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Protecting Equality and Human Dignity: Allowing Same-Sex Marriage

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Introduction

The denial of the right to marry to same sex couples remains an unacknowledged and invidious act of discrimination. By denying them this right, the heterosexual majority has exacerbated and perpetuated the dehumanization that gay men, lesbians and bisexuals experience daily in our society.

In early 1993, it seemed that the judiciary had announced its willingness to help alleviate this dehumanization. In Haig v. Canada,[1] the Ontario Court of Appeal took into account "the pain and humiliation undergone by homosexuals by reason of prejudice towards them"[2] in determining that the omission of sexual orientation as a prohibited ground of discrimination in the *Canadian Human Rights Act* constituted discrimination within the meaning of s.15(1) of the *Canadian Charter of Rights and Freedoms* ("the Charter".)

However, only eight months later, the Ontario Court (General Division) issued a decision which betrayed a reversion to the majoritarianism and intolerance of past decisions. In Layland v. Ontario[3] (hereinafter Layland), the majority of the court supported the refusal by the Ottawa city clerk's office to issue a marriage licence to two men. Unable to ground its decision in a statutory prohibition of same sex marriage (none exists), the majority propounded the existence of a common law rule which limits marriage to opposite sex couples on the basis that the capacity for heterosexual intercourse (and thus procreation) is an essential element of the institution.[4] The court then asserted that the common law limitation of marriage to persons of the opposite sex did not violate the applicants' constitutional right to equality before and under the law grounded in s.15(1) of the Charter.

This paper accepts that a common law rule prohibiting marriage between people of the same sex does exist but argues that the rule violates rights protected by both the Charter and Human Rights legislation and is inappropriate in our pluralistic modern society. First, this paper argues that the common law prohibition of same-sex marriage discriminates on the basis of sexual orientation and violates parties' constitutional right to equality protected by s.15(1) of the Charter. Second, this paper argues that the common law rule violates s.7 of the Charter in that it encroaches on the right to liberty of same-sex partners by insulting their dignity as human beings. Third, it argues that the denial of marriage licences to same sex couples is a violation of s.1 of the *Ontario Human Rights Code,* R.S.O. 1990, c.H.19. Fourth, it argues that the common law rule violates numerous international human rights conventions to which Canada is a signatory.

Finally, this paper examines possible remedies for the rights violations that would grant equal

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[1] Haig v. Canada (1993) 94 D.L.R. (4th) 1.

[2] *ibid* at page 10.

[3] Layland v. Ontario (Minister of Consumer and Commercial Relations, [1993] O.J. No. 575.

[4] the court referred to cases including Corbett v. Corbett (otherwise Ashley) [1970] 2 All E.R. 33 at page 48; also Hyde v. Hyde (1866), L.R. 1 P. & D. 130, 35 L.J. P. & M. 57, at L.R. 1 P.& D. at page 133.

access to the benefits of the institution of marriage. While recognizing that state imposition of spousal obligations is not favoured by all members of the gay and lesbian community, this paper argues that the preferable way to deal with this issue is to grant equal protection and benefits to all members of society and allow partners to contract out of any obligations they find offensive.

1. Existence of a Common Law Rule Prohibiting Marriage between Same-Sex Partners

Greer J. in dissent in Layland contended that there is no common law rule prohibiting same sex marriage. He argued that the pre-Charter cases involving marriage issues cited by the defendant should not be applied "given what has taken place since the Charter was passed, and given the body of law which has applied s.15 of the Charter." He also disagreed that the federal common law deems that a valid marriage can only take place between persons of the opposite sex.

Many of the cases cited by the defendant in Layland and referred to by Greer J. defining marriage as a union of two people of the opposite sex were English cases decided before the turn of this century. Their applicability does seem questionable considering how societal values have changed during the last one hundred years. For example, the court in Hyde v. Hyde (1866)[5] defined marriage as "the voluntary union for life of one man and one woman, to the exclusion of all others." As Greer J. rightly points out, using the words "for life" is "clearly not applicable in today's society of multiple marriages." Greer J. also argues that the common law prohibition of same-sex marriages in other jurisdictions does not necessarily mean same-sex marriages are prohibited by Canadian common law. He further contends that even if a Canadian common law rule does prohibit same-sex marriages, it likely would not survive the scrutiny of the Charter.

Serious doubt would be cast on the continued existence of a common law prohibition of same-sex marriage if post-Charter common law cases concerning the definition of marriage or "spouse" repudiated the rule. Greer J. cited two cases in which the courts held that the definition of "spouse" in respective provincial legislation should not be limited to opposite sex partners: Knodel v. British Columbia (Medical Services Commission) (1991),[6] and Leshner v. Ontario, [1992].[7] However, since 1982 when the Charter was proclaimed in force, a number of decisions seem to uphold the rule.

In Anderson v. Luoma (1984),[8] the B.C. Supreme Court affirmed the finding of the trial court that the B.C. *Family Relations Act* has no application where the parties are of the same gender. The Court denied that s.15 of the Charter had any application in the matter, due to the action of s.1.

In Re Andrews and Minister of Health for Ontario (1988),[9] the court dismissed an application by a lesbian couple for dependent coverage under the *Health Insurance Act*, which defined "spouse"

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[5] Hyde v. Hyde *ibid*.

[6] Knodel v. British Columbia (Medical Services Commission) (1991), 91 C.L.L.C. 17,023, [1991] 6 W.W.R. 728, 58 B.C.L.R. (2d) 356 (S.C.).

[7] Leshner v. Ontario, [1992] 16 C.H.R.R. D/184, 92 C.L.L.C. 17, 035.

[8] Anderson v. Luoma (1984), 42 R.F.L. (2d) 444 (B.C.S.C.).

[9] Re Andrews and Minister of Health for Ontario (1988), 64 O.R. (2d) 258 (Ont. H.C.).

as a person of the opposite sex. The court found that the Act was not inconsistent with s.15(1) of the Charter because homosexual couples are not similarly situated to heterosexual couples who procreate, raise children, and have legal obligations to support their children and spouse. The court further stated that the legislative objective of establishing and maintaining traditional families was one of substantial importance.

