<sup>17</sup>. While the original rationale for employee benefits was to protect the employee's dependents, especially women, the Board recognized that the composition of the workforce has changed over time. Indeed, the Board stated that there "is no compelling evidence before us that dependence uniformly characterizes today's opposite-sex conjugal relationships"<sup>18</sup>. Rather, employees who receive benefits do so based on entitlement instead of need<sup>19</sup>. The Board rejected the notion that the objective of gender equality was sufficient for denying rights of gays and lesbians<sup>20</sup>.

### **The Mossop Decision**

The *Mossop* case dealt with a request made by Mr. Mossop to attend the funeral of his partner's father. Mr. Mossop is a federal government employee. When his request was rejected, Mr. Mossop launched a complaint to the

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13. *Ibid.* at 6-7.

14. *Ibid.* at 39.

15. *Ibid.* at 71.

16. *Ibid.* at 50.

17. *Leshner, supra*, note 1, at 72.

18. *Ibid.*

19. *Ibid.*

20. *Ibid.* at 71.

Canadian Human Rights Tribunal<sup>21</sup>. The tribunal found in favour of Mr. Mossop, holding that the definition of family does not have only one meaning. In the tribunal's view, the definition of family must reflect various relationships. The federal government successfully appealed this decision to the Federal Court of Appeal<sup>22</sup> and Mr. Mossop subsequently appealed to the Supreme Court of Canada.<sup>23</sup>

A majority of the Supreme Court of Canada held that the denial of bereavement leave to a federal government employee to attend the funeral of his partner's father did not constitute discrimination on the basis of family status. The issue, as narrowly framed by Lamer C.J., was whether the denial of certain benefits, available to heterosexual employees but not to homosexual employees, constituted an infringement of the *Canadian Human Rights Code*. Lamer C.J. stated that the issue before him was not whether benefits ought to be extended to same sex partners of employees.

In dismissing Mr. Mossop's appeal, Lamer C.J. suggested that a challenge based on the *Charter* may have led to a different disposition of the case. However, Mr. Justice Lamer held that discrimination in this case could not be framed in a family status context. Rather, it was Mr. Mossop's sexual orientation which was the basis for the refusal to grant bereavement leave. Sexual orientation is absent from the prohibited grounds of discrimination in the *Canadian Human Rights Code* and in Lamer C.J.'s view, it was not for the courts to usurp Parliament's intention:

In the case at bar, Mr. Mossop's sexual orientation is so closely connected with the grounds which led to the refusal of the benefit that this denial could not be condemned as discrimination on the basis of "family status" without indirectly introducing into the *Canadian Human Rights Code* the prohibition which Parliament specifically decided not to include in the Act, namely the prohibition of discrimination on the basis of sexual orientation.<sup>24</sup>

In a lengthy dissent, L'Heureux-Dube J. stated that if Parliament wanted to protect only legally recognized families, it could have done so. She noted that the *Canadian Human Rights Code* lists both marital status and family status as prohibited grounds of discrimination. In L'Heureux-Dube's view, Parliament

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21. *Mossop v. Department of Secretary of State (Can.) et al.* (1989), 89 C.L.L.C. 17,010 (Canadian Human Rights Tribunal).

22. *Canada (Attorney General) v. Mossop* (1990), 71 D.L.R. (4th) 661 (Fed. C.A.).

23. *Canada (Attorney General) v. Mossop*, [1993] 1 S.C.R. 554 [hereafter "*Mossop*"].

24. *Ibid.* at 580.

intended that family status mean something other than marital status<sup>25</sup>. She noted that the definition of family as used by the American Home Economics Association referred to a sharing of resources, responsibilities, values and goals and a sense of commitment to one another over time<sup>26</sup>. She also suggested that the notion of family may not be rigidly defined for all legislative objectives. As an example, she cited the case where a person may be considered as part of a family for the purposes of receiving benefits but not for the purposes of income tax legislation<sup>27</sup>.

