WHO GUARDS THE BORDERS OF ‘GAY’?: AN EXAMINATION OF THE IMPLICATIONS OF THE EXTENSION OF ‘SPOUSAL’ STATUS TO QUEER PEOPLE WHO EXPERIENCE MULTIPLE OPPRESSION

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Abstract

In this thesis I explore the implications of the extension of 'spousal' status to same-sex couples from the perspective of queer people who experience intersectional or complex oppression. This study is grounded in a rejection of the necessity or efficacy of attempting to understand the oppressions facing queer people from only one perspective. I reject the notion that such a simplistic approach to understanding oppression is conceptually honest. Put simply, I argue that what is often characterised as a purely 'gay and lesbian' approach to reform—namely, the consideration of only oppression related to 'sexual orientation' or 'heterosexism'—is in reality the prioritisation of the limited perspective of those who only experience systemic disadvantage related to their race. These people are a small minority of queer people.

Unlike many other academics and activists, I do not conclude with a 'yes' or 'no' response to the question of whether same-sex spousal status should be sought. The analysis presented in this thesis does not permit such a final conclusion for three reasons. First, I argue that the implications of the extension of spousal status vary depending on the institutional context; in other words, the extension of spousal status is very different in the context of social assistance law as compared to the provision of employment-related benefits. Secondly, I argue that the extension of spousal status also varies among queer people; for example, the implications of the extension of spousal status to poor queers are vastly different from those who are wealthy. Thirdly, I argue that the decision to support the extension of spousal status to same-sex couples is inherently political; this decision cannot be immunised from political challenge on the basis that it is derived from some allegedly objective legal or socio-scientific calculus.

Although I have endeavoured adopt a inter-disciplinary approach, this thesis does focus on legal rights discourse. To my mind, this focus is appropriate given the emphasis on 'rights talk' and the assumed benefits of formal equality within the community of academics and activists working on queer issues. In various parts of this thesis, I focus on the approaches of activists, academics, judges and legislators to the issue of the rights of queer people and the nature of equality.

Ultimately, I conclude that until we begin to appreciate the complexity of the oppressions facing queer people, and avoid the false prioritisation of a 'purely gay and lesbian oppression' perspective, we will be unable to work in coalition or to effect progressive social change.
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Introduction: The Question of “Equality” and the Discourse of Law

In the last few years the extension of ‘spousal’ status to same-sex conjugal relationships has dominated the agenda of many Gay, Lesbian, Bisexual and Transgender (G.L.B.T.) rights advocacy groups. Because litigation has become an effective tool in the pursuit of this goal—where lobbying and mass-action have had relatively limited success—legal rights discourse (or ‘law-talk’) has become pivotal. In this thesis I will critically explore two central and interrelated aspects of this approach to equality seeking.

The first aspect of this approach that I will critically explore is the set of assumptions that are played out when law-talk becomes the primary and ideologically privileged discourse of a political movement. By a political movement I mean one that holds itself out as the advocates for a group of people who are understood or accepted as sharing similar objectives and interests in terms of social change. One of the central themes of this thesis is that by focussing on “groups or categories of people” (such as gays and lesbians) rather that “communities of interests,” vitally relevant differences between people are ignored in the formulation of political and social change agendas.

Ironically, the first part of my thesis will be that the goals of many G.L.B.T. equality seeking movements have become de-politicised. They are often understood more as legal questions than political ones. Court challenges brought by individual complainants—directed by self-interest, lawyers, legal strategy and a handful of activists—have captured the minds of many within the community, substantially reducing the levels of political debate and contest about the meaning of G.L.B.T. equality and the most effective ways to achieve that goal. The goal of same-sex spousal
recognition has become ideological insofar as its benefits are assumed. Political voices within this “group of people” but with a different “community of interest” are reduced to the level of extremist or individualistic noise pollution. This process is readily apparent, for example, in the dismissal of those who question the desirability of the extension of same-sex spousal status based on the financial and social disadvantage they may experience related to their poverty, gender, race etc.