In B. v. A (1990),[10] Master Cork held that the opposite sex requirement for the definition of "spouse" in the Family Law Act is not met if a transsexual has not irrevocably changed her biological structure (including genitalia.) He noted that he believed there to be some form of official or unofficial prohibition against homosexual marriages, or marriages between parties of the same gender. In his opinion, the Vital Statistics Act, by allowing transsexuals to change their sex on their birth certificates once their anatomical sex structure has been altered, did not intend to make possible the issuing of a marriage licence to transsexual partners who are then legally of the opposite sex.

Finally, in Egan and North v. Canada (1993)[11] a majority of the Federal Court Appeal Division affirmed the decision of the trial court that the definition of "spouse" in the *Old Age Security Act* as a person of the opposite sex does not discriminate on the basis of sexual orientation since homosexuals are treated exactly like other persons in non-spousal relationships.

The findings in the above four post-Charter cases are debatable, and decisions in cases such as Leshner emphasize this point. However, the fact that courts continue to hand down decisions based on an understanding of opposite sex as a pre-requisite for marriage and spousal relationships surely demonstrates that a common law rule prohibiting same sex marriage continues to persist. In order to best prevent continued reliance on the rule by courts in the future, the rule should be declared unconstitutional. The first problem which must be addressed then is whether the Charter can be used to attack a common law rule, or whether the rule would be saved from Charter scrutiny by an assertion that the Charter applies only to relationships between individuals and the state, not to the common law.

2. Can the Charter apply to the Common Law?

Section 32 of the Charter provides that the Charter applies to "the Parliament and government of Canada" and to "the legislature and government of each province." Case law has helped define the limits of Charter application. For example, the Charter applies to legislation[12], municipal by-laws[13], cabinet decisions[14] and rules of professional conduct,[15] but not to relationships between private parties.[16] The Supreme Court of Canada provided a clear statement on whether the

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[10] B. v. A (1990), 29 R.F.L. (3d) 258 (Ont. S.C.).
[11] Egan and North v. Canada (1991), 97 D.L.R. (4th) 320 (F.C.T.D.), aff'd F.C.A.D., judgment dated April 29, 1993.
[12] RSDSU v. Dolphin Delivery, [1986] 2 S.C.R. 573.
[13] Re McCutcheon and the City of Toronto (1983), 147 D.L.R. (3d) 193 (Ont.H.C.J.).
[14] Operation Dismantle, [1985]1 S.C.R. 441, 18 D.L.R. (4th) 481.
[15] Re Klein and the Law Society of Upper Canada (1985), 16 D.L.R. (4th) 489 (Ont.Div.Ct.).
[16] *supra* note 12.

Charter applies to the common law in RSDSU v. Dolphin Delivery.[17] In that case, McIntyre J. stated that the Charter may apply to the common law when "the common law is the basis of some governmental action which, it is alleged, infringes a guaranteed right or freedom."[18]

The Charter should apply to the common law rule prohibiting same sex marriages. The rule forms the basis for numerous federal and provincial statutes which exclude same-sex couples from their respective definitions of "spouse." It was decided in Leshner that excluding same-sex partners from a definition of spouse infringes the guaranteed right to equality under s.15(1) of the Charter. More pertinent to this paper is the fact that the rule forms the basis for the government action of denying marriage licences to same-sex partners, an action which violates rights and freedoms guaranteed by the Charter and human rights legislation at the provincial, national and international levels.

3. The Common Law Rule Violates s.15(1) of the Charter

Section 15(1) of the Charter guarantees that "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..." According to Chief Justice Lamer in R. v. Swain,[19] when a court is analysing whether a s.15(1) violation has occurred, it will first determine

> whether the claimant has shown that one of the four basic equality rights has been denied (i.e. equality before the law, equality under the law, equal protection of the law and equal benefit of the law.)

The common law rule prohibiting same-sex marriage denies same-sex partners the benefits and protections of marriage law that are available to partners involved in opposite-sex relationships. Simply on this basis, it seems that the rule violates s.15(1). The violation seems clearer when one considers Madame Justice Wilson's description of the purpose in setting a constitutionalized standard of equality[20], namely

> remedying or preventing discrimination against groups suffering social, political and legal disadvantage in our society.

However, to successfully establish a s.15(1) violation, a plaintiff must follow each step in an intricate procedure. The process was described by McIntyre J. in Andrews v. Law Society of British Columbia[21] (hereinafter Andrews.) The complainant must (a) establish that the impugned legislation draws a distinction based on one of the prohibited grounds of discrimination under s.15, and then (b) must prove that this distinction results in discrimination.

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[17] *ibid.*
[18] *ibid* at page 599.
[19] R. v. Swain (1991), 66 C.C.C. (3d) 481 at pages 520-521.
[20] R. v. Turpin (1989), 48 C.C.C. (3d) 8 at page 35.
[21] Andrews v. Law Society of British Columbia, [1989] 1 S.C.R. 143.

3.1 Establishing a s.15(1) violation

(a) A distinction based on a prohibited ground is drawn

The common law prohibition of same sex marriage creates a definite distinction. The qualifying criteria for the granting of a marriage licence is that the people wishing to sanctify their relationship through marriage prefer partners of the opposite sex. This draws a distinction on the basis of sexual orientation.

(i) sexual orientation is a prohibited ground of discrimination under s. 15(1)

While sexual orientation is not one of the enumerated grounds under s.15(1), in Andrews, the court held that the distinction created may be based on an enumerated or analogous ground. A number of recent cases have established that sexual orientation is analogous to the enumerated grounds of discrimination under section 15(1) and is therefore included in the protection offered.

In Veysey v. Canada (Commissioner of Correctional Services)[22], Dube J. held that "sexual orientation is not a prohibited ground listed under s.15 but, in my view, it is an analogous ground recognized by the above provincial and territorial human rights acts, as well as the House of Commons Parliamentary Committee on Equality Rights."