### The Egan Decision

The *Egan* case concerned a claim by Mr. Egan and his partner Mr. Nesbit that the definition of 'spouse' in the *Old Age Security Act* discriminated against them on the basis of sex or, in the alternative, on the basis of sexual orientation, contrary to the *Charter*. Mr. Nesbit's request for spousal allowance benefits under the *Old Age security Act* as the spouse of Mr. Egan was denied.

The Federal Court Trial Division held that Mr. Egan and his partner Mr. Nesbit fell into the class of a "non-spousal couple"<sup>28</sup>. Significantly, in this case neither Mr. Egan nor Mr. Nesbit referred to each other as spouses<sup>29</sup>. In fact, had they been considered as spouses, they would have received approximately \$6,000 less in benefits<sup>30</sup>. However, the Federal Court disagreed with a finding in a similar case<sup>31</sup> where the Supreme Court of British Columbia that the definition of spouse in the *Medical Services Regulations* had the effect of imposing a penalty on same sex couples relative to heterosexual couples by denying a benefit which is available to heterosexual couples. In *Egan*, the Federal Court held that "the distinction is not made upon the basis of the sexual orientation of the plaintiffs and thus does not discriminate against them on that basis"<sup>32</sup>. The court noted:

Within the non-spousal group into which the plaintiffs fall, they also fall into a sub-group of same-sex partners whose life-style mirrors many of the charac-

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25. *Ibid.* at 619.

26. *Ibid.* at 624.

27. *Ibid.* at 626.

28. *Egan, supra*, note 3, at 332.

29. *Ibid.* at 327.

30. *Ibid.*

31. *Knodel v. British Columbia (Medical Services Commission)*, [1991] 6 W.W.R. 728 (B.C. S.C.).

32. *Egan, supra*, note 3, at 332.



teristics or attributes of the spousal group but that does not, in my view at least, bring them within the traditionally understood meaning of a spousal couple which forms the fundamental building block of any society.<sup>33</sup>

These three cases suggest that it may be more successful to challenge legislation which is based on a heterosexual premise on the basis of sexual orientation rather than family status. The Board of Inquiry's reasoning in *Leshner* indicates that if, as an individual, a person has a narrower range of benefits available because of sexual orientation (i.e. not being able to obtain family coverage for a partner) while being subject to the same obligations as a heterosexual person (i.e. contributing to employment-related plans), then this is discrimination on sexual orientation grounds. The Board of Inquiry in *Leshner* was, however, cautious in making any pronouncements on the definition of family. The majority of the Supreme Court of Canada in *Mossop* appeared to reason that but for Mr. Mossop's sexual orientation he would have been granted bereavement leave.

### III. EMPLOYMENT-RELATED BENEFITS

For some gays and lesbians, one of the positive results of same sex spousal recognition will be the extension of employment-related benefits to same sex partners. The appeal of this result is self evident. Inclusion of same sex partners in these benefit packages will mean that dental care, medical care, prescription eyeglasses, pension benefits, to name a few, will be provided to a lesbian or gay employee's partner.

As the Board of Inquiry in *Leshner* noted, the original rationale for employment-related benefits was the protection of women who were not part of the paid labour force. This rationale has diminished, however, as women have entered the paid labour force.

There are many employees who do not receive any extended benefits through their employment. According to a recent consultation paper issued by the Ministry of Health<sup>34</sup>, approximately two million Ontario residents have no access to extended drug plans. These people include the self-employed, people in non-unionized businesses, part-time workers, workers in small businesses which do not offer extended health plans, workers excluded from company plans because of a pre-existing condition, workers with chronic illnesses

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33. *Ibid.* at 333.

34. "Drug Programs—Framework for Reform" Ontario Ministry of Health June 29, 1993. Ontario Ministry of Health "Drug Programs-Framework for Preference", June 29, 1993.

whose premiums are higher than the amount covered by the insurer, and the children of these workers<sup>35</sup>.

The government's report estimates that approximately 15% of small businesses in Ontario (up to 10 employees) do not offer extended health plans. It is also quite possible that people with HIV might be included in the 'pre-existing condition' clauses and therefore, be excluded from coverage.