This raises the second aspect of my thesis: a critical exploration of the potential meanings of equality, both generally and in terms of G.L.B.T. people. It will be my argument that the emphasis on the legal redefinition of ‘spouse’ has resulted in G.L.B.T. equality almost becoming synonymous with and confined by the concept of formal equality. In other words, it has come to be understood simply as the elimination of any and all legal distinctions between those with opposite-sex conjugal partners and those with same-sex conjugal partners. Formal equality has become an end in and of itself. The benefits of this change have become a matter of common-sense, whereas any disadvantages are quickly dismissed as far-fetched or irrelevant to The G.L.B.T. equality rights movement. But those benefits and disadvantages are not evenly distributed. More often than not, it is those people who experience multiple forms of oppression who will bear the brunt of the disadvantages of the extension of spousal status, while those who would not experience oppression but for their sexual orientation will reap the benefits.

I will argue that formal equality is not, and should not be understood as the self-justifying objective of G.L.B.T. equality rights groups. The elimination of all distinctions between the treatment of opposite-sex and same-sex conjugal couples is not a reflection of a purely G.L.B.T. equality rights agenda. It is not a neutral or natural
G.L.B.T. perspective. Rather, it reflects the perspective of those people who only experience oppression related to homophobia, those who will even benefit from incorporation into systems which will continue to reinforce 'other' oppressions after the type of homophobia they experience is eliminated. It reflects, therefore, the political perspective of a relatively privileged group of G.L.B.T. people and community of interest.

Political challenge to the formal equality goals of the G.L.B.T. movement—based on arguments that gaining spousal status will be ineffective in the pursuit of substantive equality or will have adverse or multivalent implications—related to the status of being a woman, a person of colour, poor, etc., 'in addition' to being G.L.B.T., cannot be dismissed as the introduction of 'other' issues. It must be understood that someone who does not experience gender-, race-, or class-related oppression still has a gender-, race-, and class-based identity(ies). A young, professional, wealthy, able-bodied white gay man is not 'just gay.' He is a young, professional, wealthy, able-bodied white gay man.

I will not be arguing, however, that the pursuit of the recognition of same-sex spousal relationships is inherently invalid. I will argue that it cannot be assumed to promote the equality of all G.L.B.T. people. For much of this thesis I will attempt to articulate the ways in which the achievement of same-sex spousal recognition will disadvantage or reinforce the oppressions experienced by many G.L.B.T. people. However, these are complex and interdisciplinary issues that involve questions of self-determination, economics, cultural identity and several types of historical disadvantage—in particular, heterosexism, classism, race and gender oppression. By discussing these issues I do
not pretend to arrive at any universally applicable conclusions about what G.L.B.T. equality looks like or whether same-sex spousal recognition is good or bad. Rather, in laying out these complex issues, these complex questions, I hope to demonstrate only that the meaning of G.L.B.T. equality cannot be assumed or derived from an exclusively legal discourse. Ultimately, my fundamental challenge is to two interrelated processes:

1. the approach through which law-talk and formal equality have become ideological, and
2. the way in which categories are articulated and understood, namely, as groups of people rather than shared communities of interest(s).

I will not attempt to provide any universal answers because my voice, my analysis and my conclusions are also political. At best, all I can do is hope to contribute to a chorus of perspectives about these complex questions. To lay claim to the answer of what G.L.B.T. equality looks like, would be antithetical to the very basis of the approach I take to these issues.

**Sources**

Within the last few years, a substantial body of work applying what I understand as an intersectional, or multi-perspective approach to G.L.B.T. equality issues has emerged. Canadian legal scholars such as Susan B. Boyd and Shelley Gavigan have effectively articulated a feminist and class based—and self-consciously race sensitive—critique to the dominant approach to G.L.B.T. equality analysis. These two authors, in particular, have effectively applied their extensive knowledge of family ideology to interrogate the value of pursuing same-sex spousal recognition. By accenting the normative, and often oppressive nature of the dominant understanding of
what ‘family’ is, they have challenged assumptions about the benefits of incorporation of G.L.B.T. people into family-based, or spousal-based institutions. In this regard, Claire Young has contributed an invaluable body of work about the potentially oppressive implications of incorporation into a tax system in which many classist and gender oppressive tax measures are organised by reference to spousal status. In the United States legal scholars such as Darren L. Hutchinson and activists such as Urvashi Vaid and Barbara Smith have written and worked for years towards the goal of articulating and representing a progressive, and highly class and race sensitive approach to G.L.B.T. equality.

