

**A Step in the Pink Direction: The Intersection of National, Familial and Sexual
Identity in Canada.**

by

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Abstract

This thesis explores the intersecting grounds of national, familial and sexual identity in Canada. Each of the three grounds is concentrically connected and therefore feeds and formulates the composition of the other. The thesis considers the ramifications of lesbian and gay inclusion within the family from a queer perspective using anti-essentialist postmodern and feminist theory as tools of deconstruction.

Immigration Canada has recently changed the composition of the 'family class' within immigration law to include lesbians and gay men. I consider how this shift in definition affects lesbians and gay men and lesbian and gay families in terms of sexual identity bearing on familial identity, and familial identity bearing on national identity.

The connections begin by considering a deconstructed version of national identity. National identity from a legal perspective has been formulated predominantly on a basis of white, heterosexual masculinity. By highlighting the incoherence and alterity that exists within the formulation of a stereotypical nationalist narrative of identity, we are able to identify the fallacious basis of nationalistic constructs of identity. Feeding this national identity has been a construct of the family, a fundamental unit of society, which has not represented the multiplicitous formation that family can take. The family as the place within society that produces a national populace has been undergoing some profound changes to its composition. The *Canadian Charter of Rights and Freedoms* has disallowed exclusively heterosexual constructs of the family to remain the only model of familial existence. The sexual redefinition of the conventional family by the inclusion of lesbians and gay men therefore has the ability to deconstruct our notions surrounding issues of gendered and sexually specified roles within the family.

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A Step In The Pink Direction: The Intersection of National, Familial and Sexual Identity in Canada

Introduction

The reformation of Canadian immigration law as outlined in the *Immigration and Refugee Protection Act*¹ has redefined the composition of the 'family class'. 'Family class' sponsorship was previously only available to heterosexual married spouses. It has now been amended so as to include lesbian, gay and heterosexual common law partners. The redefinition of "family" in the *Act* is not just significant for lesbians and gay men, it has a direct bearing on ideas pertinent to national, familial and sexual identity. The reformulation of immigration law, and specifically policies that pertain to family class immigration, could have a profound impact on the Canadian national imagination to the extent that familial identity bears on the status of national identity. Considering familial identity and the inclusion of lesbians and gay men, the admission of lesbian and gay families has the potential to be a signifier of the breakdown of traditional stereotypical familial expectations, providing an opportunity for the family's legal and social reinvention.

This thesis will discuss the correlations between national, familial and sexual identity. I will explain how these identities have fed and formulated one another, and will suggest that by deconstructing each of these grounds we may be able to form a version of human sexuality which is not bound by the normalized expectations of gender behaviour. Anti-essentialist understandings of identity will highlight the socially constructed nature of national, familial and sexual identity but will note the practical necessity, from a rights based perspective, of claiming these very identities.

¹*Immigration and Refugee Protection Act*, R.S.C. 2001, (1st Sess.), c. 27.

The reclamation of identities must be understood as being based on an idea of strategic essentialism which works to further the goals of intersecting minority groups.

The family has been the site of gendered socialization and gender expectations since it took the role of the central organizing component of private life. The government's role in altering the fundamental tenets of family within the newly shaped *Immigration Act*² may reflect an image of modernity and inclusivity; an image that Canada wishes to promote to the world. The new goals of the Government of Canada, found in *Building on a Strong Foundation for the 21st Century*³ and new legislation such as the *Modernization of Benefits and Obligations Act*⁴ entrench and formalise a Canadian commitment to sexual diversity.

Framed Identities

The multiplicity of cultural identity that Canada possesses creates a basis of national diversity. This diversity has the potential to lead to a country that realises the evolution, growth and strength of it-self. But this potential can only come about through deconstructing and reformulating Canadian identity, familial identity and the impact of non-normative sexual identities within these groupings so as to further

² *Ibid.*, the *Act* states 'Family class members would be required to have one of the following specified relationships to a Canadian citizen or a permanent resident: spouse, common-law partner, child, parent or other prescribed family member. The definitions of "common law partner" and "child" are not in the bill, but would be left to the regulations. The news release accompanying the bill states that "child" will be defined to include those under age 22 (currently under age 19), and "common-law partner" will be defined to include same-sex partners. Certain nuances may be necessary for the latter definition in view of the often special circumstances in an immigration situation.'

³ Citizenship and Immigration Canada, *Building On a Strong Foundation for the 21st Century: New Directions for Immigration and Refugee Policy and Legislation* (Canada: Minister of Public Works and Government Services, 1998).

⁴ *The Modernization of Benefits and Obligations Act*, R.S.C. 2000, (2nd Sess.), c.12. The summary of the *Act* states 'This enactment extends benefits and obligations to all couples who have been cohabiting in a conjugal relationship for at least one year, in order to reflect values of tolerance, respect and equality, consistent with the *Canadian Charter of Rights and Freedoms*'.

alternate identity formations. This potential can be realized through the continued encouragement and flourishing of that which is yet to be formed. Communitarian life and the society that provides its base are not static.

Stychin has noted that 'in the conditions of late modern (or post-modern) society, identity is complex – it is fragmented, intersected, subject to alteration, socially constructed, and it exhibits only a partial fixity at any moment.'⁵ The post-modern view of identity provides us with an open-endedness; the lack of an essential quality does not make for vagueness, rather it allows for an appreciation of intersecting histories and social imaginaries. Post-modern formulations of identity therefore, exist as individualized creations that are not fully formed or impermeable to change. These identities are continually 'intersected' by other and alternate identities shifting the boundaries of self-definition. Thus attempts at group formulations of a coherent homogenous whole are fallacious, and constricting, because each member of that group possesses individual facets of identity which contribute to a fuller picture of the individual, rendering a specific feature of identity a singular part of the personal mosaic. Within identity politics therefore, by acknowledging the multi-faceted, multi-layered composition of the individual, but concurrently highlighting a specific component of identity such as sexuality, we avoid essentialist understandings of the individual and are able to coalesce and form strategically essentialised rights based organisations.

The idea of identity being a social construct relates to how society chooses to acknowledge and identify its constituent components. Society defines identities, and identifies and formulates definition, not through a natural identity evolution, but

⁵C.F. Stychin, *Laws Desire: Sexuality and the Limits of Justice* (London: Routledge, 1995) at 102.

through the shaping and formulation of societally imposed norms that adhere to the dominant societally imposed definitions. Identity within society therefore, does not spring from some intrinsic characteristic within an individual; it is influenced, explicitly and implicitly, by social, political and legal mechanisms of domination and delimitation. The societal institutions such as the political or legal machinery, create, influence and absorb norms which seep into and are extrapolated from the social unconscious as pre-given truths, but which in fact work to an agenda formulated by those possessing political dominance which has the effect of annulling and shadowing subordinated groups. Hence the coalition of these oppressed groups within an anti-essentialist understanding of social mechanisms may help to counteract the overarching and domineering effects of a specific gendered, classed, racialized and sexualized run politics.

‘The process of identity formation is continually engaged by the individual subject and moreover is politically charged.’⁶ Through the collusion of life experiences, and their effects upon the ‘subject’, who is enmeshed in a mechanism of social interfacing, the positioning of the individual, the creation of their identity, is subject to the social, political and legal influences on their personal circumstances. From these circumstances spring affiliations and initiatives, forming an identity in a permanent state of flux, an identity with its own social, political and legal motivations. Thus the evolution of identity could be likened to a plotted graph. There is the x and y-axis, one axis represents the potential formation of identities (be they partial or not), the other charts the influence of societally imposed norms. The problem we encounter within a reading of this graph, is that the data that we required so as to extrapolate

⁶*Ibid.*, at 103.

from the graph, i.e. the differing identities and differing stages of identity of individuals are recognised and acknowledged, but, are singular instances of subject formation; there is no constant of identity within the graph. The individual is unable to sustain a stable incontrovertible identity, the de-essentialisation of that which forms us, the intersecting identities are in a state of potential flux and affiliation.

Judith Butler has written, 'the subject is neither a ground, nor a product, but the permanent possibility of a certain resignifying process.'⁷ There is an impossibility creating a coalition of pure essentialised identities, for the essentialised individual or grouping is an artificially constructed notion, with the ability to be restated, refined, expanded, constricted, but ultimately to be essentially indefinite. How, one may ask, does this translate into the formation of national identities?

We have stated that identities are subject to evolution, that there is only a 'partial fixity'⁸ at any point in time. Nevertheless, identities, or supposed identities are formulated by those with power for various reasons, one being that it is easier to find a common denominator within hegemonic groupings, whereby one can tap into a group cause or consensus of opinion and then maintain a certain level of power and influence. Such an influence can then lead to the designing of agendas, the designing of a programme of regulation, of regulatory norms, which are institutionalized, legitimized and then enforced through legislation. The implementation is carried out through covert coercion, using the widest of common denominators appealing to all and yet being specific to none. The provision of this resource of mass identification leaves elements of society outside of the dominant culture. Those outside of the

⁷J. Butler in Stychin, *supra* note 5 at 104.

⁸Stychin, *supra* note 5 at 102.

dominant culture could be said to be oppositional. These oppositional 'others',⁹ in failing to adhere to prescribed grounds of thought and action may be perceived as illegitimate components of society. The importance of legitimation within society through official mechanisms such as the law or legislature, has the ability to aid the garnering of dignity and respect to an identified group, even if it is an essentialised notion of a group, such as lesbians or gay men. Thus maintaining an ideology of anti-essentialism whilst concurrently attempting to gain group based rights is a troubling fusion of oppositional ideologies.

In his introduction to *The Rights of Minority Cultures*,¹⁰ Kymlicka discusses the importance of group membership and group legitimation, and contrasts this with what Jeremy Waldron calls 'the cosmopolitan alternative.'¹¹ Kymlicka notes, using the theories of Margalit and Raz on cultural identity, that identity provides 'an anchor for [peoples] self-identification and the safety of effortless and secure belonging.'¹² He goes on to explain that in turn this means 'people's self-respect is bound up with the esteem in which their national group is held. If a culture is not generally respected then the dignity and self-respect of its members will also be threatened.'¹³ This approach, acknowledging dignity and self-worth, has been taken up by the Supreme

⁹Stychin has written extensively on the identification of lesbians and gay men as these 'oppositional others' see, "A Post-modern Constitutionalism: Equality Rights and Identity Politics, and the Canadian National Imagination" (1994) 17 Dal. L.J. 61-82. Parts of this article were also published in *Laws Desire: Sexuality and The Limits of Justice* (1995) *supra* note 5, specifically chapter 6.

¹⁰W. Kymlicka, "Introduction" in W. Kymlicka, ed., *The Rights of Minority Cultures* (Oxford: Oxford University Press, 1995) 1 at 7.

¹¹J. Waldron, "Minority Cultures and The Cosmopolitan Alternative" in W. Kymlicka, ed., *The Rights of Minority Cultures* (Oxford: Oxford University Press, 1995) 93 at 93.

¹²A. Margalit and J. Raz, "National Self Determination" in W. Kymlicka, ed., *The Rights of Minority Cultures* (Oxford: Oxford University Press, 1995) 79 at 79.

¹³*Supra* note 10 at 7.

Court of Canada when addressing lesbian and gay rights.¹⁴ The denial of lesbian and gay equality rights has been seen to directly affect the dignity associated with a lesbian or gay identity. A lack of formal legislation protecting lesbians and gay men has the potential to denote a lack of worthiness in comparison to the heterosexual majority, who are afforded rights. The problem that we may encounter is that in seeking rights, identity takes on an essentialist rhetoric of fixed personality within the dominant confines of liberal discourse. If the dominant trope of liberalism is individuality, but the 'group basis of political life'¹⁵ is ignored, then marginalized groups are subsumed into the dominant consensus. Where it may be true to say that as individuals all are acknowledged and respected, all are acknowledged and respected in comparison to a norm. Ordinarily this norm is embedded within the dominant culture, and within western politics it is a dominant culture of white, heterosexual masculinity.

How then are lesbians and gay men to escape from this cult of liberalism and yet still acknowledge for strategic purposes that politics and specifically identity politics is based around hegemonic formulations of group coherence? What is required is a reformulation of the way in which human life within society is constituted. Waldron has suggested that one must look at culture as being kaleidoscopic.¹⁶ The constantly switching, sliding and shifting grounds of culture pass over and through one another, fusing at some points and being merely transient at others. Like a kaleidoscope, the shapes, narratives and symbols influence one another at a particular moment in time, but this influence is shaped by those who hold the

¹⁴Cases such as *Egan v Canada*, [1995] 2 S.C.R. 513 [hereinafter *Egan*] and *M v H* [1999] 2 S.C.R. 3, have explicitly discussed how the differential treatment of lesbians and gay men as compared to heterosexual couples affects the dignity and self-worth of lesbians and gay men.

¹⁵*Supra* note 10 at 7.

¹⁶*Supra* note 11 at 94.

power to mould society, to twist the kaleidoscope. If those who mould society possess certain dominant characteristics, such as heterosexuality, then it may be very difficult for a non-dominant group such as lesbians and gay men to have their concerns tabled, due to the overwhelming politics and influence of those with power. If this power holding group has the ability to perceive the kaleidoscopic shifts, for example the needs of an emergent identity, they can either acknowledge these needs and grant them status or dismiss them and attempt to subsume them into the whole. In relation to lesbians and gay men, we are subjected to the decisions of a specific group of people who may or may not understand lesbian and gay concerns. The kaleidoscope analogy is therefore more complex than it may appear. Within the encapsulated kaleidoscopic vision of society, which is formally controlled by a specific, power-holding sexual majority, although the diversity of society may be present, the kaleidoscope does not promote individuality within its confines; the subject is permanently exposed to and affected by alternate influences. Lesbians and gay men are placed within a liberal legal sphere, under the paternalistic guiding hand of liberal politics, lesbians and gay men are subsumed as a collective denying the spectrum of individual difference that we possess. Lesbians and gay men come from all walks of life, our identity is a melange, a mosaic of history, sociology and psychology, and this is why we must keep asserting and pursuing the 'diversity is our strength' rhetoric that has become a mantra of sorts for lesbian and gay rights activist groups.¹⁷

In terms of citizenship and ideas of nationality and national identity, a reformulation of identity is required. No longer should the nation state rest on some imagined picture of uniformity of its citizens; what is required is the

¹⁷Banner in the Vancouver Pride Parade, August 2001.

acknowledgement that the nation is not static, that it is being defined and redefined by those both within and without its borders. Globalization, immigration and emigration all play a vital role in the redefinition of the national imagination. Perhaps we should follow Chantal Mouffe's lead, 'the respect of pluralism and differences must be at the core of a radical democratic conception of citizenship. Nevertheless it is also necessary to indicate that such a view ... needs to acknowledge the limits of pluralism which are required by democratic politics.'¹⁸ The practical homogenous approach of democratic politics is only capable of dealing with the pluralistic nature of society by creating and endorsing a norm against which other and alternate identities must formulate or ally themselves with. Therefore one can maintain a pluralistic status within democratic politics, but one is subject to an overarching format within which one must function. Therefore when we call for group rights to be heard we must ensure that we do not create binaries, or polar opposites; we must attempt to create a system, a network of support as it were, which seeks incorporation not annihilation, and values difference rather than seeing it as a threat to internal coherence.

Pease asserts that

*[t]he national narrative produced national identities by way of a social symbolic order that systematically separated an abstract, disembodied subject from resistant materialities, such as race, class and gender. This universal body authorizes the discrimination of figures who can be integrated within the national symbolic order and matters (of race, gender, class) external to it.*¹⁹

¹⁸C. Mouffe in A. Sarat and T.R. Kearns, "Responding to the Demands of Difference: An Introduction" in A. Sarat and T.R. Kearns, eds., *Cultural Pluralism, Identity Politics and The Law* (Michigan: The University of Michigan Press, 1999) 1 at 3.

¹⁹D.E. Pease, "National Identities, Post-modern Artifacts, and Postnational Narratives" (1992) 19:1 *Boundary 2* 1 at 3.

To expand and clarify Pease's point, it may be of use to turn to a discourse of anti-essentialism. The 'national narrative' and the subsequent 'national identities' that were produced, for example within the context of immigration law, were an attempt to create a coherent whole, an identity that has a unifying essence.²⁰ This unifying essence, intrinsic to a nation, and seen to be necessary in its quest for a totalising uniformity, had an erasing quality to it. This quality sought to nullify identities that diverged from its definitional status. Such a status sought to incorporate themes of normalization, which dispense with identities that could be classed as deviant, or identities that did not form part of the stereotyped national norms. Failure to adhere to such norms has the risk of subverting national identity; subversion is the chink in the armour of national strength and identity; and such chinks lead to a definitional status, which cannot be said to be whole, and thus lacks coherence. We see a nation in a weakened state, and where there is weakness there is submission. Where there is submission there is vulnerability and it is at this point that the sexual integrity of a country is questioned. How are we to reconcile the reality of the diverse sexual composite of Canada whilst attempting to maintain an image of Canadian stability?²¹

Traditionally lesbians and gay men have been placed outside of the boundaries of the state, through a lack of legal recognition, or, have been recognized in a negative fashion, through the criminalization of lesbian and gay sexual activity. Lesbians and

²⁰ See Chapter One which discusses the exclusion of certain racial and sexual minorities, i.e. Chinese immigrants and lesbians and gay men.

²¹ In *Knodel v British Columbia (Medical Services Commission)* [1991] 6 W.W.R. 728 at 735. Rowles J. notes the psychiatric evidence of Dr Michael Myers a clinical professor in the department of Psychiatry at the University of British Columbia. Dr Myers stated 'the incidence of homosexual behaviour in western culture is conservatively estimated as 5 to 10 per cent for adult males and 3 to 5 per cent for adult females.' One could also consider Alfred Kinsey, Clyde Eugene Martin and Wardell Pomeroy's report *Sexual Behaviour In The Human Male* (Philadelphia: W.B.Saunders, 1948) and *Sexual Behaviour In The Human Female* (Philadelphia: W.B. Saunders, 1953).

gay men may represent the weakened state of gender norms by subverting traditional notions of masculinity and femininity. Canada's acknowledgment in the 1990's of sexual orientation as a prohibited ground of discrimination in the *Charter of Rights and Freedoms*²² could be perceived as an embracing of non-static sexual identities, sexual identities which are open to reformulation. The recognition of sexual orientation paved the way for the reformulation of what constitutes family. By granting lesbians and gay men a level of legal personality, a denial of the right to constitute family was blatantly impermissible. The family is a primary site from which the Canadian populace is derived; alternate family formations, which include lesbians and gay men therefore, are in a fundamental pedagogical position to influence the next generation over the differing formations of family.

Lesbians and gay men have long been assigned the role as alternate within society. Queers have been used as the deviant 'other' against whom the straight community could define itself. We may now ask the question of how the incorporation of lesbians and gay men within the family challenges the status of the identity of the nation? If the family in its traditional form of opposite sex partners is the fundamental unit of society, given primacy over all other unions, then the inclusion of the 'gender subverting' lesbian and gay man is a possible step towards the expansion of identity and the weakening of gender role specifics. Can this lack of gender conformity be said to feminize a nation, or indeed queer a nation? Does the opening of Canada's borders to homosexual couples call Canada's sexual integrity into question?

²²See Egan, *supra* note 14.

The sexual inspecificity of a nation occurs at the point where sexualised identities forged as external to the nation, have the ability to adhere to the internal concept and constitution of nation. These oppositional and previously excluded sexual identities penetrate and impinge on ideas of a singular national straight composite, rendering claims to a symbolic stereotypical, nationalist narrative fallacious.

*Because the coherence of the national narrative depends upon the integrity of its universal subject, that figure is transformed into a tacit assumption and descends into the social unconscious.*²³

This descent into the social unconscious represents the socially and politically accepted norms of what have been constructed as appropriate qualities to possess, the white, masculine, heterosexual identifiers. This sacred norm with its embodied patriarchal characteristics is ripe for exposure and in this sense is its own worst enemy. For that which is not forged out of white, masculinist heterocentrism, such as lesbians and gay men, racialized 'others', and women, has the power to challenge these stultifying norms. In exercising a presence, even if it is a presence which is frowned upon or denigrated, one highlights the incoherence of the national narrative, one de-essentializes national identity.

This de-essentialization, and in turn reclamation of presence, represents a shift in power differentials. Michel Foucault wrote, 'since power marginalizes, silences and excludes, the marginalized, silenced and excluded are always present.'²⁴ Those who traditionally exercise control over the reins of power, and have the ability to dominate marginalized groups, must attempt to forge an idea of social totality through the de-legitimation and marginalization of those who lack power. A discourse of

²³Pease, *supra* note 19 at 3.

²⁴M. Foucault in A.Hunt and G. Wickham, eds., *Foucault and The Law* (London: Pluto, 1994) 17.

exclusion is a primary tool in attempts to annul a marginalized group and its oppositional presence. Attempts to annul a presence may, however, have the opposite effect, for by excluding one must be specific about who or what one is denying, and this in turn leads to a defining of the 'other', an attempt to define that which does not reach the standard of the accepted norm.

Defining who or what are the excluded often has the effect of forming coalitions, coalitions of identities, coalitions of groups that wish to exert their rights, exert their presence. Attempts at annihilating such groups come loaded with questions of why these groups, these identities should be disavowed from the national imagination and ultimately this touches upon issues of human rights, which are supposed to be universally applicable. A presence which steps outside of the legislated norm, which has been formed and is historically derived outside of these norms, represents the flaw in attempts to create and maintain a national identity which has tried to make itself impervious to the influence of the 'other'. Such 'others' always were and have been even through their exclusion, part of the fundamental tenets of the nation state that represents the diversity of what it means to be Canadian. Pease has written,

[t]he national narrative sustains its coherence by transforming internal divisions into the symbolic demand that the subjects conscripted within its narrativity misrecognise the figures it excludes as simulacra of themselves. But when these figures surge up at these internal divides, as unintegrated externalities, they expose national identity as an artefact rather than a tacit assumption, a purely contingent social construction rather than a meta-social universal.²⁵

Pease suggests that as an exercise to create a unified whole of national identity, sublimation of differences is achieved via the misrecognition of excluded figures.

²⁵Pease, *supra* note 19 at 5.

Those figures, Pease believes, are constituted as a 'simulacra' of the populace, a deceptive substitute, therefore the power holding majoritarian class places these figures outside of the national narrative. One may ask the question of why these misrecognised figures are placed outside of and thus excluded from the national narrative.

The idea of the simulacra of the populace being excluded by the power holders through 'misrecognition' strikes me as a theory containing a flaw. First the syntax of using the word 'misrecognition' is problematic. This is the 'misrecognition' of what are ultimately subordinated groups, groups that have been quashed under the dominance of oppressive forces. Use of the word 'misrecognition' sounds like an excuse, albeit a theoretical excuse, to annul the effects and the conscious efforts of dominant social actors to maintain control over numerous minority groups.

Secondly, in order to exclude through a dialectic that annuls the presence of difference and reformulates it as the exclusion of that which is an image of it, seems like mere pretence. Theoretically up to this point we have asserted that in order to define oneself, one has to state what one is not. The question of how the nation sees itself and how its constituent components define themselves rests on a rather incoherent and evasive picture of its composite. Definition of a nation is produced through a negative dialectic of rejection. Thus within rejectionist terms there must be a conscious or at least sub-conscious awareness of that which one is 'othering' and placing outside the narrative field of national identity. Use of the example of lesbians and gay men as the 'other' and the systematic exclusion and discrimination that has accompanied a lesbian or gay existence, cannot be pacified by using an ideology based

on misrecognition. This 'misrecognition' was blatant; this 'misrecognition' was homophobia at its most powerful. There was a conscious attack on that which failed to conform to the norm; it is that attack on non-normative sexualities which is inexcusable.

What is occurring even through this misrecognition theory is the construction of the essential identity of the oppositional other. One creates a core component, easily identifiable and subject to classification, comparison and normalization. The success, from an assimilationist perspective with which this is carried out against the accepted norm, is directly related to the position in which it is placed as an 'other;' the greater conformity to the norm, within the identity, the less it will be formulated as an oppositional 'othered' identity and the more it will lose its subversive status. Because identity is transient, formulated on a basis that can shift according to dominant powers and politics and their inherent policies that form allegiances, one cannot maintain a static, consistent idea of identity.

The emptiness of the signifiers of identity means that they can be essentialised by the construction of a subject position in contradistinction to an other... it is more than a simple boundary marking the outer limits of the centred term because it functions as a supplement, marking what the centre lacks but also what it needs in order to define fully and confirm its identity.²⁶

If we return to Pease's idea about the upsurge of identity at these internal divides within a society, and look at this in relation to the Foucauldian idea of the omnipresence of the 'marginalized, silenced and excluded' we are able to see the excluded as possessing a form of power over the very same groups which chose to annul their existence. What occurs within this construct of domination and oppression

²⁶Stychin, *supra* note 5 at 112-113.

is a shift in the position of those who take, give and ultimately appropriate power within a very specific and essentialised sphere.

There comes a point in struggles for equality, in struggles for recognition, where individuals coalesce in order to project and protect their culture or a facet of their lives which is fundamental to their existence. This particular approach to activism has a tendency to subsume groups into an 'essentialist politic.'²⁷ Such essentialist groupings have had their successes in claiming rights for minorities. Lesbian and gay activist groups such as EGALÉ²⁸ for example, have fervently supported the inclusion within law and society of lesbians and gay men as a group, protected under the *Canadian Charter of Rights and Freedoms* to be free from discrimination. The problem one may perceive from strategies that invoke essentialist understandings of group identity, is that rather than a particular group such as lesbians and gay men in all our diversity being granted the respect of the legal or political system, what tends to happen is that lesbians and gay men are brought under liberal legal control as a uniform group. This has a dual effect of sidelining those lesbians and gay men who do not fit within the dominant acceptable conception of lesbian and gay existence, and secondly encourages lesbians and gay men to assimilate and endorse hetero-normalized concepts of appropriate ways to live emotionally and sexually. As lesbians and gay men we are then tacitly controlled and coerced to conform to some level of liberal legal acceptability.

²⁷C.F. Stychin, *A Nation By Rights* (Philadelphia: Temple University Press, 1998) at 14.

²⁸EGALÉ stands for Equality for Gays and Lesbians Everywhere. Their website can be accessed at <http://www.egale.ca>.

Use of the *Charter*, Human Rights Statutes²⁹ and new legislation³⁰ by lesbians and gay men as tools to gain formal equality and reflections of its granting, is obviously an important step towards recognising queer concerns within the gay community. But the question is whether any positive effect on lesbian and gay lives results from an increased legalization of lesbian and gay existence an existence which has for so long existed outside of the regulatory judicial ambit. Liberal legal thought and action now has a legitimated presence in the lesbian and gay community, in having the ability to impinge on the lifestyle choices of lesbians and gay men.³¹ This imposition has the ability to create a hierarchy of good and bad lesbians and gay men, those who conform to the straight standard, for example monogamous couples, against those who do not, such as s/m leather dykes who ride motorbikes and have multiple partners. Formal acknowledgment does not recognise the diversity of lesbian and gay existence against a lesbian and gay standard. Rather, the sublimation into liberal legalism places lesbians and gay men in contradistinction to their heterosexual counterparts at a disadvantage. The predominantly heterosexual, law-making majority are in a position of being able to regulate lesbian and gay lifestyles not necessarily fully understanding lesbian and gay ideologies surrounding queer relationships. Such ideologies may specifically be related to a rejection of notions of dependence, therefore the foisting of heterosexual norms into a politically queer relationship disallows the progressive themes of queer relationships.

²⁹e.g. *Canadian Human Rights Act*, R.S.C. 1985, c. H-6; *Charter of Human Rights and Freedoms*, R.S.Q. c. C-12; *Human Rights Code*, S.N. 1988, c. 62; *Human Rights Act*, c. 214, s. 1.; *Saskatchewan Human Rights Code*, C. S-24.1.

³⁰e.g. *Supra* note 4.

³¹For example the decision in *M v H* left lesbian and gay relationships for better or worse subject to financial obligations. See S.B. Boyd, "From Outlaw to Inlaw: Bringing Lesbian and Gay Relationships into the Family System" (1999) 3(1) *Yearbook of New Zealand Jurisprudence* 31-53.

If one looks at the granters and the grantees of rights each could be seen to take on the role of opposing teams, where one bestows and the other is bestowed upon. It seems awkward and perhaps somewhat ungrateful, to consider the *Charter of Rights and Freedoms* in terms of domination and subordination. However under the guise of liberalism, the granting of such rights seems to reflect an agenda, which covertly, has at its core, issues related to dominant and subordinate roles. It may be of interest to return to our initial question of how the granting of rights queers a nation, for there are correlations between the queering of a nation, domination and subordination, and the way in which the state chooses to identify itself.

Previously I stated that the concept of nationhood was open to reconfiguration and had no definitive intrinsic quality to be relied upon in creating a static entity. The fundamental problem nationhood has had, was that it was and is, subject to the entrance and exit of populace and the formulation and assurgance of differing groups who wish to re-imagine fundamental tenets of the collectivity of nationality. The state attempts to control the presence of those that challenge the national imagination by, as Stychin writes, 'stigmatiz[ing] potential deviants and jostling them into place.'³² The 'jostling into place' that Stychin mentions is possibly an attempt to legitimize a deviant identity, grant it a certain level of respect but ultimately to have it under the direct control of those who recognise that it was a possible threat to national totality and thus feel it necessary to monitor and de-limit its potential impact. At the same time one could interpret the granting of rights to those previously classed as deviant as an assertion of rights on the part of the minority, a reversal of the positions of domination and subordination. The dominant majority is being forced to recognise and

³² Stychin, *supra* note 27 at 14-15.

acknowledge that, which for so long it chose to disparage. The minority has pressured the majority to implement a change in the way it deals with lesbians and gay men, and thus is being encouraged and persuaded to acknowledge that its previous stance was flawed. The state's submission to the internal pressure of those it tries to turn into externalities, is representative of both a state subordination to the social pressure of a minority, but more importantly the acknowledgement of the lesbian and gay equality rights agenda, albeit an essentialised one. Perhaps we have to see this essentialised position as the first rung on the ladder to full lesbian and gay rights, and then concurrently a step towards the breakdown and deconstruction of other sexualised norms of human existence.

Queer theory has asked us to look at every aspect of life, collective and individual, from definitions of subject and object and their formation, to the role of the state and the state machinery encompassing the legal system. Lesbian and gay identity politics provide us with an opportunity for the reinvention of the confines of hegemonic categories created by heterocentric, patriarchal society. Stychin has commented that lesbian and gay identity is an 'ongoing questioning of borders and membership.'³³ The drawing of lesbians and gay men into the Canadian national imagination, and specifically into immigration law and the fundamentally symbolic institution of the family shows a certain amount of progress in terms of Canadian ideas of identity. The ability of a nation and a national institution such as the family to be reshaped and reformulated by previously disenfranchised members is a progressive step in terms of deconstructing the institution of family and the fallacious totalising heterosexuality of national identity. Lesbians and gay men must ensure that we do not

³³*Ibid.* at 113.

get wrapped up in what looks like progressive formulations of identity within the Canadian matrix but actually ends up subsuming us and negating our reformative political potential.

Considering the symbiotic evolution of immigration law and Canadian national identity, we can see that each was fuelled by the progress and continued assertion of the other. Immigration law was forged out of a desire to wrest control of the nation from British rule and assert, on an international scale, the individuality and independence of Canada. No longer did Canada wish to be seen as a mere subsidiary of Great Britain; the quest to be seen as a nation among nations was a sign of maturity and an impending need to reformulate itself in its own language. The ability to define one's own populace reflected a fundamental issue of what and who the composition of Canada was to be. In legislating immigration laws, a national identity was allowed to, and began to take shape. The identity that was forged, was however one based on white, masculine, heterosexual norms, for these represented integrity and strength and indominability toward outside influence and penetration by agitators foreign to the Canadian imagination. As with such essentialist understandings of nationality and the concept of nationhood, divergence from these totalising definitions create factions, and coalitions and groupings that do not wish to be placed under the heading, and under the control of liberal paternalism. It is at this point, that conflict over the definitional status of the term Canadian commences. What one seeks to rally against is the essentialization of the national identity. Rather than respecting the multifaceted, multi-racial, multi-sexual composite that is Canada, essentialization annuls these claims to diversity in an attempt to create a coherent whole based on untrue notions of

the formulation of Canada. The evolution of Canadian immigration law does not necessarily acknowledge the full diversity of Canada, but opts instead for incorporation, in the form of the acknowledgement of lesbian and gay families. While this may not be a radical step in the forging of identities, it is a practical step forward in terms of formal equality. To recast the Canadian family in the new immigration legislation, represents an opening of Canadian borders to alternate family forms; this is particularly symbolic as Immigration Canada states in its goals for the 21st century, 'family is the bedrock of Canadian society'. Thus to alter this facet of Canadian society goes deeper than the mere widening of Canadian immigration legislation, it steps onto a terrain of the refashioning of a fundamental institution and the fundamental sexuality of Canadian society.

The Structure of the Thesis.

The purpose of this thesis is to highlight the intersecting grounds of national, familial and sexual identity using immigration law as a tool to explicate the ramifications of their interaction and to show the ways in which they each feed and formulate one another. By deconstructing these three grounds I attempt to highlight a pathway, which may aid the deconstruction of specific gender roles which are constrained by the normalized expectations of human behaviour.

The intersecting grounds of national, familial and sexual identity are threaded throughout the chapters of this thesis. **Chapter One** is comprised of four main sections. The chapter begins by considering the historical derivation of immigration law in Canada, noting its colonial origins. The colonial origins of immigration law are

posited as the 'other' against which Canada chose to define itself and create its own national identity. In redefining Canada through immigration law, the 'sexual morality' of the nation was constituted so as to confirm Canadian identity, an identity that was predicated on a basis of heterosexuality. The chapter continues by discussing the historical treatment of lesbians and gay men, with a specific focus on the lesbian and gay political witch-hunts of the 1950's and 60's, and the supposed correlation between political and sexual dissidence and the coherence of national integrity. The next portion of the chapter discusses the 1976 immigration legislation, under which lesbians and gay men had to, until very recently, rely on discretionary relief to be granted family status for immigration purposes, and the problems inherent within the discretionary category. The final component of the chapter notes the new legislation as outlined in the newly enacted Bill C-11 the *Immigration and Refugee Protection Act*, and comments on the impact this may have on lesbian and gay family class immigration.

Chapter two discusses how the inclusion of lesbians and gay men within legislation affects our understanding of 'family'. This analysis then moves on to how lesbian and gay families have conceived their existence regardless of legal recognition, noting the inherent differences, ethical and social, that may be present within queer families. Third, I consider whether as lesbians and gay men we are being drawn more and more into the heterosexual familial web, asking whether this can be classed as a buying in or selling out of our status as potential societal reformers. Finally I ask whether lesbian and gay rejection of specific gendered norms in both a

social and sexual sense, allows us to subvert the conventional form of family? And if we are failing to alter the gendered state of family then what are we doing?

I argue that buying outright into the conventional family form is a socially regressive step and that lesbians and gay men should not be apologising for their sexuality, or for their decision to live their life and the lives of their families in a socially different way. I do not deny the social symbolism that marriage holds, nor the importance of the formal equality that the granting of marital rights would imbue, but I suggest that we must look beyond the here and now of rights based litigation and focus instead on the deconstruction of gender binaries. This approach requires a battle against the overarching dominance of essentialisation of family and sexuality. In deconstructing gender differentials and the boundaries of the masculine and the feminine we are able to gain not just entry into the family and marital rights, but the right to live our existence outside of gender norms, thus paving the way for the decimation of patriarchal, homophobic ideologies of the roles of men and women.

Judith Butler has developed in relation to gender norms, a social constructionist theory of the 'sedimentation' of identity.

*There is a sedimentation of gender norms that produces the peculiar phenomenon of a natural sex, or a real woman, or any number of prevalent and compelling social fictions, and that this is a sedimentation that over time has produced a set of corporeal styles which, in reified form, appear as the natural configuration of bodies into sexes which exist in a binary relation to one another.*³⁴

The constructedness of the boundaries of gender has therefore been formed through the continued layering of facets of identity that constitute the male and the female.