#### IV. SOCIAL ASSISTANCE BENEFITS

The mechanism of social assistance in Ontario revolves around both the *Family Benefits Act*<sup>36</sup> and the *General Welfare Assistance Act*<sup>37</sup>. Both acts currently define 'spouse' as heterosexual spouses<sup>38</sup>.

Under the *FBA* regulations, a spouse is a person of the opposite sex to an applicant/recipient who, together with the applicant/recipient, has declared that the two are spouses. However, a person of the opposite sex who has resided continuously with the applicant/recipient for a period of more than three years is *deemed* to be a spouse<sup>39</sup>. The deeming provision is not applicable where the applicant/recipient provides evidence to the Director that the "economic, social and familial aspects of the relationship between the person and the applicant or recipient were such that the continuous residing did not amount to cohabitation"<sup>40</sup>. In determining whether two people are spouses, "sexual factors"<sup>41</sup> are not to be considered.

There are similar provisions for defining a spouse under the *GWA*. For example, a spouse is a person of the opposite sex to the applicant who, together with the applicant, have declared to the welfare administrator that they are spouses<sup>42</sup>. There is a deeming provision whereby two people of the opposite sex who have lived together continuously for more than three years are considered as spouses for the purposes of receiving an allowance<sup>43</sup>. Finally,

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35. *Ibid.* at 16.

36. *Family Benefits Act*, R.S.O. 1990, c.F.2 [hereinafter *FBA*].

37. *General Welfare Assistance Act*, R.S.O. 1990, c.G.6 [hereinafter *GWA*].

38. Family Benefits Regulations, R.R.O. 1990, Reg. 366, s.1; General Welfare Assistance Regulations, R.R.O. 1990, Reg. 537, s.1.

39. R.R.O. 1990, Reg. 366 s.1(1)(d).

40. *Ibid.* s.1(3).

41. *Ibid.* s.1(2).

42. R.R.O. 1990, Reg. 537, *supra*, note 38, s.1(1)(a).

there is a provision under the regulations to the GWA where, on the production of evidence negating cohabitation, two people living together would not be considered as spouses<sup>44</sup>.

In order to appreciate the implications of the inclusion of same sex couples in the definition of spouse it is important to understand the treatment of heterosexual couples in the present social assistance regime. Under the current system, a person is eligible for family benefits or general welfare if she or he meets certain income requirements. Included in the definition of the applicant/recipient's income is any income received by or on behalf of a spouse. Thus, where a couple has declared each other as spouses or has been deemed, the income of one spouse acts as a reducing factor for the other spouse's benefits. In some cases, the level of the spouse's income eliminates completely the benefits received by the applicant/recipient.

In order to determine who is to be deemed a spouse, the Ministry of Community and Social Services distributes questionnaires to people currently receiving social assistance. The following is a sample of the questions asked:

- Do you own a house or real estate? Do you own the house by yourself?
- Can anyone else withdraw money from your account? Are any of your accounts joint?
- What do your children call your co-resident?
- When you go out with your co-resident, how do you introduce him?
- Do people think of you as a couple?
- Is your co-resident mentioned in your will? How? Are you or your children mentioned in his (her) will?
- Does your co-resident work? If so, do you or your children receive any benefits from his employment?
- Do people think of you, your children and your co-resident as a family?
- Who takes care of your co-resident when he is ill? Who takes care of you?<sup>45</sup>

The purpose of the questionnaire is to determine the extent of the social, familial and economic links between the applicant/recipient and the 'co-resident' for the calculation of benefits. As stated above, sexual factors may no longer be considered in determining whether a spousal relationship exists and it is interesting that many of the questions in the Ministry's survey are based

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43. *Ibid.* s.1(1)(d).

44. *Ibid.* s.1(3).

45. Questionnaire from Ministry of Community and Social Services.

on the perceptions of other people. The questionnaire is sent to recipients three months prior to the three year point of cohabitation. Each recipient is informed that a review of circumstances is warranted to determine whether the co-resident has a legal obligation to support the recipient<sup>46</sup>.