In Knodel v. British Columbia (Medical Services Commission),[23] Madam Justice Rowles held that the failure of the *Medical Services Act*[24] to include in the definition of spouse two persons living together in a homosexual relationship, thus denying to homosexual couples medical services plan coverage available to heterosexual couples, infringed homosexual couples' rights to equality under s.15(1) of the Charter. At page 16335, she stated:

> Although s.15 does not include sexual orientation as one of the enumerated grounds, Mr. Perlman [counsel for the Medical Services Commission], on behalf of the respondents, has conceded that discrimination based on sexual orientation contravenes the equality provisions of the Charter. That concession is consistent with the decision of our Court in Brown v. B.C. (Min. of Health) (1990), 42 B.C.L.R. (2d) 294, at 309-310.

Finally, in the appeal of Haig, counsel for the appellant conceded that sexual orientation is an analogous ground under s.15(1) of the Charter.

(b) The distinction drawn results in discrimination

Having found that a distinction has been drawn on an analogous ground, it remains to establish that this distinction results in discrimination. In Andrews, McIntyre J. defined discrimination in

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[22] Veysey v. Canada (Commissioner of Correctional Services), [1990] 1 F.C. 321, 39 Admin. L.R. 161, 29 F.T.R. 74; (1990), 109 N.R. 300 at p. 304, 34 F.T.R. 240n, 10 W.C.B. (2d) 293 (Fed. C.A.).

[23] Knodel v. British Columbia (Medical Services Commission) (1991), 91 C.L.L.C. 17,023, [1991] 6 W.W.R. 728, 58 B.C.L.R. (2d) 356 (S.C.C.).

[24] R.S.B.C. 1979, c. 255

the context of s.15(1) of the Charter at pages 18-19:

> I would say then that discrimination may be described as a distinction whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed on others, or which withholds or limits access to opportunities, benefits and advantages available to other members of society. Distinctions based on personal characteristics attributed to an individual solely on the basis of association with a group will rarely escape the charge of discrimination, while those based on an individual's merits or capacities will rarely be so classified.[25]

(i) the distinction imposes burdens, obligations and disadvantages

A definition of marriage which draws a distinction on the basis of sexual orientation virtually satisfies this test. The distinction is based on the personal characteristic of being a lesbian or gay man. It imposes the disadvantages of non-access to benefits and protections afforded by the institution of marriage and prohibited freedom of choice. That these are real disadvantages is more evident when one considers the economic burdens and obligations the distinction creates. Lesbians and gay men have the added burden and disadvantage of having to set up elaborate contractual arrangements to create spousal obligations, a burden not imposed on heterosexual couples which benefit from the default legal regime provided by marriage. If the same-sex partners cannot afford or lack the knowledge to set up a contractual arrangement, a further disadvantage is realized upon relationship breakdown, when they are denied the protection of the *Divorce Act* or *Family Law Act* with respect to equitable dissolution.

The common law rule compels lesbians and gay men to enter into opposite-sex relationships in order to have equal access to the institution of marriage and the protection and benefits under the law that this institution affords. In Brooks v. Canada Safeway Ltd.[26], the court stated that the consideration relevant to a finding of discrimination is whether the distinction created adversely affects the individual or group in a manner which is related to their personal characteristics. Being forced to enter a kind of relationship antithetical to one's identify is an adverse effect.

Furthermore, the common law rule imposes the serious burdens of (1) reinforcing the stereotypical and negative images of gay man and lesbians, (2) increasing homophobia, and (3) exacerbating the stigma and isolation gay men and lesbians experience in society. By prohibiting the sanctification of lesbian and gay relationships in marriage, the common law rule also condones the view that lesbians and gay men are less worthy of consideration in their relationships than heterosexuals. This is the very type of discriminatory treatment which s.15 was created to remedy. In Andrews, McIntyre J. stated at page 171:

> It is clear that the purpose of s. 15 is to ensure equality in the formation and application of the law. The promotion of equality entails the promotion of a society in which all are

[25]Krever J.A. in Haig quoted the definition with approval.
[26] Brooks v. Canada Safeway Ltd. (1989), 59 D.L.R. (4th) 321.

> secure in the knowledge that they are recognized at law as human beings equally deserving of concern, respect and consideration.[27]

Commenting on McIntyre's statement, Greer J. in Layland emphasized that "the common law must evolve to meet that need and the common law and Charter rights must mesh together to effect that promotion."[28]

(ii) the distinction drawn is based on personal characteristics

That a distinction imposes burdens, obligations and disadvantages is not enough to establish discrimination however. In Andrews, McIntyre J. emphasized that the distinction drawn must be based on a personal characteristic, not on the individual's merits or capacity, or it may escape a charge of discrimination.[29] Chief Justice Lamer in R. v. Swain[30] reiterated that the distinction drawn (intentionally or otherwise) between the claimant and others should be based on personal characteristics.

The distinction drawn by the common law rule between same-sex couples and heterosexual couples is based on a personal characteristic. The essential identifying characteristic of a lesbian qua lesbian or gay man qua gay man is a preference for a partner of the same sex, just as the identifying characteristic of a heterosexual identity is a preference for a partner of the opposite sex. Courts have been slow to recognize that homosexuality, like heterosexuality, is not a behaviour but an essential orientation and personal characteristic.

A distinction drawn on the basis of sexual orientation must not be found to be one of those rare occasions when the distinction will escape a charge of discrimination. Such a finding would be inimical to a modern free and democratic society dedicated to equality.[31] Further, the distinction is not based on capacity. In Layland, the court found that discrimination was not established because the distinction created was related to capacity (or incapacity). To what capacity do they refer? The capacity to enter heterosexual relationships? Entering a heterosexual relationship is not a capacity but rather an essential identifying characteristic. The capacity to bear children? Lesbians are capable of bearing children. It must be pointed out also that many heterosexual couples don't have the capacity to bear children. The capacity to form a meaningful relationship? This is only an argument if the courts are willing to come to the illegitimate conclusion that lesbians and gay men cannot form meaningful relationships characterized by emotional and economic interdependency. The fact is that gays and lesbians fall in love and form relationships like marriage. Expert evidence that same-sex relationships are analogous to opposite sex relationships was presented before the court in Knodel v. British Columbia:

> There is a high degree of similarity between homosexual and heterosexual life partners in

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[27] *supra* note 21 at page 171.