³⁴J. Butler, "Performative Acts and Gender Constitution: An Essay in Phenomenology and Feminist Theory" in K. Conboy, N. Medina and S. Stanbury, eds., *Writing On The Body: Female Embodiment and Feminist Theory* (New York: Columbia University Press, 1997) 401 at 407.

Lesbians and gay men can be seen as the cleavage in the sedimented formation of identity. We are the subversive veins of sexually reformatory familial potentiality.³⁵ However the need to construct claims in the language of liberal legalism may restrain the subversive potential of the lesbian and gay rights agenda.

Chapter three reviews the essentialisation of family and sexuality within a legal framework. The chapter is divided into four sections. In the first section I consider the *Charter* and its historical bases. The second part of the chapter takes a closer look at the analogous grounds within the *Charter* and how these grounds can and have utilised deconstructionist interpretation. The third section focuses on the construction of sexual orientation as an essentialised characteristic by the courts and whether this helps or hinders the fight for lesbian and gay rights and the deconstruction of the boundaries of gendered notions of sexuality. The final part of the chapter considers the sexual orientation and family status nexus. The section reviews three cases *Mossop v AG of Canada*,³⁶ *Egan v Canada*³⁷ and *M v H*.³⁸ The cases consider lesbian and gay identity within a familial setting. The cases represent the evolutionary progress of the courts in assessing lesbian and gay rights. The cases also highlight a judicial unwillingness for the most part to de-essentialise the sexuality of the lesbian or gay man.

The essentialisation of a lesbian or gay sexuality is predicated as an incontrovertible feature of personality. The construction of homosexuality is flawed on numerous bases. Primarily homosexuality is set against its oppositional other,

³⁵ Many thanks to Rebecca Lee for her input with regards to the geological puns.

³⁶ [1993] 1 SCR 554.

³⁷ *Egan*, *supra* note 14

³⁸ *M v H*, *supra* note 14.

heterosexuality; the performance of these sexualities is what is seen as indicative of bearing one of these titles. This type of classification does not allow for the numerous factors that go into creating someone's sexuality. Herman has noted that sexuality is influenced by a host of mitigating occurrences; she notes '[a]t the root of essentialism, and hence notions of immutability, is the belief that a pre-given proclivity to particular sexual activity constitutes the basis of the categories heterosexual and homosexual.'³⁹ She continues by highlighting that this is a fallacious base, that this classification of lesbians and gay men is 'reductionist and unpersuasive',⁴⁰ noting that to be a lesbian may be a political choice rejecting heterosexual hegemony. She explicates the fact that the nomenclature of lesbian is not indicative of lesbian sexual activity. Furthermore heterosexuality and an unwillingness to deviate from the path of heterosexual sex may be more about the 'enforcement' and 'privileg[ing]' of heterosexuality 'that denies people choice.'⁴¹ The boundedness and essentialisation of sexuality by the judiciary therefore cannot be embraced as a completely progressive step towards the breakdown of categories, towards the full equality of lesbians and gay men.

Following the judgment rendered in *M v H* which granted equality to lesbians and gay men in relation to heterosexual common law partners with regards to obligations to a partner upon the breakdown of a relationship, the government of Canada began to implement changes. Bill C-11, with regards to immigration legislation and Bill C-23 which focused on the benefits and obligations of

³⁹D. Herman, "Are We Family?: Lesbian Rights and Women's Liberation" (1990) vol 28, no 4 Osgoode Hall L.J. 789 at 812-813.

⁴⁰*Ibid.*, at 813.

⁴¹*Ibid.*

relationships were the federal government's answer in adhering to judicial determination that the relationships of lesbians and gay men be granted a status equivalent to that of heterosexual common law partners. The separate functions of the legislature and the judiciary ensure that a series of checks and balances occur between the two so that neither overstep their role. The enactment of the new immigration legislation may have been a pre-emptive approach by the legislature so as to avoid *Charter* wranglings over the inadmissibility of lesbian and gay partners. The use of the courts and the *Charter* as a tool to amend or at least tinker with legislation that does not seem to conform to a level of formal equality ensures that oppressed groups in their coalesced form are able to challenge what may sometimes seem like an impenetrable governmental entity. Hence the development of the prohibition of discrimination on the grounds of sexual orientation may help us navigate towards a position that can ensure the substantive, actualised and experienced effects of formal equality.

Chapter I
The Changing Face of Immigration Law.

Introduction: The Evolution of Immigration in Canada

If the state is a sovereign entity, with the ability to determine the composition of its populace, then immigration law can be viewed as one of the state's key tools of definition. Immigration law has been used and continues to be used as an international reflector of domestic government social policy. Immigration legislation provides a fundamental framework of legislative intent over the future formation of Canadian society. Intrinsic considerations about the future of Canadian society are expressed with regards to employment schemes and in-take quotas, refugee determinations and the changing face of family policy reflecting governmentally and legally endorsed modernizing reforms. For example, both the recently enacted Bill C-23¹ and immigration Bill C-11,² redefine the face of the Canadian family by incorporating lesbians and gay men within their ambit; one at the domestic level and the other at the international level.

This chapter offers an awareness of the history of immigration law in order to provide a firm basis on which to look at the more modern concepts behind immigration law and practice. Charting the progress of immigration law, from its origin as an affirmation of Canadian identity,³ will highlight the symbolic importance surrounding the creation of Canadian citizenship.

¹*The Modernization of Benefits and Obligations Act*, R.S.C. 2000, (2nd Sess.), c.12.

²*Immigration and Refugee Protection Act*, R.S.C. 2001, (1st Sess.), c. 27, s. 12.

³Canadian identity has been shaped by multiple immigration patterns. Immigrants have arrived in Canada from all over the world. Possibly those that came in the greatest numbers and had the greatest impact were the French and the English. Anglophone Canada has as the basis of its legal system the English legal system. Canada's desire to create its own immigration policy was just one of the ways Canada attempted to move away from the dominance of British rule and attempt to form an image of how Canadians wanted the composite of Canada to be. For more see N. Kelley & M.J. Trebilcock, *The*

From this starting point, this chapter will discuss the historical treatment of subordinated groups within Canada, focusing mainly on the treatment of lesbians and gay men. The next segment will deal with the evolving nature of family ideology within immigration legislation in its previous, present and future forms, considering legislation that has just been recently passed⁴ and how these forms have affected, and will adversely affect, lesbians and gay men. Attention will be directed towards the grounds of 'humanitarian and compassionate'⁵ considerations under immigration law, which have been particularly pertinent to lesbian and gay, and unmarried heterosexual partners immigration practice. The grounds of 'humanitarian and compassionate' consideration have been described as a 'closeted'⁶ loophole, possessing numerous flaws detrimental to lesbian and gay immigration. The 'humanitarian and compassionate grounds' are a discretionary category and not widely known by immigrants or even immigration lawyers. Further to this it will be of interest to consider how the social and legal policy goals of the government have shaped legislation that was enacted in 2002.

Making of The Mosaic: A History of Canadian Immigration Policy (Toronto: University of Toronto Press, 1998).

⁴*Supra* note 2. Immigration Canada's intentions prior to the enactment of the *Immigration and Refugee Protection Act* can also be found in, Citizenship and Immigration Canada, *Building On a Strong Foundation for the 21st Century: New Directions for Immigration and Refugee Policy and Legislation* (Canada: Minister of Public Works and Government Services, 1998).

⁵*Immigration Act*, R.S.C. 1985, c. I-2, s. 6(5) 'permits an exemption to the visa requirement in s. 9 (1) by allowing an immigrant, and all dependents, to be granted landing for reasons of public policy or compassionate and humanitarian considerations' in Frank N. Marrocco and Henry M. Goslett, eds., *The 2002 Annotated Immigration Act of Canada* (Toronto: Thompson Carswell, 2001) at 88.

⁶See "EGALE Brief to Immigration Legislative Review Ministerial Consultations" (March 11th 1998) online: EGALE Homepage <<http://www.egale.ca>> (date accessed 29th of April 2002). EGALE more recently submitted a brief "EGALE Submissions to House of Commons Standing Committee on Citizenship and Immigration: Re Immigration Regulations" (February 2002) online: EGALE <<http://www.islandnet.com/~egale/documents/ImmigrationSubmissions2002.htm>> (date accessed 29th of April 2002).

The assertion of Canada as a nation in its own right

The *Constitution Act* of 1867⁷ had multiple roles, delineating the form and function of the Canadian government and the ambit of its reach within a defined Canadian space.⁸ The *Constitution Act* was the first legislation to touch on the subject of immigration to Canada. The immigration provisions were entwined with agricultural policy.⁹ In an attempt to entice agricultural rather than industrial workers to immigrate to Canada, restrictions were placed on employment policies. The *Alien Labour Act*¹⁰ made it illegal for employers to offer job contracts to those residing outside of Canada,¹¹ conversely in an attempt to develop the farmland of western Canada, incentives such as free land were offered to attract agricultural workers from overseas.¹² Even with these restrictions in place, this was a period of high-level immigration to Canada.¹³ Such legislation was the first of its kind to allow Canada to form an image of what it wanted the Canadian populace to consist of, thereby

⁷*Constitution Act, 1867* (U.K.), c.3, reprinted in R.S.C. 1985, App. II, No. 5.

⁸The *Constitution* codified public debt and property, regulation of trade and commerce, unemployment insurance, the raising of money by any mode or system of taxation, the borrowing of money on public credit, postal service, census and statistics, militia military and naval service, fixing of and providing for the salaries and allowances of civil and other officers of the government of Canada, the list goes on to mention coinage, fisheries, weights and measures, immigration, agriculture, copyright and marriage and divorce. For a more in depth and fuller picture of Parliament's scope see section VI (91) of the *Constitution Act 1867*. Department of Justice Canada, *The Constitution Acts 1867 to 1982* (Ottawa: Canadian Government Publishing, 2001) at 28-30.

⁹*Ibid.* s. 95 at 38 'In each province the Legislature may make Laws in relation to Agriculture in the Province, and to Immigration into the Province; and it is hereby declared that the Parliament of Canada may from Time to Time make Laws in relation to Agriculture in all or any of the Provinces, and to Immigration into all or any of the Provinces; and any law of the Legislature of a Province relative to Agriculture or to Immigration shall have effect in and for the Provinces as long and as far only as it is not repugnant to any Act of the Parliament of Canada'.

¹⁰*An Act to restrict the importation and employment of Aliens*, S.C. 1897, (2nd Sess.), c.11.

¹¹Law Union of Ontario, *Canada's New Immigration Act: A Guide and Critical Commentary* (Toronto, Ontario: Law Union of Ontario, 1978) at 5.

¹²*Ibid.*

¹³*Ibid.*, at 10. The Law Union of Ontario has noted the figures regarding the influx of immigrants. They note that between 1896 and 1913, 2.5 million immigrants arrived in Canada. 1913 showed the greatest influx with just under half a million immigrants arriving. Records of the crime of 'moral turpitude' which would have included lesbian or gay sexual practices, and criminal records for homosexual sex would have prevented lesbians or gay men from entering Canada.

attempting to form some sort of Canadian identity, which would give it a distinct character in its own right.

With these attempts at self-definition came a period of intense racism, with restrictions being placed on immigrants from East Asia.¹⁴ Chinese immigrants were hit particularly hard with the new government directives that attempted to reduce the number of Asiatic immigrants.¹⁵ Policies affecting the Chinese included an increase in the head tax. One example was that of the quotas of sea faring vessels. Such vessels had the ability to bring immigrants from their own country to settle in Canada. Ordinarily a vessel was allowed to carry one immigrant per two tons of tonnage, but if the immigrant was Chinese then it was one immigrant per fifty tons of tonnage.¹⁶ By 1906 the levels of tonnage had risen to two hundred and fifty tons per Chinese immigrant. Racist policy continued to be wreaked upon Chinese immigrants in numerous ways.¹⁷ Racism peaked around both of the world wars, when Asian immigrants and Canadian-Asian citizens were seen as potential threats to national security, and policies of deportation and internment in concentration camps were seen as justifiable protective measures.

¹⁴K. W. Taylor, "Racism in Canadian Immigration Policy" (1991) 21:1 *Canadian Ethnic Studies* 1, online: EBSCO: Academic Search Elite <<http://www.ebsco.com>> (date accessed: 29th April 2002).

¹⁵ *An Act to Restrict and Regulate Chinese Immigration to Canada*, S.C. 1885, c. 71.

¹⁶*Ibid.* s. 5.

¹⁷*Supra* note 14. Taylor has noted the imposition of the "single continuous journey" policy developed by Immigration Canada. "The original 1885 *Chinese Immigration Act* and its subsequent revisions had imposed an immigration tax, referred to as a "head tax," on Chinese immigrants. The 1923 revision effectively terminated immigration from China. Immigration from India and Ceylon was controlled by the "single continuous journey" provision which effectively curtailed immigration (Buchignana, Indra and Srivastatava, 1985). Immigrants from the rest of Asia, South and Central America, Africa, and Blacks from the U.S. (Troper, 1972), could be dealt with by all-purpose exclusion provisions that were developed and refined around the turn of the century. The 1906 *Act* prohibiting the landing of the "feeble-minded," idiots, epileptics, the insane, the deaf and dumb, those "afflicted with a loathsome disease," paupers, the destitute, professional beggars, vagrants, and anyone "likely to become a public charge." Where these exclusions failed, the government could, whenever expedient, make a proclamation to "prohibit the landing in Canada of any specified class of immigrants." (R.S.C. 1906, c. 19, s.26-30).

Canadian immigration policy at this point seemed to be a confusing conjoining of dichotomous directives in both the actual and symbolic sense. The image Canada wished to assert was that of a predominantly white, European nation. Canada was intent on reducing its links with British colonial political dominance but still enthusiastically encouraged British immigration. The thwarting of attempts by immigrants from many parts of Asia to gain entry into Canada, further compounds the racist specificity of who was to garner the title of 'Canadian.'¹⁸

On the cusp of World War I in a further attempt to disassociate itself from British rule, Canada adopted the *British Naturalization Act*.¹⁹ Although the Act seemed to focus on who could constitute a British subject and the benefits and obligations that accompanied this status, implicit within the *Act* was the assertion of a Canadian national status.²⁰ According to Galloway²¹ this is a point of significance; having the *Naturalization Act* in its entirety spanned issues broader than that of just naturalization, its enactment stretched into the arena of national autonomy.²² 'It was important to at least appear to have authority over all matters relating to nationality and citizenship ... [and was] an effective measure to create momentum in attempts to gain independence from the United Kingdom.'²³ Indeed prior to the enactment of the

¹⁸In one particularly racist outburst by Mr Thomas Reid (M.P. for New Westminster, B.C.) he stated "Many undesirable people are making their way into this country, and I believe I am correct in saying that the state has the power to say who shall become its citizens. On the Pacific coast we are faced with a race problem. These newcomers will not assimilate with our Anglo-Saxon stock, and they are content with a much lower standard of living and of civilization... Even if bars were put up against Asiatics coming into British Columbia, and such immigration ceased, the birth rate would still be alarming and in the course of years the Asiatic probably would overshadow the white population" *House of Commons Debates* (May 27th 1931) at 2026.

¹⁹*An Act Respecting British Nationality, Naturalization and Aliens* R.S.C. 1914, c.44.

²⁰*Ibid.* s. 2.

²¹J.D. Galloway, "The Dilemmas of Canadian Citizenship Law" (1999) 13 *Geo. Immigr. L. J.* 201 at 213.

²²*Ibid.*

²³*Ibid.*

Statute of Westminster in 1931, the Canadian government did not have the requisite jurisdiction to allow it to amend its laws regarding nationality. This power was still vested solely in the Parliament of the United Kingdom.²⁴

In 1947, in an attempt to establish a Canadian identity, free from the shackles of British rule, the Canadian legislature began to define what and who constituted a Canadian citizen.²⁵ Prior to 1946 steps towards independence had been faltering. There was a political unwillingness to assertively confront colonial superiors²⁶ who still maintained a level of dominance over Canada.²⁷ The *Canadian Citizenship Act*²⁸ was one of the final attempts on the part of Canada to assert sovereignty over its dominion. Canada wished to assert its identity as an independent country with an unfettered national identity. In formulating a Canadian immigration policy, Canada was able to define what it viewed as its own form of citizenship and citizenship policy. From this point onward, Canada had the ability to shape the composite and facial form of the nation. Secretary of State Paul Martin commented, "It is a discreditable position in which we find ourselves as a nation among nations of the world [today] not to be able clearly to address one another with the full sanction of the law and for all purposes as citizens of our own country."²⁹

Each individual Canadian could now identify as a Canadian, rather than being a subsidiary citizen of the UK. Canada's steps toward creating an identity

²⁴*Ibid.* at 210.

²⁵*An Act to Amend the Immigration Act and to Repeal the Chinese Immigration Act* R.S.C. 1947, c. 19 at 107-109. Furthermore *Supra* note 14, Taylor has tabulated the volume and composite of immigrants to Canada from 1906 to 1988. The tables highlight that even with the removal of explicitly racist immigration policy, there is still a substantial level of racism within immigration policy. See tables 1-5 in the endnotes of Taylor's work.

²⁶C. Parry in Galloway *supra* note 21 at 213.

²⁷See *House of Commons Debates* (April 3rd 1946) at 425.

²⁸*Canadian Citizenship Act*, R.S.C. 1946, c. 54.

²⁹Secretary of State Paul Martin in Galloway, *supra* note 21 at 210.

recognisable to the international community as being alternate to the affiliated identity of the UK allowed Canada to redefine itself both within and without its national borders.

The great strength of immigration law is the symbolism that is attached to it. Immigration legislation formalises the hopes and aspirations of a populace, and has the ability to concretize the acceptable, appropriate and wanted face of a nation. Those who have emigrated from all over the world have continually shaped Canadian society, bringing their own cultures and practices to bear on the Canadian community. To define the intrinsic part of Canadian society is impossible, for Canada is a mosaic of endless definitions, there is no specific facet that provides us with an essential essence of Canada. With this indeterminacy in mind how does this affect the status of newly emergent social identities such as lesbians and gay men? How can the non-specificity of 'Canada' be utilised as a tool to encourage the growth and formation of identities rising out of this multi-composite nation state?

The Historical Treatment of lesbians and gay men under Canadian immigration legislation

If self-definition is seen as a facet of state autonomy, whereby autonomy allows the state to define what one is and what one is not, then sexuality has played a role in the Canadian national imagination in defining Canadian society. The implied exclusion of lesbians and gay men within Canadian immigration legislation was an attempt on one level to create an image of Canada as a strong masculine nation; a nation that could not be metaphorically penetrated by outside influence in the form of deviant sexuality. Stychin has noted 'If the western nation has been defined and

maintained by the creation of a devalued other placed outside the boundaries of the state, then one such expulsion...traditionally has been the homosexual.³⁰ Within national boundaries there has always been a homosexual presence even if not an explicit lesbian or gay identity.³¹ This 'homosexual' presence and activity has been vilified, abhorred and outlawed. In casting the 'homosexual' as the devalued, deviant other, the nation has been able to define itself, from a sexual perspective as a coherent straight whole. The 'outsider' status that Stychin notes, refers to a queer status of being both inside and outside the nation state at the same time. The physical proximity of the lesbian or gay man within Canada denotes an insider status within the state. But, in terms of a national presence the lesbian or gay man was placed outside of the institutions which affirm the structure, composite and familiarity that makes one a part of Canadian national society. Lesbians and gay men were excluded from and found prejudice within the realms of family, politics, workplace environments, criminalization of the sexual aspects of relationships, immigration, and so on. The outright rejection of homosexual immigrants was a further attempt to position lesbians and gay men outside of the state.

Canada's attempt to assert a newly shaped sense of itself could not and would not allow for an incoherent deviant sexual identity to become part of its affirmed and constituted populace.³² Lesbian and gay exclusion from the state is to be viewed as a

³⁰ C.F. Stychin, *Laws Desire: Sexuality and the Limits of Justice* (London: Routledge, 1995) at 103.

³¹ In differentiating between a lesbian or gay presence and a lesbian or gay identity, I seek to highlight that homosexuality has been a constant facet of human sexuality. Its documented presence stretches back to the Greeks. A homosexual identity on the other hand, is a claiming of more than just sexuality, it has the potential to be a political statement of social significance. A lesbian or gay identity is a willingness to buck social norms of gender and sexuality and to claim a space denoting an unwillingness to be bound by heterosexist and centrist norms of political, physical and emotional existence.

³² *Infra* note 36.

symbolic gesture, which seeks to affirm heterosexual identity, conforming to a heteronormative view of the supposed composition of Canada. A historical view of immigration law will explain the position of the 'devalued other' and how his and her existence was erased and seen to be contrary to the creation of a national identity³³ and how lesbians and gay men also were deemed a threat to national security and morality.

'Loathsome diseases' and 'psychopathic queers'

The *Immigration Act* of 1906³⁴ was the first piece of immigration legislation to deny a class of individuals entry into Canada due to their sexuality and sexual habits. Paragraphs 27 and 29 of the 1906 *Immigration Act* read, '[n]o immigrant shall be permitted to land in Canada, who is afflicted with a loathsome disease.' According to Green a loathsome disease often referred to a venereal disease.³⁵ Therefore certain modes of sexual behaviour which would propagate venereal disease such as promiscuity could not be constituted as appropriate for immigration to Canada and the granting of Canadian citizenship. The second class, referred to in section 29 focused on those 'convicted of a crime involving moral turpitude, or who is a prostitute, or

³³ R. Dworkin, *Taking Rights Seriously* (Cambridge, Massachusetts: Harvard University Press, 1977) at 31 in A.C. Pratt, "Dunking the Doughnut: Discretionary Power, Law and the Administration of the Canadian Immigration Act" (1999) 8, 2 Social and Legal Studies 199 at 199, '[d]iscretion, like the hole in a doughnut does not exist except as an area left open by a surrounding belt of restriction'. If we take Dworkin's metaphor of the 'hole in the doughnut', in attempting to define that which is to be annulled or de-legitimized and apply it to the position of lesbians and gay men we can state that by denying lesbian and gay existence within Canada and the prevention of lesbian and gay immigration, lesbians and gay men are having to be defined in opposition to their heterosexual counterparts. Thus rather than saying what a lesbian or gay man is and what constitutes lesbian or gay behaviour, queer behaviour is defined against that which it is not, namely heterosexuality. Thus the hole in the doughnut like lesbian or gay sexuality is comprised of that which surrounds it, but the hole itself lacks any sense of an essential quality other than that which it is defined as not being, thus it exists on a theoretically negative plane as opposed to having a basis of positive definitive heterosexual reality.

³⁴ *Immigration Act*, R.S.C. 1906 (2nd Sess.), c.19, s. 1.

³⁵ R. Green, "Give me your tired, your poor, your huddled masses" (of heterosexuals): An Analysis of American and Canadian Immigration Policy" (1987) 16 Anglo-Am. L. Rev. 139 at 149.

who procures, or brings, or attempts to bring into Canada prostitutes or women for purposes of prostitution.' Homosexual sex in the early twentieth century would certainly have been classed as a crime of moral turpitude. The Canadian government's exclusion of these classes of individuals was to safeguard the sexual morality of the nation. Over the next twenty years steps towards a more specific reference to lesbian and gay exclusion were made using scientific rational and nomenclature. The revisions in the *Immigration Act* of 1927³⁶ excluded lesbians and gay men on the grounds that they were '[p]ersons of constitutional psychopathic inferiority,'³⁷ the wording used by the medical profession at the time.³⁸ It wasn't until the 1952 *Immigration Act*,³⁹ twenty-five years later that reference specifically to homosexuals as a class of persons was explicitly outlined in immigration legislation.

Post World War II and heading into the cold war and an era of "McCarthyism", immigration law became a tool for state circumscription of national 'morality', meaning sexuality, national 'identity', and anti communist policy so as to ensure national security. The intertwining concepts of immigration policy, sexual morality, and national security created a political climate bent on rooting out the 'subversives' in society, making lesbian and gay existence a covert operation in itself.⁴⁰

³⁶ *Immigration Act*, R.S.C. 1927 c. 93.

³⁷ *Ibid.* at s. 3(k).

³⁸ *Supra* note 35 at 150.

³⁹ *Immigration Act*, S.C. 1952 c. 42, s. 5(e) and (f).

⁴⁰ *Before Stonewall* (1984) directed by Robert Rosenberg and John Scagliotti.

The lesbian and Gay Governmental Witch Hunt

The 1950's signified an intense period of paranoia within both the USA and Canada. Anti-communist sentiment surrounding the Cold War had permeated the North American consciousness, whereby anything that was alternative or did not follow specific, traditional North American norms was seen as a possible site of subversion open to communist infiltration. Thus political dissidence in the form of pro-communist sentiments and sexual dissidence, in the form of homosexuality or sexual alterity, were seen as intimate bedfellows ripe for subverting the American nation.

World War II fundamentally altered the composition of the American family. The War had lead to an increase in female emancipation from the confines of the home and domestic sphere, thereby thrusting women into the traditionally masculine domain of industry⁴¹ which had been reluctantly abandoned by the male workforce because of conscription policies.⁴² The replacement of the male workforce by female employees was only one of the ways in which gender roles were subverted.

The liberation of women and their quest for further liberation posed a threat to the dominance of patriarchal socialization.⁴³ This female oriented homo-socialization led to an increase, as Girard notes, of a potentiality for women to socialize in 'a context not dominated by men.'⁴⁴ Such a context was a seemingly ideal period for the

⁴¹G. Kinsman, *The Regulation of Desire: Homo and Hetero Sexualities*, 2nd ed. (Montreal: Black Rose Books, 1996) at 148-149. Chapter 7 generally is an excellent source for information on lesbian and gay life in World War II.

⁴²*Ibid.*

⁴³*Ibid.* at 149, notes the Report of the United Church of Canada who expressed concern on the effect the war was having on family life. The church perceived the wartime environment as a period of the breakdown of family, community and sexual morality.

⁴⁴P. Girard, "From Subversion to Liberation: Homosexuals and the Immigration Act 1952-1977" (1987) 2 Canadian Journal of Law and Society 1 at 2.

development of a lesbian positive community, with a reduced necessity to discount attractions to those of the same-sex. In not having to conform to strict gender norms or to present one's self and sexuality so as to attract men, there may have been a greater openness to deconstruct the imposed sexual boundaries of gender.⁴⁵

The post-war period represented a return to conditions where sexuality once again had to remain within the confines of conservative societal acceptability, namely heterosexuality. With the dawn of the McCarthy era and the insurgent paranoia regarding pro-communist affiliations, any person seen to be a potential subject for communist recruitment was investigated and discharged from areas which possessed information pertaining to the administration of the time. Canada was embroiled within the US politic of the era, due to its position as a nuclear ally. The ousting of homosexuals from the US administrative machine was partly due to a lack of conformity to heterosexism. Hodges has stated a further reason for the ousting of gays: '[I]t was not...homosexuality that presented a difficulty to the mind of security, but the lack of control, the element of the unknown.'⁴⁶ Homosexuality, like communism, was seen as a secretive cult threatening the very foundations of the US political and social system. Communism affected the foundations of state security, and homosexuality threatened the fundamental tenet of family, the purported bedrock of American society. Denial of communist propaganda and presence within the US was attempted, but to deny lesbians and gay men a presence presented problems for the administration, problems that had to be dealt with through new legislative reforms.

⁴⁵ Kinsman, *supra* note 41.

⁴⁶ Hodges in Girard, *supra* note 44 at 3.

The initial investigations carried out by the US government in 1950 highlighting the prevalence of homosexuality within the state department, culminated in a report entitled *Employment of Homosexuals and Other Sex Perverts in Government*.⁴⁷ The publication of this report and the consequences that were to follow from a finding of homosexuality, were swiftly followed North of the US border. Canada devised its own internal investigations committee, which subsequently lead to changes in Canadian law surrounding homosexual entry into the country.⁴⁸

In 1952 amendments were made to the Canadian *Immigration Act* regarding homosexuals.⁴⁹ Following the increased pressure stemming from the US to tighten up security measures regarding governmental politics and defence projects, Canada made its bid toward greater national security. The 1945 defection of Canadian Igor Gouzenko, who had organised a network of espionage, feeding government information back to his Russian counterparts, was the catalyst to the implementation of new security directives. A Security Panel was created which involved officials from External Affairs, the Department of National Defence, the RCMP and the Privy Council. Under the auspices of the Security Panel, the RCMP was given *carte*

⁴⁷Subsequent to this report, the *New York Times* published an article entitled "Federal Vigilance on Perverts Asked", in Jonathan Katz "1950-55: Witch-Hunt; The United States Government versus Homosexuals", a copy of this report can be found in William Rubenstein ed., *Lesbians, Gay Men and the Law* (New York: The New York Press, 1993) 313 at 317-318. Rubenstein also notes a more recent 1987 case *Padula v Webster* 822 F.2d 97 (D.C. Cir. 1987) 319-325 in Rubenstein (1993). Margaret Padula alleged that the FBI failed to hire her because of her homosexuality. The court affirmed the FBI's stance, citing reasons such as it being morally offensive, illegal still in many of the states of the US, potential for blackmail not only for the Agent but for the partner of the agent, and that the specialized function of the bureau could be placed in jeopardy.

⁴⁸ *The Report of The Royal Commission: to investigate the facts relating to and the circumstances surrounding the communication, by public officials and other persons in positions of trust of secret and confidential information to agents of a foreign power* (Ottawa: Edmond Cloutier, 1946) The full report of the Royal Commission indicated the presence of communist infiltration into the sphere of the Canadian government.

⁴⁹ R.S.C. 1952, c.325, s. 19(2).

blanche to make inquiries in all civilian departments.⁵⁰ If a security risk was detected, the person in question was either dismissed or asked to resign with no leave to appeal the decision.

It was during this period of intense scrutiny (and statistics indicate that the number of opened investigative files assessed by the RCMP jumped from '9,000 in 1948... to 67,000 in 1951,')⁵¹ that amendments were made to the *Immigration Act*. The amendments and insertions of the 1952 *Immigration Act* were the first to acknowledge homosexuals as a group rather than identifying solely sexual behaviour proscribed by criminal law.⁵² The wording used under the prohibited class section, was,

*[n]o person shall be admitted to Canada if he is a member of any of the following classes of persons...prostitutes, homosexuals or persons living on the avails of prostitution or homosexuality or who attempt to bring into Canada or procure prostitutes or other persons for the purpose of prostitution, homosexuality or other immoral purpose.*⁵³

Creating legislation that sought to exclude lesbians and gay men was one thing, but actual enforcement of the provisions was fraught with difficulty. How were immigration officers to decide who was and was not gay without being intrusively subjective? In the absence of declarations of homosexuality by the visitor, enforcement of the admissibility rules proved tremendously difficult for officers at their allotted points of entry. A further facet and duty of the new legislation was to deport homosexuals or 'those living on the avails of homosexuality.'⁵⁴ Previous

⁵⁰ Girard, *supra* note 44 at 4.

⁵¹ *Ibid.* at 5.

⁵² D.G. Casswell, *Lesbians, Gay Men and Canadian Law* (Toronto: Emond Montgomery, 1996) at 565.

⁵³ *Immigration Act*, R.S.C. 1952, c.325, s. 5(e) and 5(f).

⁵⁴ Under the 1952 *Immigration Act* homosexuals could have been deported under 'section 19(1)(e)(ii) which was a conviction for a criminal code offence 19(1) (e)(iv) discovered to have been member of a

convictions for homosexual offences were the alternative mechanism that immigration officers could rely on for grounds of deportation. A lengthy medical assessment was required in order to deport someone who had been found in a sexually compromising situation.

Due to the medicalization of homosexuality in the 1950's, the definition of who constituted a homosexual, as opposed to someone who performed homosexual acts, was beyond the realm of an immigration officer's knowledge or mandate, and required a psychiatric evaluation. Girard has noted the inherent difficulties faced by immigration officers surrounding the deportation of lesbians and gay men. There was a Catch 22 situation created for the officers. If the immigrant in question had not had official police charges brought against him and been convicted, then proof of homosexual activity was questionable. Classification of a homosexual identity and homosexual activity were differing grounds with differing ramifications. Girard's findings indicated that the Department of National Health and Welfare saw that the homosexual acts 'while evidence of a homosexual inclination is not by itself sufficient evidence to say that a man is a homosexual. This is apparently a very difficult finding to make from a medical point of view, and...would require evidence of an extreme physical expression of this tendency.'⁵⁵

Thus, to a certain extent, homosexuals were both insulated by the medicalization of homosexuality, with the burden being placed on the medical profession to prove the possession of a psychopathic personality, and yet defined as psychopaths by the very same institution and thus exposed to deportation orders.

prohibited class at the time of entry; or 19(1)(e)(v) having become since entering Canada a member of a prohibited class'. In Girard, *supra* note 44 at 25.

⁵⁵*Supra* note 44 at 12.

Levels of detention, arrest and deportation in the 10 years preceding the implementation of the 'homosexuality' sections were negligible.⁵⁶

The decriminalisation of private consensual sex between adults of the same gender was proposed in 1967, as then Prime Minister Pierre Trudeau stated, 'the state has no place in the bedrooms of the nation.'⁵⁷ The decriminalisation of homosexual sex followed its removal from the American Psychiatric Association's list of mental disorders.⁵⁸ Canada followed suit in removing homosexuality from its list of mental disorders within a short space of time.⁵⁹ In 1969 consensual homosexual acts were no longer deemed to be criminal activities.⁶⁰ It wasn't until 1976, however, that immigration legislation changed,⁶¹ in accordance with the new liberal attitudes towards homosexuality. Under the auspices of the Joint Committee of the Senate and the House of Commons, a report was released towards the end of 1975, which recommended that certain portions of the *Immigration Act* pertaining to lesbians and gay men be removed. 'Many organisations and individuals called for the removal of any reference to homosexuals and homosexuality in section 5(e). They argued that homosexual acts between consenting adults are no longer an offence under the criminal code, and that the new immigration law should reflect the fact that Canadian

⁵⁶*Ibid.* at 13, Girard has noted that there was no specific reference to the sexual orientation of those that were deported or denied entry into Canada. He notes from 1958-1963 there were a total of 5 deportations under sections 5(e) and 5(f).

⁵⁷ R.S.C. 1968-69, c. 38, s. 7. See Kinsman, *supra* note 41 at 263.

⁵⁸ 1968 saw the first shift in medical diagnosis of homosexuality in the revised *Diagnostic and Statistical Manual of Psychiatric Disorders*. Homosexuality was no longer a sociopathic personality disturbance it was now just seen as another sexual deviation. 1973 saw the complete removal of homosexuality from the nomenclature of the American Psychiatric Association. In Ronald Bayer "Homosexuality and American Psychiatry: The Politics of Diagnosis" in William B. Rubenstein, *supra* note 47 at 68.

⁵⁹*Supra* note 35 at 155.

⁶⁰*Criminal Law Amendment Act*, S.C. 1968-69 c.38, s. 7.

⁶¹*Citizenship Act*, S.C. 1976, c.108.

attitudes towards homosexuality have changed significantly since the last *Act* was written.⁶²

During the committee's expedition around Canada, attempting to find a consensus of opinion on the statutes under fire, numerous organizations presented their own briefs and recommendations about provisions that they felt ought to be repealed. The groups presenting to the committee included women's representatives, peace activists, students, academics, disability groups, racial groups, religious organisations and an unprecedented number of lesbian and gay groups whose concerns had not been tabled in initial reports. The lesbian and gay organisations⁶³ found a receptive panel, and queer concerns were duly addressed. Subsequently the homophobic provisions were repealed in the new legislation and lesbian and gay visitors to Canada could enter without fear of deportation or denial of entry at the border.

Steps towards a more inclusive immigration policy have been slow and faltering, influenced by the politics, both national and international of the time. If we consider Canada as a nation developing a greater sense of itself, of its own identity, divorced from that of the US and the UK, then Canada's move towards a humanistic view of sexuality presents a greater step away from US mentality regarding sexual identities. Comparatively speaking, US fear of acknowledging and protecting its sexual minorities is reflected in national law. The US does not protect lesbians and gay men from discrimination on the basis of sexual orientation under rights based

⁶²Girard, *supra* note 44 at 16.