## V. THE IMPACT OF SAME-SEX SPOUSAL RECOGNITION ON *FBA* AND *GWA* RECIPIENTS

Under a framework of same sex spousal recognition, the definition of 'spouse' under both the *FBA* and the *GWA* will be amended. This has significant implications for lesbian and gay couples. Even where a couple does not declare that they are spouses, the deeming provisions in the *FBA* and *GWA* would take effect after three years of living together. For a gay or lesbian couple to continue to receive benefits as individuals, they would have to produce evidence that they are not cohabiting.

Under a regime of same sex spousal recognition, it is likely that the Ministry's questionnaire will be sent to gay and lesbian couples prior to the three year anniversary of cohabiting. As noted above, the questions are intended to determine the extent of the social and economic link between the cohabitants. It is possible that for some gays and lesbians the test of cohabitation may be met even where the couple does not consider each other as spouses.

Arguably, this is no different from the experience of heterosexual couples who wish to maintain their level of benefits as single people. However, the impact of denying a relationship for gays and lesbians goes to a deeper denial of identity than for heterosexuals. Coming out for lesbians and gays is often a protracted process through which self-acceptance and pride is realized. There is no question that having to deny the existence of a relationship for the purpose of receiving social assistance is demeaning in any circumstance. However, for lesbians and gays, this denial goes to the root of their existence.

It has been stated that gays and lesbians have "an ironic advantage"<sup>47</sup> over heterosexual applicants for social assistance in that gay and lesbian couples are treated as individuals rather than as families. Same sex spousal recognition will transform this so-called ironic situation to one where only those gays and lesbians who benefit can feel proud of declaring their relationships. For those who receive social assistance, declaration of their relationships will reduce or

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46. Pre-intent letter accompanying the questionnaire.

47. Bruce Ryder, "Equality Rights and Sexual Orientation: Confronting Heterosexual Privilege" (1990) 9 *Canadian Journal of Family Law* 39 at 62.

eliminate their benefits. It is only through a denial of identity that these gays and lesbians can maintain their individual level of benefits. The further visibility of middle class gays and lesbians will be won at the expense of perpetuating the increased invisibility of low income members of the lesbian and gay communities.

A more pressing impact exists for gay and lesbian couples on social assistance, where one or both partner faces a serious disability or chronic illness<sup>48</sup>. For those gay couples living with HIV and AIDS, issues of benefits and adequate housing are daily concerns<sup>49</sup>. The reality for many of these couples is that the present model of same sex spousal recognition will cause their social assistance benefits to decrease markedly or be cut off entirely<sup>50</sup>. This may have a deterrent effect on the establishment and maintenance of relationships. For those relationships which continue, it will add an unnecessary layer of stress.

## VI. CLGRO'S REPORT

CLGRO's report entitled "Happy Families" was issued before the *Leshner* decision was released. It contains a detailed survey of legislation in Ontario which includes a heterosexual definition of 'spouse'. In CLGRO's view, the definition of 'marital status' must be amended to reflect gay and lesbian relationships.

CLGRO's 1990 Statement of Principle is as follows:

CLGRO believes that, while our preference would be that benefits be made on an individual basis (with allowances for the dependence of children, the aged, and the disabled), whenever benefits are made available to heterosexuals

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48. According to the *Canada Communicable Disease Report* published March 13, 1992 78% (4341 men) of Adult Cases of AIDS Reported in Canada as of January 1, 1992 were through homosexual/bisexual activity. The same report states that 39% of AIDS Cases Reported in Canada as of January 1, 1992 were from Ontario. This translates into 2135 men and 77 women. A report entitled "Breast Cancer: Unanswered Questions" *Report of the Standing Committee on Health and Welfare, Social Affairs, Seniors and the Status of Women* June 1992 stated that in 1992 an estimated 14,400 new cases of breast cancer would be diagnosed and that of these, 5,100 women would die of breast cancer. The statistics indicate that each woman has a 10% risk of developing breast cancer. Moreover, women who never become pregnant or who start having children in their 30's face an increased risk of breast cancer.
  49. See Jim Gaylord and Pamela Bowes, "Disabled and Poor: A Growing Reality for People Living With HIV/AIDS" (1992) *ARCH-TYPE* 4.
  50. The reality for many people with AIDS is that they have to deal with the inadequacy of social assistance benefits, the growing list of drugs excluded from the Drug Card, and the homophobia evident within the social assistance system.

living in couples, these same benefits must also be made available to same-sex couples on the same footing.<sup>51</sup>

It is from this position of "basic equality"<sup>52</sup> that CLGRO formulates its rationale for same sex benefits. Linked to its position of equality, CLGRO places its model of benefits for lesbian and gay couples within the framework of freedom of choice. That is, those gay and lesbian couples who wish to have access to these benefits ought to have the freedom to define themselves as couples.