[28] *supra* note 3; *Family Law Cases and* Materials, Rogerson and Shaffer, (University of Toronto, 1994-1995) at page 190.

[29] *supra* note 19 at pages 18-19; Krever J.A. in Haig quoted with approval the definition

[30] R. v. Swain (1991), 66 C.C.C. (3d) 481 at pages 520-521.

[31] referring to the wording of s.1 of the Charter.

> that they are much more the same in their attitudes, expectations and values than they are different. [32]

In Leshner, Chairperson Dawson commented on similar expert evidence:

> Dr. Valverde emphasized that, apart from patterns imposed by regulation, the experiences of commitment in relationships are similar across sexual orientations. Indeed, she cited research indicating that the most significant difference with respect to commitment to relationships correlates with gender rather than sexual orientation. [33]

If the court was referring to the capacity to form traditional families, this seems an invalid criteria. Families in our pluralistic society are evolving and taking many forms. A functional approach to the definition of family[34] deals with familial interaction across several dimensions: procreation, socialization, sexual relationship, residence, and economic and emotional dimensions. By applying a functional definition, one need not view same-sex relationships as incapable of fulfilling the definition of family. As well, many legally-recognized marriages lack family interaction in many of these dimensions.

The functional approach was adopted by Madame Justice L'Heureux-Dube in her dissent in Re Attorney General of Canada and Mossop:

> The multiplicity of definitions and approaches to the family illustrates clearly that there is no consensus as to the boundaries of family and that family status may not have a sole meaning, but rather may have varied meanings, depending on the context or purpose for which the definition is desired. This same diversity in definition can be seen in a review of Canadian legislation affecting "family". The law has evolved and continues to evolve to recognize an increasingly broad range of relationships.[35]

In any case, the finding of the court in Layland that there had been no discrimination because the distinction drawn was based on capacity proves that the definition of discrimination in Andrews is too limited. Distinctions based on capacities should be viewed as discrimination especially if the court is going to fail in its discerning between capacity and personal characteristic.

As a final note, it seems dishonest to argue that a rule prohibiting same-sex marriage does not draw a distinction based on sexual orientation. Southey J. for the majority in Layland appears to argue that this is the case. He stated that because the rule does not prohibit gay men and lesbians from marrying, but only prohibits them from marrying a person of the same sex, the law does not create a distinction that is discriminatory. A popular club that limits memberships to Anglicans only draws a distinction based on religion. Forcing Jews change their religion in order to become members would be forcing them to do something antithetical to their identity. Similarly, forcing

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[32] *supra* note 23 at page 363.

[33] Leshner v. Ontario (1992), 16 C.H.R.R. D/184 at D/211.

[34] Dr. Margaret Eichler, *Families in Canada Today, Recent Changes and Their Policy Consequences*, 2nd ed. (Toronto: Gage, 1988).

[35] Re Attorney General of Canada and Mossop (1993), 100 D.L.R. (4th) 658 at 706.

homosexuals to enter a kind of relationship antithetical to their identity seems equally discriminatory when viewed with the understanding that sexual orientation is a personal characteristic like religion.

(iii) discrimination in the broader social, political and legal context

Establishing that a distinction based on personal characteristics has been created is not sufficient to establish discrimination.[36] In R. v. Turpin, Madame Justice Wilson reiterated her statement in Andrews that courts must also look at "the larger social, political and legal context" in order to determine whether the distinction results in discrimination:

> It is only by examining the larger context that a court can determine whether differential treatment results in inequality or whether, contrariwise, it would be identical treatment which would in the particular context result in inequality or foster disadvantage. A finding that there is discrimination will, I think, in most but perhaps not all cases, necessarily entail a search for a disadvantage that exists apart from and independent of the particular legal distinction being challenged.[37]

According to Krever J. in Haig,[38] the pain and humiliation undergone by homosexuals by reason of prejudice towards them is a disadvantage in the social context that exists apart from the legal distinction created in that case by the omission of sexual orientation as a prohibited ground of discrimination in s.3(1) of the *Canadian Human Rights Act*. Krever J. pointed out that the fact discrimination against homosexuals has been recognized as a social problem in Canada may reasonably be inferred from the fact that the Human Rights Codes of six Canadian jurisdictions include sexual orientation as a prohibited ground of discrimination.

In Egan and North v. Canada, Linden J.A. (in dissent) described the social, political and legal context of discrimination endured by gay men and lesbians:

> Gay men and lesbians are legally, economically, socially and politically disadvantaged. Lesbians and gay men endure the constant threat of verbal, physical, and sexual abuse. Harassment is not uncommon. For most of the century, certain forms of gay male sexual expression have been criminalized. Indeed, lesbians and gay men have often felt that they must conceal their life-styles because of these difficulties... In short, lesbians and gay men suffer widespread stereotyping and prejudice in our society, as they have throughout history.[39]

Writing in dissent in Layland, Greer J. also discussed the social, legal and political context of discrimination against gay men and lesbians:

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[36]Krever J. in Haig, *supra* note 1, at page 9.
[37]R. v. Turpin (1989), 48 C.C.C. (3d) 8 at page 34, [1989] 1 S.C.R. 1296, 69 C.R. (3d) 97.
[38]*supra* note 1, at page 10.
[39] *supra* note 11, at pages 335-336.