⁶³*Ibid.* at 15. Lesbian and gay organisations from all over the country presented their views, such as the Community Homophile Association of St John's, Gay Alliance Towards Equality (Toronto and Vancouver), Gay Community Centre of Saskatoon, PEI Civil Liberties Association.

legislation. Canada on the other hand has explicitly prohibited discrimination on the basis of sexual orientation under its human rights legislation and more recently – thanks to the courts – as an analogous ground to sex⁶⁴ under section 15 of the *Canadian Charter of Rights and Freedoms*.⁶⁵

How do the substantially different approaches to matters of sexuality affect the way in which we perceive Canada? If Canada has a more open view of sexuality as compared to the US, is the state seen as having an intrinsic weakness or site of potential exposure, and therefore lacking an internal (heterosexual) strength and coherence? Is Canada more willing to cross boundaries of gender by allowing for the growth and protection of sexual minorities i.e. lesbians and gay men? It may be of interest to consider lesbian and gay immigration under the family sponsorship legislation, and to assess the progress being made in this area and the impact it may have on ideas of national identity and integrity.

Lesbian and Gay Family Sponsorship under the 1976 Immigration Act⁶⁶ and beyond.

Immigration Canada stated and still states as one of its primary tenets, the foundational status of family as the ‘cornerstone of the immigration program... While family structures continue to evolve, the family remains the foundation for Canada’s social cohesion.’⁶⁷ Prior to delving into the specifics of definitions of family, the question of who could sponsor whom under the ‘family class’ must be addressed. Under the 1976 immigration legislation there were three areas of consideration that

⁶⁴ *Egan v Canada* [1995] 2 S.C.R. 513.

⁶⁵ Part I of the *Constitution Act*, 1982, being Schedule B of the *Canada Act*, 1982 (UK), c. 11.

⁶⁶ *Immigration Act*, S.C. 1976, c.52.

⁶⁷ Immigration and Citizenship Canada, *supra* note 4 at 22.

had to be affirmed, the first of these being, does the sponsor qualify for this role. Essentially, suitability for this role hinged on two factors: was the sponsor a Canadian citizen or permanent resident, which must be answered in the affirmative, and secondly the financial position of the sponsor. Could the sponsor financially support the sponsored person for a period that would not exceed 10 years? The second regulation in question involved the admissibility of the immigrant. Although there was no points system that the immigrant must fulfil within family class immigration, such as educational standards or language requirements, the immigrant must have had a clean criminal record, be medically fit and pose no threat to national security. The final proviso for entry was to assess whether the applicant was a designated member of the family class, for example a spouse or sibling etc.⁶⁸ Many of these requisites remained the same in the newly enacted *Immigration and Refugee Protection Act*, but with a major change, that being that common law partners were now able to sponsor their spouses, for a reduced period of three years.

A recent publication by Immigration Canada, *Building on a Strong Foundation for the 21st Century*⁶⁹ stated that one of its principles for reform is to support family reunification:

*Canada has a long tradition of supporting the reunification of Canadians with their close family members from abroad. Family reunification enriches the lives of those involved and strengthens Canadian communities...the characteristics of Canadian families have changed...[n]ew immigration legislation should support family reunification by responding to new social realities.*⁷⁰

⁶⁸*Supra* note 52 at 567. Casswell notes these provisions are subject to the *Immigration Regulations*, 1978, sections 2 (1) (definitions of "sponsor" and "member of the family class"), 4, 6, and 6.1.

⁶⁹ Immigration and Citizenship Canada, *supra* note 4 at 10.

⁷⁰ *Ibid.*

Until 2002, immigration legislation had failed to live up to these new social realities. Definitions of the family and spouse failed to take into account alternate family forms and newly emerging constructs of the family e.g. lesbian and gay families, and heterosexual cohabitees; such constructs have certainly been around for many years⁷¹ but only now, in an era of greater societal acceptance, have these families called for inclusion and acknowledgement before and under the law.

Prior to the enactment of the new *Immigration and Refugee Protection Act*, sponsorable family members were restricted to heterosexual married spouses, dependent sons or daughters, the sponsor's father and mother, grandmother and grandfather, nephews, nieces, fiancées and adopted children under the age of 19.⁷²

The problematic construction of family in relation to lesbians and gay men hinged on the definition of spouse. Under section 2(1) of the 1978 *Immigration Act* the definition of spouse was applicable 'with respect to any person, means the party of the opposite sex to whom that person is joined in marriage.'⁷³ The exclusive category of spouse therefore precluded sponsorship by certain Canadians. Heterosexual and lesbian or gay common law partners were unable to sponsor their partners using the same channels as heterosexual married couples.

In order for lesbians and gay men and heterosexual cohabitees to circumvent the legislation so as to be reunited with their partners, they had to apply for

⁷¹ Consider for example the relationship between James Egan and John Nesbit, who had been living together for almost 50 years and who decided to take their case, *Egan and Nesbit v Canada* [1995] 2 S.C.R. 513, to court to fight for old age pension benefits and for recognition of the validity of their relationship. For an insight into the activism of James Egan See Kinsman *supra* note 41.

⁷² Under Immigration Canada's new guidelines *supra* note 4 at 23, the age of dependent children is to be raised from 19 to 22.

⁷³ *Immigration Regulations 1978* section 2 (1) Frank N. Marrocco and Henry M. Goslett, eds., *The 2000 Annotated Immigration Act of Canada* (Ontario: Carswell Thomson Professional Publishing, 1999) at 620.

discretionary relief based on 'humanitarian and compassionate grounds'. Immigration legislation provided that if a situation exists whereby it is necessary to use humanitarian or compassionate grounds then potentially admission may be granted to any person. The Minister for Immigration, and the officers acting beneath him or her undertakes such decisions regarding admittance. Decisions within the humanitarian and compassionate grounds were and still are discretionary. Many lesbian and gay immigration organisations viewed and still view the discretionary nature of the humanitarian and compassionate ground within immigration law as problematic.⁷⁴ Discretionary decision-making is often highly subjective, regardless of guidelines that explicitly prohibit the fettering of discretion by bias. The fettering of discretion is a point that was addressed by Immigration Canada in its proposals for the future on how to modernize immigration in the 21st century. Immigration officers, just like the rest of society, include persons who are prone to homophobia, a homophobia that may very well transfer to the decisions they are making.⁷⁵

In June 1994 a Canadian Government telex was sent to embassies worldwide. Telex ORD0150 sought to give direction to the process of administering same-sex requests for family immigration.⁷⁶ The Telex followed increased media, public, court and interest group concern for the position of lesbian and gay family sponsorship.⁷⁷

⁷⁴ See for example submissions of EGALE, *supra* note 6.

⁷⁵ Consider the case of *Shah v Minister of Employment and Immigration* (1994) 170 NR 238, at 240 (FCA).

⁷⁶ Canadian Government Telex ORD0150, June 3rd 1994, Hull, Department of Immigration "Processing Same-sex and Common law Cases" in LEGIT-Vancouver for Status of Women Canada, *Beyond Borders: The Journey Towards Equal Immigration Rights for Lesbian and Gay Canadians* (Vancouver: The Lesbian and Gay Immigration Task Force, May 1998) (Appendices 13).

⁷⁷ The case of Christine Morrisey and Bridget Coll had attracted widespread media attention, which in part may have facilitated the granting of citizenship to the non-Canadian partner. See Vicki Hall "Gays Get Immigration Facts" *The Leader Post* (January 12th, 1998) A4; and Paula Simons "Gays, Lesbians Seek Right to be Legal Sponsors" *The Edmonton Journal* (January 19th, 1998) B3.

The Telex suggested options available to Canadian immigration officers around the world to deal with same-sex immigration issues. The immigration Missions were asked to consider each application on its individual merits using specific guidelines to assess the potential for the lesbian or gay partner to immigrate. The guidelines suggested that if an applicant had applied through the family class channel, that his or her application should be processed under the independent immigrant process, and that this transfer to a different class ought not to result in the denial of an application. If the applicant conformed to the requisites of the points system and thus qualified then status could be granted, but alternatively if the applicant did not have sufficient points, but in the deciding officer's opinion had the potential to successfully establish him or herself in Canada, then the officer could grant status. For some applicants the above requisites would not be workable, and it was in these cases that the 'humanitarian and compassionate ground's may be most applicable. To utilise the 'humanitarian and compassionate ground's,' there had to be the existence of 'a stable relationship with a Canadian citizen or permanent resident. Missions should recognise that undue hardship would often result from separating or continuing the separation of a bona fide same-sex or common-law couple.' The *bona fides* of the relationship included the duration and stability of the relationship, so as to ensure that the relationship was not entered into purely for the purpose of gaining admission to Canada.⁷⁸

One of the most important factors in an attempt to gain permanent resident status in Canada was obtaining the sympathy of an immigration officer. Although officers were not to fetter their discretion there were obviously certain officers who were bound to be more gay or lesbian friendly. One could legally challenge an

⁷⁸ Telex ORD0150, supra note 76 at 14.

officer's decision if it was felt that the decision was influenced by a prejudicial attitude that interfered with the exercise of his/her discretion.⁷⁹ The problem that arose when challenging the decision of an immigration officer is that courts were and are reluctant to interfere with the exercise of discretionary powers; it has been said that 'the applicant must show that the decision maker erred in law, proceeded on some wrong or improper principle or acted in bad faith.'⁸⁰

A new era of lesbian and gay immigration.

The family related provisions of immigration legislation recently changed. Proposals were tabled in 1998; the four main areas for reform were stated as:

- Keeping the core family together;
- Better protecting the child in international adoptions;
- Providing fair treatment to common-law and same-sex couples; and
- Increasing the integrity of sponsorship undertakings.⁸¹

Of particular interest is the fair treatment of common law and same-sex couples. Immigration Canada acknowledged that the former definition of spouse, with its reliance on the traditional legal definition of marriage as that of a union of members of the opposite sex is exclusionary and potentially a violation of s.15 of the *Canadian Charter of Rights and Freedoms*.⁸² Furthermore the discretionary nature of the

⁷⁹ *So v Canada (Minister of Employment and Immigration)* (1995), 28 Immigration Law Reports (2d) 153 (FCTD).

⁸⁰ *Shah v Minister of Employment and Immigration* (1994) 170 NR 238, at 240 (FCA) in Casswell *supra* note 51 at 572. For more on discretionary power within an immigration context see Satvinder Juss, *Discretion and Deviation in the Administration of Immigration Control* (London: Sweet and Maxwell, 1997).

⁸¹ Immigration and Citizenship Canada, *supra* note 4 at 25.

⁸² *Ibid.* at 2 'The *Canadian Charter of Rights and Freedoms* has strengthened Canada's democratic character by enshrining in the constitution our fundamental freedoms. Democratic, mobility legal and

decision-making was accused of 'lacking transparency and... led to complaints of inconsistent treatment...thus fairness, transparency and responsiveness to new social realities are key considerations for the government.'⁸³

The new legislation regarding lesbians and gay men embodied in the now enacted *Immigration and Refugee Protection Act*, formerly Bill C-11, has reformulated the composition of the 'family class' by including heterosexual and homosexual common law relationships. What we must consider with regards to this granting of a level of formal equality within immigration law is how this inclusion affects lesbians and gay men.

The new immigration legislation has made numerous changes to the 'family class'. EGALE has outlined some of the changes most relevant to lesbians and gay men. Section 12(1) of the *Immigration and Refugee Protection Act* now 'provides that a common-law partner may now qualify as a member of the family class.'⁸⁴ EGALE further notes that no definition of common law partner along gendered lines is provided in the *Act* therefore not making it very clear for immigrating queer couples as to whether they are included under this definition.⁸⁵

Under regulation 1(1) 'common law partners' are defined along grounds of cohabitation and conjugality, whereby the partners must have cohabited for at least 1 year. Regulation 1(2) provides an exemption from the cohabitation requirement 'due

equality rights have been spelled out in the Constitution. By fundamentally redefining the relationship between the individual and the state, the Charter has affected decision making in the immigration arena in a way not contemplated by the current Act.' It may be of interest to note that a same-sex family immigration case has never had the opportunity to reach the Supreme Court of Canada. Immigration Canada has always settled the issue out of court by granting residency to the complainant, thus avoiding having to make any type of argument to justify the legislation in question, thus causing the complaint to become a moot point.

⁸³Immigration and Citizenship Canada, *supra* note 4 at 25.

⁸⁴EGALE, *supra* note 6.

⁸⁵*Ibid.*

to persecution or any form of penal control.’⁸⁶ EGALE has voiced their concerns over the cohabitation requirements. They note that in an immigration context, ‘couples of different nationalities often can’t cohabit-precisely because immigration regulations do not yet permit them to live together in the same country.’ Therefore due to the cohabitation requirements, lesbians and gay men who are unable to cohabit may have the *bona fides* of their relationship called in to question. The exempting codicils of the cohabitation requirements that acknowledge the potential for lesbian and gay discrimination in the form of ‘persecution’ and ‘penal control’ is according to EGALE overly narrow in scope. EGALE notes ‘[the] exemption...would only cover applicants who would in any event qualify as refugees. In practice, couples in *bona fide* relationships may not cohabit for a wide variety of reasons, including discrimination, cultural, social, financial, immigration and other factors.’⁸⁷ The humanitarian and compassionate grounds under regulation 109(2) are still available to fiancé(e)’s or intended common law partners ‘provided they demonstrate within 15 months that they meet the definition of common law partner (i.e. cohabitation).’⁸⁸ The problematic elements related to humanitarian and compassionate grounds are found in its continued arbitrary and discretionary nature with no right to appeal, therefore subjecting lesbians and gay men potentially to continued prejudice.⁸⁹

The government of Canada has chosen to endorse a new sexual composition of that which we define as family, and from a formal equality perspective this is a progressive move on the part of the Canadian state. How does this continued drawing

⁸⁶SOR/2002-227 *Immigration and Refugee Protection Regulations* C. Gaz. 2002.II.Extra.18-19.

⁸⁷*Ibid.*

⁸⁸*Supra* note 6.

⁸⁹*Ibid.*

in of lesbians and gay men into the definition of family aid lesbian and gay attempts to deconstruct essentialised notions surrounding the family? As lesbians and gay men, we were and are in a position to highlight that the conventional family form is a socially constructed unit premised historically on a basis of female subordination. Lesbian and gay inclusion in a societal structure premised on such a basis endorses this structure as a valid, incontrovertible form. By widening the heteronormative boundaries of liberalism are certain groups of lesbians and gay men, who do not wish to be included within this structure, pushed further to the periphery of society? How are their alternate family forms viewed under the liberal legal microscope. In our quest for formal equality, lesbians and gay men must take care not to perpetuate the oppressive norms of heteronormalisation. We must ensure that the formal equality we are granted is a deconstructed, contextualised and realistic equality, which embraces versions of family outside of the norm. Chapter II will continue this discussion in more depth highlighting the potential difficulties associated with the new immigration legislation provisions on family sponsorship from a lesbian and gay family ideology perspective.

Chapter II: A queer family ideology

Introduction

The nexus of lesbians and gay men to the legally sanctified heterosexual family is increasing.¹ The legally sanctified lesbian and gay family within the new immigration legislation and the *Modernization of Benefits and Obligations Act* has been granted status in both the national and international realm. Lesbian and gay identity – at least in its familial form - therefore has been endorsed as an intrinsic component of Canadian society. How then does a lesbian and gay presence within the family impact upon Canadian familial identity and regulate family relations?

Lesbian and gay inclusion within the conventional construction of family has sparked much debate. This debate has covered a spectrum of opinion on the impact that familial inclusion /encroachment² might have on lesbian and gay existence both within and without the family. The discourse surrounding the topic of family and lesbians and gay men, has ranged from a whole-hearted acceptance of the validity of fighting for inclusion within the family, to those that see the conventional family as

¹Consider for example *The Modernization of Benefits and Obligations Act* R.S.C. 2000, (2nd Sess.), c.12 [hereinafter *Modernization of Benefits Act*] which has made the legal status of common law partners equivalent but separate from the status of spouse. Common-law partners are now deemed to include both straight and lesbian/gay couples. For a comprehensive review of the current standing of lesbians and gay men and the recognition of their relationships see K.A. Lahey, *The Impact of Relationship Recognition on Lesbian Women in Canada: Still Separate and Only Somewhat "Equivalent"* (Ottawa: Status of Women Canada, 2001). Alternatively one could consider the joint efforts of I. Demczuk, M. Caron, R. Rose and L. Bouchard, *Recognition of Lesbian Couples: An Inalienable Right* (Ottawa: Status of Women Canada, 2002). The Demczuk *et al.* report contains information on the progress and impact of lesbian and gay legal inclusion within the family. Within the report there is also discussion of marriage rights on both a Canadian and international level.

²In using the term 'encroachment' I refer to an ideology of lesbian and gay life that seeks not to be regulated, endorsed or denounced by the state. Essentially it is perhaps to live somewhere beyond the legal and political confines that regulate family life.

a site of oppression for women.³ Aligned with this sentiment of gender subordination is the opinion that assimilation into the family is a fundamentally regressive approach towards attempts to reformulate relationships.⁴

In commencing this chapter, I consider how lesbian and gay families currently exist in their 'within' and 'without' the state position.⁵ I ask whether by entering into the institution of family, lesbians and gay men bolster patriarchal norms that have oppressed and continue to oppress those lacking social dominance? Do we reinforce traditional heterosexist and patriarchal values? Are lesbians and gay men choosing to be assimilated into the heterosexual mainstream or is heterosexual society enforcing norms on our relationships? Are these norms we have been socially brainwashed to believe are the only valid relationship templates?

With the enactment of the *Modernization of Benefits Act* the rights and obligations⁶ that arise from the inclusion of lesbians and gay men within the common law category of relationship further expand and enforce the hierarchisation and heteronormalization of relationships. Lesbians and gay men have been endowed with the same benefits and obligations that were previously only available to married spouses and heterosexual common law couples. As lesbians and gay men, we are now in a social position, from a benefits and obligation perspective, of

³D. Herman, "Are We Family?: Lesbian Rights and Women's Liberation" (1990) 28, 4, Osgoode Hall L.J. 789, see also C. Saalfeld, "Lesbian Marriage...[K]not" in A. Stein, ed., *Sisters, Sexperts, Queers: Beyond the Lesbian Nation* (New York: Plume, 1993) 187.

⁴See for example R. Robson, *Lesbian (out)law: Survival under the Rule of Law* (Ithaca, New York: Firebrand Books, 1992).

⁵The within/without the state reference refers to the position of lesbian and gay acknowledgement and codification within the legal and political system.

⁶*Supra* note 1. The *Act*, and the statutes which are affected can be accessed online: Government of Canada

<http://www.parl.gc.ca/common/Bills_House_Government.asp?Language=E&Parl=36&Ses=2#C-23>

being equal to heterosexuals. But, the fight for the expansion of the definition of spouse was about more than garnering social and governmental benefits. For some lesbians and gay men it was and still is about acquiring a relationship status, which is afforded equal respect and dignity when compared to heterosexual relationships.

The granting of common law status to some lesbian and gay couples is a step towards a more definitive sense of personhood within Canadian society. The granting of such a status may make some lesbian and gay couples feel that Canadian society is embracing lesbian and gay relationships in a formal sense, and that they become a part of the "Canadian family." For other queers this inclusion in the family is a perpetuation of the trope of gender socialization, which endorses the rigid boundaries of sex specific identity.

Recent advances in the field of lesbian and gay rights claims have focused on expanding definitional terms such as 'spouse' in order to gain partner based benefits such as insurance,⁷ tax related pension breaks,⁸ and access to spousal support.⁹ These cases have had far reaching consequences, redefining what it means to be in a lesbian or gay relationship and having the status of common law thrust upon one. How do we balance the formal equality of rights based litigation that draws us into the Canadian national matrix, alongside our queer goals of de-essentialising constructs such as the conventional family?

⁷For example see *Kane v Ontario & Axa Insurance*, [1997] 152 D.L.R. 4th 738, and *Vogel v Manitoba* [1995] 126 D.L.R. (4th) 72 (Man C.A.).

⁸*Rosenberg v Canada (Attorney General)* [1998] 158 D.L.R. (4th) 664. For an interesting analysis of the impact of lesbian and gay inclusion within the taxation system see C.F.L. Young, "Aging and Retirement Are Not Unique To Heterosexuals' *Rosenberg v Canada*" in C.F. Stychin and D. Herman, eds., *Sexuality in the Legal Arena* (London: The Athlone Press, 2000) 151.

⁹*M v H* [1999] 2 SCR 3.

For the creation of egalitarian families we need to look beyond gender towards an ideology that family is who we regard as family, irrespective of the gendered composition or the structure that it takes, so long as it is a viable unit. Deconstruction of the strict boundaries of masculinity and femininity must be accomplished and these must be shown to be social constructs rather than intrinsic identities. In deconstructing gender we deconstruct our relationships so that sexual identification is an insignificant factor with regards to our emotional and sexual lives. When we have reached a point where we can walk down the street with a same-sex partner, without even thinking about the fact that we may be verbally or physically abused, then we will know that society's attitude has changed. Perhaps it will be at this point that personal fulfilment, or rather, societal approval of our personal fulfilment will have been attained.

If we view immigration law as the macro-level instrument through which we shape society, then we can estimate its overarching impact upon the formation of families that are to immigrate and define themselves against a Canadian derived standard. These families are the microscopic formations and embodiments of legislation that defines their purpose and composite, and as such are formal representations of the Canadian national composite. If here has been officially defined to be queer, then the queer is officially an intrinsic part of the here that is Canadian.

How have Lesbian and gay families conceived their existence?

The fluidity associated with matters of sexuality¹⁰ can be transposed directly into the sphere of the family. As critiques of the 'institution' of heterosexuality have become more prevalent, so have critiques of the institution of family, a primary site of heterosexual activity and heterosexual identity formation. The erosion of the dualisms of hetero/homo, and the integration of queer positive understandings of sexuality imported within the family are shifting the parameters of sexual existence.¹¹ This shift is not all-encompassing and radical, but neither is it unimportant or negligible with regards to its impact on traditional family forms. Collier has noted,

*[t]he very idea of the heterosexual 'familial' social subject, no less than the concept of heterosexuality itself, has been discursively produced by relations of power, constituted by the productive work, not of one discourse, but rather a plenitude of discourses.*¹²

The discursive production of heterosexuality has been formulated within a matrix of dominant cores of power. The dominance of the heterosexual family as a site benefiting from its position of social recognition, and thus social assistance, is a testament to its esteem within the ranks of the dominant core. The family has garnered rewards from all arenas within society. Hundreds of pieces of legislation

¹⁰ By the fluidity of sexuality, I refer to an anti-essentialist discourse that bucks the presumption of intrinsic sexualities. Anti-essentialist understandings of sexuality deconstruct the boundaries of normative sexuality and with that the boundaries of normative understandings of gender. See for example M. Foucault, *The History of Sexuality*, 1st ed. trans. R. Hurley (New York: Pantheon Books, 1978).

¹¹ For more on the pluralistic nature of sexuality consider F. Mort, "Essentialism Revisited? Identity Politics and Late Twentieth Century Discourses of Homosexuality" in J. Weeks, ed., *The Lesser Evil and the Greater Good: The Theory and Politics of Social Diversity*. (London: Rivers Oram Press, 1994) at 201.

¹² R. Collier, "Straight Families, Queer Lives? Heterosexualizing Family Law" in C. Stychin and D. Herman, eds., *Sexuality in the Legal Arena* (London: The Athlone Press, 2000) 164 at 164.

delineate the form family may take, the benefits it may gain and the responsibility it bears towards Canadian society. The plenitude of discourses that have constructed the heterosexual family have traversed many disciplines, including law, politics, psychology and sociology. The family has been constructed as a haven separate from the workplace, with its own values and structure intact, so as to provide nurture and care away from the very public agenda of the market place.¹³

The discourse disseminated as 'truth' as to what the heterosexual family is, has been engrained in all forms of existence. That which has been formed is a version of the structure of family that fits an appropriate model of what is perceived to be necessitated by family; this in turn has become the 'truth' of the family.¹⁴ The discursive production of the traditional 'family', whilst maintaining dominance in a definitional sense, has both precluded and encouraged the formation of families that do not conform to the norms of 'truth'. In terms of formal recognition, the traditional family has pushed alternate family forms into a corner, denying their existence and labelling them as the deviant definitional 'other'. By labelling alternate families as 'other', the traditional family has bolstered its own strength and yet at the same time exposed its intrinsic weakness. The fissures within traditional conceptions of family arise when families that are formulated against a different model can be successful within this state of alterity.

¹³For more on this see M. Fineman, "Cracking The Foundational Myths: Independence, Autonomy and Self-Sufficiency" (2000) 8, 1 American University Journal of Gender, Social Policy and the Law 13.

¹⁴As Jody Freeman has noted there is no one specific cite to the legal definition of what is family. See Freeman's article, "Defining Family in *Mossop v DSS*: The Challenge of Anti-essentialism and Interactive Discrimination For Human Rights Litigation" (1994) 44 U.T.L.J. 41 at 44. Freeman notes McDaniel's assessment of the definition of family who states 'Considerable flexibility is necessary in defining the family in Canada today, since it takes many forms and varies across ethnic

Michel Foucault states that 'since power marginalizes, silences and excludes, the marginalized, silenced and excluded are always present.'¹⁵ The family can be seen as a social construct in a constant state of change, influenced by the very forces it wishes to exclude. By attempting to construct a unified whole, the family, and endorsing a specific hetero 'sexuality' within this, one must define the excluded other against which one may rail, the homosexual. The denial of family status to lesbians and gay men is a trio of marginalization, silencing, and exclusion. Legal and social rejection of lesbian and gay families through legislation and case law sought to annul the fact that 'family' can take on numerous forms.¹⁶ Lesbians and gay men chose to create their own types of family, some traditional, some alternative. Regardless of which form these families took, the outsider status that such formations held at the same time challenged hegemonic understandings of familial ideology, deconstructing definitions of 'truth' by revealing the lesbian and gay families in the closet.

The existence of lesbian and gay families defies a societally imposed norm of gendered expectation and explodes the construction of the lesbian and gay man as

groups... In many parts of the world, India, for example the individual's emotional needs may be met through ... a more extended family group than generally exists in Canada' at 57.

¹⁵M. Foucault in A. Hunt and G. Wickham, *Foucault and The Law* (London: Pluto, 1994) 17.

¹⁶For example consider the reasoning in *Vogel v Manitoba* [1995] 126 D.L.R. (4th) 72 at 73 (Man C.A.), where it was alleged there was discrimination on the grounds of sex, marital status, family status and sexual orientation. The couple were denied benefits that had been made available to legal and common law spouses in heterosexual relationships. The benefits negotiated by the Government of Manitoba and an employee's association were regulated by government statutes and provided for health care, dental and pension benefits. The Human rights adjudicator dismissed the complaints of *Vogel* as did the court of Queen's Bench in its judicial review stating "[there] is no discrimination because sex refers to gender not sexual orientation, marital status refers to being married or living common law in a heterosexual relationship and family status does not refer to a homosexual partnership...no discrimination on the basis of sexual orientation because a common law relationship must be between partners of the opposite sex".

hypersexual¹⁷ beings with an inability to form monogamous 'familial' relationships. Time and again we have read judicial decisions based on solid reasoning, utilizing the research of social and legal academic papers.¹⁸ Such decisions have stated that lesbians and gay men can and do form long-term, stable, committed relationships of interdependence.¹⁹ Yet Riddiough has noted that

*[b]ecause the existence and specific sexual behaviour of lesbians and gay men contradicts these lessons of the nuclear family [hierarchical relations between men and women, repression of sexuality, encouragement of procreation] society is keenly interested in keeping gay people invisible and using homophobia to marginalize those who manage to become visible.*²⁰

The category of common law spouse, which increasingly includes some lesbian and gay relationships, compared to married spouses which is strictly opposite sex in composition, is another attempt to retain the rigid boundaries of heterosexism, thereby perpetuating a gender hierarchised format of relationships. In an immigration context the difference between the status of 'common law partners' which is lesbian and gay inclusive, and 'married spouses' which is only heterosexual becomes very important. Heterosexual common law couples have the

¹⁷Hypersexuality is a term I denote to mean that one exists beyond the bounds of ordinary sexuality, in that one is defined and acts in a manner of increased sexual activity, and exists merely to encounter and propagate such sexual activity.

¹⁸See the bibliographies of the judgments for cases such as *M v H*, *supra* note 9, at 22. Both Cory J. and Iacobucci J. cite a wealth of literature that may have aided and informed the outcome of their decision.

¹⁹For example see the majority judgment in *M v H*, the minority judgment in *Egan v Canada* [1995] 2 S.C.R. 513; 124 D.L.R. (4th) 693, or the judgment *per* Coe J. in *Kane v Ontario and Axa Insurance*, *supra* note 7. Coe J. utilises the standard core components of a relationship as highlighted in *Molodowich v Penttinen* (1980) 17 R.F.L. (2d) 376 at 381-382 'The legislative scheme manifestly declares that opposite sex couples are entitled to rights and advantages to which same-sex couples are not and thus inferentially makes the point that certain clearly defined relationships should be entitled to, and certain clearly defined relationships should not be entitled to, recognition and respect. The declaration simply carries forward and nurtures now abandoned stereotypical concepts that have no place in the fabric of our community.'

²⁰C. Riddiough in M.P. Jacobs, "Do Gay Men Have a Stake in Male Privilege? The Political Economy of Gay Men's Contradictory Relationship to feminism" in A. Gluckman and B. Reed, eds.,

option of being able to marry, and therefore can circumvent the prerequisite one year cohabitation requirement as outlined in the legislation.²¹ Lesbians and gay men are not afforded the marriage option and possess no automatic right of entry as a common law partner in a *bona fide* relationship. The cohabitation rule places an inordinate amount of pressure on lesbian and gay relationships and those straight couples that choose not to marry for their own reasons. The cohabitation requirement is another hurdle over which non-marital relationships must clamber. The delineation between 'spouse' and 'common law partner' when imbued in immigration legislation represents an international indication that Canadian society wishes to retain a heteronormative sense of superiority and that lesbians and gay men, although formally included within legislation, are still outside of Canadian social norms.²²

This heterosexist, hierarchised familial format of 'spouse' and the 'conventional marital unit' has been impenetrable thus far by those who seek to change it.²³ Lesbians and gay men have shown that they can conform to the norms of heterosexual relationships just as well as anyone else and are willing to take on the rights and responsibilities of that position. But, what lesbians and gay men have also highlighted is that there is no special feat in being able to follow a heterosexual template of relationship. Gender within a relationship does not constitute the success of a union; and despite all the preening and posing that marriage and the

Homo Economics Capitalism, Community and Lesbian and Gay Life (London: Routledge, 1997) 165 at 168

²¹ SOR/2002-227 *Immigration and Refugee Protection Regulations* C. Gaz. 2002.II Extra.18.

²² It is important to note that legally and socially lesbian and gay men, formally are losing the outsider status. Consider for example the recent pronouncement on the Ontario marriage case. The case highlights the impermissibility of denying lesbians and gay men marital rights.

family does, and the traditional ideologies which have formalised its ontological boundaries,²⁴ it is a form that can be easily absorbed, by those lesbians and gay men currently outside of it, regardless of whether one wishes to or not. More importantly lesbians and gay men have shown that they do not need state sanctified approval in order to form their relationships in both traditional and alternate fashions.

Fernbach has written that 'gay people cannot contribute to this struggle [undermining of familial roles] because they exist outside of the family and so cannot participate in the struggle against familial structure.'²⁵ If lesbians and gay men are unable to struggle from within the family in its marital form, then perhaps we can set the standard without. The furore surrounding the lesbian and gay family is somewhat akin to the debate on genetically modified/engineered foods. The queer family has all the basic attributes of the straight family, potentially we can do all the things straights do, and like GE food we look the same on the outside. The problem lies in the fact that no one knows what is going to happen 10 years down the line. Will GE foods suddenly take over the world? Will lesbian and gay sexuality penetrate its way into every home? Will lesbians and gay men destroy the traditional heterosexual family? For the conservative caucus we are the 'Frankenstein' family, created and given life and a voice by those left wing liberals, who are now unsure as to just how far they ought to take us. Do they embrace us

²³*Halpern et al v Canada (Attorney General)* Ontario Superior Court [2002] O.J. No.2714 (Ontario Divisional Court), online: QL (OJ).

²⁴K. O' Donovan, "Marriage: A Sacred or Profane Love Machine" (1993) 1: 1 Feminist Legal Studies 82. In the US the enactment of the *Defence of Marriage Act* 1 U.S.C. para. 1.[hereinafter DOMA] ensured the opposite sex formation of marriage was maintained.

²⁵D. Fernbach in Jacobs *supra* note 20 at 167.

into the familial bosom, or hope we go away and assimilate into straight society and ask for nothing more than the heterosexuals?²⁶

Lesbian and gay families have the potential to be so much more, to create so much more. In our emergent status we have the ability to define our families; and in defining our own families we challenge hegemonic conceptions and conservative ideologies. The future of our families can never be based on straight norms, we do not have that option, but what we do have is new ways of living, new ways for change.

Inherent Differences Within The Lesbian and Gay Family

The correlation between the exploitation of women and their relationship to the family is of major concern to many feminists. The predominant theme of female subordination lies in the ideology of the family. Women, overwhelmingly, are subjected to dominant relations of power based on traditional ideological notions of gender behaviour; sexual submissiveness, economic dependence,²⁷ and confinement to the private sphere of the home. The prevalence of such 'properties' is one of the primary reasons why there is opposition to the fight for lesbian and gay inclusion within the conventional institution of family.²⁸

²⁶For an interesting analysis of the conflation of lesbians and gay men and challenges to the rigidity of the human body in a technical, cyborgian sense see J. Halberstam and I. Livingston, eds., *Posthuman Bodies* (Bloomington and Indianapolis: Indiana University Press, 1995) 1.

²⁷ See Lahey, *supra* note 1.

²⁸If one considers the new "Immigration Regulations", *supra* note 21, traditional notions of dependence, have been instilled as one of the codicils to guarantee relationships and to remove economic dependence from the state. at s. 1 (a) (b), sections 119 and 120 (a) and (b) outline the approved sponsorship applications, section 126 outlines the consequences of the withdrawal of sponsorship. section 130 outlines the sponsor's responsibilities to the immigrant.

Didi Herman has noted the arguments presented by feminist theorists²⁹ in rejecting lesbian and gay inclusion within the institution of family.

These theorists contend that hegemonic familial ideology is a primary contributor to the oppression and exploitation of women...[T]here is little point in constructing oppositional familial ideologies because the family form is itself inextricably tied to class and gender relations of power.

Herman continues by highlighting the fact that lesbian and gay relationships therefore can never be family because they are not premised on a basis that 'necessitates the productive, reproductive and sexual exploitation of women by men.'³⁰

The very concept and composite of the lesbian and gay family does not have the capacity to generate power differentials based on gendered notions of difference.³¹ The lesbian and gay family defies traditionalist conceptions and fails to live within the preconceived parameters of the normalized heterosexual family. Stychin has described lesbian and gay identity as being 'self-consciously contingent and in process, characterized by reinvention and ongoing questioning of borders and membership.'³² Lesbians and gay men have been forced to reinvent themselves, have been forced to create some sort of identity outside of the heterosexist and centrist presumptions that have dogged queer existence. The self-conscious contingency that Stychin notes is an essential facet of emerging identities. In

²⁹Herman notes the theories of Carol Smart, Shelley A.M. Gavigan and M. Barrett and M. McIntosh *supra* note 3 at 796.

³⁰*Ibid.* at 797.

³¹However the sameness of gender does not preclude power differentials based on other differences within the relationship such as, class, income, race etc.