CLGRO notes that there is disagreement within the lesbian and gay communities surrounding the issue of definition as 'family units'<sup>53</sup>. However, this apparent problem is explained away by contextualizing the issue within a freedom of choice debate:

All individuals should have the right to determine the nature of their own personal relationships in accordance with their personal values and beliefs. This is essentially an issue of freedom of choice. And these relationships should receive institutional support from government and the community to support their stability.<sup>54</sup>

CLGRO's report recognizes that social assistance benefits will be reduced for some lesbian and gay couples. However, framing the issue as one of freedom of choice to define relationships has little benefit for lesbian and gay couples on social assistance. For them, the deeming provisions in the current legislation will render the choice of defining their relationships illusory.

CLGRO's recommendation is that in the absence of a complete restructuring of the social benefits system, the Ontario government should treat same sex couples in the same manner as heterosexual couples<sup>55</sup>.

In the second part of CLGRO's brief, more specific suggestions are made relating to various pieces of legislation. One such recommendation is that the Ontario government institute "an optional system of status designation"<sup>56</sup> whereby lesbian, gay, or heterosexual couples can define the nature of their

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51. CLGRO brief, *supra*, note 5, at iv.

52. *Ibid.*

53. *Ibid.* at 1.

54. *Ibid.* at 2.

55. *Ibid.* at 7.

56. *Ibid.* at 14.

relationships. With regard to social benefits, CLGRO recognizes that under the Family Benefits Act:

Women in same-sex relationships may benefit, however, since both women in a relationship would be considered to be single. If both qualified for benefits, each would obtain greater benefit than if their relationship was recognized to constitute an economic unit.<sup>57</sup>

While CLGRO realized that there could be a potential detriment to lower income gays and lesbians, this analysis was not further explored.

CLGRO's recommendation is based on a "de facto test of dependency"<sup>58</sup> which will "remove discrimination in the determination of eligibility for social benefits"<sup>59</sup>. From the perspectives of some feminists, the family as a social institution is a source of the oppression of women<sup>60</sup>. According to these feminists, if gays and lesbians to adopt the structure of family as the basis for entitlement to benefits they:

... may be supporting the very institutional structures that create and perpetuate women's oppression. Our reliance on the language of monogamy, cohabitation, life-long commitment, and other essentials of *bona fide* heterosexual coupledness may divide us, not only from other lesbians and gays who do not live in this fashion, but from all people defined as "single" by virtue of their exclusion from the model.<sup>61</sup>

While Didi Herman notes that there are differing views among feminists on the family, she attempts to reconcile the conflict by suggesting that the idea of a family as a site of resistance can be "imported"<sup>62</sup> into the discussion of lesbian and gay families. She suggests:

Our families may be different in that they are not premised on the subordination of women by men. Yet, even if we assume that lesbian or gay families are so different or radical (and these are by no means the same thing), the ability

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57. *Ibid.* at 41. It is interesting to note which legislation CLGRO analysed in its brief. For example, the impact of recognizing same sex spouses was studied with respect to the *Change of Name Act*. However, the impact of same sex spousal recognition on people receiving social assistance under the *FBA* or the *GWA* was not studied.

58. *Ibid.*

59. *Ibid.*

60. Didi Herman, "Are We Family: Lesbian Rights and Women's Liberation" (1990) 28 *Osgoode Hall Law Journal* 789 at 795.

61. *Ibid.* at 797. In her article, Didi Herman also notes that this analysis has met with some criticism, notably from women of colour. In their experience, the notion of family is the site of their strength and resistance against the dominant group.