> The applicants must be looked at in the context of the place of homosexuals as a group in the entire social, political and legal fabric of our society... In many aspects, homosexuals have been politically powerless, just as non-citizens were powerless in the Andrews case, and they have often been subjected to negative treatment and bigotry.[40]

Greer J. concluded, as this paper argues, that denying same-sex couples access to marriage is discrimination and violates their right to equality under s.15(1):

> In my view, the impact of the denial of the granting of a marriage certificate to the applicants is discriminatory. It is burdensome on the applicants and others who wish to marry persons of the same sex. The message they receive must surely give them the perception they are inferior persons in our society.[41]

The above all suggest that the common law rule violates s.15(1) of the Charter. The common law rule creates a distinction based on sexual orientation which is a prohibited ground of discrimination under s.15(1) of the Charter. The distinction created results in discrimination. First, the rule imposes disadvantages, burdens and obligations by denying the benefits and protections of marriage law available to opposite-sex partners and by exacerbating the humiliation gay men and lesbians experience daily in society. In this way the rule denies same-sex partners equality before and under the law. Second, sexual orientation is a personal characteristic and as such the distinction should not escape a charge of discrimination. Finally, an examination of the social, political and legal context of the treatment of gay men and lesbians reveals that numerous disadvantages exist apart from the distinction being challenged.

3.2 Is the violation upheld under s.1 of the Charter?

The criteria which must be met to establish that a violation of a Charter right is reasonable and demonstrably justified in a free and democratic society were outlined in R. v. Oakes.[42] First, the objective of the limitation on the right must be shown to be pressing and substantial in a free and democratic society. Second, the means of achieving the objective must be proven to be proportional to the objective (this is referred to as the proportionality limb of the test.) This is measured in three ways: (1) the means must be rationally connected to the objective, not based on unfair or irrational considerations; (2) the means should impair the right as little as possible; and (3) there must be proportionality between the effects of the limit and the objective.

The violation of individuals' s.15(1) right to equality by a common law rule prohibiting same-sex marriage cannot be justified under s.1 of the Charter. The reason often cited, if not explicitly then implicitly, for limiting marriage to opposite sex couples is that promoting the traditional heterosexual family and ensuring procreation are essential to stability of the state and preservation of the species (e.g. in Layland). There are two serious problems with these assertions.

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[40] *supra* note 3; *Family Law Cases and* Materials, Rogerson and Shaffer, (University of Toronto, 1994-1995) at page 189.

[41] *ibid*.

[42] R. v. Oakes (1986), 26 D.L.R. (4th) 200, 24 C.C.C. (3d) 321, [1986] 1 S.C.R. 103.

First, there is no rational connection between supporting the traditional heterosexual family in order to create state stability and denying homosexuals the right to marry. It is in the state's interest to foster all family relationships, be they heterosexual or same-sex, in order to promote stability and harmony in society. Happy families and happy children can only create happier, more giving and productive members of society. To prevent gays and lesbians from marrying does not increase the likelihood of a happy heterosexual family -- rather it only continues to deny the reality of same-sex families. Same-sex families with children exist, and these family units -- especially the children -- would benefit from societal respect. And to prevent gays and lesbians from marrying does not encourage heterosexuals to marry. As Greer J. wrote in Layland heterosexuals will not be in any way limited by extending to gays and lesbians the right to marry.[43]

Second, there is no rational connection between denying same-sex partners the right to marry and encouraging procreation. Allowing same-sex marriage does not reduce the sterility of opposite sex couples. Conversely, to prevent gay men and lesbians from marrying does not encourage heterosexuals to procreate. Also, many heterosexual couples are unable to have children in the first place. And the availability of alternative means of procreation means that lesbian couples can and do have children together.

Finally, the equality rights of same-sex partners are more than minimally impaired. They are denied. There is a means of impairing their rights less while still meeting the goals of fostering "family" and preserving the species -- granting same-sex couples access to the institution of marriage would allow the state to foster the many different types of family that do exist in modern society and as well as provide better protection for the children born to same-sex couples.

For these reasons, the common law rule fails the proportionality limb of the Oakes test. This conclusion is supported by the decision in Leshner. In that case, the court found that the denial of benefits to same-sex partners did not meet the proportionality test. The court held that it is not necessary to deny benefits to same-sex partners in order to meet the objective of ameliorating the economic vulnerability of elderly women. The rights of same-sex partners were more than minimally impaired.

4. The Common Law Rule Violates the Right to Liberty Protected by s.7

The common law rule prohibiting same-sex marriage also violates the right to liberty of same sex partners guaranteed by s.7 of the Charter. That section provides:

> Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

The right to liberty must be protected because "if a person were deliberately denied the opportunity of self-respect and that contentment [which resides in the ability to pursue one's own

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[43] *supra* note 28.

conception of a full and rewarding life], he would suffer deprivation of his essential humanity."[44] Common law has established that the right to liberty protects individuals from government action which assaults their human dignity by denying them their ability to make fundamental personal choices. In R. v. Morgentaler, Wilson J. stated that "the Charter and the right to individual liberty guaranteed under it are inextricably tied to the concept of human dignity." [45] She emphasized that the idea of human dignity is the basis of almost every right and freedom guaranteed in the Charter. According to Wilson J., the basic theory underlying the Charter is that

> the state will respect choices made by individuals and, to the greatest extent possible, will avoid subordinating these choices to any one conception of the good life... an aspect of the respect for human dignity on which the Charter is founded is the right to make fundamental personal decisions without interference from the state... Liberty, as was noted in Singh, is a phrase capable of a broad range of meaning. In my view this right, properly construed, grants the individual a degree of autonomy in making decisions of fundamental personal importance.[46]

By denying gay men and lesbians the freedom to enter the institution of marriage, the common law rule assaults their human dignity. It subordinates their freedom of choice to the heterosexual majority's conception of the good life. It also denies them their autonomy to make a decision of fundamental personal importance, thereby interfering with their pursuit of happiness. As was recognized by the court in Loving v. Virginia at page 12: "the freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men. Marriage is one of the basic civil rights of man..." This basic civil right must be protected by the law -- if it is not, then state actors have too much freedom to deny a constantly discriminated-against minority their dignity and self-respect. Noreen Burrows reminds us that:

> The history of the struggle for human rights from the eighteenth century on has been the history of men struggling to assert their dignity and common humanity against an overbearing state apparatus.[47]

Common law has also established that protecting the right to liberty is essential for our society to function. In R. v. Big M Drug Mart Ltd,[48] Dickson C.J.C. stressed that

> The ability of each citizen to make free and informed decisions is the absolute prerequisite for the legitimacy, acceptability, and efficacy of our system of self-government.