³²C.F.Stychin, *A Nation by Rights* (Philadelphia: Temple University Press, 1998) at 113. Stychin in this particular instance is referring to lesbian and gay identity within the nation state, but one can push the descriptors so as to construct lesbian and gay identity within the family as being akin to a form of entry into a specified and historically contingent arena.

forming and acknowledging a lesbian or gay identity one is taking on an identity with no predefined social space. The occurrence of homosexual acts has been around since the dawn of man³³ but the fusion of such acts with what could be termed a lifestyle choice or identity, which has political and social ramifications, is a relatively new phenomenon. Thus the queer subject is a self-reliant being, whose identity does not stem from the populist/majoritarian societal signifiers, but from an inner concept of identity or a limited identity within the lesbian and gay community. Stychin's reference to the '...reinvention and...questioning of borders and membership' is a liberationist deconstruction of the norms of family. Formally lesbians and gay men and their families were not acknowledged within these national norms; nevertheless lesbian and gay families affirmed and defined their own existence. By signifying that their composites were indeed families and that the borders erected by officialdom, were not a barrier to membership within these self defined familial units, lesbians and gay men re/invented their familial existence.

Individual lesbians and gay men have always held membership within the family, (both opposite-sex and same-sex versions of family), and within the nation; the only facet missing was the self-identification as a lesbian or gay man. Queers, like a wolf in sheep's clothing, were within the family in an indistinguishable guise. The impenetrable, purist family unit has always had and has always produced that which it tried to keep separate, the queer. The importing of lesbian and gay families within the confines of immigration law is a fusion of lesbian and gay sexual

³³ One can take as an example the Greek stories of the older male teacher and young student involved in a homosexual relationship. Also one can consult the works of possibly the first published lesbian author Sappho. See J. McIntosh Snyder *Lesbian Desire in the Lyrics of Sappho* (New York: Columbia University Press, 1997).

identity, a deconstruction of the hetero-normative composition of family, and a questioning of the composition of national sexual identity. If national identity is comprised of a host of differing identities, and this identity is deconstructed along lines of family, then the defining components of Canadian society's family is a diverse melange, rendering conventional families as an example of familial types. If we focus on a deconstructed vision of the family and its members, then we deconstruct ideologies of the gender specificity of the family, sexual composition is rendered a nullity, thereby allowing for the development of national, familial and sexual identities unimpeded by hegemonic identity norms.

One reason for denying lesbians and gay men entrance into the family is the enforcement and encouragement of gender roles. The family has been classified as one of the major sites for learned gender behaviour. Such an environment is highly socially circumscribed and infused with a gender hierarchisation. Within the family, sexual roles are assigned and made to function as natural givens. In having the family function this way, perpetuating a dominant trope of heterosexual existence in the 'safe' framework of family, one is normalised by such behaviour and makes heteronormative accounts of gender appear as a societal 'truth'. Judith Butler has written

*[t]he idea that sexual practice has the power to destabilize gender ...and to...establish that normative sexuality, fortifies normative gender...one is a woman according to this framework, to the extent that one functions as one within the dominant heterosexual frame and to call the frame into question is perhaps to lose something of one's sense of place in gender.*³⁴

³⁴ J. Butler *Gender Trouble: Feminism and the Subversion of Identity*, 2nd ed, (Great Britain: Routledge, 1999) XI.

To lose one's sense of place in gender is to be able to move through sexual boundaries, to be unencumbered by the societal norms of conformity; one chooses not to adhere to the socially ascribed sexual roles. In losing one's sense of place in gender, one may deconstruct the boundaries of gendered behaviour. Introducing this behaviour within the family may allow the lesbian or gay man to become a full member of the family rather than a scripted player within a heterosexual matrix of familial performance. Furthermore, the raising of children within a sexually liberated atmosphere has the potential to foster children with a greater willingness to embrace the fluidity and alterity of sexuality with less painful emotional confrontation and with a greater acceptance of the de-gendered roles which men and women can accept. Paula Ettelbrick has summed up the potential that lesbians and gay men possess with regards to progressive familial formations and identity politics. She states:

[b]eing queer is more than setting up house, sleeping with a person of the same gender, and seeking state approval for doing so. It is an identity, a culture with many variations...Being queer means pushing the parameters of sex and sexuality, and the family, and in the same process transforming the very fabric of society.³⁵

Thus when legislation is tabled which includes lesbians and gay men within its ambit we must approach such legislation cautiously, and comprehend what kind of impact it will have on lesbian and gay existence and whether there is the potential for the 'transformation of society'. The gender composition of the immigrating lesbian and gay family may have been expanded, but the codicils that go along with that status may endorse a hetero-normative construct of family.

Affirmation of traditional values: Are we buying in or selling out?

The prevalence of heterosexual images bombards us on both a conscious and sub-conscious level. The heterosexual family is affirmed as being the site of appropriate emotional and sexual activity. Society validates the institution of family through the granting of benefits and responsibilities and awarding a social status to the creation of family units. The traditional signifiers associated with the family such as dependence, monogamy, parenthood and property relations are also intrinsic values related to heterosexuality.³⁶ We have been programmed to believe that the heterosexual family and the marital union that is a part of it are natural givens, and that to live outside of this institution is to be socially defiant or potentially deviant. Richard Collier has spliced together the theories of Judith Butler and Adrienne Rich, stating that we are having our identities shaped by 'an overarching 'matrix' of 'compulsory heterosexuality''³⁷ which itself is suffering from an insecurity of definition.

The lesbian and gay fight for inclusion within the family is an interesting battle to gain access to an institution that has attempted to annul our existence. This institution has many flaws and is based on many forms of oppression, for example gender, sexuality, class, and alternative family status. Nevertheless the family remains symbolically important to some individuals as an institution that may help to eradicate the negative stereotypes that surround lesbians and gay men.³⁸

³⁵P. Ettelbrick in R. Robson and S.E. Valentine, "Lov(h)ers: Lesbians as Intimate Partners and Lesbian Legal Theory" (1990) 63 Temple Law Review 511 at 540.

³⁶Saalfeld, *supra* note 3 at 191.

³⁷Collier, *supra* note 12 at 168.

³⁸Those stereotypes include promiscuity, disease spreading, lonely, confused, deviant, freakish and anti-family paedophiles.

The question is, then, whether lesbians and gay men are reinforcing traditional heterosexual family values by fighting for lesbian and gay spousal rights? In gaining family status, do lesbians and gay men lose their identity as sexual subversives in aligning themselves with the heterosexual majority?³⁹

Kaplan has noted that 'shifting ground from sexual freedom to the recognition of lesbian and gay partnerships and families asserts a commonality with the professed aspirations of the heterosexual majority and undercuts the construction of queers as sexual subversives.'⁴⁰ We have constructed the aspirations of the heterosexual majority as being partly fuelled by patriarchal notions of female subordination. The inclusion of lesbians and gay men, we have been warned, has assimilationist possibilities.⁴¹ Much lesbian and gay anti-discrimination work seeks to challenge subordination and inequality. Increasing visibility of lesbians and gay men is an important factor in encouraging people to acknowledge and accept their sexual orientation. What lesbians and gay men must ensure is that we critically consider the ramifications of this increasing visibility and the ways in which we are being made visible. Accepting spousal status wholeheartedly and without question is a regressive act on the part of lesbians and gay men. As new incumbents to the formal system of relationship recognition, we have had the ability to view the flaws of the current ideology of family; with what is left of our role as sexual subversives reformation rather than reifying the family has greater social worth. Furthermore if

³⁹M.B. Kaplan "Intimacy and Equality: The Question of Lesbian and Gay Marriage" in S. Phelan, ed., *Playing With Fire: Queer Politics, Queer Theories* (New York: Routledge, 1997) 201 at 204.

⁴⁰*Ibid.*

⁴¹*Supra* note 14. Freeman noted whilst working with Gwen Brodsky an intervener on the *Mossop* case, the difficulty of presenting arguments to the court without sounding assimilationist or essentialist with regards to sexual and familial theories and functions.

lesbians and gay men do accept the heterosexual family formation then we are once again in the position of becoming one of the disappeared. We are fashioned in the likeness of a straight norm and lose our own identity; an identity that is not yet ready to be annulled as just another facet of personality.

At present the lesbian and gay identity machine has much work to do, for the fight against heterosexism, heterocentrism and with it homophobia, still leave their indelible mark on lesbian and gay lives. Robson has written that 'the legal notion of family domesticates lesbians through its strategies of demarcation, assimilation, coercion, indoctrination, and arrogation.'⁴² By declaring marriage and the heterosexual family as our goal, we risk confirming the validity of the institution in its current form. Confirmation of the conventional family form restricts our ability to alter the basis on which the family is premised; it strengthens the ideological basis, increasing the difficulty of shifting the grounds of the familial institution.

Prior to our full inclusion within the definitional terminology of family, we should be addressing the broader issues of patriarchy and heterosexism. Hoagland states, "any revolution which does not challenge it [heterosexualism] will be incomplete and will eventually revert to the values of oppression."⁴³ If certain groups of lesbians and gay men, such as radical feminists or queer theorists, are attempting to alter the fundamental basis of family and thus shift patterns of learned behaviour within the family, we require a new template of familial existence. By creating and living a more egalitarian concept of family based on definitions that do

⁴²R. Robson "Resisting the Family: Repositioning Lesbians in Legal Theory" (1994) *Signs* 975 at 976

not require the norms of heterosexual and heterocentrist existence, we create families without the socially erected borders of who can or cannot be included.⁴³

Does this standard of reasoning go far enough?

The legal acknowledgment of lesbian and gay relationships in the *Modernization of Benefits and Obligations Act* utilizes norms of heterosexuality. Queer relationships are constructed as comparable to heterosexual common law relationships in terms of the standards that they must meet. In attaining a comparable relationships status and having it classed as valid, lesbians and gay men may absorb and endorse a normative structure of family. By hetero-normatively defining family, the borders of our emotional existence are defined, perpetuating a double standard between those who choose to opt in or remain without the family.

The conventional family has been engrained to such an extent within the national imagination that alternate constructs such as queer families, or donor sperm or surrogate based families are still perceived as 'other' to the norm. If we have no choice but to be drawn in to the national imagination of familial identity, viewed from a straight norm, then it is our responsibility as lesbians and gay men to continue the fight for families that cannot and will not perpetuate hetero-normative ideologies. Perhaps it is up to lesbians and gay men to keep re-asserting the fact that there are alternate relationships that do not consist of a heterosexual couple and their offspring. We need to start explaining that family is whom we decide is

⁴³D.M. Henson "A Lesbian Feminist Critique of Susan Okin's Justice, Gender and the Family: Lesbian Families With Children as a Non-Heterosexist Model for the Development of Morality and Justice" (1993) 4:2 Hastings Women's Law Journal 249 at 257.

⁴⁴The enactment of Bill C-23 is the formal legalistic side of expanding our definitions of who may constitute family. With the enactment of this legislation we must look at which lesbians and gay men and which styles and compositions of relationship are being endorsed.

family, not some antiquated notion of family that rests on blood ties.⁴⁵ Many lesbians and gay men do not have the option of falling back on their blood families for emotional, political or legal support, hence the importance of deconstructing our notions of who and what family is. This is the reality of queer family life and this is what ought to be being dealt with by the legislature when it decides to codify our familial existence.

New immigration legislation overlooks the prejudice that still exists towards lesbians and gay men. References to 'common law partners' in the legislation sets out a number of requisites that are necessary for lesbian and gay and straight relationships to be processed under the 'family class'. The classification of hetero and homo common law relationships is founded on a basis that does not differentiate between the sexual composition of the unit and therefore proceeds from a sameness approach when viewing a queer or straight composition of family. Immigration legislation and its sameness approach towards lesbian, gay and straight relationships is unaware that the imposition of straight norms is not just politically or indeed ideologically repugnant to some lesbians and gay men, but is also practically unreasonable. An example is provided by the cohabitation requirements in the new legislation. EGALE Canada has noted that under Regulation 1(1) of the *Immigration and Refugee Protection Regulations* common law partner is defined as "an individual who is cohabiting with the person in a conjugal relationship, having so cohabited for a period of at least one year."⁴⁶ The concerns EGALE has outlined

⁴⁵See K. Weston, *Families We Choose: Lesbians, Gays, Kinship* (New York: Columbia University Press, 1991).

⁴⁶EGALE Canada, "Submission to House of Commons Standing Committee on Citizenship and Immigration: Re Immigration regulations" (February 2002), online: EGALE

with regards to cohabitation highlight Immigration Canada's heteronormative views of the ways in which lesbians and gay men construct their relationships.

EGALE begins by noting "it is inappropriate in the immigration context to treat cohabitation as a prerequisite for a qualifying relationship...bi national couples are often unable to cohabit- precisely because they live in different countries and are separated by reasons of immigration."⁴⁷ EGALÉ has suggested that the sufficient indicators of a relationship ought to rest on three grounds,

- i. The bona fides of the relationship; indicated by phone bills, proof of visits, photographs, letters, testimonials etc.
- ii. Conjugalilty.
- iii. A relationship of one year's duration.⁴⁸

EGALE notes the cruel irony of the immigration regulations, '[i]n the immigration context, couples will be in a Catch-22 position if they are unable to live together because of their immigration status and are thereby precluded from fulfilling the one prerequisite they need to obtain their immigration status.'⁴⁹

EGALE notes that the legislation was created without specific lesbian or gay input regarding the terms of the legislation, unlike Bill C-23, which EGALÉ was heavily involved in shaping.⁵⁰ Despite its recognition of same-sex relationships the new *Immigration Act* is rather naïve regarding the indicators of lesbian and gay relationships. The positive formal equality that the legislation has granted is

<<http://www.islandnet.com/~egale/documents/ImmigrationSubmissions2002.htm> >(date accessed 5th July 2002). The Regulations can be found at SOR/2002-227 Immigration and Refugee Protection regulations C. Gaz. 2002.IIExtra.18.

⁴⁷EGALÉ, *Ibid.*

⁴⁸*Ibid.*

⁴⁹*Ibid.*

⁵⁰*Ibid.*

negated by a refusal to expand the boundaries to acknowledge the intricacies and differences that are found in lesbian and gay relationships. As the next point explains, the formal equality of the *Immigration Act* has not translated into a practical substantive equality that contextualises the reality of lesbian and gay relationships in an international arena.

The discourse of assimilating lesbians and gay men/assimilate or be assimilated

The ways in which lesbians and gay men are being constructed has, for the most part, taken a sameness style of approach to equality.⁵¹ Lesbian and gay families are judged against the comparator of the heterosexually normative family. In order to gain formal recognition, lesbians and gay men must condescend to have their relationships viewed in terms of how successfully they are able to mimic straight norms.

Writing for the majority of the Supreme Court of Canada in *M v H*,⁵² Cory J. cited the case of *Molodowich v Penttinen*.⁵³ *Molodowich* sets out the characteristics associated with a conjugal relationship. Conjuality is one of the requisites in the new *Immigration Act*. The characteristics include, 'shared shelter, sexual and personal behaviour, services, social activities, economic support and children, as well as the societal perception of the couple.'⁵⁴ Cory J. stated that not all of these elements must be present in a relationship for it to be deemed conjugal: 'the

⁵¹ A notable exception is the way in which Gwen Brodsky, a litigator who represented intervenors in the *Mossop* case specifically rejected the sameness approach in favour of an anti-essentialist approach to the 'definition' or 'indefinability' of family. See Freeman, *supra* note 14.

⁵² Cory J. *M v H* *supra* note 9 at 25.

⁵³ (1980), 17 R.F.L. (2d) 376 (Ont. Dist. Ct.).

approach to determining whether a relationship is conjugal must be flexible. This must be so, for the relationships of all couples will vary widely.⁵⁵ Even though the judiciary allows for a certain amount of variance within relationships, ultimately same-sex couples must satisfy certain norms and thus meet the requisite legal definition of conjugality.⁵⁶

The legal definition of a relationship is based on hegemonic heterosexual norms such as conjugality that were not constructed with lesbian and gay relationships, or alternatively structured familial relationships, in mind. The essentialisation of family has proceeded from an overarching definition dependent upon the norms of heterosexism and heterocentrism. Within these definitions, understandings of the modern family have been constructed in an overly exclusive manner. The inherent rights, responsibilities and fiscal benefits and obligations⁵⁷ that flow from the family form have encouraged the delimitation of the modern family. With the granting of such benefits society begins to recognize one specific formation of family as a socially and legally approved institution. The legal and legislative approval of the traditional familial institution not only confirms its place within society, but also its place within discourse. One particular formation of family is affirmed as being the supreme unit.

⁵⁴Cory J. *M v H* *supra* note 9 at 50.

⁵⁵*Ibid.* at 51.

⁵⁶For an excellent discussion of the difficulty of trying to define what constitutes family, and thus how one can present family and alternative families to the court see Jody Freeman, *supra* note 14.

⁵⁷In *M v H* *supra* note 9. The court justified expanding "spouse" to same-sex partners on the basis of an argument of fiscal conservatism. It was highlighted that by allowing lesbians and gay men access to spousal support, this would move those reliant on the state upon the breakdown of a relationship, to now be dependent upon their ex- partners. For a fuller analysis see S.B. Boyd, "Family, Law and Sexuality: Feminist Engagements" (1999) 8(3) *Social and Legal Studies* 369.

The courts and the legislatures have generally essentialised the family by outlining its structure and its constituent components against a heterosexist norm. The family in its current legally recognized form has been constructed as an immutable facet of society, rather than a constructed unit, serving a specific purpose related to industry, capitalism, the development of the North American continent and patriarchal ideologies.⁵⁸

Nitya Iyer has written, in relation to immutable characteristics, such as race, religion, and sexuality, under section 15 of the Charter,

*By focusing on immutability, the test reinforces an understanding of ascribed social characteristics as intrinsic to individuals, rather than comparative or relational; as inevitable, rather than historically and geographically variable; and as neutral, rather than reflecting a particular pattern of social relations.*⁵⁹

The ascribed immutability of sexuality is related to the immutability of qualities associated with the family. Although there has been a movement away in recent cases for example *M v H*, over the necessity of bearing an immutable characteristic there is still an implication that one carries such a status. The *M v H* ruling may not have specifically addressed lesbian and gay sexuality as such, its focus being on the expansion of the definition of spouse, so as to gain spousal support provisions for same-sex partners. *M v H* expanded the definition of spouse in the spousal support provisions of the *FLA* to include lesbians and gay men, but did so in a way that circumvented discussions of essential notions of sexuality. In *M v H* the family was viewed from a functional and contextualised fiscally conservative standpoint. Core

⁵⁸See for example E.M. Nett, *Canadian Families Past and Present*, 2nd ed. (Toronto: Butterworths, 1993) or V. Lehr, *Queer Family Values: Debunking The Myth of The Nuclear Family* (Philadelphia: Temple University Press, 1999) at 61.

characteristics that represent family such as conjugality and dependence were seen to be indicators of a functional family life. From a definitional perspective this decision was a step forward for lesbian and gay rights by disregarding the gender composition of the relationship and focusing on the practicalities instead. In *M v H* the term 'spouse' was deconstructed so as to include lesbians and gay men but lesbian and gay sexuality was not deconstructed. Lesbian and gay identity and sexuality remained coherent and was not viewed as a feature of identity that was dependent on the way in which we construct the gender binaries of masculine and feminine, and pursuant to these, homo and heterosexuality.

The immutability of sexual orientation is a socially constructed notion based on the ways in which we have constructed gender. Sexuality has been constructed as an intrinsic factor with generally three main possibilities: heterosexuality, bisexuality and homosexuality. These three categorizations base our sexuality on gender and the gendered norms that surround them, 'the pattern of social relations.'⁶⁰ The construction of an immutable sexuality has essentialised sexuality rather than broken down the barriers of gendered and sexualised behavioural norms. Essentialisation and thus immutability has reinforced the barriers of sexual identity with a process of even more categorization rather than demystifying and acknowledging the social production of gendered identities.

Similarly, social relations and essentialisation have constructed the family. These relations have varied over history and over geography. There is no natural inevitability that 'family' will be formed; rather there is a process of normalization.

⁵⁹N. Iyer, "Categorical Denials: Equality Rights and The Shaping Of Social Identity" (1993) 19 Queen's L.J. 179 at 189.

The legislature codifies and encourages this normalization,⁶¹ creating the hegemonic family with its own immutable characteristics of dependence, monogamy, longevity, shared shelter etc. We confine the family to a centralized structure, affirm its values and render some lesbians and gay men outside of its seemingly all-encompassing sphere. The outsiders of the normalized family, rather than benefiting from the gaining of lesbian and gay familial rights are pushed even further outwards from the centralized core of the 'holy' family and indeed the centralized core of the state, leaving its immutable status intact.⁶² An example is the exceptions to the cohabitation requirements of the new immigration regulations; section 1(2) provides if 'an individual that has been in a conjugal relationship with a person for at least one year but is unable to cohabit with the person due to persecution or any form of penal control, shall be considered a common-law partner of the person.'⁶³ Although this legislation seems to take into account the occurrence of lesbian and gay persecution, what it actually does is negate the purpose of the family class of immigration by requiring the lesbian or gay man to demonstrate actual persecution. EGALE has noted:

*we welcome the recognition that some lesbians, gays, bisexuals and transgendered people live in countries where they are precluded from cohabitation by persecution, the exception appears to set an even higher standard than that required of refugees. A refugee need only have a well-founded fear of persecution, whereas the cohabitation exception refers not to the reasonable fear of persecution, but appears to require demonstration of actual persecution.*⁶⁴

⁶⁰*Ibid.*

⁶¹For example consider the benefits accrued by married spouses: the tax breaks, insurance benefits, in a criminal context the non-enforceability of a spouse having to testify against their spouse.

⁶²O'Donovan, *supra* note 24 at 77-82.

⁶³*Immigration and Refugee Protection Regulations, supra* note 46.

⁶⁴*Ibid.*

The best intentions of the immigration legislation have further alienated certain classes of lesbians and gay men from its overarching protective sphere. The realities of lesbian and gay existence have not been fully explored and classes of lesbians and gay men in positions of extreme vulnerability have been forced to the periphery of immigration law and further exposed to abuses of the state system. The comparator group of heterosexual common law couples against which lesbians and gay men are judged, is not an appropriate classification. The pervasive quality of discrimination directed towards lesbians and gay men does not allow for queer relationships to function in a heteronormative manner. Due to the homophobia directed towards lesbians and gay men our relationships may not be supported or aided in collecting information that highlights our discrimination. The immigration legislation does not appreciate the confines of heteronormativity and therefore decontextualises lesbian and gay relationships.

Iyer suggests,

*[w]e need to generate a self-consciousness about the location of the dominant group, to make visible the invisible norms against which claimants are measured. Respect for the complexity of social identity and social relations requires an ongoing struggle against the centralizing tendencies of categorical thought.*⁶⁵

The inclusion of lesbians and gay men within the liberal paradigm of the conservative family formalizes lesbian and gay inclusion within the matrix of the centralised voices of the majority. Lesbians and gay men are brought within the realm of the liberal hegemonic norm and are centralized within the dominant discourse. In doing this, do lesbians and gay men lose something of their status as a

⁶⁵Iyer, *supra* note 59 at 205.

rebellious faction determined not to live by the exclusive norms of heterosexual conformity? By increasing the scope of the centralizing category we make it harder to challenge the hegemonic norms of the ways in which we are sanctioned to live our emotional lives. The drawing in of those who were previously excluded, or resisted the centralized categorization of familial existence affirms the validity of the institution of the heterosexual family as a positive structure. There is no doubt that certain families thrive within the conventional heterosexual family structure, but to affirm this structure as the supreme institution, without question, and without exploring other options for family that may be available, cannot be viewed as a wholly progressive decision:

The development of alternative ways of organizing private life is desirable not simply because it would allow many gays and lesbians to live as they desire, but also because those who are choosing to form private lives and families based on values inimical to those of the dominant culture are providing models of private life based on developing and exercising agency in a new and ethically justifiable way...the ethical framework embedded in these alternative ways of life is one that can allow for traditional choices, whereas the ethical framework of gay liberals who seek to gain marriage and family rights is inevitably a moral system that will exclude many who understand themselves as gay, lesbian or queer.⁶⁶

Because lesbians and gay men were forced to create and foster families outside of the realm of legal acknowledgment, we were as outsiders enabled to critically assess the form and function of that we were excluded from. For some lesbians and gay men this exclusion provided us with a need to create an ethically justifiable vision of family. When lesbians and gay men seek equality, namely the liberal equality within which western society seems to be embedded, we must ensure that we do not disassociate ourselves from our community, the queer community. In our fight to

be acknowledged and to be treated with equal respect and dignity in comparison to the heterosexual community, we must ensure that we do not render lesbians and gays who do not fit within the liberal ideology of family a nullity cast even further towards the periphery of society. If we accept as our ontology the heterosexual family as our desired status of being, then what we form are straight families headed by queers, rather than queer families not willing to be subordinate to a straight epistemology of family life. If the government continues attempting to normalise and circumscribe behaviour in a way that encourages assimilation into the Canadian hegemony, then we lose the notion of the Canadian mosaic of identity. The circumscription of sexuality is a part of the circumscription of all the identities that are representative of what it means to be Canadian. If our families must subscribe to a conventional heterosexual norm, there is then the possibility that perhaps our racial differences will need to be subsumed into the Canadian norm. We must take care not to endorse the creation of policy that rests solely on hegemonic norms rather than contextualised existences.

Didi Herman has asked the question "When we call ourselves families or spouses, and perhaps win this recognition from legal institutions are the meanings of these words radicalised or are we simply accommodating ourselves?"⁶⁷ Realistically, when lesbians and gays adopt traditional formulations we are both radicalising and assimilating. It proves difficult, when attempting to state as an incontrovertible fact whether we are or are not radical when adopting the status of 'spouse' or 'family'.

⁶⁶Lehr, *supra* note 58 at 45-46.

⁶⁷Herman, *supra* note 3 at 790.

A radical definition would posit that we expand the existing categories of what it is to be family and what it means to be family. Lesbians and gay men explode the traditional constructions on which the family was premised. By including queers within what has been a strongly heterosexist institution, an institution that has defined itself on the basis of its heterosexuality, we shift the boundaries of familial discourse. Lesbians and gay men, like straights, become part of the legal definition, part of the dictionary definition of the family.

Alternatively from the assimilationist perspective one must ask whether expanding legal definitions and forming previously unacknowledged families is in fact radical rather than the acquisition of formal rights within a liberal legal and ultimately conservative framework. The family formation in itself may not be radical, but perhaps what is, is the politicality of these families, the rejection of patriarchal norms and gender role specifics that lesbian and gay families can offer. Nevertheless are we accommodating ourselves within the hegemonic norms of family? Some lesbians and gay men may indeed be assimilationist and attempt to recreate (aside from the opposite-sex composition) all that can be regressive within heterosexual familial relationships. What we must do is locate the fine line between the traditional, conservative, heterosexual family and the radicalised socially aware lesbian and gay composite, which gives its family members an ethically justifiable way in which to develop within a family unit. Locating the fine line may not alter the heterosexual family as we now know it, but what it may do is socialize the next generation of children to choose ways of living emotionally and sexually, which allows for alternate family arrangements. It is important that we are not bound and

that our families are not defined by conservative notions of the ways in which the family has been programmed to function.

The redefinition of familial 'truths' is part of the ongoing struggle to reject 'societ[ies] regime of truth.'⁶⁸ Such regimes of truth, have posited one version of the truth as normative, as the correct way to live, with competing notions dismissed as inferior, or denied as falsehood. Foucault wrote,

[t]here is a battle 'for truth', or at least 'around truth'- it being understood once again that by truth I do not mean 'the ensemble of truths which are to be discovered and accepted', but rather 'the ensemble of rules according to which the true and the false are separated and specific effects of power attached to the true,' it being understood also that it's not a matter of a battle 'on behalf' of the truth, but of a battle about the status of truth and the economic and political role it plays.⁶⁹

The specific effects of power, which attach themselves to the truth, are what make the truth powerful in the first place. The dominance of a particular ideology associated with and formulated by a certain group, who possess social dominance, allows for a very specific form of truth to gain status. Foucault stated that this is not a battle on behalf of the truth, but about the status of truth. This is an important statement, for it delineates that there is no one specific tangible truth, there can be no battle on behalf of a static elemental embodied truth, for the truth is a subjective entity. The subjectivity of how we view what is true, and thus what is right, stems from a knowledge base (which is constantly evolving) specific to the individual. The individual is shaped, educated and influenced by the truths that s/he has been socially constructed with, although this is not to deny that one is able to alter one's

⁶⁸M. Foucault *Power/Knowledge: Selected Interviews and Other Writings 1972-1977*, ed., C. Gordon (New York: Pantheon Books, 1980) at 131.

⁶⁹*Ibid.* at 132.

belief about the status of truths. Shifts in the way the truth is constructed or who is constructing it, may make what is viewed as the truth more relevant and belief worthy, or a greater falsity than one could have ever imagined. In attaching truth to the presence of lesbian and gay families, lesbians and gay men assert a status and dismiss the myth that lesbian and gay families do not exist. Lesbians and gay men transmogrify the existing dominant truths and ideology that surrounds family, that surrounds sexuality. We create incoherence within the dominant normalized trope of the conservative heterosexual family. Lesbians and gay men shift the status of truth by revealing its incoherence as a specific form of truth in its construction of the family. The exposure of alternative forms of truth does not lower the status of traditional ideologies of the family; it merely increases the scope of what can be seen as a truism of the family form.

We need to ask whether the assertions of competing family forms, the assertion of a different truth, has actually accomplished anything. Has contesting the meaning and composition of the traditional family changed the status of queer under the rubric and codification of family? Brenda Cossman has noted the claim that 'we are family' is made by the lesbian and gay couple, but that the subject of that claim is the state.⁷⁰ Ultimately it is the state that lesbians and gay men have to convince in claiming that our queer families are worthy of recognition. If the state does not acknowledge our families then we turn to the courts that in turn force the state to adhere to their rulings. The power of inclusion is vested within the legislature, which can then grant us legal inclusion.

⁷⁰B. Cossman, "Family Inside/Out" (1994) 44: 1 U.T.L.J. 1 at 23.

By inclusion within the family there is no radical shift of truth, there is no abolition of the heterocentric values that underlie the family, there is merely an increase in the scope of definition. The lesbian and gay families that are affirmed are those that closely mimic the heterosexual norm. There is nothing subversive or progressive about that. There is no redefining of the truth of the homosexual or heterosexual family; it is pure and simple assimilation. Bunch argues that 'it is not okay to be queer under patriarchy – and the last thing we should be aiming to do is make it okay,'⁷¹ Boyd follows this point by stating 'that being defined as a 'spouse' may make it okay for some lesbians and gay men to be at least somewhat queer under patriarchy and does not in itself sustain a political critique of heterosexuality.'⁷²

Lesbians and gay men have a responsibility in their newly emergent status to reject the perpetuation of patriarchal norms. This is not to deny that traditional heterosexual styled homosexual families function productively in society, but we must be prepared to fight for those families that do not wish to mimic heterosexual norms. We must ensure that lesbians and gay men who choose not to enter into legally sanctified relationships are not stigmatised and cast as even greater outsiders.

The current wave of lesbian and gay rights litigation has perhaps inevitably possessed an assimilationist rhetoric. The necessity in legal proceedings to state one's position as comparable to an already established group, curtails the ability to put forward radical arguments. Radical arguments may well alienate the judiciary and obscure the scale of comparison to which equality seeking groups such as

⁷¹C. Bunch in Boyd, *supra* note 57 at 382.

⁷² Boyd. *Ibid.*,

lesbians and gay men aspire. Invoking arguments of sameness within the parameters of liberal legalism is perhaps the fine line over our perception of lesbians and gay men as both radical and not radical. When lesbians and gay men must present themselves in a legal environment then our identities are circumscribed our differences are subsumed into the 'whole' of lesbian and gay identity and the radicality of existence of some lesbian and gay men is faded out. Therefore perhaps the gaining of formal rights in a legal context is a presentation and a shielding of the complexity and diversity of lesbian and gay existence so as to further the overarching goal of equality.

Are we subverting the traditional heterosexual family?

The influence that lesbians and gay men may have on the traditional heterosexual family has been framed in numerous ways. Brenda Cossman has highlighted the dichotomization of debate by noting the 'we are/we are not' family discourse which has followed the garnering of formal equality provisions.⁷³ Some scholars feel that the entry of lesbians and gay men into a formerly heterosexist institution cannot fail to challenge the patriarchal foundations upon which the family was created. Furthermore many lesbians and gay men believe that the formal equality associated with the gaining of family status will legitimate and sanctify lesbian and gay relationships.⁷⁴ Alternative camps posit that inclusion of lesbians and gay men within the familial structure is wholly regressive. That lesbian and gay relationships are markedly different from those of our straight counterparts, and that

⁷³Cossman, *supra* note 70 at 1.

⁷⁴*Ibid.* at 7.

to stress inclusion, as a formal aim of the lesbian and gay community is to undermine this notion of difference.⁷⁵

The question asked was, are we subverting the traditional heterosexual family? Perhaps what ought to have been my focus is, do we have a responsibility to subvert the heterosexual family?

The straight family has been going through some profound shifts; the two parent family formation, whilst still functioning, is becoming less prevalent. Single parent families, non-married partners, stepfamilies, non-related kin members are all taking their place within society. This change in familial structure has brought forth the question 'is the family in crisis, at a point of breakdown, or is it being reconstituted, redefined and remodelled in new ways?'⁷⁶ The crisis of family being experienced at present is that the alternate forms of family are subjected to oppressive heterosexist familial morality, based on the hierarchisation of familial constitution. Common law relationships are classified in relation to marital relationships, and seen as valid but not quite as worthy of complete recognition, hence only recently have shifts in the benefits and obligations associated with spouses and common-law partners begun to gain a level of parity. The crisis we have is that some segments within society, lesbian and gay or straight, wish to cling to the last shreds of an oppressive institution. In clinging to the traditional form of family, we continue to delimit the ways in which people can form their

⁷⁵ *Ibid.* at 8, Cossman notes two basic schools of thought. The first is the radical pluralist which posits that lesbian and gay relationships are not 'functionally equivalent' to heterosexual relationships, in that they may not be based on monogamy or emotional exclusivity. The second school is the feminist train of thought which rests its belief on the family as the site of production of social inequalities such as gender and class.

⁷⁶ Midgley and Hughes in Collier *supra* note 12 at 169.

relationships, and perpetuate the continuance of the alternative family format to experience social opprobrium.

Smart and Neale have noted that 'the space of the heterosexual family is itself now being fractured and reformed as a different kind of space.'⁷⁷ The descriptor of the heterosexual family as possessing 'space' is of semantic interest. The Oxford dictionary has defined space as 'a continuous unlimited area or expanse.'⁷⁸ The 'space' of which we talk when referring to the legal and social family manifests itself in differing ways. The space of family is defined and bounded within a normalised sphere of familial composition. Legal and legislative regulation has given rise to a tightly formed unit. Social expectation of the family's role and constitution further endorses such expectation and instils the legalities of family as if one common sense formation were an intrinsic truth.⁷⁹ On the other hand the spatial influence that the heterosexual family has possessed is boundless. The morality and formation associated with family has impinged and encroached on all other types of relationship. The space and structure of the family is engrained through the media, in novels, through legal and political policies as a space of comfort and confinement. The evolving definition of family and the increase in the scope of what and who is defined as its composite has, definitionally, shifted expectation; as to whether the family has been fractured remains to be seen.

Using the term 'fractured' in order to describe the modern conception of the family could be seen as aspirational. The traditional heterosexual family, whilst

⁷⁷C. Smart and B. Neale in Collier, *Ibid.*, at 173.

⁷⁸*Oxford Modern English Dictionary* (2nd ed) (ed) Della Thompson (Oxford: Oxford University Press, 1996).

under pressure, is still a format that is widely endorsed and aspired to. Fracturing of this format, denoting a break in the way the traditional family is constructed, including a break with traditional aspirations and expectations of the roles that women and men automatically assume, has yet to be seen. Whilst there has been an increase in the visibility of lesbians and gay men and their families in the media and other public forums, queer visibility is still inadequate. The fracturing of the family's heterosexist past, and the potential for its reformation into an egalitarian unit, has failed to manifest and materialise into an institution of growth rather than containment.

The increase in the number of gay and lesbian weddings and the increase in visibility of lesbian and gay relationships have failed to fracture at this point in time the space of the heterosexual family. One may ask whether the legalisation of lesbian and gay marriages would fracture the intrinsic components of the heterosexual family?