62. *Ibid.* at 801.

of existing structures to accommodate us is done at the expense of women as a whole. We gain entry into the institutions, and (if we win our cases) thereby further entrench these institutions in law.<sup>63</sup>

It is appealing on some levels to consider that lesbian and gay families by definition subvert the heterosexual model of family. However, from a practical point of view, the proposed changes to the definition of marital status may simply legislate that same sex relationships are mirror images of heterosexual relationships.

It appears unlikely that any legislative changes will reflect the diversity of our communities. Rather, same sex spousal recognition will be based on the replication of heterosexual cohabitation. This will arguably entrench the heterosexual, patriarchal concept of family to the detriment of those who do not fit this model and those who will be adversely impacted by its imposition.

## VII. FUTURE DEVELOPMENTS

There have been various studies over the past few years which have advocated substantial reforms to the social assistance system<sup>64</sup>. These studies have recommended that the benefit amount received by couples be twice that received by individuals. The rationale as stated in the "Transitions" report is:

We have endorsed a definition of the benefit unit that reflects support obligations between individuals as defined by family law. However, such a definition of the benefit unit must not create disincentives to the formation of families. Thus, for example, we recommend that a couple receive the same benefit as two individuals.<sup>65</sup>

The "Transitions" report also recommended that the current system of family benefits and general welfare be merged into one system which governs all social assistance.

The study "Back on Track" recommended that same sex couples be treated in the same manner as heterosexual couples<sup>66</sup>. To this extent, this study is in

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63. *Ibid.* at 803. See also Lisa R. Zimmer, "Family, Marriage, and the Same-Sex Couple" (1990), 12 *Cardozo Law Review* 681; Ryder, *supra*, note 35; "Looking for a Family Resemblance: The Limits of the Functional Approach to the Legal Definition of Family" (1991) 104 *Harvard Law Review* 1640.

64. "Report of the Social Assistance Review Committee - Transitions" prepared for the Ontario Ministry of Community and Social Services, Toronto, 1988; "Back on Track", First Report of the Advisory Group on New Social Assistance Legislation, Queen's Printer for Ontario, March, 1991; "Time for Action: Towards a New Social Assistance System for Ontario" Queen's Printer for Ontario, May, 1992.

65. "Transitions - Summary", *supra*, note 65 at 30.



agreement with the CLGRO report. However, this study also proposed that couples be given the same benefit payment as two individuals<sup>67</sup>. This report estimated that the cost to the province of doubling the payment received by couples would be approximately \$9.6 million<sup>68</sup>.

The report "Time for Action" proposed changes to the benefit unit. This study premised its recommendation on the basis that adults ought to be treated as individuals. The benefit unit would also take into account "any income actually received from anyone, anywhere"<sup>69</sup>. This approach, according to the report, would not make any assumptions about relationships. Another significant aspect of this study is the recommendation that "hardship provisions"<sup>70</sup> be used to ameliorate the situation where a person with a disability marries a person with low income. This provision, it is argued, will not discourage relationships from forming. Rather, its purpose is to recognize the additional costs incurred by people with disabilities and the current penalties imposed by having benefits reduced by spousal income.

The Ontario government recently announced that it will be implementing changes to the province's social welfare system<sup>71</sup>. The stated reason for the proposed transformation of the current system is to reduce the number of people currently receiving social assistance<sup>72</sup>. According to the report, the restructuring of the economy has seen a "growth in both low- and well-paid jobs and a corresponding decline in middle income jobs"<sup>73</sup>. Moreover, there are increasing strains on family structures. For example, it is estimated that there are 180,000 sole support parents on social assistance in Ontario, 83% of which are women<sup>74</sup>. The report also states that there are 159,000 persons with disabilities on social assistance in Ontario<sup>75</sup>.

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66. "Back on Track", *supra* note 64, at 87.

67. *Ibid.*

68. *Ibid.*

69. "Time for Action", *supra*, note 64, at 53.

70. *Ibid.*

71. *Turning Point New Support Programs for People with Low Incomes* Ministry of Community and Social Services, released July 9, 1993.