To these, and many other pieces of scholarship I hope, in this thesis, to contribute a broad analysis of several G.L.B.T. equality issues currently being discussed, and litigated, across Canada. I rely upon and refer to several different perspectives, including an understanding of feminist, class and race based theories. Ultimately, although this thesis refers in large part to Canadian law and legal institutions, I hope to avoid privileging legal discourse. Unlike many texts written by lawyers about law, I will apply a contextual and interdisciplinary approach to understanding changes to the law and legal institutions. I will contest, rather than assume the implications of these legal changes: investigate their multivalent consequences and rigorously apply their complex implications to the real life circumstances of a variety of G.L.B.T. people, whose place in Canadian society varies according to their race, class and/or gender in addition to their sexual orientation.

**OUTLINE**

In the first chapter of this thesis I will introduce the topics of race and racism. More
particularly, I try to illustrate the importance of our racial identity(ies) as G.L.B.T. people of colour. In a conscious attempt to displace a powerful myth of academic discourse, namely its claim to objectivity, this chapter is written in a style which I intended to reflect the importance of my own racial identity(ies) to my politics. I will describe how and why the marginalization of racial identity(ies) within the G.L.B.T. movement has resulted in mistrust and animosity between and among different racial groups. I also discuss the shortcomings of legal and academic analyses about G.L.B.T. equality rights that either ignore or diminish the relevance of ‘other’ forms of oppression.

In the second chapter, I will use proposed changes to Canadian immigration law as a case study. Through exploring these proposed changes, in detail, I will elaborate upon and contextualise some of the race issues raised in Chapter One while also introducing a more substantive discussion of gender and class. My focus will include, but will not be limited to, a discussion of the proposed addition of a category for unmarried same- and opposite-sex ‘spouses’ within the immigration sponsorship system. Indeed, it is the central argument of this chapter that this proposed new category cannot be viewed in isolation, but should rather be understood as a broader process through which the rights of certain types of immigrant families are welcomed to Canada, while others are restricted even more.

In the first part of this chapter, I will discuss the centrality of the demand for what I have termed ‘categorical equality,’ which is the demand that married people, opposite-sex and same-sex conjugal partners be contained within the same category. I will argue that although it is assumed to be a prerequisite to queer people attaining full equality within the ‘formal equality’ approach to reform, in certain contexts categorical equality with heterosexual norms will frustrate the dignity of some queer people or communities
of interest within that group.

In the second part of this chapter I lay out the theoretical groundwork upon which the chapter is based: an understanding of ‘family ideology’ and notions of group-based identity(ies).

In the third part of the chapter I lay out some concrete examples of ways in which incorporation of same-sex conjugal partners may result in the reinforcement of ‘other’ oppressions.

In the fourth part of the chapter I illustrate some examples of the ways in which people in same-sex relationships, who experience multiple oppressions, are disadvantaged from being incorporated within ‘spousal’ categories.

In the conclusion to this chapter I discuss some concrete alternative approaches for promoting a more broadly framed understanding of equality for those in same-sex relationships, one which is based on a close scrutiny of community of interests, rather than a group of people.