The lesbian bride⁸⁰ as a previously inconceivable figure is both a parody of the heterosexual bride and a conformist feature of heterosexist society. The parody of the bride lies in the fact that all outward signifiers denote traditional expectations. The ease with which the lesbian bride can mimic her straight counterpart is indicative of the fact that there are few signifiers necessary in order to act out sexual identity. The conformity of the lesbian bride lies in the fact that essentially she will conjoin and form a relationship where there will be longevity and commitment, she

⁷⁹ Although here is no specific definition of family, the courts have relied on a common sense understanding of that which defines family, see Freeman *supra* note 14.

⁸⁰ See S. Zetlein, "Lesbian Bodies Before The Law: Chicks in White Satin" (1995) 5 The Australian Feminist Law Journal 49 at 54.

will foster a loving home and may well bear children. This situation negates the subversive quality of the lesbian or gay man and endorses straight norms within queer relationships. The lesbian bride does not create any revolutionary inroads into the dismantling of the heterosexual family; she is subsumed into its normative state. The interesting duality, which occurs through the differences, associated with marital rights and spousal benefits are of importance. As lesbians and gay men our cohabitants (after the requisite one year cohabitation period) are common law in status, and through this status we have almost all of the benefits and obligations that heterosexual spouses possess. As lesbians and gay men we are not married spouses, in the sense that our relationships do not bear the social symbolism that is attached to marriage. Our relationships are constructed around legalistic terminology defined by governmental schemes, which entitle us to monetary and societal benefits and obligations. When lesbian and gay relationships are garnering the rewards and obligations of formal equality how does this translate into the substantive equality of reducing homophobic attitudes towards lesbians and gay men? How does this formal equality convert into deconstructed visions of sexuality and therefore the family?

Practically lesbians and gay men need to be included within heteronormative spheres so that we have, at the very least, the ability to legally form families and thus gain and be subject to the benefits and obligations of this status. Realistically it is too soon to tell what kind of impact the inclusion of lesbians and gay men will have on the heteronormative family. Lesbian and gay existence requires the expansion of terms which have been heteronormatively constructed such as

'spouse', so that we can begin to form internationally viable relationships with our partners. The way in which this impacts on the heterosexual family may or may not be significant. Perhaps all that lesbians and gay men can hope for is that the way we live our lives, now that we have been granted a formal legal familial status, if it is ethical, communal and affirming is enough to render our relationships valid and positively influence future familial arrangements.

Diana Fuss has noted

[t]o be out, in common gay parlance, is precisely to be no longer out; to be out is to be finally outside of exteriority and all the exclusions and deprivations such outsiderhood imposes. Or, put another way, to be out is really to be in--inside the realm of the visible the speakable, the culturally intelligible.⁸¹

If lesbians and gay men are now formally within the realm of family, we have had our positions codified and are no longer the sexual outlaws that we were. In possessing a legally acknowledged identity, we have a duty to keep pushing the boundaries of what people perceive as valid relationships. We have been granted standing, the legal authority to call our partners 'partners', and the opportunity to be seen as persons under the law and to claim our family as kin. In attempting to dismantle the patriarchal structures that surround the family, perhaps the most influential way we can impact on the institution is through our inclusion within it in a formal legal sense and our 'lived experiences'⁸² through it.

In reshaping the family, and redefining the family, the patriarchal basis on which the family has been defined is negated; by reshaping the family heteronormative ideologies bear a diminished role in the control of family ideology.

⁸¹D. Fuss "Introduction" in D. Fuss, ed., *Inside/Out: Lesbian Theories, Gay Theories* (New York: Routledge, 1991) 1 at 4.

Foucault has noted the argument 'that power is neither given, nor exchanged, nor recovered, but rather exercised, and that it only exists in action.'⁸³ In this sense power exists as a kinetic energy, its force is exerted through direct application, giving rise to a consequence that will be exerted upon the circumstance. In relation to the status of family such an 'energy' or power is directly related to the status that one possesses. Those in positions of domination have the ability to assert a form of knowledge, constructed and disseminated as a truth. This 'truth' possesses a power that has the ability to shape our modes of existence, shape the ways in which we choose our relationships to operate. Foucault's assertion of the transient nature of power, and its conflation with the analogy of power as a form of energy, gives rise to the knowledge that energy can neither be created nor destroyed, but exists as an undercurrent of potentiality. 'The power of inclusion and exclusion is diffuse, shifting, and, often, the site of conflict.'⁸⁴ Perhaps it is the insecurity, the instability of this power which forces people to try to codify its existence through modes of repression and social construction, so that one may cling to an aspect of power, and attempt to create an incontrovertible form of this power. Is this why immigration legislation pertaining to lesbian and gay relationships does not dare to step outside of the boundaries of conventional familial existence? Do lesbian and gay relationships that do not adhere to societal norms pose such a threat to heterosexual hegemony?

The expanding definitions of spouse and the increased flexibility in family class immigration still requires a certain level of conventionality. Lesbians and gay

⁸²Cossmann, *supra* note 70 at 24.

⁸³Foucault, *supra* note 68 at 89.

men have always been viewed as problematic by the immigration services. If we consider the exclusionary legislation passed in the 1950's when paranoia over sexual alterity and its effect on national security reached a peak, lesbian and gay sexuality was targeted as one of the societal unknowns and therefore a potential site of subversion. In the immigration legislation of 2002 the government, albeit in a less obvious form, is still concerned over which foreigners it allows into Canada especially when these foreigners are lesbian or gay. The difference in the twenty-first century may be that although lesbians and gay men do not possess a threat to national security per se, what they do represent is a threat to the moral order of society when granted access to a fundamental institution of Canada, the family.

The continued ingraining of the conservative heterosexual family is the resistance to a shift in an intrinsic social construct. By failing to endorse the classification of lesbians and gay men as family unless they meet strict rules, lesbians and gay men are classified outside of the terrain of what is acceptable. Ideally, one could say, that which is socially acceptable is that which we do not want to be, nor should be fighting to be a part of. The problem lies in the fact that if we are not an acknowledged part of the familial composite then we fail to obtain social and legal respect. Foucault writes, 'we are judged, condemned, classified, determined on our undertakings, destined to a certain mode of living or dying, as a function of the true discourses which are the bearers of the specific effects of power.'⁸⁵ The 'true discourses' of which Foucault writes are not set in stone. As lesbians and gay men we have the ability to change the truth of familial discourse.

⁸⁴Cossman, *supra* note 70 at 24.

⁸⁵Foucault, *supra* note 68 at 94.

Lesbians and gay men have already started shifting definitions of sanctified familial terms such as 'spouse' and who can be defined as 'parent' or 'legal guardian'. We have entered an era where new terminology reflects the composite of our family, the donor sperm fathers, the non-birth mother, the egg donor, and the families of the partners of sperm donors, etc. Where the official status of these people may not have been fully defined by law they still exist as a reality of the lesbian and gay familial composite. We are redefining the truth, we are shifting the balance of power; and where this may not be enough to overthrow the elements of patriarchy which still reside in many relationships, it is our ethical step forward, our ethical step towards relationships of parity and egalitarianism. Inclusion of lesbians and gay men is the first step towards reconfiguration of the intimate relationships that have such an effect on our lives.

For an overarching shift in the way relationships are constructed we need to reconfigure the social, cultural and economic aspects, which have been engrained within the marital institution.⁸⁶ This reconfiguration may well have as its aim the overhaul of the marital institution, but in reality it would affect every single area which has had, and continues to have as its base, a reliance upon domination in the form of patriarchy, racism, or capitalism.

Doing Gender

'Doing Gender' as familial subversion is the end point of the concentric circle analogy that commenced with the overarching reach of immigration law

⁸⁶N.D. Polikoff, "Why Lesbians and Gay Men Should Read Martha Fineman" (2000) 8: 1 American University Journal of Gender, Social Policy and the Law 167.

through a demarcated national sexuality, through to the shifting definitions of family, ending with the deconstruction of sexuality within these families.

In this part of the chapter I highlight the potential impact that a deconstructed sexuality would have on the heterosexual family. If the heterosexual family is a normatively based unit, with hegemonic gender norms built into it, then by deconstructing the boundaries of family composition, gender identity and consequently sexuality, we reconstitute the fabric of familial composition, gender identity, sexual identity and the identity of nation.

In deconstructing the masculine and the feminine and showing that they are social constructs in themselves, not only do we render the strict confines of appropriate male and female behaviour null and void, we have an impact on the composition of the family as a de-gendered grouping.

*Sexual identity may be...in Foucauldian terms, less a matter of final discovery than perpetual reinvention.*⁸⁷

The 'perpetual reinvention' of sexual identity is indicative of its incoherence, and of its claim that it is an identity that is transient. Shifts in the way we are able to constitute our sexual identity stem partly from the ways in which society deals with sexuality. Society deals with sexuality in a formal moralistic manner, condoning and condemning according to societal expectations, according to affirmed societal 'truths'.

Sexual identity is evolving in a way that undermines the strict boundaries of gendered identity. Post-modern analysis of gender identities and the influence of queer theory sought to destabilize understandings of the masculine and the feminine.

⁸⁷Fuss, *supra* note 81 at 7.

Post-modern analysis has shown that 'masculine' and 'feminine' are not intrinsic to gender, rather they are socially constructed and socially engrained performances. Sexual identity and sexuality have been shackled together along with gender; these three intersecting facets have created essentialised sexual identity characteristics, existing within essentialised norms of appropriate human sexual behaviour. Lesbian and gay sexuality is a reinvention of sexual identity on both a gendered and sexual level.

The increase in the number of people willing to 'come out', willing to publicly state both their lesbian and gay sexuality and identity, is progressive in terms of the qualities of reinvention. Lesbian and gay self-identification is a social indicator of the continued presence of identities on the verge of emerging. The emergence of these previously unacknowledged identities from the generic norm, affects this norm by shifting the definition of its composite. The coherence of what the norm perceived itself to be is rendered incoherent. The generic formulation upon which the norm was premised was a fallacy of finality and was merely the mask covering the shifting composite of sexual potentiality.

Considering sexual identity as perpetual reinvention on an individual level, challenges the coherence of the self. First, on an atomistic level we question where the line lies between behaviour based on the social norms and truths that we have absorbed, and our individual 'truths' that we are willing to make function as a component of our life. Secondly, establishment of a lesbian or gay sexual orientation and a lesbian or gay identity reinvents one's self as being 'other' to the norm. One's identity is reinvented in society's eyes through the outing of a closeted

identity, highlighting that one's sexuality has a political, or at least potentially political element to it. Thirdly, if one chooses to enter into a same-sex sexual relationship, this is a physical manifestation of an unwillingness to accept the sexual confines of heterosexist society. These three examples of some of the stages of sexual development are only a partial representation of the ways in which we represent, reinvent and reconfigure our sexual identity.

In shifting the boundaries of sex and sexuality we also alter the foundation of the traditional concept of family. The inclusion of lesbians and gay men within the ambit of family is progressive, but as stated previously the specificity's of the lesbians and gays being allowed in, particularly via legal recognition, have an assimilationist tendency. The radical aspect associated with same-sex sexuality and the courage it takes to embrace a lesbian or gay identity is, for some, bound to the desire to expose the porosity of sexualised categories. Lesbians and gay men highlight a fluidity of sexuality. The osmotic features of lesbian and gay sexuality reveal that the composition of the 'straight' and the 'gay' is prone to shifts and affiliations, absorptions and diffusions.

The denial by lesbians and gay men of strictly controlled and produced gender categories challenges normative gendered accounts of gender identity. Stychin has stated 'the cultural acceptability of gay identity threatens to undermine the universality of the heterosexual subject and to open up for public viewing a new terrain where the contingency of sexuality and its categories is revealed.'⁸⁸

The non-contingency of sexuality relies on outward signifiers, signifiers that are re-affirmed and re-presented. The family as a primary site for the development

of sexual categories affirms the current constructs of the masculine and feminine. Lesbian and gay sexuality placed within this familial format denaturalises the intrinsic link between sex and the viability of family.

If lesbians and gay men are failing to challenge the societal format of family then what are we doing?

Although the inclusion of lesbians and gay men within the family may not be totally radical, what is radical is the way in which through a discourse of the family we have been given the opportunity to de-construct gender, an activity which has much greater consequences. 'By deconstructing gender, the subject at hand is highlighted as being partial rather than totalised. This partiality and the specificity of its summated identity can only be demarcated by exclusions that return to disrupt its claim to coherence.'⁸⁹ The ability to exclude a certain feature of subject-hood requires definition of exactly what that feature is. By stating that the comparator subject does not contain such a feature, we must define the other facets of identity that form the composited whole.

The need to positively affirm certain facets of identity acts as an assurance that the definition on which this identity is based has remained static. It is this need for affirmation Stychin has surmised, which denotes instability. 'The instability of subject-hood ensures that a gay identity potentially can challenge received notions of gender.'⁹⁰ Stychin further concludes 'by deconstructing sexual identities, the

⁸⁸C.F. Stychin, *Law's Desire: Sexuality and the Limits of Justice* (London: Routledge, 1995) at 31.

⁸⁹*Ibid.*

⁹⁰*Ibid.*

boundedness of the category of the other begins to disintegrate.⁹¹ The boundedness of the category of queer begins to exhibit fissures, which permeate the whole that is heterosexuality. The categories of gay and straight, the boundaries of what is gay or straight, and the ideals associated with masculinity and femininity and thus male and female are questioned. The inspecificity of sexuality, sex, family and nationality points to Butler's 'overarching matrix' of deconstructionist potential.

Essentialised accounts of social and national identity have been rendered porous, permeable to conflicting accounts of what were thought to be static identities. The increased porosity of previously rigid borders and boundaries has occurred on both macro and micro levels. The increases in global travel, business globalisation, emigration and immigration all point to a greater ease of access in entering the nation state. The opening of state borders to lesbians and gay men has been a step towards formal equality, and a breakdown of heterosexist assumptions of a totalised national sexuality. Whether the Canadian national imagination believed it could absorb homosexuality, or help it to thrive, is to be questioned. The potential creation and codification within immigration law specifically affirming lesbian and gay family class immigration is a further indicator of the deconstructed definitions of what were thought to be unchangeable facets of society.

'Lesbian, gay, bisexual and queer politics and culture...[is] characterised by reinvention and an ongoing questioning of borders and membership.'⁹² Lesbians and gay men having been cast as the deviant outsiders have had to question and re-define all areas of life so as to be included, so as to have the opportunity in which to

⁹¹ *Ibid.*

⁹² Stychin, *supra* note 29 at 113.

form a space whereby one can claim their identity. Lesbians and gay men have shifted these borders and gained membership, but have had to reinvent and redefine the scope of their own and society's existence.

Lesbians and gay men have been on the frontlines of attempting to deconstruct set gender roles, and specific sexualities. As lesbians and gay men we are aware of the ramifications of classifying our sexualities, of classifying our genders. Queer theorists aligned with progressive feminist theorists, have asked us to deconstruct the straight and the gay and to highlight that these seemingly dichotomous pairings are social constructs that require us to identify and to correspond to specific gendered behaviour within specific gendered confines.

As lesbians and gay men, buying into a sameness/assimilationist style of relationship undoes the progressive work and the progressive format that some lesbian and gay families have decided to take. Lehring has commented that 'by accepting essentialism as our ontology and its corresponding goal of "equal rights", we limit our ability to change, to reconstitute ourselves and the process of differentiation which produced the heterosexual/homosexual dichotomy in the first place.'⁹³ By accepting 'equal rights' within the framework of liberalism we compound and endorse the theories that affirm the specificity of an essentialised sexuality. By rendering sexuality as essential, intimately connected to the ways in which gender has been programmed to function, and by allowing for an expanded notion of sexuality, but still limiting it to an essential gendered role, we fail to deconstruct the boundaries of gender. By failing to deconstruct gendered norms,

⁹³G. Lehring "Essentialism and the Political Articulation of Identity" in S. Phelan, ed., *Playing with Fire: Queer Politics, Queer Theories* (New York: Routledge, 1997) 173 at 194.

there is no movement towards a reformulated vision of the 'masculine' and 'feminine'. Ultimately it is the rigidity of the boundaries of masculine and feminine that has rendered 'woman' and 'man' as possessing an intrinsic sexuality, an intrinsic heterosexuality. Factoring lesbians and gay men into this sexualised equation only redefines the boundaries of sexuality in its essential form. What is necessary is the ability to acknowledge sexuality as a fluid rather than a specific system of categorisation.

If lesbians and gay men represent the inspecificity and insecurity of gender and sexual orientation, then a queer presence within the family partially dismisses the gendered norms upon which the modern family was constructed.

Richard Goldstein has noted,

*the gay family is short hand for a new institution; one that bears little resemblance to the patriarchal structure most of us were raised in. Homosexuals are by definition outside that structure, and given our status, when we try to appropriate the tradition of forming families, we end up creating something new.*⁹⁴

Goldstein's statement must, however, be approached somewhat tentatively. It is true that lesbians and gay men do not have the physical capacity to enable us to perfectly mimic the heterosexual family, and why should we. The problem lies in the fact that the affirmation of lesbian and gay families has tended to mimic the straight norms of breadwinner/homemaker. Lesbians and gay men have a responsibility to promote and create families that are socially progressive and socially beneficial. These families may well be of a 'traditional' format, but they must be aware that the hierarchisation of family exists, and must live in a manner that bucks the social moralism which has plagued alternate family formations.

If queer is about being on the outside looking in, then it is also about seeing sexuality and seeing family as a terrain of difference, and thus, as terrains open to reconfiguration. The rights and responsibilities that we wish to endorse, that we wish to affirm must be viewed through the lens of difference. The lens of difference allows lesbians and gay men to acknowledge their history, to view the history of others and thus to move forward and create something new. 'If we buy wholesale into the idea that an equal rights ethos is the only legitimate progressive path, then we simply limit our ability to imagine ourselves differently, and differentiate ourselves imaginatively.'⁹⁵

Bearing this sentiment in mind, the focus of the next chapter is the way in which lesbian and gay rights and lesbian and gay men have been constructed within the courts. The evolution of judicial thought surrounding issues of sexuality has had a direct impact on the way in which the lesbian and gay family and the granting of equality rights has progressed in terms of formal legislation.

⁹⁴R. Goldstein in Herman *supra* note 3 at 801.

⁹⁵Lehring, *supra* note 93 at 194.

Chapter III

Sexual orientation, Family and the Canadian Charter of Rights and Freedoms: The incorporation and control of emerging identities

Introduction

Definitions of terms within law such as 'spouse' and 'family', and subjects such as 'lesbians and gay men' are in a state of evolution. The evolutionary definitional progress of law is never more noticeable than when traditional notions of the family are being challenged and exposed as outdated concepts. Formulaic findings of what the family is or was have been challenged and branded as socially constructed;¹ such constructions do not reflect the reality of the varying forms that family has taken historically or contemporarily. The definition of spouse within the legal sphere has often lain at the heart of this bitterly argued site of contestation over meaning, with contextualised definitions butting heads with more traditional formulations of the spousal role.² Lesbians and gay men have been at the core of this

¹ M. Barrett and M. Macintosh, *The Anti-social Family* 2nd ed., (London: Verso, 1991) at 27; J. Millbank, *What Do Lesbians Do? Motherhood Ideology, Lesbian Mothers and Family Law* (LLM Thesis, University of British Columbia Department of Law 1994) [unpublished] 171-176; V. Lehr; *Queer Family Values: Debunking the Myth of the Nuclear Family* (Philadelphia: Temple University Press, 1999). For an analysis of how lesbians and gay men could work around and beyond a socially constructed ideology of family see R. Robson, *Lesbian (out)law: Survival Under the Rule of Law* (New York: Firebrand Books, 1992), specifically chapter 10.

² Consider the definition of spouse in *Egan and Nesbit v The Queen* 124 D.L.R. (4th) 609 at 610 [hereinafter *Egan*]. In *Egan* the court was divided over the extension of spousal status to lesbian and gay partners. The concurring judges, namely La Forest J., Lamer C.J.C., Gonthier and Major JJ. saw the benefits garnered by the traditional family as being directly related to the traditional family's role in society as the arena in which children are raised, '[I]n recognition of changing social realities the definition of "spouse" was amended to extend the legislation to couples in a common law marriage. Marriage, a social institution of fundamental importance, is firmly anchored in the biological and social realities that heterosexual couples have the unique ability to procreate, that most children are the product of these relationships, and that they are generally cared for and nurtured by those who live in that relationship.' They go on to state that 'homosexual couples are not capable of meeting the fundamental social objectives to be promoted by Parliament. While they may occasionally adopt or bring up children, this is exceptional and does not affect the general picture'. The dissenting minority of judges namely L'Heureux-Dubé J.; Cory J., McLachlin and Iacobucci JJ. dissented from the opinions of the majority highlighting that '[t]he impugned distinction is discriminatory as it promotes and perpetuates the view that the appellants are, by virtue of their homosexuality... less worthy of

fight, and, some would say, have been successful in shifting the legal parameters of family and the definition of spouse.

My emphasis in this chapter is how the open ended nature of the *Canadian Charter of Rights and Freedoms*³ has allowed and continues to allow for the formulation of emerging identities and a redefinition of the current ones within a defined Canadian space. The *Charter's* role as a national symbol of the right to be free from impermissible discrimination has ensured that all legislation conforms to a level of liberal equality. This pan-Canadian framework of rights has aided the expansion of the term 'spouse', for example within the aforementioned immigration context.⁴ Although there was no direct involvement by the court in altering the definition of spouse within immigration law specifically, prior *Charter* rulings regarding the impermissibility of discrimination on the basis of sexual orientation, such as *Egan v Canada*,⁵ and *M v H* would probably have found the limiting of partner sponsorship to opposite-sex couples to be discriminatory on the basis of sexual orientation.⁶ The *Charter's* impact has a 'trickle down' effect on all spheres of

recognition'. Furthermore 'the metamessage that flows almost inevitably from excluding same-sex couples from such an important social institution, is essentially that society considers such relationships to be less worthy of respect, concern and consideration than relationships involving members of the opposite sex.'

³Part I of the Constitution Act, 1982, Schedule B of the Canada Act, 1982 (UK), c. 11.[hereinafter *The Charter*].

⁴See Chapter 1.

⁵*Egan*, *supra* note 2.

⁶Donald Casswell notes in his book *Lesbians, Gay Men and Canadian Law* (Toronto: Emond Montgomery, 1996) at 568- 570, that the court had not had the opportunity to consider the constitutionality of the 'immigration regulations limiting partner sponsorship to opposite sex couples.' Immigration Canada has settled any cases that have been brought against it, such as that of Christine Morrissey and Bridget Coll. Morrissey and Coll were the first queer couple to challenge the restrictive definition of spouse in the immigration legislation. Casswell notes '[t]he challenge argued that the relevant provisions of the Immigration Regulations were unconstitutional in that they discriminated against lesbians and gay men contrary to section 15 of the Charter.' The government swiftly granted Coll permanent residency. Casswell notes one of the reasons Immigration Canada granted residency may have been to avoid litigation over the issue of same-sex partnership, due to the fact that there was a

legalized existence. The international and national focus of immigration law is intrinsically affected in its administration, by the *Charter*; immigration law as a tool of the Government must maintain and uphold a level of equality.⁷ The definition of 'family' and more specifically 'spouse' is therefore affected by rulings which enforce the equality provisions of the *Charter*. Lesbians and gay men are subject to the effects of the redefinition of family, subsequently, the shifting definition of spouse affects the way in which we view lesbians and gay men and their sexuality within a familial context.

Through a *Charter of Rights* framework lesbians and gay men were enabled to push for legal recognition of their existence. The *Charter* has allowed for the incorporation of sexual orientation as an analogous ground to sex. It is important to note how lesbians and gay men have been constructed by the courts and whether the use of sexual orientation as an essential characteristic by lesbian and gay rights activist groups such as EGALE⁸ is fundamentally regressive with regards to an anti-assimilationist rhetoric of lesbian and gay identity.

I will chart the Supreme Court of Canada's connective journey through the field of lesbian and gay rights litigation using the cases of *Mossop v A.G. of Canada*,⁹ *Egan*

chance that immigration Canada would lose, and in loss there would be the judicial precedent permitting same-sex partner sponsorship.

⁷"EGALE Submissions to the House of Commons Standing Committee on Citizenship and Immigration: Re Immigration Regulations" (February 2002) online: EGALE Homepage <<http://www.islandnet.com/~egale/documents/ImmigrationSubmissions2002.htm> > (date accessed 5 July 2002). Concerning the Immigration and Refugee Protection Act (formerly Bill C-11) EGALE continues to use the Charter as a protective tool for anti-discrimination work. The legal requirements of the new immigration legislation such as cohabitation are viewed by EGALE as problematic and unconstitutional. EGALE notes that due to the legal incapacity of lesbians and gay men to be able to marry the requisite one year cohabitation requirement in order to prove a bona fide relationship exists creates a hierarchy of relationships and places a greater burden of proof on cohabiting couples.

⁸ EGALE stands for Equality for Gays and Lesbians Everywhere. Their website can be accessed at <http://www.egale.ca>.

⁹*Mossop v A.G. of Canada* [1993] 1 S.C.R. 554 [hereinafter *Mossop*].

and *Nesbit v The Queen*¹⁰ and *M v H*.¹¹ The Court's journey has been one of gradual incorporation of the lesbian and gay man within a fundamentally heterosexual framework. Such a journey begins with the acknowledgement of lesbian and gay sexuality and the necessity for it to be a protected analogous ground of discrimination under the *Charter of Rights and Freedoms*. The incorporation and acknowledgment of lesbian and gay sexuality as a legitimate form of sexual and emotional expression is articulated through the recognition of same-sex cohabitants and other legislatively incorporative acts.¹² This increased depth and breadth of definition of family and sexuality shows a willingness to protect and foster emergent identities. From an anti-essentialist perspective the *Charter's* breadth of acknowledgment could be seen as a legislative symbol of Canadian national potentiality. The ramifications of the *Charter* have been brought to bear on all parts of Canadian legislative existence¹³ including that of immigration law.¹⁴ The *Charter's* expansive scope has rendered formerly essential categories such as family, heterosexuality, and spouse, areas that were symbolic components of the Canadian matrix, open to deconstruction, and open to reformation.

¹⁰*Supra* note 2.

¹¹*M v H* [1999] 2 SCR. 3.

¹² See *Modernization of Benefits and Obligations Act*, R.S.C. 2000, (2nd Sess.), c. 12. [hereinafter Bill C-23] Some of the areas of law affected by Bill C-23 and its inclusion of common law couples both straight and lesbian and gay are *The Agricultural Marketing Programs Act* 1997, c. 20; *Bank Act*, R.S.C. 1991, c. 46; *Bankruptcy and Insolvency Act* R.S.C., c. B3; 1992, c. 27, s. 2.; *Canadian Wheat Board Act* R.S.C., c. C-24.; *Citizenship Act* R.S.C., c. C-29; *Canada Pension Plan* R.S., c. C-8; approximately 75 statutes are affected by Bill C-23.

¹³ The necessity for Bill C-23 to conform to the guarantees of the Charter is stated in the summary of the Act 'This enactment extends benefits and obligations to all couples who have been cohabiting in a conjugal relationship for at least one year, in order to reflect values of tolerance, respect and equality, consistent with the *Canadian Charter of Rights and Freedoms*.'

¹⁴*Immigration and Refugee Protection Act*, R.S.C. 2001, (1st Sess.), c. 27. Lesbians and gay men have been included in the common law definitions of spouse. See SOR/2002-227 *Immigration and Refugee Protection Regulations* C. Gaz. 2002.II Extra. 18.

The Canadian Charter of Rights and Freedoms and its expansive possibilities

*The British North America Act planted in Canada a living tree capable of growth and expansion within its natural limits...that should not be cut down...by a narrow and technical construction...but should be given a large and liberal interpretation.*¹⁵

The sentiment of Lord Sankey in addressing the scope and role of the constitution continues to be felt in *Charter* cases today. The 'living tree' imagery, as stated in what became known as the 'persons' case¹⁶ emerged in a case about the affirmation of the legal personality of women as being distinct from but equal to men. Essentially women were held to be 'persons' in law.¹⁷ The expansive judgment of the *Edwards* case, within constitutional law under *The British North America Act 1867*, set the scene for progressive identity politics and the potential for newly emergent subjects to claim an identity within the Canadian legal arena.

The British North America Act was forged out of the constitutional law of the U.K. Symbolically, the open-ended nature of constitutional reform as iterated in the *Edwards* Case, allowed Canadian constitutional law to evolve beyond the scope of the UK. The progressive potential of the *Edwards* case and the 'living tree' analogy, enabled the development of new theoretical approaches to newly emergent legal subjects. The expansive approach as utilized in *Edwards* has been put to effect in *Charter* challenges. The era in which the *Edwards* decision was rendered was a time of great change with heavy immigration into Canada. The sentiment of the *Edwards*

¹⁵*Edwards v AG of Canada* [1930] AC 124, at 136, per Lord Sankey [hereinafter *Edwards*].

¹⁶*Ibid.*

¹⁷K. Lahey, *Are We 'Persons' Yet?: Law and Sexuality in Canada* (Toronto: University of Toronto Press, 1999) at 116.

decision which possesses an awareness of the shifting face and norms of Canada was fundamentally necessary due to the diverse nature of the immigrating populace.

1982 saw the incorporation of the *Canadian Charter of Rights and Freedoms*¹⁸ into the Canadian legal system. The *Charter* embraced the concepts that had been developed in the *Edwards* case, the concept of liberal legal interpretation. A lack of specific reference to rights such as sexual orientation within the *Charter* was eventually seen by the courts to be an insufficient basis on which to deny the fundamental right and freedom not be discriminated against on the grounds of sexual orientation.¹⁹ The ideology of the 'living tree' approach to law making was tacitly referred to in *Law Society of Upper Canada v Skapinker*²⁰ where the court warned that a 'narrow interpretation of the *Charter* if not modulated by a sense of the unknowns of the future, can stunt the growth of the law.' Lesbians and gay men were an example of the 'unknowns' within Canada that required legal protection under the *Charter*. Lesbians and gay men are a new, legally recognized branch of the composite of Canadian identity, which becomes a partial representation of the Canadian national imagination.

The *Charter* was constitutionally entrenched so as to ensure that both individuals and groups had rights against government action they felt to be unjust and/or discriminatory. These *Charter* based rights and freedoms are subject to certain

¹⁸*Supra* note 3.

¹⁹It must be noted that sexual orientation was not automatically found to be a fundamental right, regardless of how explicit or implicit the Plaintiff chose to pursue his case. For example consider the *Mossop* case for the denial of family status to lesbians and gay men. The court found that the issue was not one of family status but the unprotected ground of sexual orientation discrimination within the Canadian Human Rights Act. When the case was brought to court sexual orientation was still a permissible ground of discrimination.

²⁰[1984] 1 SCR 357, in *Lahey supra* note 17 at 389.

restraints, which are found in section 1 of the *Charter*.²¹ Section 15(1) of the *Charter*, which deals with equality rights, came into effect three years after the *Charter*'s initial introduction into law.²²

*Andrews v Law Society of British Columbia*²³ was one of the first cases to discuss the purpose of section 15(1). The purpose was stated as being,

*to ensure equality in the formulation and application of the law. The promotion of equality entails the promotion of a society in which all are secure in the knowledge that they are recognised at law as human beings equally deserving of concern, respect and consideration.*²⁴

Dickson J. in *R v Oakes*²⁵ wrote 'the whole point of the *Charter* is to ensure that Canadian society be free and democratic and that the introduction of the charter meant a redefinition of our democracy.'²⁶ Theoretically the redefinition of democracy, which the *Charter* provided, could have proceeded from an anti-essentialist basis, which allows for the deconstruction of normalized expectations of human behaviour and classification. Realistically what has occurred is that the implementation of the *Charter*, and its redefinition of democracy, has endorsed a particular form of liberal legalism, which has a formal same-ness/assimilationist dictum to it. With regards to constructs of the family, neither the Supreme Court of Canada nor the legislature seems to want to fundamentally alter an intrinsic institution of Canadian society, the

²¹Section 1 states: '*The Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.'

²²Section 15(1) states 'Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.'

²³[1989] 1 S.C.R. 143 [hereinafter *Andrews*].

²⁴*Ibid.*, at 171.

²⁵*R v Oakes* [1986] 1 S.C.R. at 103.

²⁶Dickson J. in B. Macdougall, "Comment: Case Comment on *M v H*" (1999-2000) 27:1 Man. L.J. 141 at 146.

family, by deconstructing and anti-essentialising sexuality, for fear of the impact this would have on the institution, and pursuant to this, Canadian identity.

At this point in time lesbians and gay men are torn between two approaches towards rights based litigation, a formal equality approach versus a more radical. A formal equality approach to rights based litigation argues predominantly for the granting of rights, equal to those of heterosexuals. Differences between the equality seeking groups and the comparator groups, differences which could negate the positive impact of rights are subsumed in favour of formal "equality". Furthermore a liberal ideal of formal equality maybe more assimilationist in its relationship to heterosexuality.²⁷ A radical approach towards lesbian and gay rights bucks the inclusion of lesbians and gay men within a heterosexual framework, and seeks to deconstruct the boundaries of gender, and with it the influence of patriarchal ideologies²⁸ which continue to fuel homophobia, sexism and gender specific identities.²⁹

Mary Eaton has characterized the granting of formal equality as having a 'multivalent' developmental status for lesbians and gay men, 'carrying both the

²⁷ See for example the submissions of EGale Canada in *Egan*. < <http://www.egale.ca/legal/egan.htm> > Although EGale specifies that '[t]he equality of lesbians and gay men will not be advanced by requiring same-sex partners either to misrepresent their relationships as being modeled on heterosexual roles (husband and wife) or to represent their relationships publicly in such a manner so as to expose themselves to the discrimination, harassment and violence that may result from public declarations of lesbian or gay sexuality.' For more on the problems of a formal approach to rights and the differing ramifications see C.F.L. Young "Taxing Times for Women: Feminism Confronts Tax Policy" (1999) 21 Sydney Law Review 487.

²⁸ For example, a reluctance to fight for lesbian and gay marriage rights.

²⁹ See S.B. Boyd, "Family, Law and Sexuality: Feminist Engagements" (1999) 8 (3) Social and Legal Studies 369 or for an interesting account of an intervenor rejecting assimilationist arguments see J. Freeman, "Defining Family in *Mossop v DSS*: the challenge of anti-essentialism and interactive discrimination for human rights litigation" (1994) 44, no 1, U.T.L.J. 41.

negative charge of containment and the positive charge of liberation.³⁰ The incorporation of lesbians and gay men within law has had the effect of creating an essentialised sexually specific identity. Lesbians and gay men are rendered a sexually specific group. If our goal is one of deconstructing the boundaries of sexuality, of deconstructing the norms ascribed to appropriate gendered sexual behaviour, then the codification of that which is perceived to be lesbian or gay sexuality is a further circumscription and reinforcing of the ontological boundaries of sexuality. If we are to encourage the evolution of emerging identities, then the necessity that an essential characteristic of sexuality must exist in order to make rights claims circumscribes this notion of a progressive identity politics under the ambit of the *Charter*. Sexuality has been classified as an immutable characteristic, an essential feature of identity that is unchangeable or changeable only at great personal cost. This may prove problematic. By essentialising sexuality we are unable to highlight that sexuality and the performance of sexual activity is not necessarily indicative of a homosexual or heterosexual identity and may be as Herman points out a politically motivated choice, rejecting heterosexual hegemony.³¹

³⁰ M. Eaton, "Lesbians, Gays and the Struggle for Equality Rights: Reversing the Progressive Hypothesis" (1994) 17:1 Dal. L.J. 130 at 131. Further reference to the notion of containment/liberation can be found in Ruthann Robson's, *Lesbian (Out)law*, *supra* note 1. Robson makes reference to her theory of the 'domestication' of lesbians and lesbian sexuality within a safe and manageable framework of heterocentric ideology. The differentiation between a formal and radical approach to equality also lies in the difference between the effects of formal equality and its substantive impact. The garnering of formal rights is a valid goal but if this goal does not translate into practical, real equality i.e. substantive equality whereby we can feel the effects of the granting of equality. Perhaps one could say that the formal and radical approaches to equality are different points on the liberation from prejudice scale. We may very well need the formal equality rights that some lesbians and gay men fight for, but additionally we perhaps need those radicals who look beyond the acquisition of formal rights so as to provide a guide to a future where sexual identity is no longer confined to gender.