In order to protect the proper functioning of our free and democratic society, the right to marriage must be protected by the right to liberty. Viewing the right to marry as included in the right to

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[44] *Legal Right and Social Democracy: Essays in Legal and Political Philosophy* (1982), Professor Neil MacCormick, Regius Professor of Public Law and the Law of Nature and Nations, University of Edinburgh.

[45] R. v. Morgentaler [1988] 1 S.C.R. 30, 44 D.L.R. (4th) 385.

[46] *ibid*.

[47] Noreen Burrows, "International Law and Human Rights: the Case of Women's Rights" *in Human Rights: From Rhetoric to Reality* (1986).

[48] R. v. Big M Drug Mart Ltd. , [1985] 1 S.C.R. 295 at page 346 (hereinafter Big M).

liberty is in line with the statement of Dickson C.J.C. in Big M. He emphasized that giving the right to liberty a generous interpretation accords with the purpose of the Charter:

> the purpose of the right or freedom in question is to be sought by reference to the character and the larger objects of the Charter itself... the interpretation [of the right] should be, as the judgment in Southam emphasizes, a generous rather than a legalistic one, aimed at fulfilling the purpose of the guarantee and securing for individuals the full benefit of the Charter's protection.[49]

5. What is The Appropriate Constitutional Remedy?

Guidance in the search for an appropriate constitutional remedy may be taken from Haig, where Krever J. stated at page 12:

> In choosing the remedy, one must look to the values and objectives of the Charter, because an appreciation of the Charter's deeper social purposes is central to the determination of remedy, especially when the impugned legislation confers a benefit on disadvantaged groups.[50]

In Haig, Krever J. discussed the remedies available under s.52 of the Charter, and focused on the choice between "reading in" (e.g. adding the discriminated against group to the impugned rule) or "striking down" the impugned rule in its entirety. Krever J. relied on the guiding principles set out in Schachter v. Canada,[51] namely (1) the remedy must respect the role of the legislature and the purposes of the Charter; and (2) the remedy chosen should constitute the least intrusion into the legislative domain.

The court in Schachter outlined four factors which must be considered in determining whether "reading in" is the appropriate remedy: (1) the extent of the inconsistency between the rights under s.15(1) and the impugned legislation must be determinable with sufficient precision; (2) the remedy must be the least possible interference with legislative objective and reading in must enhance the legislative objective more than striking down; (3) reading in is inappropriate if it results in an intrusion into legislative budgetary decisions so substantial as to change the nature of the legislative scheme in question; (4) whether the significance of the remaining portion is so markedly changed by reading in that it would be unsafe to assume that the legislature would have passed it (the relevant size of the relevant groups is a significant factor.)

In the case at hand, reading into the common law rule the words "same-sex partners" seems the appropriate remedy. The inconsistency between s.15(1) rights and the common law rule may be determined with precision. Reading in would be less intrusive than the total destruction of the common law rule's objective that would result from striking the provision down. It would not only leave intact a valid purpose of the rule (e.g. promoting all types of family) but would

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[49] *ibid* page 344.
[50] *supra* note 1, at page 12.
[51] Schachter v. Canada [1992] 2 S.C.R. 679, 93 D.L.R. (4th) 1.

enhance the rule by making it conform to Charter values. The budgetary impact of extending the rule to same-sex partners would be minimal. Further, the group to be added to the protection of the institution of marriage is significantly smaller than the group already benefiting. None of the criteria established in Schachter suggest that reading in is inappropriate. As well, because no legislation defining marriage exists, it would be useful to have a common law rule which is non-discriminatory and provides courts with a clear, modern, non-discriminatory definition of marriage, at least until a statutory definition of marriage is created.

While recognizing that access to the institution of marriage is not desired by all members of the gay and lesbian community (some object to state imposition of spousal obligations), this paper argues that the preferable way to remedy the discrimination caused by the common law rule is to grant heterosexual and homosexual members of society equal access to the institution of marriage. This solution would allow same-sex partners to receive the protection and benefits of marriage law that heterosexual couples receive. Same sex partners should then contract out of any obligations they find offensive. This solution would reflect the policy decision behind Bill 167, which would have required that every piece of Ontario legislation extend its definition of "spouse" to include same sex couples. Bill 167 was a specific rejection of the registered partnership scheme proposed by the Law Reform Commission which would provide same-sex partners with identical legal rights and obligations as marriage, except for the right to adopt children. It should be noted that during the period leading up to the failure of the Ontario legislature to pass Bill 167, there was a strong public lobbying effort by the gay and lesbian community in favour of passing the bill. The only public opposition to Bill 167 came from members of the heterosexual community opposed to the legal recognition of the validity of same-sex relationships in any form.

The Charter seems a potentially powerful source of remedy for same-sex partners who wish access to the institution of marriage. However, whether these complainants would succeed in proving discrimination and achieving the "reading in" remedy is highly dependent on a number of factors -- e.g., successfully establishing that discrimination offending s.15(1) or s.7 exists according to the criteria set out by common law, proving that the limitation under s.1 of the Charter is unreasonable in a free and democratic society, and having the financial resources to make and pursue the complaint. There are other avenues of redress which complainants could consider, namely human rights conventions and codes at the domestic and international levels.

6. The Common Law Rule Prohibiting Same-Sex Marriage Violates Human Rights Legislation

The above Charter analysis shows that denying a member of a distinct and insular minority the right to marry the person of his/her choice, while guaranteeing that right to the majority, offends two principles central to human rights: equality and human dignity. Numerous international human rights documents and conventions emphasize the fundamental importance of these principles.[52] For example, the Preamble to the Universal Declaration of Human Rights, 1948 states:

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[52] for example, *The International Covenant on Civil and Political Rights*, 1966 (Canada signatory, 1976*); The European Convention for the Protection of Human Rights and Fundamental Freedoms*, 1953.

> Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world...