72. *Toronto Star* July 9, 1993 at A24. According to the article in the *Toronto Star*, there are 1.2 million, or one in nine, people in Ontario receiving social assistance.

73. *Turning Point*, *supra*, note 71 at 5.

74. *Ibid.*

75. *Ibid.*

The report describes one of the deficiencies in the current welfare system as the continuing cycle of dependency. It may be a more economically rational solution for people to remain on social assistance because of the benefits available, such as access to free prescription drugs<sup>76</sup>.

One of the changes advanced by the Ontario government involves a scheme whereby people on social assistance are encouraged to move back into the labour force. This will be done through the implementation of the Ontario Adult Benefit (OAB)<sup>77</sup>. The OAB is intended to replace both the payments made under the *FBA* and the *GWA*. It is proposed that eligibility for the OAB will be based on the applicants' income and resources<sup>78</sup>. For those people who are unable to work because of illness or disability, the government has proposed a long term income supplement. Moreover, certain disability expenses will be paid by the provincial government.

The report also states that the Ontario government is exploring the optimal method of delivery of such a program. Some of the areas being studied are: the amount of benefit, eligibility criteria, and how to meet the needs of the disabled<sup>79</sup>. It is not stated in the report whether the inclusion of spousal income (in cases where a declaration of spouse has been made or where a person has been deemed as a spouse) would reduce the benefit received by the applicant/recipient.

Almost concurrently with the announced plans to reform the social assistance system, the Ontario Ministry of Health released a Consultation Paper<sup>80</sup> which set out the guidelines for a new drug benefit plan. Under the current regime, people on social assistance receive certain medications free of charge. The revisions to this system would increase the coverage base to include the working poor who are without employee benefit plans<sup>81</sup>. In addition, the suggested guidelines include coverage for 'catastrophic' drug costs for illnesses such as AIDS<sup>82</sup>. The eligibility for this program is income based - that is, "the beneficiaries would have to contribute the greater of \$2,000 or 3 per cent of their net income to the cost of their drugs"<sup>83</sup>.

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76. *Ibid.* at 13.

77. *Ibid.* 19.

78. *Ibid.*

79. *Ibid.* at 20.

80. Drug Programs Framework for Reform, *supra*, note 34.

81. *Ibid.* at 16.

82. *Ibid.* at 17.

It is premature to predict the impact of the Ontario government's announcement regarding social assistance reform. As stated above, the Ontario government's position regarding the appropriate benefit unit and treatment of couples living with disabilities was not apparent from the initial announcements.

### VIII. CONCLUSION

The advances in the law regarding discrimination on the basis of sexual orientation have focused on individual claims. Any human rights protection for gays and lesbians is offered solely to individuals. With respect to the recognition of the rights of gay and lesbian couples and their commitments, progress has been much slower.

Recent announcements which would afford lesbian and gay couples the same status as cohabiting heterosexual couples have, on one level, been hailed as a step towards equality for gays and lesbians. However, on a closer analysis, it appears that the gains will be made primarily in favour of middle class gays and lesbians. The losses will be borne by a disproportional number of low income gays and lesbians whose income is received from social assistance programs. Especially disadvantaged will be those couples who live with disabilities or chronic illness.

It may be argued that solutions should be directed at social assistance reform. To this end, it is imperative that lesbian and gay organizations form coalitions with anti-poverty groups to end the marginalization of lower income people. However, it is also necessary for gays and lesbians to fully address the implications of same sex spousal benefits. Seeking legal recognition of gay and lesbian relationships is a worthy goal. However, it should be understood that increased benefits for gays and lesbians who are economically privileged at the expense of those who are economically vulnerable may not further the goal of equality for all gays and lesbians.

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83. *Ibid.* at 17. The Ontario government's proposal to have beneficiaries contribute the greater of \$2,000 or 3% of their net income has already received criticism from AIDS Action Now! (AAN). AAN has suggested that this method of coverage benefits those who are already covered by health plans. AAN proposed that the test be based on spending the lesser of \$2,000 or 3% of net income. See XTRA! July 9, 1993 No. 227, page 15 "AIDS Drug Plan".