³¹ D. Herman, "Are We Family?: Lesbian Rights and Women's Liberation" (1990) 28:4 Osgoode Hall L.J. 789 at 812-813.

Analogous grounds and fragmentary formulations.

The use of analogous grounds within section 15 of the *Charter* is the definitive indicator of the expansive nature of the *Charter's* approach to equality. As an analogous ground to sex, sexual orientation was incorporated within section 15 of the *Charter* in *Haig and Birch v Canada*.³² Following this case, sexual orientation was affirmatively incorporated by the Supreme Court of Canada within section 15 of the *Charter* in *Egan and Nesbit v Canada*.³³

The interpretation of the *Charter* by the courts has shown overall a willingness to incorporate new identities. This incorporation and acknowledgment of emergent identities has caused the *Charter* and its interpreters to take on the status of post-modern entity and post-modernist enforcers, unwilling to be bound by the strict social constructs of legal interpretation, choosing instead to look at contextualised understandings of human existence. One of the most interesting aspects of the prohibition of discrimination in the *Charter* is the idea that it both unites and fragments sex and sexuality. In a terminological context the court is redefining our understanding of gender, as being connected to sexuality, thereby blending and reinforcing the notion of sexual practices being specific to gendered identities. This increase in the scope of definition is at the same time limited in its potential to see sexuality as a multi-faceted spectrum of deconstructionist shifts outside the realm of gender.

Sexuality is and is not immutable, sexuality is and is not a choice. The Supreme Court of Canada's approach to the issue of lesbian and gay sexuality has

³²*Haig and Birch v Canada* (1992), 9 O.R. (3d) 495 (Court of Appeal).

³³*Egan*, *supra* note 2 at 513.

been one of, trying to view sexuality as an intrinsic, almost genetic, fact, similar to race or sex, for these are the grounds which provide a template that the courts may follow. Indeed some of the lesbian and gay rights groups have presented lesbian and gay sexuality as a biological facet of identity, thus the court is not the only entity to perceive lesbians and gay men in an essentialised light.³⁴ The formal acknowledgment of sexual orientation as a prohibited ground of discrimination is positive, but what must be investigated is the way in which lesbian and gay sexuality is used and viewed in comparison to heterosexuality, and the way in which sexual orientation as a ground is used to define lesbians and gay men.

Deeming queer sexuality to be incorporated within sex as a ground of discrimination renders it partially shadowed. Chantal Mouffe has argued that 'modern social antagonisms often result when new discursive subjects are confronted with other discursive practices which negate them.'³⁵ The new discursive subject, the lesbian and gay man and thus a specific mode of sexual orientation, was initially placed as an analogous ground, within the confines of the sex category of prohibited discrimination. The maintenance of the connection between sexual orientation and sex is partly due to the fact that sexuality is viewed as tied to gender, rather than being interpreted as a socially constructed facet of normative identity. Normative gender has been programmed to produce correlating normative sexualities, lesbians and gay men step outside of these norms. A further reason for the confinement of lesbians and gay

³⁴ See for example submissions of the petitioners EGALE in *EGALE Canada v AG of British Columbia*. The submissions are available on the EGALE website
<<http://www.islandnet.com/~egale/documents/BC-Final.htm>> (date accessed 5th July 2002).

³⁵ C. Mouffe, "Hegemony and New Political Subjects: Towards a New Concept of Democracy" in C. Nelson and L. Grossberg, eds., *Marxism and the Interpretation of Culture* (Houndsman: Macmillan, 1988) in D. Herman, *Rights of Passage: Struggles for Lesbian and Gay Legal Equality* (Toronto: University of Toronto Press, 1994) at 18.

men to the sex category of the equality provisions is that it renders queers as an unthreatening entity, easily controlled and 'domesticated' within a *Charter of Rights* framework, a template, as it were, that has been tried and tested. In light of this the judiciary have an idea of how far they can take formal rights, the shape these rights will take and the potential impact upon society as a whole in their granting.

If we consider the new legislation in the *Immigration and Refugee Protection Act* (formerly Bill C-11) lesbian, gay and heterosexual common law couples have been granted the right to sponsor their common law partners. In granting lesbians and gay men rights that are formally on a par with heterosexual common law couples, the legislature has not had to shift the gendered foundation of an institution such as marriage. The common law relationships of heterosexual couples have been gaining more and more rights; by giving lesbians and gay men these rights the legislature is able to follow, to an extent, the template initially set out by these straight cohabiting common law couples. The legislature is able to predict the ramifications of a lesbian and gay inclusive policy.

One of the problems of this lesbian and gay inclusive definition of common law spouse is that it has not altered the basis on which family class immigration is predicated. Lesbians and gay men and heterosexual cohabitees have been subsumed into the family class as one and the same. Heteronormative values, such as dependence, monogamy, cohabitation have been pushed into queer relationships, values which do not aid a deconstructionist philosophy of a reformulation of the foundation of family.

The inclusion of lesbians and gay men within the *Charter*, as already stated, has caused both a fusion and fragmentation of the boundaries of sex and sexuality. The incorporation of lesbians and gay men has the effect of reducing the politicized state of queer existence that has been so important. In being formally rendered as a socially accepted group lesbians and gay men lose their 'outsider' status to a certain extent and are given an interior space within liberal legal norms. How does the lesbian or gay man confront the ideology of liberalism whilst being placed at the centre of liberal discourse?

Optimistically speaking, the drawing in of lesbians and gay men into the heterosexual matrix has the potential to destabilize heteronormativity. One could postulate that the presence of queer lead families fundamentally shakes the foundations of what the family has been constructed to be. Realistically however what seems to be happening is that judges are rendering invisible the difference of lesbian and gay relationships; there is a presumption that lesbian and gay relationships both endorse and are able to function in a manner mirroring heterosexual relationships. Within the immigration legislation it is presumed that lesbians and gay men will live in conjugal relationships and that for a period of three years the immigrant will be dependent on his/her partner rather than the state. For some lesbians and gay men a relationship of dependency is perhaps a partial replication of heterosexual norms and therefore is ideologically repugnant. Essentialising the family renders invisible the unique facets of queer families; families that possibly choose to live in a more socially aware state and buck the norms of gender specific roles. The lesbian and gay families, which judges seem to be affirming, are those, which assimilate to the heterosexual

norm. While it has been stated, for example in *Braschi v Stahl Associates Co*, that not all of the facets of familial life must be present within lesbian and gay relationships, the standard which homosexual relationships are held up to is that of the conventional heterosexual family.³⁶ Within an immigration context this heteronormative standard denigrates lesbian and gay common law relationships as inferior to heterosexual relationships, subjecting lesbians and gay men to a higher standard of proof with regards to the *bona fides* of their relationship. The lesbian and gay equality rights group EGALE has noted the unconstitutionality of the 'family class' proposals under the new immigration legislation. 'The *Charter of Rights* requires criteria that do not discriminate between couples based on whether they are married or unmarried, opposite-sex or same-sex.'³⁷ EGALE highlights the pervasive inequalities of the family class criteria

*[u]nder the proposed regulations, opposite-sex couples can marry and thereby automatically qualify under the family class without needing to satisfy any cohabitation requirement. By contrast, same-sex couples, with no current capacity to marry, will be denied access to the family class irrespective of the bona fides or duration of their relationship, unless they can meet a cohabitation requirement. Cohabitation is not a prerequisite for all opposite-sex couples, and may be unattainable by many same-sex couples.*³⁸

Lesbians and gay men are placed in a double bind of legal technicality. Unlike married heterosexuals who can immigrate under the 'family class' provisions regardless of cohabitation status, lesbians and gay men must demonstrate one year's

³⁶Consider for example the case of *Braschi v Stahl Associates Co.*, 543 N.E. 2d 49. Judge Titone at 51. "The long term interdependent nature of the 10-year relationship between appellant and Blanchard fulfills any definitional criteria of the term 'family.'" Judge Titone continued at 54, 'Family includes two adult lifetime partners whose relationship is long term and characterized by an emotional and financial interdependence.'

³⁷EGALE Canada Submission to House of Commons Standing Committee on Citizenship and Immigration: Re Immigration Regulations. February 2002, *supra* note 7.

³⁸*Ibid.*

cohabitation, specifically due to the fact that they are legally unable to marry. Furthermore an inability to cohabit with one's same-sex partner, regardless of the *bona fides* of the relationship, excludes lesbian and gay partner from the family class immigration process. Reasons for lesbians and gay men being unable to cohabit may be based on a fear of persecution; although the legislation notes that persecution may be a problem for some lesbians and gay men, the legislation requires that lesbians and gay men demonstrate actual persecution. In this situation these lesbians and gay men could immigrate as refugees, thereby rendering the legislation dealing with persecution an overly narrow immigration tool.³⁹ This in turn forces lesbians and gay men to use the 'humanitarian and compassionate' grounds in the *Immigration Act*, which are notoriously discretionary and arbitrary, and leave no right to appeal.⁴⁰ The heteronormative qualities of straight relationships when foisted onto lesbian and gay relationships do not take into the account the realities and contextualities of queer familial units; units that may be immigrating due to persecution, units that may well not cohabit or share assets for financial reasons, or do not predicate their relationships on the grounds of domination and subordination. Recognizing difference, rather than subjecting lesbians and gay men to a process of heterosexual normalization, would ensure that an idea of equality predicated on an workable realistic basis is implemented, rather than insufficient effects of a symbolic rather than actuated equality.

The sameness/assimilationist approach to lesbian and gay relationships was used in the intervenor factum of EGALE in the same-sex marriage case *EGALE*

³⁹*Ibid.*

⁴⁰*Ibid.*

Canada v Attorney General of British Columbia.⁴¹ The approach they have taken is a sameness style of argument in that lesbian and gay relationships are posited as being no different on a commitment or depth of feeling scale to that of heterosexuals. The personal accounts of the interveners' desire for marriage are highly emotive. The submissions seem to desire heterosexual society's acceptance and condonation of lesbian and gay relationships:

*Who doesn't dream, when they are young, about meeting the right person, falling in love and getting married? Once I realized I was gay, I thought that dream would be forever denied to me. I never dreamed I could marry a man, because all my life marriage was reserved for heterosexuals...Gays and lesbians deserve the right to share in that dream.*⁴²

Parliament has similarly seemed to take the approach of keeping its friends close and its enemies closer. Lesbians and gay men have been embraced by new legislation such as the *Modernization of Benefits and Obligations Act* that draws us into the web of heterosexual normalization.⁴³ We have been formally included in legislation that pertains to the family and have been granted a level of equality with heterosexual common law partners. Our relationships have been rendered inside the realm of law regardless of whether this is a desired status for lesbians and gay men or not, for example when we live with our partners for one year we automatically assume common law status. Queers in domestic relationships therefore have for all intents and

⁴¹(2002), 95 B.C. Law Reports (3d) 122. [hereinafter EGALÉ BC marriage case].

⁴²Affidavit of Shane McCloskey, para. 24, in Submission of the Petitioners EGALÉ Canada in *EGALÉ Canada v Attorney General of BC*, *supra* note 34.

⁴³Take for example the recently enacted Bill C-23, *supra* note 12 at s.1.1,. The amendments within the *Act* stipulate that in no way would the *Act* redefine the constituent components of Marriage, '[f]or greater certainty, the amendments made by this Act do not affect the meaning of the word "marriage", that is, the lawful union of one man and one woman to the exclusion of all others.' For more on the progress of Canadian legislation and the lesbian and gay community and marital rights see D.G. Casswell "Moving Towards Same-sex Marriage" (2001) 80 Can. Bar Rev. 810. Also see EGALÉ *supra* note 34 at para. 8-11.

purposes been normalized, essentialized and assimilated, and one must ask why this is such an important position for the government to have us in. In an era which has seen the gradual destabilization and deconstruction of states, and borders and boundaries, and family formations and rigid sexuality and sexual roles, intrinsic national identities have come under pressure to reassert a sense of their own being. Perhaps an anti-assimilationist approach to lesbian and gay sexuality, furthers exposes the contested site of meaning, 'the family', as a site of instability within the national composite, a site which is not living up to its constructed role. The *Modernization of Benefits and Obligations Act* therefore may be an effort to stabilize national identity through a format of family, thereby stabilizing those 'queer' elements that were seen to be insecure and potential sites of subversion.

Appropriation of the family has occurred in numerous circles, by numerous people. Just consider the increase in non-traditional families, single parent families, stepfamilies, lesbian and gay families, all with their role in society, but not necessarily for some, such as the lesbian and gay family, a legally acknowledged role.⁴⁴ Thus the drawing in of these families by Government codification is perhaps an attempt on the part of the legislature to reassert its authority and to wrest control back from those less empowered groups that took it and began to define their own familial position within Canadian society on their own terms.

⁴⁴ I highlight just some of the amendments made to the statutes of some of the provinces regarding the acknowledgment of lesbian and gay and straight common law partners as noted by the intervenors in the B.C. marriage case EGALE Canada, *supra* note 34 at para. 65, *Adoption Act* R.S.B.C. 1996, c.5, s.5(1); *Health Care (Consent) and Care Facility (Admission) Act*, R.S.B.C. 1996, c.181; *Family Relations Act*, R.S.B.C. 1996, c.128; *Family Relations Amendment Act 1997*, S.B.C. 1997, c.20; *Estate Administration Act*, R.S.B.C. 1996, c.122; *Adult Guardianship Act*, R.S.B.C. 1996, c.6; *Family Maintenance Enforcement Act*, R.S.B.C. 1996, c.122; *Definition of Spouse Amendment Act*, 2000, S.B.C. 2000, c.24; *An Act to Comply with the Supreme Court of Canada Decision in M. v. H. Act*, S.M. 2001, c.37.

Fassin and Feher have argued, with regards to French republican ideology and the Pacte Civil de Solidarite (PACS)⁴⁵ that the drawing in of lesbians and gay men has the purpose of

*integrat[ing], in the same way, women into political life and homosexuality into social life. Far from threatening national unity, these two projects reinforce civic bonds. Far from setting up legal and political minorities, they accomplish, each in its own way, a universal programme.*⁴⁶

Ironically, however, republican ideology disallows the growth of minority groups within the state, because they are viewed as a threat to national coherence. Sexual minorities in particular represent a cleavage in nationalist sexual totality. Therefore the drawing in of sexual minorities within the dominant core of Republican society denies this sexual faction the ability to create their own identity and denies the sexual spectrum of society to assert an identity ulterior to the norm.

Republican ideology, similar to *Charter* ideology, has the potential to stifle growth within a national group, with growth defined as the emergence of progressive identities. The universalization of formal rights, whilst popular, rejects the ideology of the "diversity is our strength" rhetoric, which has in certain circles fuelled the lesbian and gay movement. The diversity perspective is essential to an anti-assimilationist strain of potential which should be heeded rather swept away and ignored just because the majoritarian opinion of legislature and judiciary sees it as a more easily controlled

⁴⁵The PACS is the French form of a domestic contract, which can be used by both straight and lesbian and gay cohabiting couples.

⁴⁶E Fassin and M. Feher, "Parite et PACS: anatomie politique d'un rapport" in D. Borrilo, E. Fassin and M. Iacub, eds., *Au-delà du PACS* (Paris: Presses Universitaires de France, 1999) in Carl F. Stychin, "Civil Solidarity or Fragmented Identities? The Politics of Sexuality and Citizenship in France" (2001) 10 (3) *Social and Legal Studies* 347 at 356. Stychin discusses the impact of the PACS, the French equivalent of a domestic contract, the impact on Republican ideology and the solidarity of the nation state. He argues that the French government considered the inclusion of lesbians and gay men within the French national family to be a positive step towards the creation of national unity rather than a questioning of the very basis on which the French family is constructed.

category. One must take care not to be blinded by what seems like an overarching solution to lesbian and gay discrimination, when in actual fact the solution annuls the multi-faceted spectrum of identity.

Formal equality embodies the symbolic victory of the acquiescence to lesbian and gay rights within a liberal context, but aligned with this is the encroaching liberal politicality of identity politics. An anti-essentialist approach to lesbian and gay rights is useful when attempting to deconstruct the rigid boundaries of the according of *Charter* rights that construct individuals who are composed of only a single feature of personality. Essentialised accounts of sexuality lead to essentialised notions of sex and gender. Within these essentialised accounts of sex and gender is an assimilationist propensity, which disallows the deconstruction of those rigid categories of sex and gender, and disallows the deconstruction of masculine and feminine behaviour within specific gender groups.

The construction of sexual orientation as an immutable characteristic

The construction of lesbian and gay sexuality by the courts has far reaching consequences for the ways in which queers are incorporated into legislation and are acknowledged within society. Law is not and never has been 'unto itself'. The decisions made by the courts, and the terminology used speaks to society in a way that politics cannot. The judiciary is perceived as an institution that bases its decision making on morality and common sense reasoning, using judicial precedent as a guiding hand; the government on the other hand may be seen to bend its policy so as to court the voting majority and therefore is somewhat subject to its whim. Presently

the way in which the judiciary chooses to view lesbian and gay sexuality is as an essential facet of personal identity.⁴⁷ This approach is not limited to the judiciary. The essentialisation of gay identity is also a component of lesbian and gay activism and cannot be dismissed as performing a specific role. Essentialisation from a strategic standpoint can be a very useful tool in attempting to gain group rights. In strategising for change it is important that people with similar features such as a lesbian or gay sexual orientation acknowledge their similarities within a heteronormative society and thus fight for change under an umbrella identity.

In commencing this section it may be of use to note that since the formulation of a 'homosexual identity',⁴⁸ as opposed to homosexual acts, which were often seen as indeterminate of a lesbian or gay status, perceptions of issues surrounding sexual orientation have shifted. Herman notes

*[a]s asexual citizens they possessed formal equality; as 'homosexuals' they were both denied official recognition/protection and subjected to constant and changing medical diagnoses; as lesbians and gay men they created positive, affirming community structures and culture.*⁴⁹

⁴⁷ The judges in *Egan* affirmed that sexual orientation was a fundamental characteristic. Per La Forest J. *supra* note 2 at 619, "I have no difficulty accepting the appellants' contention that whether or not sexual orientation is based on biological or physiological factors, it is a deeply personal characteristic that is either unchangeable or changeable only at unacceptable personal costs...". L'Heureux-Dubé at 636, was skeptical of the approach taken by the courts in its addressing of lesbian and gay rights and the immutability factor inherent within the enumerated and analogous grounds approach. She states "[m]ost would agree that the common characteristics of all of the enumerated grounds other than religion is that they involve so-called 'immutable' characteristics. Religion, on the other hand, has been described as being premised on a 'fundamental choice'?" This result seems absurd, yet it seems to flow inevitably from an approach to "discrimination" that relies exclusively on drawing analogies from the essential characteristics of the enumerated grounds. It also demonstrates, in my mind, why reliance on characteristics "analogous" to those in the enumerated grounds is a potentially unsatisfactory means of giving effect to s.15's open-ended character."

⁴⁸ By homosexual identity I refer to a self-acknowledgment on the part of lesbians and gay men which not only embraces sexuality as a physical and emotional component of our lives, but also as belonging to a 'community' be that politicized or not.

⁴⁹ Herman, *supra* note 35 at 19.

The history of lesbians and gay men is one of enforced definitions by straight society.⁵⁰ The analytic unity of the subject, the 'homosexual' has been prone to variances in definition, variances, which portray an evolving concept of human sexuality, and the transience of 'immutable' sexual identifying characteristics. The drawback of shifting definitions is the fact that all of these shifts have represented and brought forth greater regulation, containment and constitution⁵¹ of the queer within a straight norm.

The present essentialisation of sexuality by the judiciary,⁵² seeking to define the queer body, is a further step in the continuum of lesbian and gay identity being circumvented and subjected to a predominantly heterosexual definition.⁵³ If what one is attempting to do is deconstruct the barriers surrounding what is appropriate gender behaviour and within that, appropriate gender specific sexual behaviour, then immutability arguments inhibit the quest for deconstructed identities. If we were to redefine what it means to be a man or a woman from a gender performance

⁵⁰ See chapter 1 of this thesis. Lesbians and gay men as social pariahs and perverts were brought under the wing of the medical community, and were subject to pathologisation. Having lesbians and gay men placed under the strict control of the medical profession, with its shifting definitions, sought to institutionalize homosexuals and confine them to the contained and controllable sphere of mental illness. With the move toward the definition of the non-clinical status of homosexuality, and its removal from the American and Canadian medical association's list of pathological diseases, lesbian and gay existence was altered once more. What I am attempting to emphasize is the transience of definitions of identity and thus the fluidity of what constitutes identity, especially sexual identity.

⁵¹ Herman, *supra* note 35 at 19.

⁵² *M v H* *supra* note 11 affirmed the finding in *Egan* per La Forest J. at 619 para. 5, that sexuality is "a deeply personal characteristic that is either unchangeable or changeable only at unacceptable personal cost".

⁵³ Lesbian and gay relationships are fashioned in a likeness to heterosexual common law relationships. After one year's cohabitation the relationship gains a legal status. For some lesbians and gay men the reasons for entering into a queer relationship may have been based on a desire to reject such legal norms. The political nature of some lesbian and gay relationships is annulled through the legal enforcement of such norms.

perspective, then we could deconstruct and redefine what is and is not appropriate sexualised and genderised behaviour.⁵⁴

If we return to the question of the role of essentialism, we have to be aware of how it has aided the lesbian and gay movement in the past and does indeed have a role to play now. This is a role, which must be tempered under the heading of 'strategic essentialism.' 'Despite its limitations, the use of essentialist rhetoric retains a strategic usefulness in constitutional rights discourse.'⁵⁵ The law requires strict definition and categorisation of its subject. In order for successful claims to be brought before the courts, it is easier to construct the lesbian and gay man as having a characteristic, sexual orientation, that is an unchangeable facet of personality. The idea that sexual orientation is programmed as genetic fact or at least a fundamental choice⁵⁶ allows for such ease. This 'ease' of classification allows for a distinct identity, which can be drawn into the recognised framework of human rights discourse, taking as its base a style of argument based on the claims of previously disenfranchised groups such as women or ethnic minorities. Thus sexual orientation litigation has a template to follow and potentially allows the judiciary to work from a frame of reference that it is

⁵⁴Judith Butler's *Gender Trouble: Feminism and the Subversion of Identity* (New York: Routledge, 1990) is an excellent text that addresses this point in depth.

⁵⁵C. Stychin, "Essential Rights and Contested Identities: Sexual Orientation and Equality rights Jurisprudence in Canada" (1995) 8 Can. J. L. & Jur. 49 at 59 in B. Macdougall, *Queer Judgments Homosexuality, Expression and the Courts in Canada* (Toronto: University of Toronto Press, 2000) at 44.

⁵⁶*Egan supra* note 2 at para. 89, L'Heureux-Dubé J. states with regards to the distinctions being made within the spousal benefits legislation, based on the sexual orientation of the applicants, that 'The distinction, moreover, is on the basis of an aspect of "personhood" that is quite possibly biologically based and that is at the very least a fundamental choice.' La Forest J. in *Egan* at 620 para. 6 '[I] observed that the analogous grounds approach in section 15 was appropriate to a consideration of the character of "social groups" subject to protection as convention refugees. These, I continued, encompass groups defined by an innate or unchangeable characteristic which, I added, would include sexual orientation.'

comfortable with, thereby making lesbian and gay rights claims slightly less threatening by reducing the 'novelty' factor.⁵⁷

A further factor to be considered in the essentialist debate is the affirmation of lesbian and gay existence. In Macdougall's *Queer Judgements*, reference is made to Eve Kosofsky Sedgwick's concern that the influence of anti-essentialism has the potential to erase lesbian and gay existence, to the point where '[constructionism] continues by inventing an ethical or therapeutic mandate for cultural manipulation; and ends in the overarching hygienic western fantasy of a world without any more homosexuals in it.' She goes on to conclude that "essentialism offers resistance to this threat 'by conceptualizing an unalterably *homosexual body*, to the social engineering momentum apparently built into every one of the human sciences of the west....'"⁵⁸ From a strategic legal stance, the 'unalterable homosexual body' that Kosofsky-Sedgwick refers to provides a core of resistance that is incontrovertible and unified. Lesbian and gay sexuality and the inherent identification which comes with that has not reached a point where one can comfortably say that one no longer needs a specific lesbian and gay identity politic. Lesbian and gay existence is still subjected to homophobia, to certain legal restrictions, to in some cases societal abhorrence. Public opinion still resists complete inclusion of lesbians and gay men. It is from this perspective, with the quest for formal equality still being fought, that we cannot fully reject essentialist philosophies. What is necessary to do though is to reconfigure this essentialism as strategically based. If we acknowledge a common thread binding not just lesbians and gay men together, but all groups who have been subjected to

⁵⁷ Although in *Egan*, Justice Sopinka was disinclined to expand the definition of spouse, one aspect of his reasoning was based upon the 'novelty' of same-sex couples.

⁵⁸ Macdougall *supra* note 55 at 44-45.

prejudice in the past through not conforming to societal norms, be they gender, racial, religious or sexual, we have the ability to fight a common enemy, a common enemy of normalized expectation of human behaviour.

The strategic essentialist standpoint is not so far removed from an anti-essentialist grounding being merely different points on the anti-discrimination continuum. For example EGALE's essentialism focuses on the here and now, the specificity of lesbian and gay existence and the practical formal equality of benefits and obligations aligned with a sentiment of non-differentiation between straights and lesbians and gay men. If we compare this with an anti-essentialist approach and its post-modern associations we are asked to look further than we previously thought we needed to. In the struggle to gain formal equality we may well have bypassed the very foundation of what has endorsed the discrimination of lesbians and gay men, the normalized roles of gender behaviour as instituted by those who benefit from such roles, the racially dominant, sexually dominant monetarily dominant, predominantly male caucus. The granting of a specific type of formal equality, i.e. liberal equality, has endorsed a sameness style approach to the rights which are granted to lesbians and gay men and heterosexual common law couples. For example, in *M v H* there was no questioning of straight relationships as being flawed, what was questioned was whether lesbians and gay men could fit within this format and not disrupt the structure of the heterosexual family. Radical feminism therefore and its deconstructionist associations which focus more on the deconstruction of gender and its associations of the masculine and the feminine, thereby rendering accounts of sexuality outside of

gender have been sidelined within the Supreme Court, in favour of the here and now of formal equality.

Anti-essentialism provides us with an opportunity to reshape our understanding of human behaviour. As previously mentioned 'identity is complex-it is fragmented, intersected, subject to alteration, socially constructed, and it exhibits only a partial fixity at any moment.'⁵⁹ This 'partial fixity', this transience of identity leaves remnants of itself from which future identities may flourish and build on. The fact that men and women will experience sexual and emotional attraction towards members of their own sex will never disappear. What will happen is that the boundaries which are in place will become more porous and the stigma which is attached to same-sex sexual orientation will cease. Post-modern discourse surrounding gender identities will provide a map of sorts, aiding the journey through these tumultuous times.

By maintaining the immutability theories of sexual orientation in formal equality discourse, we are not only allowing resistance to deconstructionism to take hold, we are proscribing specific gendered sexual behaviour. We are allowing ourselves to be brought within a framework of socially normalised, socially accepted standards of human sexual existence. Immutability has allowed the law to ascribe legally permissible same-sex behaviour under the heading of sexual orientation. This permissible sexual identity has further assimilated lesbians and gay men to a norm which was not of our creating and which is fundamentally a flawed fallacy in the first place. We are being asked to live up to a fallacious standard that exists for only a small minority of the population but which has been heralded as the only viable

⁵⁹ C.F. Stychin, *Laws Desire: Sexuality and The Limits of Justice* (London: Routledge, 1995) at 201.

option, the golden child of gendered sexual existence, the conventional family. By confining sexual orientation to those with a lesbian and gay identity is to proscribe acceptable sexual behaviour to a specific class rather than to the class of humanity in general.⁶⁰

The sexual orientation and family status nexus

***'Receptivity to political discourse is in part dependent on the dynamics of subjectivity.'*⁶¹**

The shifting dynamics of our contextualised existence have the ability to shape our views and render us in a position, to formulate a discourse worthy of progressive social intent. The 'receptivity to political discourse,' which Mort mentions, bears great importance for progressive formulations of identity and progressive formulations of family. Receptivity allows us to envisage the 'potential'. This openness to an evolving political discourse, allows for the redefinition and reinterpretation of constituted norms. And while it is true that this discourse will be dependent on personal dynamics, an openness to hear and acknowledge the discourse is the first step in attempting to implement change.

If one considers the judiciary an entity that is in a supreme position to be a receptive vessel of political discourse, one begins to see the import and necessity of the 'living tree' doctrine of the *Charter*. Lesbian and gay activists have had to use the rhetoric of progressive identity politics in order to assert a sense of shared community,

⁶⁰For more on the constructing of social identities within the courts see N. Iyer, "Categorical Denials: Equality Rights and the Shaping of Social Identity" (1993/94) 19 Queen's L.J. 179.

⁶¹F. Mort, "Essentialism Revisited? Identity Politics and Late Twentieth-Century Discourses of Homosexuality" in Jeffrey Weeks, ed., *The Lesser Evil and the Greater Good. The Theory and Politics of Social Diversity* (London: Rivers Oram Press, 1994) 201 at 205.

so as to gain formal equality. The gaining of this equality has been in part dependent on the willingness of the judiciary to re-imagine the realities, contexts and boundaries of human sexual and emotional expression.⁶² Mort notes that '[n]ew sexual personas are not assembled out of thin air, they have to be forged out of the current vocabularies available.'⁶³ Redefining notions of the family, for example the definition of spouse and the widening of the ambit of legislation, has contextualised queer relationships and has brought queer existence into the realm of public discourse, into the realm of nationalist discourse.

The vocabulary of the law has granted lesbians and gay men formal equality and drawn them further in to a 'straight style matrix' of relationship, a 'style' which was not necessarily desired by all. If we consent to Mort's hypothesis that 'persona's are forged out of the current vocabulary available' then we must realise that these new personas, or these redefined facets are influenced by the historical derivation of the words used to define them. What we do by redefining these words is push the boundaries of existence, and reformulate modes of living. With language as our primary tool, public awareness is heightened by the impact of a new discursive term, such as the legally endorsed lesbian and gay relationship reflecting a new discursive subject, the queer common law partner. As this new discursive subject challenges the definition of family, the family's boundaries are expanded; the lesbian and gay man

⁶²For example in *Egan* the dissenting judgments of L'Heureux-Dubé J.; Cory J.; Iacobucci JJ. and McLachlin J., were unanimous in their opinion that the denial of Old Age Pension benefits to a same-sex partner was discriminatory and that this exclusion sent out the message that 'society considers such relationships to be less worthy of respect, concern and consideration.' These members of the Supreme Court were unwilling to endorse such a message. Since *Haig and Birch*, the Court's approach to lesbian and gay relationships has been to accord them equal respect and parity with common law heterosexual relationships, indeed the enactment of Bill C-23, *supra* note 12, is the formalized version of the re-imagining of intimate relationships. For the legislation that is affected by the *Act* see note 12, or for a thorough listing log on to the government website <http://www.parl.gc.ca>.

⁶³Mort, *supra* note 61 at 207.

becomes an intrinsic part of the familial definition and a component in the intimate living arrangements of the Canadian family.

The refusal of many lesbians and gay men to assimilate into a straight lifestyle, denying heterosexual sexual orientation, has been cause for accusations that queers undermine society.⁶⁴ By resisting the 'threat' of social castigation and bucking heterosexuality as the only valid way to express one's self emotionally and physically, one validates one's queer existence by positively affirming an alternate way to live. This alterity manifests itself in for example a refusal to procreate through heterosexual sexual activity, thus 'threatening societies very existence.'⁶⁵ Lesbians and gay men further undermine society by questioning sexualized gender roles, thus undermining what it means on a sexual and emotional level to be a man or a woman.

The meanings assigned to the roles of gendered sexual behaviour by society have been one of the greatest challenges to the affirmation of lesbian and gay existence.⁶⁶ The assignation of a homosexual identity has brought with it both liberation and judgment. Jeffrey Weeks has noted that '[t]he real problem... lies in the question: What are the meanings that this particular culture gives to homosexual behaviour, and what are the effects of those meanings on the ways in which individuals organise their sexual lives.'⁶⁷ The court's role in assigning these meanings is of fundamental importance. As a national institution the judiciary's interpretation of

⁶⁴Herman *supra* note 35 at 19.

⁶⁵*Ibid.*

⁶⁶ See for example the case of *Re Board of Governors of the University of Saskatchewan and Saskatchewan Human Rights Commission* (1976), 66 DLR 3d 561 (Sask. QB), where it had to be explicitly noted that the gay defendant was also admittedly of the male gender.

⁶⁷Jeffrey Weeks in Macdougall *supra* note 48 at 46-47.

the meanings of the terms 'family' and 'lesbian and gay' will have an impact on the way Canadian society views the family and lesbians and gay men.

Canada v Mossop: frozen family formations and legislative intent

The evolution of judicial thought surrounding lesbians and gay men and their relationships is progressing. Since the current position of lesbians and gay men within the *Immigration Act* under the 'family class' is that of common law status, it may be of interest to chart the court's journey towards this point. If we begin with the case of *Canada (Attorney General) v Mossop*,⁶⁸ we see that the Supreme Court's characterization of lesbian and gay sexual orientation and its nexus to the relationships lesbians and gay men chose to enter were seen to be separate issues.

The facts surrounding the case are as follows. Brian Mossop was an employee of the Federal government. Mr Mossop had been involved in a relationship with Ken Poppert for the last ten years, during which time they had jointly owned and maintained a home. Upon the death of Mr Poppert's father, Mr Mossop took a day off work to attend the funeral. According to the collective agreement between the Treasury Board and Mr Mossop's union, which had codified the terms of employment, Mr Mossop was entitled to four days of bereavement leave upon the death of a member of his 'immediate family'. Immediate family in the agreement included common law spouses but common law spouse at the time was defined as a person of the opposite sex. Upon applying for bereavement leave the day after the funeral, the application was refused. Mr Mossop's grievances passed through the appropriate work agreements channels, which failed to offer any hope of a successful outcome.

⁶⁸*Supra* note 9.

Hence, Mr Mossop filed his grievance with the Canadian Human Rights Commission.⁶⁹ The Commission found impermissible discrimination under the ground of 'family status' contrary to the *Canadian Human Rights Act*. The Commission ordered that the definition of common law spouse be amended so as to include same-sex couples.

The Federal Court of Appeal reversed the findings of the Commission. Upon the appeal reaching the Supreme Court of Canada, the two main issues to be determined were whether the Federal Court of Appeal had incorrectly held that a Human Rights tribunal decision was reviewable, and furthermore whether the definition of 'family status' was to be interpreted so as to not include same-sex relationships.⁷⁰

The Supreme Court of Canada in a 4-3 verdict disagreed with the decision of the Human Rights Tribunal. Lamer C.J, writing for the majority, relied on arguments based on legislative intent. Lamer C.J. concurred with the findings of Marceau J.A. in the Federal Court, noting that when the *Canadian Human Rights Act* was amended in 1983 to include 'family status' as a prohibited ground of discrimination, Parliament specifically refused to include sexual orientation as a further prohibited ground of discrimination. Lamer C.J. continued,

*[i]n 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 CHRA the prohibition which parliament specifically decided not to include in the Act, namely the prohibition of discrimination on the basis of sexual orientation.*⁷¹

⁶⁹ All facts were taken from the original judgment of *Canada (Attorney General) v Mossop*, *supra* note 9.

⁷⁰ *Ibid.* at 555.

⁷¹ Lamer C.J. in *Mossop*, *ibid.*, at 580.