The Preamble to the *Ontario Human Rights Code* ("the Code") repeats this phrase. Indeed the Code provides a realistic avenue of redress from the discrimination created by the common law rule prohibiting same-sex marriage.

6.1 Denying Same-Sex Couples Marriage Licenses Violates s.1 Of The *Ontario Human Rights Code*

(a) The advantages of bringing the complaint under the Code

There are certain advantages to bringing a complaint regarding the common law rule under the Code. Admittedly, complaints brought under the Code typically take a long time to be heard. However, the advantages are numerous. The Code enjoys special status with respect to acts, regulations and case law[53] and thus takes precedent over any other law in the province. The quasi-constitutional status of the Code, and the Preamble of the Code which enunciates its broad policy, have allowed the courts give a broad interpretation to the words of the Code.[54] For these reasons, the courts may find that the common law rule prohibiting same-sex marriage is discriminatory more quickly and easily than they would using the complicated s.15(1) Charter analysis described above. A comment by McIntyre J. in O'Malley v. Simpson Sears reveals how simply discrimination may be found under the Code:

> if [the action's] effect is to impose on one person or group of persons obligations, penalties, or restrictive conditions not imposed on other members of the community, it is discriminatory. [55]

Bringing a complaint under the Ontario Human Rights Code rather than the Charter has other advantages. Bringing a complaint under the Code may also prove less costly than litigation. As well, bringing a complaint under the Code also has the advantage that an s.1 Charter argument cannot be used to justify the rights violation.

(b) Issuing a marriage licence may be classified as a service in which discrimination is prohibited by s.1 of the Code

Sexual orientation is a prohibited ground of discrimination under s.1 of the Ontario Human Rights Code. That section states:

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[53] s.47(2) of the *Ontario Human Rights Code*, see also Ontario Human Rights Commission (O'Malley) v. Simpson Sears, [1985] 2 S.C.R. 536 at pages 546-547.
[54] O'Malley v. Simpson Sears, ibid. also Action Travail Des Femmes, [1987] 1 S.C.R. 1114; Robichaud (1987), 40 D.L.R. (4th) 577.
[55] *ibid* at page 547.

> **1.** Every person has a right to equal treatment with respect to services, goods and facilities, without discrimination because of ... sexual orientation...

While sexual orientation is not defined by the Code, it seems reasonable to infer that it refers to "the sex of the partner of one's choosing." This paper argues that issuing a marriage licence is one of the "services" provided by the Ontario provincial government in which discrimination on the basis of sexual orientation is prohibited by s.1 of the Ontario Human Rights Code. Admittedly, there has not yet been an Ontario case which defines issuing a marriage licence as a "service." However, the term "service" has been applied to a wide range of activities in the case law and generally refers to the offering or provision of something. As Judith Keene points out, the case law uses the term in a way which corresponds with the definition of service in the Oxford English Dictionary. That definition includes "the duties or work of public servants" as well as "the action of serving, helping or benefiting; conduct tending to the welfare or advantage of another; the supply of the needs of persons..."[56] This definition easily can include issuing a marriage licence, in that it is work performed by a public servant which tends to the welfare of the recipients of the licence and grants them legal advantages.

In Gay Alliance Toward Equality v. Vancouver Sun,[57] the Supreme Court of Canada offered a definition of "services." Martland J. writing for the majority stated that "service refers to such matters as restaurants, bars, taverns, service stations, public transportation and public utilities." However, as Judith Keene points out, the list was not meant to be exhaustive and Martland J.'s observation was made in the context of legislation before him which limited services to "those customarily available to the public."[58]

There have been no cases in Ontario in the area of licensing, but Keene points out that the issuing of a hunting licence was found by a Newfoundland court to be a "service."[59] If issuing a hunting licence is a service, issuing a marriage licence definitely should be. This assertion is supported by the statement by McIntyre J. in O'Malley v. Simpson Sears that the words of the Code should be given the widest possible interpretation.[60]

(c) Using key concepts of discrimination under the Code

Various key concepts of discrimination described in the common law help identify how the common law rule prohibiting same sex marriage is discriminatory.

(i) direct discrimination or "adverse effects" discrimination?

In O'Malley vs. Simpson Sears, the court distinguished between direct discrimination and "adverse effects"(constructive) discrimination. The court defined direct discrimination as a rule

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[56] Judith Keene, *Human Rights In Ontario* (2d) (Scarborough: Carswell, 1992) at page 19.
[57] Gay Alliance Toward Equality v. Vancouver Sun (1979), 97 D.L.R. (3d) 577 (S.C.C.).
[58] *supra* note 56, at pages 19-20.
[59] Rogers v. Newfoundland (Department of Culture, Recreation and Youth) (1988), 10 C.H.R.R. D/5794 (Nfld. Comm. of Inquiry).
[60] *supra*, note 54.

which "on its face discriminates on a prohibited ground."[61] While the common law rule defining marriage as the union of opposite sexes seems like direct discrimination on the basis of sexual orientation, there is the danger that a court may decide that the rule does not discriminate on the basis of sexual orientation because it treats same-sex couples the same as any other two people of the same sex, e.g. two sisters. For example, the Federal Court Appeal Division in Egan and North[62] held that there was nothing discriminatory in a law restricting pension benefits to opposite-sex couples and that the law did not discriminate on the basis of sexual orientation since homosexuals were treated exactly like other persons in non-spousal relationships.

It may therefore be better to frame the common law rule as "adverse effects" discrimination. In O'Malley v. Simpson Sears, the court defined this concept by stating that the effect, not the intent, of a rule is important, so that rules which appear neutral can violate the Code if their effect is to discriminate. At page 551, McIntyre J. stated:

> [adverse effects discrimination] arises where an employer for genuine business reasons adopts a rule or standard which is on its face neutral, and which will apply equally to all employees, but which has a discriminatory effect upon a prohibited ground on one employee or group of employees in that it imposes, because of some special characteristic of the employee or group, obligations, penalties, or restrictive conditions not imposed on other members of the work force... [a rule] honestly made for sound... purposes, equally applicable to all to whom it is intended to apply, may yet be discriminatory if it affects a person or group of persons differently from others to whom it may apply.