Concluding, Lamer C.J. noted that if sexual orientation had been included within the *Act* at the time the case entered the court system then potentially the decision may have gone in favour of Mr Mossop. Furthermore it is interesting that Lamer C.J., aware of the changing legal approach to issues of sexual orientation, noted that 'this decision [should not] be interpreted as meaning that homosexual couples cannot constitute a "family" for the purposes of legislation other than the *CHRA*. In this regard, each statute must be interpreted in its own context.'⁷²

The *Mossop* ruling was a disappointing socially regressive downturn in the quest for formal equality. It indicated that the judiciary at this point was unwilling to go against what it saw as legislative intent and unwilling to acknowledge the family status of lesbian and gay couples. The reasoning of the majority was shrouded in terminology reflecting an "our hands are tied" excuse, relying on the proposition of legislative intent. Ryder has noted that following parliamentary intent is atypical of the way in which Human Rights cases have previously been decided: '[P]arliament's intent was to have tribunals and courts determine the precise meaning of family status in the usual evolutionary, case-by-case basis.'⁷³ The unwillingness of the Supreme Court to expansively interpret definitions of 'family status' stifled the Tribunal's progressive approach and placed legal boundaries on the potential impact of human rights rulings, which would have to defer to legislative intent. This approach was

⁷² *Ibid.*, at 582. Bruce Ryder notes in his article "Family Status, Sexuality and the Province of the Judiciary: The Implications of *Mossop v A-G- Canada*" (1993) 13 Windsor Y.B. Access Just. 11-12, that the decision reached in *Veysey v Correctional Service of Canada*, (1989), 29 F.T.R. 74, [1990] 1 F.C. 321 *Knodel v British Columbia (Medical Services Commission)* (1991) 58 B.C.L.R. (2d) 356, *Leshner v Ontario* (No.2) (1992), 16 C.H.R.R. D/184 (Ont. Bd.Inq.) and *Clinton v Ontario Blue Cross* (No.2) (1993), 18 C.H.R.R. D/377 (Ont.Bd.Inq) 'accepted that one's choice of intimate living partner is closely linked to one's sexual orientation.'

⁷³ Ryder, *ibid.*, at 19.

fundamentally at odds with the idea of a progressive and evolutionary approach to emerging groups and emerging identities in Canadian society.

Secondly, the undefined nature of 'family status' was a site ripe for an expansive definition. Canadian Human Rights legislation along with the *Charter of Rights and Freedoms* and the *Constitution Act* of 1867, had been utilised in a manner which is dynamic, purposive and generous. The living tree metaphors of all rights based litigation, including the quasi-constitutional *Human Rights Act*, were seen to embody that spirit. Reliance upon parliamentary intent negates that spirit and was fundamentally at odds with the way in which the courts had approached other human rights cases.

The dissent of L'Heureux-Dubé J. in *Mossop* was, however, an encouraging judgment with regards to the living tree analogy, and with regards to the realities of lesbian and gay families. She notes that the lack of specific definition over 'family status' within the *Act*, leads one to interpret the enumerated grounds of discrimination 'in the context of contemporary values, and not in a vacuum.'⁷⁴ The evolving nature of family therefore should not be "frozen in time"; her Ladyship's assent to the tribunal's findings highlights the fact that interpretation of 'family status' was subject to and governed by 'the principles of interpretation of human rights codes in general and the *Act* in particular, enunciated by the Supreme Court of Canada in *O'Malley*, *Bhinder*, *Action Travail des Femmes* and *Robichaud*. This is not simply a mechanical exercise, because the principles of interpretation are themselves expressed in broad terms.'⁷⁵ Thus the Court had previously affirmed the legality, the constitutionality and

⁷⁴ L'Heureux-Dubé J. in *Mossop* *supra* note 9 at 621.

⁷⁵ *Ibid.*, at 622.

the expected scope of human rights tribunals to interpret in a liberal and purposive manner, that which reflects current understandings of human rights issues. McIntyre J. in *O'Malley* observed 'the accepted rules of construction are *flexible enough* to enable the court to recognize in the construction of a human rights code the special nature and purpose of the enactment'. [Emphasis in original].⁷⁶

L'Heureux-Dubé J.'s construction of the term 'family status' was an attempt to balance progressive anti-essentialist theories of the family, with the necessity for some sort of demarcated boundaries of family that are socially, legally and politically acceptable and useful within a practical framework. She began by highlighting the ambiguity of the term family: "[w]e speak of families as though we all knew what family are."⁷⁷ What we are confronted with is the dominant conception of what the family is. We have the stereotypical norm of the husband and wife and their children as being constitutive of the dominant socially correct familial formation. What the tribunal attempted to do was to conceptualize the family from a functional standpoint, considering the intrinsic elements within the term. The tribunal had the foresight to recognise that the attributes of family were not a static set of correlatives, but instead were a composite of possibilities. L'Heureux-Dubé J.'s judgment lists numerous possibilities ranging from the traditional conservative conceptions, to the theoretical and functional, where the modern family is deigned to be those in a caring relationship with future obligations towards the unit.⁷⁸ The Supreme Court's final decision

⁷⁶McIntyre J. quoted by L'Heureux-Dubé J. *ibid.*, at 622.

⁷⁷L'Heureux-Dubé J. *supra* note 9 at 623.

⁷⁸*Ibid.*, at 625. L'Heureux Dubé J. specifically lists

1. "The family is a system or unit.
2. Its members may or may not be related and may or may not live together.
3. The unit may or may not contain children
4. There is commitment and attachment among unit members that include future obligations.

conceptualizing the family seemed to be fundamentally flawed, lacking any sort of contextualised judgment, and ignorant to the reality of the lesbian and gay family, whether legally sanctified or not.

L'Heureux-Dubé J. further insisted on highlighting that one's choice of partner is of fundamental importance with regards to one's emotional well-being. If the family is seen as the foundation of society, a forum in which to care and be cared for, a place of 'safety and comfort', if this is denied to certain groups of people, namely lesbians and gay men, then this prohibition fundamentally affects one's role within the state. Denial of this role within the state is a denial of an integral "sense of personhood."⁷⁹ Castigation of lesbians and gay men is a denial of belonging both legally and socially and contributes to the annulment and erasure of lesbian and gay existence as a partial representation of the Canadian composite.⁸⁰

Emphasis within her Ladyship's judgment was placed on modern conceptions of the family, considering its functional rather than idealized state. She chose to utilize much socially progressive feminist and lesbian theory: 'It is the social utility of families that we all recognize, not any one proper form that "the family" must assume; it is the responsibility and community that the family creates that is its most important social function and its social value.'⁸¹ If we accept the fact that much 'social value' is placed on the family, then it seemed regressive and socially harmful to deny lesbians and gay men access to the family. If the legislature or society was attempting to forge

5. The unit care-giving functions consist of protection, nourishment and socialization of its members'.

⁷⁹L'Heureux-Dubé J. in *Mossop* supra note 9 at 637.

⁸⁰ For a thorough analysis on the issue of lesbian and gay personhood within Canada see Lahey, *supra* note 17.

⁸¹J. Larson, "Discussion" (1992), 77 *Cornell Law Review* 1012, at 1014, quoted by L'Heureux-Dubé J. in *Mossop* supra note 9 at 632.

relationships of intimacy, caring, support both emotional and financial, then the exclusion of lesbians and gay men was patently unreasonable. Exclusion from an assimilationist point of view merely allowed lesbians and gay men to become an unstable entity outside of the direct control of the courts and legislature. If Parliament and Immigration Canada wanted to assert a more coherent and unified vision of Canadian identity, then the endorsing of queer relationships as an integral part of the Canadian family helps to forge a national identity where differences can be sublimated (to a certain extent) within the legal construct of family, thereby theoretically providing an arena of national unity.

Ultimately same-sex relationships can have all of the outward signifiers which would be found in a heterosexual relationship. L'Heureux-Dubé J.'s challenge to conservative conceptions was guarded by a need to be socially aware of the realities of family but also to acknowledge that the law requires definition, and recognisable characteristics to work with. Her Ladyship characterizes the decision over what constitutes family as a 'false choice.'⁸² 'It is possible to be pro family without rejecting less traditional family forms. It is not anti-family to support protection for non-traditional families. The traditional family is not the only family form, and non-traditional family forms may equally advance true family values.'⁸³

The majority in *Mossop* endorsed a heterosexual formation of family as a foundational feature of Canadian society. The impact this had on lesbian and gay families is a denial of belonging within the state. Rulings on the construct of the family within legal discourse do not just affect the parties before the court but the

⁸²L'Heureux-Dubé J. in *Mossop*, *supra* note 9 at 634.

⁸³*Ibid.*

Canadian family in a national sense. The denial of the rights of lesbian and gay families was an explicit rejection of the validity and sanctity of lesbian and gay relationships. Concern, respect and consideration were seen as values which were not appropriate to bestow on queer families; lesbians and gay men were denied a sense of personhood within the state; under the law our relationships were cast as less than real, and we as less than human. Within *Mossop* lesbians and gays were not family and therefore not part of the pan-Canadian family, our familial relations were not constitutive of an appropriate form of Canadian identity.

The constructed categories of the traditional family have hindered the development of alternate family forms and delimited the options of sexually categorized roles within the family. Although *Mossop* dealt very closely with the issue of family status, there was very little discussion on the impact that this redefinition would have had on the definition of spouse. For a closer analysis of the implications of the changing definition of spouse and the affirmation of sexual orientation as a prohibited ground of discrimination we must turn to *Egan and Nesbit v Canada*.

The influence of the Egan and Nesbit v Canada decision

The case of James Egan and John Nesbit revolved around the definition of spouse in section 2 of the *Old Age Security Act*.⁸⁴ Egan and Nesbit claimed that the then definition of spouse within the *Act* violated section 15(1) of the *Charter*. Spouse was defined as 'a person of the opposite sex who is living with that person, having lived

⁸⁴*Egan and Nesbit, supra* note 2.

with that person for at least one year, if the two persons have publicly represented themselves as husband and wife.⁸⁵

The provisions of the *Act* allowed for the granting of a spousal allowance to the spouse of the pensioner when the spouse is between the ages of 60 and 65, and where the combined income of the couple falls below a designated level. Egan and Nesbit had lived together in a 'spousal' like relationship since 1948. Nesbit applied for the spousal allowance when he reached the age of 60 but was rejected because he was not part of an opposite sex couple. Egan and Nesbit sought a remedy, which would expand the definition of spouse so as to include same-sex conjugal couples as being akin to common law couples.⁸⁶

The *Charter* challenge began in 1989. In 1991 the Trial division of the Federal Court denied Egan and Nesbit's claim. The reason the trial judge gave for the negative outcome was based on the fact that the couple belonged to a 'non-spousal category' of claimants. The judge acknowledged that the government had conceded that sexual orientation was an analogous ground under the *Charter*, but that 'the distinction between homosexual and heterosexual couples was not based on sexual orientation but rather on the Plaintiffs belonging to the non-spousal category.'⁸⁷ Furthermore the purpose of the legislation was deemed to be to 'alleviate the financial plight of elderly married couples, primarily women who were younger than their

⁸⁵*Old Age Security Act*, R.S.C. 1985, c.O-9, section 2, as amended by R.S.C. 1985, c. 34 (1st Supp.), s. (1). The definition of spouse has since been repealed by the implementation of the *Modernization of Benefits and Obligations Act*, *supra* note 12 under s. 254 (1),(2), (3).

⁸⁶C.F. Stychin, "Novel Concepts: A Comment on Egan and Nesbit v The Queen" (1995) 6:4 *Constitutional Forum* 101.

⁸⁷M.C. Hurley and J.R. Robertson "Sexual Orientation and Legal Rights" *Current Issue Review* (Ottawa: Library of Parliament, 1997) at 13.

spouses and who generally did not enter the work force.’⁸⁸ Upon reaching the Federal Court of Appeal a 2-1 majority concurred with the Federal Trial division findings and ruled that in relation to other non-spousal couples lesbians and gay men were not affected in an adverse way. The crux of the issue rested on entitlement based on spousal status and homosexuals, like many other groups, did not possess this status.⁸⁹

In May of 1995, the case reached the Supreme Court of Canada where a 5-4 majority dismissed the appeal for redefinition of ‘spouse’.⁹⁰ Due to the division of issues that were discussed the loss was not a complete failure. The court affirmed unanimously that under section 15(1) of the *Charter*, sexual orientation was an analogous ground of prohibited discrimination, thereby asserting as an absolute, the protection of the *Charter’s* equality guarantees. The second issue under adjudication was whether the definition of spouse did discriminate on the basis of sexual orientation. A 5-4 majority found that the definition of spouse did discriminate on the grounds of sexual orientation.⁹¹ The final point, which was the point on which the case failed, was the justification of discrimination under section 1 of the *Charter*. Whilst Sopinka J. had agreed that sexual orientation was an analogous ground of discrimination and that under section 15(1) of the *Charter* there existed a finding of discrimination, he found, pursuant to section 1 that such discrimination was permissible. His reasoning on the justifiability of deference to section 1 was based on a belief ‘that government must be accorded some flexibility in extending social

⁸⁸*Supra* note 85.

⁸⁹The groups mentioned included other non-spousal couples such as brothers and sisters, other relatives regardless of sex, parent-child relationships, room-mates or any other non-spousal household excluded from the *Act*.

⁹⁰The majority that ruled against *Egan* was composed of La Forest J.; Lamer C.J.; Major J.; Justice Gonthier, and Sopinka J.

⁹¹The majority on this point consisted of Sopinka J., Cory J., Iacobucci J., McLachlin J. and L’Heureux-Dubé J.

benefits and does not have to be proactive in recognizing new social relationships. It is not realistic for the court to assume that there are unlimited funds to address the needs of all.⁹²

The predominant reasoning of the court was based on key features such as an unwillingness to interfere with parliament's socio-economic policy.⁹³ Secondly, the functional value of the legislation was not just to support poor elderly spouses but was to support the unique aspect of heterosexual conjugal relationships, the ability to procreate.⁹⁴

*[M]arriage has from time immemorial been firmly grounded in our legal tradition...[I]ts ultimate raison d'être...is firmly anchored in the biological and social realities that heterosexual couples have the unique ability to procreate, that most children are the product of these relationships ...[I]t would be possible to legally define marriage to include homosexual couples, but this would not change the biological and social realities that underlie the traditional marriage.*⁹⁵

The third main reason was based on the idea that lesbian and gay men and indeed lesbian and gay rights, were at this time seen as 'novel concepts'⁹⁶ when attempting to redefine spouse.⁹⁷

The judgments in *Egan* provided us with varied approaches to judicial decision-making. La Forest J.'s traditionalist conservative family values approach toward the role of family and Sopinka J.'s judicial deference, if compared to the more progressive practical financial approach of Iacobucci J. and the reformulative approach to analysing equality of L'Heureux-Dubé J., provided a spectrum of legal

⁹²Sopinka J. in *Egan supra* note 2 at 653.

⁹³Per La Forest J. at 627. La Forest J. writing for the majority of the court reasoned that parliament ought to be given "reasonable room to manoeuvre."

⁹⁴*Ibid.*, at 624-628.

⁹⁵*Ibid.*, at 625.

⁹⁶Sopinka J. in *Hurley and Robertson supra* note 87 at 13.

⁹⁷Sopinka J. in *Egan supra* note 2 at 656, 'equating same-sex couples with heterosexual spouses, either married or common law, is still generally regarded as a novel concept.'

view points. As diverse as some of these viewpoints were, there was still a unity in the definition of the lesbian or gay man within gendered boundaries. The family, whether it was being shored up by the majority judgment and defined within a narrow traditionalist conception, or was being expanded by the dissenters within the case, nevertheless retained a specific form and function. The dissenting judgment encouraged a newly developed image of family to prevail, but ultimately it was an essentialised image of the normative values of the heterosexual family that lesbians and gay men must adhere to.

The minority judgment of La Forest J. with regards to the issue of procreation was problematic on numerous levels. La Forest J. continued to ascribe specific characteristics of familial and sexual existence, whereby lesbians and gay men were precluded from bearing any role with regards to the procreation of children. For heterosexuals La Forest J. chose to essentialise the straight family as having an innate need to create a family unit, which presumably he believed was not the case in lesbian and gay relationships. 'Parliament's support and protection of legal marriage extends to heterosexual couples who are not legally married...many of these couples live together indefinitely, bring forth children and care for them in response to familial instincts rooted in the human psyche.'⁹⁸

Let us first consider how La Forest J.'s 'rooted in the human psyche' was logically connected to the matter in hand, the definition of spouse. Were we to infer from La Forest J.'s comments that in possessing an essential heterosexual orientation one is automatically driven to breed. Is the judiciary in a position to confront and judge the desires of the human psyche? Furthermore why would this primary desire to

⁹⁸La Forest J. *supra* note 2 at 626.

create familial ties be exclusively heterosexual? La Forest J. failed to provide any reasoning, scientific or moral, for this heterosexual familial fate. La Forest J. rested his theory on out dated notions of what the family was and how it was represented in society.⁹⁹ There is no harm in acknowledging the traditional family, so long as it is acknowledged as just one of the many forms that the family can take. It is true that the heterosexual family is the primary site for the raising of children, but this is certainly not the only site. If what was at the heart of his judgment was a 'best interest of the child' argument, then surely the best interest of the child would be in an environment, which is legally acknowledged and protected, and benefits from the social welfare programmes of the state. Placing children in an environment where their families are not acknowledged seems to expose children to potential abuses of the state system.

Returning to the legislation that was at hand once more, the place of children within the judicial debate seems to be going further than what the legislature intended. The legislation highlighted the opposite sex definition of spouse but in no way made any reference to children or procreation.¹⁰⁰ The legislation focused on the financial needs of a couple once they have reached the requisite age for old age pension benefits. Nowhere does the legislation indicate that the presence of children should be a relevant factor.

⁹⁹ In the bibliography of the judgment there is a wealth of material on the diversity of lesbian and gay relationships.

¹⁰⁰ *Old Age Security Act, R.S.C. 1985, c.O-9*

19(1) Subject to this Act and the regulations, for each month in any fiscal year, a spouse's allowance may be paid to the spouse of a pensioner if the spouse,

(a) is not separated from the pensioner

(b) has attained sixty years of age but has not attained sixty-five years of age; and

(c) has resided in Canada after attaining eighteen years of age and prior to the day on which the spouses application is approved for an aggregate period of at least ten years and, where that aggregate period is less than twenty years, was resident in Canada on the day preceding the day on which the spouses application is approved.

The decontextualisation of family in favour of some traditionalist conservative notion rendered the judicial interpretation of the purpose of the legislation flawed and incomplete. The judgment of L'Heureux-Dubé J. was perhaps the most useful and progressive approach towards the issue of discrimination. Her Ladyship's judgment was a reconfiguration of the previous approaches to equality and was seen as a step towards the anti-essentialist movement of identity politics. L'Heureux-Dubé J. warned of the perils of following a road where discrimination must be based on one of the current enumerated grounds: 'discrimination cannot be reduced to water tight compartments, but rather will often overlap in significant measure.'¹⁰¹ The *Egan* case had three predominant overlapping grounds of discrimination; the claimants were older, poor and gay. How one may ask, is it possible to separate these three intrinsic factors within their lives? Although the courts may be aware of these intersecting grounds of discrimination the issues presented and the decisions rendered were based only upon the one ground that was thought to be the main ground of discrimination.¹⁰²

L'Heureux-Dubé J.'s questioning of the necessity to possess an 'immutable characteristic' in order to bring a *Charter* challenge was of interest, in terms of the way equality rights were heading. Allowing for the growth and development of emerging identities L'Heureux-Dubé J.'s approach allowed for the evolution of newly emergent groups regardless of whether they possess one of the enumerated characteristics. In considering section 15(1) she argued that an approach which focused on considering the specified grounds enumerated in the *Charter* '[does] not give primacy to the word discrimination, but rather give(s) primacy to the nine

¹⁰¹L'Heureux-Dubé J. in *Egan supra* note 2 at 646.

¹⁰²Cory J. chose to take the view that the discrimination was based on finances and economics that bore a logical connection to the relationship which the claimants were involved in.

enumerated grounds. In essence, it defines the preconditions to when discrimination will be present exclusively by reference to qualities seen generally to reside in those grounds.¹⁰³ She continued by suggesting that the necessity of possessing an immutable characteristic 'is a potentially unsatisfactory means of giving effect to s. 15's open-ended character.'¹⁰⁴ L'Heureux-Dubé J.'s concern that one must draw analogies from the enumerated grounds was centred on the impact this approach may have on circumventing potential claims of discrimination for those who have yet to have their rights tabled for discriminatory protection. What one must take into account is the impact that such distinctions have on particular groups rather than focusing on the grounds upon which such a distinction is made;¹⁰⁵ 'it is no longer the "grounds" that are dispositive of the question of whether discrimination exists, but the social context of the distinction that matters.'¹⁰⁶

By contextualising discriminatory distinctions we are given the chance to look at the intersecting grounds of discrimination that people experience. These intersecting grounds deconstruct the rigid legal barriers that encapsulated and separated groups that ought to have been recognising diversity, recognising the correlations of oppression. In the continuing attempt to break down the barriers of our existence, we must acknowledge that it is all of the components of the enumerated grounds, not merely individual grounds, that form our composite. By deconstructing the boundaries of sex and sexuality, age and disability, and all of the other potential combinations and acknowledging that those grounds are not the end groupings of

¹⁰³L'Heureux-Dubé J. in *Egan* at 635.

¹⁰⁴*Ibid.*, at 636.

¹⁰⁵*Ibid.*, at 637.

¹⁰⁶*Ibid.*, at 646.

discrimination we deconstruct the boundaries of legal existence. When these grounds intersect we must look to the factors that affect and oppress those in positions of subordination and unite in a common goal to reject and rebel against those factors in society that have a common thread of domination and normalization.

Egan represented the movement towards the inclusion of the lesbians and gay man within liberal legal discourse. The sexuality of the queer was positively affirmed and protected by the judiciary, and thus sexuality on an individual basis was allowed to become part of the matrix of identity which forms Canada from a legal perspective. Same-sex sexuality and its relationship to the family was, however, held to be insufficiently annexed to one another. The assertion of the reality of the lesbian and gay family was rejected as being inconsistent with the norms of the conventional heterosexual family and thus lesbians and gay men and their families were constituted as being outside of the Canadian national familial imagination.

M v H¹⁰⁷: The redefining of family and the delineation of spouse

M and H were two women who had lived together in a "spousal" like relationship for approximately ten years. Upon the breakdown of the relationship M moved out of the 'common home', and sought an order for 'partition and sale of the house' and then subsequently amended the order to include a claim for spousal support under the *Family Law Act*.¹⁰⁸ M challenged the constitutionality of the opposite sex definition of spouse within section 29 of the *FLA*.¹⁰⁹

¹⁰⁷ *Supra* note 11.

¹⁰⁸ *R.S.O. 1990, c.F.3* [hereinafter *FLA*]

¹⁰⁹ "spouse means a spouse as defined in subsection 1 (1), and in addition includes either of a man and woman who are not married to each other and have cohabited,

An 8-1 majority of the Supreme Court¹¹⁰ held that under section 15 of the *Charter*, the definition of spouse discriminated on the basis of sexual orientation. Lesbian and gay relationships were acknowledged and the claims that the *Act* in question was discriminatory were heard. Facially *M v H* was an important victory in deconstructing the definition of spouse so that lesbians and gay men were eligible for spousal support provisions. It was tremendously encouraging to have an almost unanimous court endorse the validity of lesbian and gay relationships and alternate structures of family. The Supreme Court's acknowledgment that levels of financial dependency exist upon the breakdown of same sex relationships is an acknowledgment of the financial and social realities of lesbian and gay relationships and is a formal practical step forward in the way in which queer relationships are viewed. The differing justifications behind the judgment's are somewhat problematic when endorsing a deconstructed version of 'spouse' within the *FLA*. The judgments of Cory J. and Iacobucci J. are an interesting fusion of endorsing same-sex relationships whilst deconstructing understandings of 'spouse', pursuant to and reliant upon the practical legislative goals of fiscal conservatism and the privatization of economic responsibility.

(a) continuously for a period of not less than three years, or

(b) in a relationship of some permanence, if they are the natural or adoptive parents of a child.

Section 1 (1) defines spouse as

1. (1) In this Act

...

"Spouse" means either of a man and woman who

(a) are married to each other, or

(b) have together entered into a marriage that is voidable or void, in good faith on the part of the person asserting a right under this Act.

¹¹⁰The majority of the court wrote separate judgments regarding the definition of 'spouse'.

Nevertheless a 6-1 majority found in favour of altering the definition. Justice Cory and Iacobucci JJ. wrote a joint judgment at 25-89 which also represented the view points of Lamer C.J., L'Heureux-Dube J., Cory J. McLachlin J., Iacobucci JJ. and Binnie JJ.; Major J concurred 155-157; Bastarache J. wrote from 157- 201. Justice Gonthier dissented and his judgment can be found at pages 89-155.

Justice Cory commenced his judgment with a consideration of the equality guarantees. The section 15 equality findings relied mainly on the precedent set in *Law v Canada*.¹¹¹ The judges' three-step approach towards a finding of discrimination involved three lines of inquiry. Cory J.'s first line of questioning was to ask if the impugned law 'draws a formal distinction between the claimant and others on the basis of one or more personal characteristics, or fails to take into account the claimants' already disadvantaged position within Canadian society resulting in substantively differential treatment between the claimant and others on the basis of one or more personal characteristics.'¹¹² Under section 29 of the *FLA* it was found that there was differential treatment, due to the fact that had M been involved in a heterosexual rather than homosexual relationship she would have been able to make a claim for spousal support. Under section 29 of the *FLA* two out of three personal characteristics of M and H's relationship were found to be present, namely that there was a degree of permanence and that the relationship had been conjugal in nature. The only factor that was under question was that a relationship with someone of the same sex was a barrier to support and this was the indicator of differential treatment based solely on the sexual orientation of the claimant.¹¹³

Cory J.'s second line of inquiry asked 'was the claimant subject to differential treatment on the basis of one or more of the enumerated and analogous grounds?'¹¹⁴ As stated in *Egan* sexual orientation is an analogous ground of prohibited discrimination.

¹¹¹*Law v Canada (Minister of Employment and Immigration)* [1999] 1 S.C.R. 497.

¹¹²Cory J. in *M v H* *supra* note 11 at 46.

¹¹³Maddougall, *supra* note 26 at 144-145.

¹¹⁴Cory J. *supra* note 112 at 46.

Cory J.'s third inquiry was 'does the differential treatment discriminate in a substantive sense, bringing into play the purpose of section 15(1) of the *Charter* in remedying such ills as prejudice, stereotyping and historical disadvantage.'¹¹⁵ His three main objections to the treatment of lesbians and gay men under this ground commenced with the argument that one should be given access to a process which could potentially confer a benefit, economic or otherwise. Secondly denying lesbians and gay men access to such a benefit contributes to the overall vulnerability of those involved in same-sex relationships. Finally Cory J. focused on the notion that denying this right demeans the relationships of lesbians and gay men, characterizing them as being relationships of impermanence, which lack fundamental features of 'intimacy and economic dependence.'¹¹⁶ Cory J. summed up his findings by attempting to dispel some of the myths that surround lesbian and gay relationships,

*[t]he exclusion of same-sex partners from the benefits of s.29 of the FLA promotes the view that M and individuals in same-sex relationships...are less worthy of recognition and protection...they are judged to be incapable of forming intimate relationships of economic interdependence as compared to opposite sex couples.'*¹¹⁷

Cory J.'s encouraging response towards same-sex relationships was an overwhelmingly positive approach to same-sex relationships. Iacobucci J. wrote the section 1 analysis. Under a section 1 analysis the onus is placed on the shoulders of the legislature to prove that the burden is warranted. The legislature must demonstrate

¹¹⁵ *Ibid.*

¹¹⁶ Cory J. *supra* note 11 at 57.

¹¹⁷ *Ibid.*, at 57.

that the 'legislation furthers an important objective and there is a nexus between that objective and the impugned law, the law will be justified.'¹¹⁸

Iacobucci J. deemed that the primary purpose of the *Family Law Act* 'is to provide for the equitable resolution of economic disputes that arise when intimate relationships between individuals who have been financially interdependent break down (Parts I-IV).'¹¹⁹ He further found, having considered the government debates that had surrounded the introduction of the *Act*, that one of the objectives of the government had been to move the financial burden away from the government and onto the shoulders of the private sector upon the breakdown of a relationship. In light of this, Iacobucci J. could find no logical reason for the exclusion of lesbians and gay men from the legislation. The inclusion of lesbians and gay men would further the government's commitment to an economy of 'fiscal restraint'. The gender neutral wording of the *Act* was another factor which swayed Iacobucci J. towards the conclusion that there was no legislative intent or rational connection in attempting to improve the position of heterosexual women in constrained economic positions.¹²⁰ The support obligation of section 29 'is borne by spouses who are defined as "either of a man and woman."¹²¹ Iacobucci J. approaches the position of M in a contextualised manner, looking at the reality of the relationship upon its breakdown. In his proportionality assessment Iacobucci J. sees no rational connection between denial of

¹¹⁸M. Welstead, "M v H Financial support in Same-sex relationships – A Canadian Constitutional Solution" (2000) 12:1 Child and Family Law Quarterly at 76.

¹¹⁹Iacobucci J., *supra* note 11 at 63.

¹²⁰Maddougall, *supra* note 55 at 148.

¹²¹*Supra* note 119 at 66.

support to same-sex couples and the objectives of the *Act*: 'dependencies can and do develop irrespective of gender in intimate conjugal relationships.'¹²²

In remedying the discriminatory legislation, Iacobucci J. decided to sever the definition of spouse in section 29 of the *FLA*, declaring it to be of no force or effect. In using this remedy Iacobucci J. gave the legislature time to 'devise its own approach to ensuring that the spousal allowance be distributed in a manner that conforms with the equality guarantees of the Charter.'¹²³

M v H sends out the message that the judiciary is not willing to advocate discrimination towards lesbians and gay men. The fact that the judgment was couched and endorsed in terms of the privatization of economic responsibility is, however, disappointing. Preferably, the judgment would not have needed to rely on socio-economic legislative intent in order to provide a socially acceptable and workable judgment. What would have been more heartening and supportive would have been a judicial endorsement of lesbian and gay relationships regardless of the benefits of privatizing costs upon the breakdown of personal relationships.¹²⁴ Nevertheless *M v H* is a positive step towards the formal recognition of lesbian and gay relationships in its most practical sense. The awarding of spousal support has the effect of legitimizing and in a way sanctifying the import and ramifications of entering into a relationship. The rights and responsibilities that flow from lesbian and gay relationships have been subjected to legal codification and thus have legal ramifications of protection and penalisation.

¹²²*Ibid.* at 68.

¹²³*Ibid.* at 87.

¹²⁴ For more on the economic aspects and the endorsing of lesbian and gay relationships see Susan B. Boyd, *supra* note 29.

The positive formal gains which *M v H* has provided must be considered in the context of a progressive approach to lesbian and gay families. If our goal is to break down the gendered norms of sexuality and thus attempt to combat patriarchy, sexism, and homophobia, and we see the family as one of the primary sites within which these norms are perpetuated and endorsed, we have to consider how much of a positive impact the outcome of this case really has had.¹²⁵

The outcome of *M v H* provides three major causes for concern. Once again traditional marriage like relationships have been endorsed and placed on a pedestal of social recognition, and further ingrained in societies head that '[o]ther forms of sexuality are understood in relation to marriage'¹²⁶ with marriage as King. Although lesbian and gay relationships were placed on a par with heterosexual common law relationships, there is still a division between this status and that of marriage. The judgment was explicit about the fact that what was under question was the definition of spouse and not the definition of marriage, these were posited as two very separate spheres.

The incorporation of lesbians and gay men within a family law context, has the potential as Boyd has written to "domestic[ate] deviant sexualities within a safe, useful and recognizable framework."¹²⁷ We must consider which lesbians and gay men are gaining access to the institution of family law. Lesbian and gay inclusion within the family law framework extends appropriate ways of living through a fundamentally

¹²⁵The legislation pursuant to the *M v H* decision was *An Act to amend certain statutes because of the Supreme Court of Canada decision in M v H*, R.S.O. 1999, (3rd Sess.), c.6. For more on the implications of lesbian and gay inclusion see S.B.Boyd "From Outlaw to Inlaw: Bringing Lesbian and Gay Relationships into the Family System" (1999) 3(1) Yearbook of New Zealand Jurisprudence 31-53.

¹²⁶B. Macdougall, "The Celebration of Same-Sex Marriage" (2000-2001) 32: 2 Ottawa L. Rev. 235 at 243.

¹²⁷Boyd, *supra* note 29 at 378.

heterosexist framework to those previously excluded from familial legal practices. Our inclusion within the framework is heavily circumscribed using assimilationist tactics to make lesbians and gay men look and act as straight as possible. Gwen Brodsky has provided a succinct account of this process,

[I]n family benefits litigation, the formal equality paradigm marginalizes lesbians and gay men who are not like the stereotype of heterosexual couples or who do not meet standard criteria for heterosexual common law relationships; ignores the equally legitimate claims to benefits of those not in couples, whether heterosexual or lesbian or gay; precludes a more radical challenge by lesbians and other feminists to the patriarchal family; endorses socially approved sexual relationships as a legitimate basis of entitlement to benefits, and falsely assumes that only benefits and no detriments flow from state recognition of spousal relationships.¹²⁸

We are strengthening the validity of traditional family ideology, and thus formal and substantive equality is paired along the lines of one step forward or two steps back.¹²⁹

The continued essentialisation of the familial constituent and familial role-play is being further engrained. The drawing in of lesbians and gay men has ideologically the potential to reformulate the very basis upon which the family stands. In order for lesbians and gay men to be both incorporated into family legislation and challenge this incorporation at the same time, we must ensure that new legislation does not enforce the reproduction of heterosexual norms within a liberal agenda of immutable homosexuality assimilated and defined as gay but only straighter.

The ramifications of the *Charter* rulings directly impacts on the formation of immigration law. The *Charter* has highlighted the impermissibility of discrimination

¹²⁸G. Brodsky, "Out of The Closet and Into a Wedding Dress? Struggles for Lesbian and Gay Legal Equality" (1994) 7 C.J.W.L. 523 at 532 in W. Van der Meide "Who Guards the Borders of Canada's "gay" Community: A Case Study Of The Benefits of the Proposed Redefinition of "spouse" Within the Immigration Act to Include Same-Sex Couples"(2001) 19 Windsor Y.B. Access Just. 63.

¹²⁹D. Cooper and D. Herman "Getting "the Family Right": Legislating Heterosexuality in Britain, 1986-1991" (1991) 10 Can. J. Fam. Law. 41 at 78.

on the basis of sexual orientation. As we have seen this *Charter* protection is applicable to our same-sex relationships. The *Charter* has become a useful tool in the hands of the judiciary. The rights and responsibilities, which are found within the *Charter* ensure that all government institutions adhere to a certain level of liberalism. Parliament and Immigration Canada may have been aware that if a *Charter* challenge were made to the provisions of the *Immigration Act* that did not recognise same-sex family class immigration then the court's may have had to utilise their powers and legally enforce change.

Mossop, *Egan* and *M v H* in their combined effect have all contributed to the creation of the new *Immigration and Refugee Protection Act*. *Mossop* attempted to fuse the idea that one's sexual orientation is intimately connected to the relationships that one forms. *Egan* continued this vein by highlighting that the sexual orientation and family nexus were connected and required financial help. This financial assistance was circumvented through the discriminatory definition of spouse, but on a positive note sexual orientation was found to be a prohibited ground of discrimination. *M v H* took the definition of spouse within the *FLA* one step further, a step that ultimately impacted on legislation nationwide. *M v H* began the steady journey towards the modernization of benefits and obligations and then the reformulation of family class in the *Immigration and Refugee Protection Act*. The influence of *M v H* has proved tremendously important in the way legislation has been approached from a financial standpoint.

The ruling in *M v H* justified the privatization of economic responsibility and has been utilised and endorsed within the *Immigration and Refugee Protection Act*.

The duration of sponsorship of an immigrant has been reduced from ten to three years. Within these three years the immigrant's sole means of support in lieu of employment is reliance upon one's sponsor i.e. one's common law or married spouse. The expense of sponsoring one's spouse is kept firmly in the boundaries of the family unit, diverting costs away from the state. Although the decrease in sponsorship duration from ten to three years is encouraging, problems may arise within those three years, problems that perpetuate relations of domination and subordination through economic dependency. EGALE has noted that a 'lengthy sponsorship duration impacts disproportionately upon women and increases dependency and subordination.'¹³⁰ The affirmation of heteronormative values within lesbian and gay relationships perpetuates the subordinated position of the less dominant social actors. By denying immigrants access to the social security system, they are tied to a sponsor and their immigratory status is subject to the mercy of a common law partner or spouse. This situation of dependency does not foster relationships of parity and equality, it leaves partners open to spousal abuse using immigration law as a weapon to enforce such abuse.¹³¹

The *Charter* has proved tremendously useful as a tool for formal legal change. But this formal equality that we have been granted must translate into actual lived and experienced equality. Our lesbian and gay partners have been given an opportunity to become our legal family. This is an interesting position for many lesbians and gay

¹³⁰ *Supra* note 7.

¹³¹ Citizenship and Immigration Canada have stated in *Building on a Strong Foundation for the 21st Century* (Canada: Minister of Public Works and Government Services, 1998) at 26, that there will be an increase in the integrity of sponsorship undertakings. the proposed policy directions of Immigration Canada state '[t]he government proposes to expand Citizenship and Immigration Canada's power to undertake collection action against defaulting sponsors and to share the proceeds with the provinces...it is also proposed to prohibit sponsorship by people in default of court-ordered obligations alimony or child support) and people convicted of crimes involving domestic violence. There is an assumption that a family will be viable, and will be able to function on a single wage if the immigrant is unable to find a job.

men, for we are now both within and without the system of liberal legalism. Some queer families are endorsed, namely those that conform to the heterosexual norm against those that choose to live alternative relationships, a position which is becoming harder to maintain. Upon being placed within the centre of law and liberal discourse, our relationships are subjected to certain modes of existence, for better or worse; in spite of this we have the ability, even if we are drawn into this legal web, of creating families that can be critically aware of patriarchy, of domination and subordination and try as far as possible to expel such norms from the realm of the same-sex family.

Conclusion
*The Primacy of Practice over Belief*¹

In this thesis, the intertwined relationships of national, familial and sexual identity have been exposed as sites of contested meaning. The 'definitive' qualities associated with each have been shown to be social constructions rather than essential facets of identity and thus have been subject to deconstructionist explanations of the bases on which they were predicated. The interplay of the three grounds of national, familial and sexual identity is viewed in the thesis as concentrically connected and inherently unstable.

The concentric connections followed a pattern whereby national identity is influenced by legislation pertaining to who can and cannot be considered part of the Canadian national matrix through the utilization of immigration law and legislated family policy. Immigration was seen as the first line in the construction of an acceptable face and an acceptable sexual composite of Canada. The family was and is seen as a regulated institution from which we not only derive a national populace, but a populace with a specific face and sexuality that is indicative of Canada. The redefining of family within immigration law to include lesbians and gay men was therefore directly connected to perceptions of the Canadian family and the Canadian national populace. The nexus of sexuality to national identity and family is of great importance.

The inclusion of lesbians and gay men within the family class for the purposes of immigration law has altered the expected and legally endorsed composite of family.

¹Foucauldian philosophy as interpreted by S. Bordo, "The Body and the Reproduction of Femininity" in K. Conboy, N. Medina and S. Stanbury, eds., *Writing On The Body: Female Embodiment and Feminist Theory* (New York: Columbia University Press, 1997) 90 at 91.

Lesbians and gay men have the potential to shift foundational features of the family such as patriarchy and homophobia to the periphery of their familial unions. These newly endorsed family forms that buck gender norms become partial representations of the Canadian family and thus become partial representations of the Canadian composite, redefining the straight basis on which both the family and national identity were composed. The fusion of nationality, family and sexual identity were found to be inherently unstable categorizations. Attempts to formulate these identities as static and unchanging were discussed and dismissed in chapters one and two as essentialised accounts that are permanently subject to transformation; these identities can only be viewed as singular instances of individual subjectivity.

The instability of the categories nationality, family and sexuality ultimately reflect the instability of the self. Collier has observed through a Foucauldian interpretation that 'sexual identity has become ... that through which we speak of *and become* ourselves, the Truth of our beings.'² There are three points within this statement that require further analysis. '[T]hat through which we speak of' has linguistic intricacies, which belie its seemingly obvious facial interpretation. 'Sexual identity [as]... that through which we speak of' embodies lesbian and gay sexuality as more than a performative conjunction of two same-sex bodies. Within this sentence '[T]hat through which we speak of,' consists of an identity of sexuality which resides within humankind as a conduit. '[T]hat' becomes intrinsic to us, and in this sense sexual identity cannot be quantified, cannot be defined solely on the basis of signifiers of sexuality. '[T]hat' sexual identity denies the specificity of the lesbian, gay,

²R. Collier "Straight Families, Queer Lives? Heterosexual(izing) Family Law" in C. Stychin and D. Herman, eds., *Sexuality in the Legal Arena* (London: The Athlone Press, 2000) 164 at 177.

bisexual, and straight categories. The human body uses sexuality as a conduit which produces a prismic sexual identity. Sexual identity as a prism channels the discourse of identity and identification and produces a spectrum of sexual potentiality. In possessing these sexual prisms we produce our own individual spectra of sexuality. '[T]hat prism is the conduit through which we are able to construct and deconstruct our sexualities. '[T]hat' sexual identity allows us to assert a deconstructed theory of sexuality predicated on a medium composed of multi-faceted imaginings of human sexuality. What this spectrum of sexual composition enables us to do is deny the essentialised categories of human sexuality and highlight that the prismic potential of sexual orientation is infinite. This deconstructionist approach to sexuality proves problematic when utilized within law. Laws tendency to create absolutes, norms against which the 'other' can be placed becomes a fallacy when placed within post-modern discourse. The norm within law in itself is an incoherent concept, transient, shifting and inherently unstable. If there is no norm then how can we justify the position of the 'other' as being other, the 'other's' transgression is negated and becomes part of the collectivity of instability.

The second analytic point of the sentence, 'that through which we speak of *and become*', Collier's Foucauldian use of the words '*and become*' betray the constructed nature of sexuality. In becoming we must have constructed our sexuality, or had our sexuality constructed for us from what could be seen as a blank sheet. To 'become', one must begin at a certain point. The point most of us start at in becoming a specific identity commences with our gender identity assigned at birth. As male and female our lives are a mass of socially constructed norms that are foisted onto our blank non-

programmed, non-indicative bodies the moment we are born. We are constructed within the categories of male and female as possessing masculine or feminine traits; the better we enact these traits the more successful we can say one is, as a man or a woman. The genderisation of the human body is the enactment and assignment of specific and appropriate modes of sexuality. Collier's Foucauldian observation that sexuality therefore becomes the truth of our being can only be seen as valid when we become beings devoid of a domineering socially constructive cult of essentialisation. The 'Truth' of our sexual identity is the truth of a liberated sexuality, unbound by the norms of a society intent on classification and normalization. When we have wrested the control of our sexuality away from ideologies that have sought to exclude lesbians and gay men, ideologies that dominate and delimit sexual potentiality, perhaps then we will all be able to speak of the truth of our beings.

A further consideration of the interplay of nationality, family and sexuality is necessary to indicate the way in which deconstruction of these three grounds plays into the liberation of the norms of sexuality.

Halberstam and Livingston note '[t]he urgency for new kinds of coitions and coalitions is too compelling in an age of continuous and obligatory diasporas.'³ The stranglehold of essentialised identities, and their confinement within specific boundaries of the social is slowly being dismantled. The urgency of which Halberstam and Livingston speak is the realization and the desperate embrace to start living life anew. The coitions and coalitions that were previously outlawed/unavailable/closeted/denigrated have been redefined by standards that

³J. Halberstam and I. Livingston, "Introduction" in J. Halberstam and I. Livingston, eds., *Posthuman Bodies* (Indianapolis and Bloomington: Indianapolis University Press, 1995) 1 at 2.

deviate from the totalizing hegemonic definitions of normalized society. Lesbians and gay men are formulating their own modes of sexuality against a lesbian and gay standard of moral acceptability. Furthermore anti-essentialist accounts of liberating wo/man from the dominance and complex interweaving of patriarchy, homophobia, misogyny, racism and the host of other discriminatory categories, are coalescing and utilizing the 'tools' that other oppressed groups have already used in order to achieve further liberation from discrimination.⁴ In deconstructing institutions that were previously thought to be impermeable to change, such as family and sexuality, we have allowed ourselves to glimpse the potential that society possesses. This potential to shift the boundaries of existence cannot be bounded within the sphere of the national. In an age where communication and discursive input across international boundaries can be instantaneous, the discourse, status, and sexuality of the international lesbian and gay man is gradually from a Canadian perspective being unbounded.

Lesbian and gay familial identity, particularly in Canada, has to a limited extent been liberated. The lesbian and gay body has become an international entity, threatening the boundedness of state affirmed sexuality. Orford has noted that 'the sovereign Western state "represents the fantasy of a certain kind of heterosexual masculinity... impermeable, bounded, separate and Other to the chaotic world that surrounds it."' ⁵ Lesbian and gay identity as a feature of the populace of the western nation is a symbolic component of all that is not the fantasy of the western nation.

⁴T. Kushner, "Homosexual Liberation: A Socialism of the Skin" in A. Gluckman and B. Reed, eds., *HomoEconomics: Capitalism, Community and Lesbian and Gay Life* (New York: Routledge, 1997) 185 at 189.

⁵A. Orford, "The Use of Sovereignty in the New Imperial Order" (1996) *Australian Feminist Law Journal* in C.F. Stychin, *A Nation by Rights* (Philadelphia: Temple University Press, 1998) 12.

The lesbian and gay body has become a fantasy of alterity; the lesbian and gay body has become the permeable, and a tool of permeating, the boundedness of the homosexual has given way to its inculcation, acknowledgment and formal acceptance within society. Lesbians and gay men are no longer separated entities. Lesbian and gay enclaves, communities, stores, clubs, celebrities have become accepted components of the broader community, aiding community diversification. If lesbians and gay men have been presented as the 'other', a component of the 'chaotic world', then we have also become signifiers of the far-reaching grounds of normalized political liberalism. Lesbian and gay sexuality has been legally affirmed in Canada as a ground of prohibited discrimination; from being classed as the deviants of society, some of us are now classed within that bedrock of acceptability, as members of the family.

How does the inclusion of lesbians and gay men affect the national imagination? How does this inclusion affect 'the iconography of interstate relations.'⁶ What the inclusion of lesbians and gay men represents is the deconstruction of the fallacious sexual ideal of the nation state's inherent sexuality. Lesbian and gay formal equality in the realm of immigration law, specifically within the realm of family class immigration policy, as discussed in chapter one, denotes the multi-composited accent of Canadian sexuality; it shows a development in the perceived facial and sexual form of which nation can partake. Sarat and Kearns have posited that 'good society values diversity as the basis of inclusion.'⁷ Perhaps Canada has reached a point where it holds the belief that its national identity and international significance does not need to

⁶D. Cooper, *Power in Struggle* (Buckingham UK: Open University Press, 1995) at 72 in Stychin., *ibid.*

⁷ A. Sarat and T.R. Kearns "Introduction" in A. Sarat and T.R. Kearns, eds., *Cultural Pluralism, Identity Politics and the Law* (USA: University of Michigan Press, 1999) 1 at 3.

formulate a politics of exclusion on the basis of sexuality. By drawing certain lesbians and gay men into an arena of liberal sexual and familial normalization, the law and legislature are able to control an identity which was seen as subversive, and a threat to the fundamental tenets of nationhood premised on the basis of family. The drawing in therefore of lesbians and gay men seems to be less about the endorsing of alternate sexualities, but of the 'tolerance' of an alternate sexuality within a highly regulated format of family which is nuclear and privatized. Furthermore, the inclusion of lesbians and gay men rather than breaking down the barriers of our notions of the specifics of gender and sexuality, merely rewrites the cast of Canadian society. Sarat and Kearns have noted that 'identity and culture are performed or enacted in socially prescribed ways.'⁸ The identity and culture of Canada therefore has increased its cast list. The newly enacted immigration legislation is the casting call for specific types of lesbian and gay relationships, these are relationships that are as close to the heterosexual norm of the nuclear privatized family as possible. The reality therefore of the lesbian and gay family, of lesbian and gay gender subversive sexuality is subsumed into the enactment of the normalized conventional family. This lesbian and gay sublimation further distances those queers who are not willing to enter into the matrix of heterocentrism, rendering them as outsiders on the periphery of society.

Within immigration legislation there has been an assumption of dependence, previously on a gendered basis. The sponsor of an immigrant within the family class was bound to her sponsor for a period of ten years as a dependent.⁹ The decrease of the ten-year sponsorship to a period of three years in the 2002 legislation is a notable

⁸*Ibid.*, at 4.

⁹S.A.M. Gavigan, "Paradise Lost, Paradox Revisited: The Implications of Familial Ideology for Feminist, Lesbian and Gay Engagement to Law" (1993) 31:3 Osgoode Hall L.J. 589 at 608.

decrease in time span for what may have been enforced dependency, but nevertheless a level of dependency is still there. In the newly devised format of family, the legislature has still not allowed for an overhaul of the notion of dependent female spouse and breadwinner husband. Lesbian and gay relationships are being subjected to such norms of dependency, imbuing within potentially egalitarian relationships patriarchal notions of power and oppression. Therefore the evolution of family has still not reached its goal of a familial unit based on a standard of equality and parity even with the inclusion of lesbians and gay men. The inclusion of lesbians and gay men has seemingly shored up the construction of the conventional family and affirmed its power-ridden structure.

The historical foundation on which the family has been constructed was devised on a basis imbued with patriarchal notions of gender subordination and economic dependency. Formally Canadian society has rejected through statutes and case law the validity of women's oppression. However, what is occurring in newly fashioned legislation, albeit in a less obvious manner, is the continued subordination of women and the subordination of alternative sexualities. Some lesbian and gay headed families have differing ideologies over the purpose and format that family may take, but in order to gain legal status, are having to curtail these alternative family arrangements for familial structures which pander to straight norms.

Foucault has written that 'power represses therefore should not the analysis of power be first and foremost an analysis of the mechanism of repression.'¹⁰ The mechanism that has been used as the tool of repression has been the circumscription of

¹⁰M. Foucault *Power/Knowledge: Selected Interviews and Other Writings 1972-1977*, in Colin Gordon Ed., (New York Pantheon Books, 1980) 90.

gendered identity and thus sexual identity. The essentialisation of the masculine and feminine along with the dominance of capitalist societies has rendered women as subsidiary additions to a world of men. The repression of women and their consignment to the non-public world of the home has placed the identity of women in the realm of the subordinate. The subordination of women has been compounded through the continued construction and shaping of familial legislation, which has endorsed structures of dependency based on gender identities. Foucauldian philosophy has posited that

[t]o be a woman, a man, or a parent, is not just a biological label, but is encrusted with all the complex things that it means to be a woman, man, parent in a particular culture at some particular point in time.¹¹

The labels of man, woman and parent are non-static in their representative status. The shifting expectations of man, woman and parent, were utilized as appropriate identifiers of one's role within society. The potential the family possesses for further evolution is unbounded. Postmodernism will not allow for constructs such as the family to stand still; by the very act of exposing the basis on which the family stands, we enable a discourse to ensue which asserts that any static singular definition of the family is plaintively fallacious, or ideologically misguided. The changes that occur within a fundamental societal unit such as family cause a ripple of fear to run through those that were raised within the family. Alterations to an institution that for many people is or was a haven of love, nurturance and protection seem unnecessary and a threat to the basis of their lives. That which is to be formed, these alternative families, is a source of excitement and fear, the element of the unknown; the potential for the

¹¹ Foucault in A. Hunt and G. Wickham *Foucault and the Law* (London: Pluto, 1994) 7.

egalitarian liberated version of family or what some may see as a horrific travesty of family lies ahead.

Postmodernist assessments of societal structures such as family, allow for the discursive interpretation of that which has been formed in an attempt to analyze the why and how of societal structural integrity.

*'Post-isms' marks simultaneously the...failure to imagine what's next and the recognition that it must always appear as "the as yet unnamable which is proclaiming itself and which can do so, as is necessary whenever a birth is in the offing, only under the species of the non-species, in the formless, mute infant and terrifying form of monstrosity."*¹²

These post-isms are an interesting culmination of descriptive identifiers. If we consider the lesbian and gay family as a post-ism of 'non-species' of 'formless', 'mute infant', 'monstrosity', we are able to see the queer family as a composite of binaries within the descriptive complex. The idea of lesbian and gay families as a non-species and as formless allows lesbian and gay families to construct themselves from a basis that has not been outlined by heterosexual society. The notion of the queer formless family is the ultimate position in liberation from constructionist society. The connection of the formless to the 'mute infant' and the feared 'monstrosity' negates the societal liberation and instead becomes a societal premonition or at least societal nightmare, which in itself impinges on and rejects the potential projected formations of future society.

'Western culture has never been anything but a selective fiction.'¹³ Western culture has been a creation through the eyes of a specific sector of society, a dominant sector of society, namely white heterosexual masculinity. The fictions the dominant

¹² *Supra* note 3 at 2-3.

¹³ *Supra* note 3 at 9.

actors have created within society have served and continue to serve its purpose as a fiction engrained within what is now perceived as the 'truth'. This 'fiction' of western culture that embodies the family has become a constructed version of a disseminated reality. This is a reality based on the hegemonic norms of a dominant masculinity and a dominant sexuality. This 'fiction' permeates its way into all spheres of social life including the legal and political, hence we have a form of society predicated on a specific genderised and sexualized moral basis. Lesbians and gay men and other groups are challenging this totalising fiction that seeks to tell the story of our lives and in turn are presenting our autobiographies of existence, both familial and sexual.

Chapter three of the thesis sought to highlight the way in which lesbians and gay men were being constructed within the legal field. The 'fiction' of western culture and therefore the 'fiction' of the western family in its conventional format have also served to propagate the fiction of essential sexuality. The imbuing of essential characteristics within the legal subject allows for an ease of classification. The multiplicity of characteristics that form the non-legally classified person are too complex, too subjective, and too individualistic to be subject to the strict interpretation of legal nomenclature.

The formation of identities is constituted on a basis of comparison; one is defined, especially in equality rights litigation in terms of what one is not, in terms of how much we deviate from the norm. In terms of the judiciary, the position of the adjudicator, the position of the claimant, and the position of the comparator group against which the claimant states his/her position, the claimant must highlight the norm and assert a claim that there is an inequality because the claimant does not

conform. Iyer has written, in relation to the categorizer in anti-discrimination law that s/he has a

*particular social identity shared, in varying degrees, by members of the dominant group in Canadian society...[t]he dominant social identity is embedded in the basic social structures so that it remains white and male and heterosexual even though not all members of the dominant group possess all of these characteristics.*¹⁴

The possession by the judiciary of the dominant features of society, white, masculine, heterosexual characteristics therefore privileges the adjudicator's social experience as the norm, whilst constructing the claimants experience and lived social position as somehow inferior. The white, male, heterosexist social position becomes that which claimants must aspire to. Law's approach to the classification of the legal subject is the opposite of the post-modernist accounts of humanity. Post-modernism places the 'human subject within the lens of the social.'¹⁵ Through this lens the identity of the subject is viewed as a composite of characteristics derived from a social basis. The individual becomes just that, an individual; s/he does not represent the totality of one particular group, she is not the supreme representation of wo/man, of queer, of a specific racialized identity, the subject within postmodernism has the potential to be all of these things and to be none of these things, but what they will be, and what they will possess is a multi-faceted identity with correlations and relationships connected to the rest of society in greater or lesser degrees. As a theoretical approach to explaining the identity of wo/man and her/his social situation, post-modernism allows us to take this human subject, view his/her derivation, view

¹⁴N. Iyer, "Categorical Denials: Equality rights and the Shaping of Social Identity" (1993/94) 19 Queen's L.J. 179 at 186.

¹⁵J. Wicke, "Postmodern Identity and The Legal Subject" (1991) 62 University of Colorado Law Review 455 at 457.

the construction of his/her life and then be able to assess the position of the subject with a greater awareness of his/her origins, experiences and needs.

The form of law cannot cope with intersecting grounds of identity, and thus contorts and constricts the subject before it. 'The ideological role of law is to transform the human subject into a legal subject and thus influence the way in which participants experience and perceive their relations with others.'¹⁶ If the ideological role of law is to transform, then what the law is doing is creating a fallacy. The law is creating a disembodied fantasy of the subject that stands before it. Zetlein has commented 'that the body temporarily before the law is a regulatory illusion.'¹⁷ The circumscribed body represents itself as a totality of identity, an identity that is under-fire. Lesbian and gay bodies stand before the law as the vision of what is queer. Lesbians and gay men do not just possess a lesbian or gay sexuality, they are that sexuality. The sexual component of queer identity 'overwhelms all other aspects' of lesbian or gay male identification within the realm of the court.¹⁸ The construction of sexuality as an immutable characteristic proves problematic when we attempt to deconstruct the reasons for differential treatment. As an immutable characteristic sexual orientation becomes an intrinsic identifier of sex and sexuality rather than an identity which is 'comparative or relational.'¹⁹ Sexuality continues to be viewed as a binary formation; sexual orientations of whatever nature are positioned as 'other' against a heterosexual norm. Heterosexuality as the norm is an incoherence in itself,

¹⁶W. Van der Meide "Who Guards the Borders of Canada's "Gay" Community: A Case Study of the Benefits of the Proposed Redefinition of "Spouse" Within the Immigration Act to Include Same-sex Couples" (2001) 19 Windsor Y.B. Access Just. 39 at 49.

¹⁷S. Zetlein "Lesbian Bodies Before The Law: Chicks In White Satin" (1995) 5 The Australian Feminist Law Journal 49 at 60.

¹⁸Iyer, *supra* note 14 at 196.

¹⁹*Ibid.*, at 189.

heterosexuality has been made to function as the appropriate way in which to express oneself sexually. What this appropriation of heterosexuality has constituted is an inability to experience that which does not constitute heterosexuality. Immutability of sexuality has boxed the specific roles of gender and sexual performance. Immutability leaves the boundaries and the construction of masculine and feminine untarnished. Lesbian and gay inclusion in the immutability of sexuality provides the nomenclature of gender specific sexual identity and activity, rather than any kind of subversive comment on the diversity of human sexuality.

Social constructionist theory's gaining of credence is of importance specifically when we refer to institutions that previously have seemed beyond the ability to change. Gavigan has written '[t]he insistence on the implications of *social construction* is of fundamental importance: if relations of subordination are socially constructed, it follows that they can be changed.'²⁰ This is an important reminder of the shifting nature of identity and the fact that if we understand the reason behind why identities are constructed in such a way then we can consciously attempt to premise our mode of living on a basis that is not controlled explicitly by domineering societal norms.

Lesbian and gay inclusion within the family, and the concurrent expansion of the boundary of liberal legalism ensures that lesbians and gay men who do not wish to live the heterosexual familial fantasy must work even harder to keep their relationships outside any legal intrusion. 'Socialized legal coercion'²¹ is the intrusive and stealthy encroachment of codification on some relationships which have premised

²⁰Gavigan, *supra* note 9 at 595.

²¹*Ibid.*, at 598. Gavigan uses this terminology in relation to state regulation of the working and dependent poor. The sentiment with regards to lesbians and gay men has a similar effect.

themselves on the basis of non-legal inclusion for ideological or political reasons. The formal equality that lesbians and gay men have gained with regards to the modernization of benefits and obligations is the practical effect of being given a legal status equivalent to common law heterosexual couples and being included within the realm of liberalism. The garnering of these social rewards is a step towards the full formal inclusion of lesbians and gay men within the fundamental areas of society such as family. What is also inherent in the inclusion of lesbians and gay men within legislation is a moralistic process of normalization. Lesbian and gay families that are included within legislation are being endorsed along lines of assimilation to a heterosexual nuclear family norm. The legal coercion being used by the legislature appeals to the practicality of a relationship. However, some relationships actually suffer financially from legal inclusion, for example, those that do not gain the practical financial benefits associated with inclusion.²² Additionally entry into the realm of the common law partner and the expanded definition of spouse, whether consciously decided or not, may make some lesbians and gay men feel as if their relationships are finally being granted the respect they deserve from straight society.

The partial collusion of the straight and the lesbian and gay in an environment such as the family to an extent coops the queer whilst at the same time symbolically if not practically altering the foundation of family. The binarisms that had been constructed around gay and straight, family and not family, have given way to a decentralizing of totalizing heterocentrism. From the insider position of some lesbians and gay men, we must adopt a position of responsibility in the way we live for and

²²C.F.L. Young, "Spousal Status, Pension Benefits and Tax: *Rosenberg v. Canada*" (1998) 6 Canadian Labour and Employment Law Journal 435.

through our families. We must ensure that we do not repeat the misogynistic, patriarchal and homophobic mistakes of our straight fore-families by accepting heterosexual norms as the basis of our familial existence. The hierarchisation currently associated with certain types of families, as being somehow more valid must be rejected by queer-lead socially progressive families. We must highlight that the difference of families, rather than sameness, is the key to dismantling the oppressions that still reside in many homes.

Kaplan has asserted that the 'existence of different sexualities with their own modes of intimacy is itself a contribution to human flourishing.'²³ We, as lesbians and gay men, have a responsibility to encourage the flourishing of human sexuality. Allowing people to overcome their fears of appropriate sexual activity, giving us all the option to form relationships not predicated on dependency or social expectation but on emotional and physical gratification is the key to dismantling patriarchy and homophobia. Lesbian and gay families especially are in a unique position to prove to their kids that sexuality can be explored, and explored safely outside of generic modes of sexuality.

The garnering of equality rights in the lesbian and gay populace must not be wasted in a tide of normalizing morally imbued legislation. The granting of rights as ends in themselves is a futile fight. If formal rights cannot be utilized in a substantive sense and are unable to shift the stagnant grounds on which society has based some of its beliefs, then treating rights as ends negates all of the good work done by lesbian and gay organizations, groups, academics, and individuals. By turning the formal

²³M.B. Kaplan "Intimacy and Equality: The Question of Lesbian and Gay Marriage" in S. Phelan, ed., *Playing With Fire: Queer Politics, Queer Theories* (New York: Routledge, 1997) 201 at 218.

right into a substantive we are able to bolster the expectations of those other oppressed minorities who seek to improve society in some sense. The essentialisation of the lesbian and gay movement must be fashioned as a strategic essentialism of practicality.²⁴ Strategic essentialism will allow for lesbian and gay issues to be addressed whilst also aiding other minority groups as to strategies that can be used. By viewing rights based organizations as overlapping we increase the membership of all oppressed groups until what we have is a network of interfacing oppressed peoples willing to aid one another in their fights to dismantle oppressive structures and socialized practices.

Van der Meide has commented that '[f]ormal equality has become a self-justifying legal objective held aloft of political discourse about social change.'²⁵ The very purpose of the fight for lesbian and gay rights is not just a fight for formal equality in the form of statutory benefits, lesbians and gay men have a responsibility to challenge the sexual norms of society, to challenge the assumptions that are made over the form and function of family. If lesbians and gay men view the granting of formal rights as the end product then we allow and indeed perpetuate dominant ideologies formulated by the dominant societal groups to remain as societal truths. '[A] ruling ideology does not so much combat alternative ideas as thrust them beyond the very bounds of the thinkable.'²⁶ If lesbians and gay men do not challenge these ruling ideologies, then due to our former position as sexual 'outlaws',²⁷ our unqualified

²⁴F. Mort "Essentialism Revisited? Identity Politics and Late Twentieth Century Discourses of Homosexuality" in Jeffrey Weeks, ed., *The Lesser Evil and the Greater Good. The Theory and Politics of Social Diversity* (London: Rivers Oram Press, 1994) 201 at 218.

²⁵Van der Meide, *supra* note 16 at 45.

²⁶Gavigan, *supra* note 9 at 589.

²⁷R. Robson, *Lesbian (out)law: Survival under the Rule of Law* (Ithaca, New York: Firebrand Books, 1992).

acceptance of ruling heterosexual ideologies strengthens these ideologies to an even greater degree by presenting the lesbian or gay 'insider' as having been won over and convinced of the validity of these ideologies.

Fuss asks the question '[d]oes inhabiting the inside always imply cooptation?'²⁸ The implications of lesbians and gay men residing in the conventional family does and does not imply cooptation. From an assimilationist stand point some lesbians and gay men do affirm the central ideology of the conventional family. A lesbian or gay position of assimilation is a desire to no longer be seen as a societal sexual alternative. Assimilation implies a discomfort with one's sexuality, a discomfort in being perceived as someone who is different, as someone who perhaps has certain political beliefs, a discomfort that one is attracted to one's own sex. In assimilating, some lesbians and gay men may feel that they can disappear into the background of society; they are normalized to a certain extent by becoming part of the homogeneity of straight society. Essentialised 'queers' reject the nomenclature of 'queer' with its deconstructionist overtones and its inability to be locked in the closet. Lesbians and gay men who support the essentialisation of both sexuality and family are attempting to keep the parameters of our world, our knowledge and our expectation under control. The problem is that so long as lesbians and gay men are kept under control, hierarchical structures of family life are kept in place. These hierarchical, moralistic structures that control our family and the validity of our family are the very structures that oppress lesbians and gay men and their families. Lesbians and gay men, no matter how hard they try, will never be the storybook version of the

²⁸D. Fuss, "Introduction" in D. Fuss, ed., *Inside/Out Lesbian Theories, Gay Theories* (New York: Routledge, 1991) 1 at 5.

conventional straight family; this fantasy was not created with queers in mind. Queers must create their own storybook of family life. One can hope that the queer storybook reflects the beauty and diversity of lesbian and gay existence, and supports rather than demeans families that are alternatively structured.

I do not believe that it is a natural given that 'to engage... in a system is to affirm its central values.'²⁹ We have the option to reject the hegemonic norms of family whilst concurrently receiving the social benefits of family. In an era of fiscal constraint, to deny lesbian and gay families the perks and obligations of cooptation is to render these families in a further state of social opprobrium. Lesbian and gay families require governmental aid just as much as any other family unit, to reject this aid is to shift the level playing field of familial monetary assistance.

The lesbian and gay family as the 'other' to the straight norm, inherently possesses the ability to reject normalized hegemony. By fighting to retain our status of otherness in an overwhelming sea of normalization, we combat 'the matrix against which the self is made to appear and from which it can never be extricated. The conservation of "otherness" dictates that any "assimilation" or "incorporation" will also be a transfiguration.'³⁰ Potentially lesbians and gay men can be transfiguring but this is not a natural given. Lesbians and gay men must work to transfigure society, to shift the boundaries of sexual and familial existence. Lesbian and gay residence within the family can be just as easily subsumed into the norm as those former outsiders, single parents and divorcees. In remaining other to the conventional family

²⁹Hoagland in D.M. Henson "A Lesbian Feminist Critique of Susan Okin's Justice, Gender and the Family: Lesbian Families with Children as a Non-heterosexist Model for the Development of Morality and Justice" (1993) 4: 2 Hastings Women's Law Journal 249 at 257.

³⁰Halberstam and Livingston, *supra* note 3 at 5.

we construct our relationships, our queer relationships in a way that is 'real' and 'functional'.³¹ The family cannot resist the changes that are afoot. We are in, what Thompson-Schneider calls a 'cultural revolution' that rejects 'traditionally defined institutions for more functional structures that reflect twentieth century life.'³²

Concurrent with Thompson-Schneider's philosophy of the institutional structures of twentieth century and twenty-first century life is the functionality of genderised notions of sex and sexuality. The construction of the 'domestic angel', the puritanical version of appropriate womanhood has had a profound impact on the circumscription of female potential. The fantasy of woman and her alter ego other, the man, has sought to stabilize the norms of gender by essentialising masculine and feminine characteristics. The family is still governed by its reliance on the traditional roles of men and women. The inclusion of lesbians and gay men has not destabilized the gendered basis on which the family rests. Lesbian and gay inclusion has affirmed the structure of the traditional family as a valid construct, without having to examine the flaws in its structural integrity. Its structural integrity finds that the foundations of family have been shored up and built upon patriarchal and fallacious grounds of essentialised characteristics of sex. Wittig writes that 'the myth of woman being only a snare that holds us up.'³³ If the myth of woman is merely a snare that holds us up, then correlatively woman can escape from this snare. What we as women, as lesbians

³¹J.C. Hathaway, *Report of the National Consultation on Family Class Immigration* (York University: Convened by the Department of Citizenship and Immigration Government of Canada and Refugee Law Research Unit Centre for Refugee Studies, 1994) 3.

³²D. Thompson-Schneider "The Arc of History: Or the Resurrection of Feminism's Sameness/Difference Dichotomy in the Gay and Lesbian Marriage Debate" (1997) 7 *Law and Sexuality* 1 at 7.

³³M. Wittig "One Is Not Born a Woman" in K. Conboy, N. Medina and S. Stanbury, eds., *Writing On The Body: Female Embodiment and Feminist Theory* (New York: Columbia University Press, 1997) 309 at 316.

must be prepared to do is struggle for our freedom. We must be willing to sacrifice our position of alliance with members of society who would set more snares to entrap us into a sphere of continued sexual oppression. These members of society are not confined to one gender grouping; women and men's perpetuation of gendered norms are intimately connected. Both oppressive men and women attempt to maintain the constructs of gender and sexuality, fearing that which they do not understand, reveling in a position of supposed moral superiority. It is these person's within society that are our nemesis. It is this judgmental backbone of society, which fuels the fire of hatred for lesbians and gay men, which perpetuates homophobic violence and which pulls the trigger on teenage lesbian and gay suicides. Furthermore this judgmental backbone aids lesbian and gay self-hatred and delimits the ways in which lesbians and gay men live their lives. Jacob's notes that within certain parts of the gay community there is 'the message that it's okay to be a fag provided you're also a man.'³⁴ This type of thinking is found in the straight community as well, and what it shows is the fear associated with stepping outside of the norms of gender. If one is a sissy or a fairy or a butch dyke, fear is evoked in the sphere of normalized society. Those who willingly and outwardly reject their gender norms should be congratulated for their willingness to take a stance on what could be seen as a dangerous role. Lesbian and gay rejection of the outward stereotypical signifiers of 'camp' or 'butch' could be seen to be a rejection of the outsider status of queer existence.

If our role as lesbians and gay men is to deconstruct the boundedness of sexuality in order to create a society not predicated on fear of sexual alterity, we need

³⁴Altman in M.P. Jacobs "Do Gay Men Have a Stake in Male Privilege? The Political Economy of Gay Men's Contradictory Relationship to Feminism" in A. Gluckman and B. Reed, eds., *HomoEconomics: Capitalism, Community and Lesbian and Gay Life* (New York: Routledge, 1997) 165 at 178.

to accept the diversity of human sexual existence, thereby improving the future for lesbian, gay and straight kids. 'Lesbian and gay kids will have less trouble accepting their homosexuality not when the Gay Pride Parade is an orderly procession of suits arranged in monogamous pairs but when people learn to be less horrified by sex and its complexities.'³⁵ The fundamental importance of the function and format of family therefore is directly tied to the ways in which sex and sexuality is composed. As the primary site of socialization, lesbians and gay men especially have a duty to raise their children and to live their familial existence on a basis of equality and openness to the diverse nature of human sexuality. The ways in which we live our lives affect the way in which our children, lesbian, gay or straight live theirs. If we imbue this next generation with a sense of self-worth on an emotional and sexual level, then we may be able to challenge received ideas of the function and form of family. Halberstam and Livingston have noted that 'there really is no place like home,'³⁶ what in fact we have is multiple forms of 'home' and multiple forms of family all of which contribute to the development of human flourishing in a nation unwilling to be bound by an ideology of sexually constrictive fascism.

³⁵Kushner, *supra* note 4 at 190.

³⁶Halberstam and Livingston, *supra* note 3 at 13.

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