Applying this concept to a rule making marriage available only to opposite sex couples would result in a finding of discrimination against same-sex couples. Even if the government successfully argued that the rule is made for the sound purpose of preserving family and the human species, and that the rule applies equally to all people of the same sex, the courts could still find that the rule discriminates because it affects same-sex couples in romantic/sexual relationships differently than it affects two people of the same sex in a non-romantic/sexual relationship.

The "adverse effects" rule is now found in section 11 of the Code. Briefly, s.11 provides that a practice which has a disproportionate effect upon a group protected by the Code may not be continued unless it can be justified as reasonable and bona fide.[63] The section states in full:

> **11.** (1) a right of a person... is infringed where a requirement, qualification or factor exists that is not discrimination on a prohibited ground but that results in the exclusion, restriction or preference of a group of persons who are identified by a prohibited ground of discrimination and of whom the person is a member except where,...
>
> (a) the requirement, qualification or factor is reasonable and bona fide in the circumstances;...
>
> (2) The Commission, a board of inquiry or a court shall not find that a requirement,

[61] *ibid* at page 551.
[62] *supra* note 11.
[63] Keene, *supra* note 56 at page 116.

> qualification or factor is reasonable and bona fide in the circumstances unless the needs of the group of which the person is a member cannot be accommodated without undue hardship on the person responsible for accommodating those needs, considering the cost, outside sources of funding, if any, and health and safety requirements, if any.

The two defenses to an s.11 complaint, that the requirement is reasonable and bona fide and that a duty to accommodate has been met, are available in all types of claims. Judith Keene points out that the words of section 11 make it clear that adverse effects discrimination is prohibited not only in employment but also in all the areas covered by the Code.[64] Therefore, the defenses would be available to the government in defending the prohibition of same sex marriage. The first issue to be decided would be whether the requirement of opposite sexes is reasonable and bona fide. According to Ontario (Human Rights Commission) v. Etobicoke (Borough),[65] the requirement must be imposed in good faith and be reasonable from an objective point of view. This paper argues that from an objective point of view, taking into account the many different forms of family in today's society, the alternative means of procreation available, religious/spiritual pluralism and our society's alleged dedication to equality, there is no defensible reason to preclude same sex couples from marrying.

The second issue that must be addressed is whether a duty to accommodate has been satisfied. This paper argues that this duty has not been met. The Law Reform Commission's proposed domestic partnership registration scheme has not yet been put in place.[66] Also germane is the defeat of Bill 167.[67]

Because adverse effects discrimination seems evident, and both s.11 defenses could fail, a complainant could likely succeed in proving that the common law rule prohibiting same-sex marriage is discriminatory.

(iii) systemic discrimination

Systemic discrimination is another concept which would support a that the common law rule is discriminatory. In Action Travail des Femmes,[68] the court held that the exclusion or under-inclusion of an entire group within a system by the simple of operation of established procedures, none of which is necessarily designed to promote discrimination, is systemic discrimination. In that case the court stated that systemic discrimination is reinforced:

> by the very exclusion of the disadvantaged group because the exclusion fosters the belief, both within and outside the group, that the exclusion is the result of "natural forces", for example that women "just can't do the job."[69]

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[64] ibid at page 125.
[65] Ontario (Human Rights Commission) v. Etobicoke (Borough), [1982] 1 S.C.R. 202.
[66] see section 5 of this paper.
[67] *ibid*.
[68] C.N. v. Canada (Human Rights Commission), [1987] 1 S.C.R. 1114.
[69] *ibid* at page 1139.

The exclusion of gay men and lesbians as a group from the institution of marriage is an apt example of systemic discrimination. By fostering the belief that their exclusion is the result of natural forces, e.g. that gay men and lesbians can't procreate, the common law rule reinforces the systemic discrimination. The decision in Haig supports the assertion that underinclusion is discrimination. That case helps demonstrate that underinclusion is a backdoor way of discriminating. Equality must be seen as indivisible.

In Action Travail, the court ruled that in combating systemic discrimination it is essential to look at past patterns of discrimination and destroy them. It also held that courts may go beyond individual remedies and introduce a wide remedy leading to systemic change. The court thus would have the ability to order that the common law rule include same-sex partners in its definition of marriage.

Conclusion

Same-sex partners should have the right to marry. Prohibiting same-sex marriage violates their constitutionally guaranteed right of equality under s.15(1) of the Charter. The common law rule prohibiting same sex marriage creates a distinction based on the personal characteristic of sexual orientation which results in discrimination offending s.15(1). The distinction imposes disadvantages, burdens and obligations by denying same-sex partners the benefits and protections of marriage law and by heightening the humiliation gay men and lesbians experience daily in society. As well, an examination of the social, political and legal context of the treatment of gay men and lesbians reveals that numerous disadvantages exist apart from the distinction being challenged. The rule should not escape a charge of discrimination.

The limitation on their rights by the common law rule cannot be upheld under s.1 as it fails the proportionality limb of the Oakes test. To deny marriage to same-sex partners does not enhance the objectives of promoting family and procreation. As well, the rights of same-sex partners are more than minimally impaired.

The rule prohibiting same sex marriage also violates the right to liberty guaranteed by s.7 of the Charter. It denies same-sex partners the ability to make a fundamental life choice and offends their human dignity. State interference in such a fundamental life choice is oppressive and moralistic. As Wilson J. noted in R. v. Morgentaler, "liberty in a free and democratic society does not require the state to approve the personal decisions made by its citizens; it does, however, require the state to respect them."[70]

Finally, the common law rule constitutes adverse effects and systemic discrimination under the *Ontario Human Rights Code*, and offends international human rights documents. Besides the fact the common law rule violates so many documents designed to protect human rights, it is inappropriate in a modern, pluralistic society dedicated to equality. The common law rule defining marriage must be changed to include same-sex partners so that it promotes, not insults, our free and democratic society's concepts of equality and human dignity.

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[70] R. v. Morgentaler, *supra* note 45.