Chapter Three is primarily a discussion and critique of the Supreme Court of Canada’s understanding of concepts related to equality. In particular, I question whether or not the jurisprudence of the Court can meaningfully address the experiences of those who experience multiple oppression, not just one or the other. I will hold up the Court’s, and my own doctrinal analysis of equality jurisprudence against the broader socio-political context in which it exists. I will argue that although some justices (such as L’Heureux-Dubé J.) have attempted to grapple with differences within groups of disadvantaged people, the Court’s fundamental reliance upon categories of people, rather than communities of interests, frustrates its ability to meaningfully cope with the complexities of multiple and intersectional social oppression.
In the Conclusion to this thesis I will return to a discussion of the inherently political nature of the question: ‘What is equality?’ or ‘What is G.L.B.T. equality issue?’ I will outline a political approach to contesting various approaches, perspectives and priorities related to these essential, yet too often neglected debates. I will not only articulate my resistance to the universal and uncritical acceptance of the pursuit of same-sex spousal recognition, but also my resistance to its carte blanche rejection. Rather, I will emphasize that it may very well be that the pursuit of same-sex spousal recognition is the most politically feasible and efficacious approach to promoting the equality of G.L.B.T. people. But this must be determined by political consensus, not theoretical or ideological fiat, nor legal judgement.

\[1\] I have used this spelling to emphasize a theme which is discussed throughout this thesis: namely, that people's identities are complex, plural and interactive, but also unified; people's identities are not simple nor severable.


Chapter One: Establishing the ‘Difference(s)’ Among Queer People (with Colour)¹

**INTRODUCTION**

The purpose of this thesis, and this chapter more specifically, is to search for some of the difference(s)² among people who are clumped together by this society as ‘queer’ because of their derogation from the dominant heterosexual norm. Given the current academic trend to reject grand theories in favour of more context and subject specific analyses, this may seem a simple task. Indeed, even within the growing body of work specifically on the subject of those who are queer, authors are increasingly adopting approaches that either question or flatly reject any universal notion of the ‘homosexual.’³ The once unifying concept—at least for those privileged enough to only experience one form of oppression—of ‘sexual orientation’ with its object of the ‘homosexual,’ has seemingly given way under the strain of deconstruction.

For example, the reality of sexism, gender codes/coding and patriarchy has been well articulated by those who insist on the difference between gay men’s and lesbian women’s lives. As Sharon Dale Stone has observed: ‘Lesbians are women. This point is crucial for understanding lesbian existence within a heterosexual, patriarchal context. As women, lesbians do not have access to male privilege.’⁴ As a result of the divergent and polarizing impacts of these forces on people equally queer(ed) yet differently gendered, the ‘homosexual’ soon became ‘gays and lesbians.’ But as the definitions and categories used by some people changed, the very unified (not ‘unifying’) force of compulsory heterosexuality persisted as a dominant norm in this society.⁵ In appreciation of this reality, the categories of ‘gays and lesbians’ were in turns supplemented with the (sub-)categories of ‘bisexuals,’ ‘transsexuals,’
'hermaphrodites,'...and so the list of others who also transgressed from compulsory heterosexuality grew. This process (of 'commatization') continued until the list was supplanted, by some at least, with the less linguistically cumbersome term 'queer.'

I would suggest, however, that in the push for inclusion within the category 'queer' one of the central missions of that movement, of the concept 'Queer' was lost in the shuffle: the deconstruction of categories and (fixed) identities by demonstrating that these categories are social constructions, not natural phenomena.6 The boundary setting concept of 'sexual orientation' may have been rhetorically submerged by some, but its usefulness, validity and meaning continue to be assumed and largely unquestioned, particularly in legal discourse.7 This creation of a 'fixed identity primacy' based upon the concept of sexual orientation inappropriately obfuscates the very real difference(s) which exist among us generally, and as queers.8

'Gay and lesbian' issues related to 'sexual orientation' have been constructed as constituting a 'pure' core, separate from other 'non-gay and non-lesbian' issues unrelated to that identity.9 In so doing, the question of whether any gay or lesbian person's identity can ever be significantly understood without reference to all but one aspect of their identity has become a non-question. The issues of race and racism, for example, are often at best peripheral and at worst non-issues lost in a theoretical, and political ocean of neglect and silence.10

I wish in this chapter to begin a process of challenging the boundary of 'sexual orientation' by 'racializing' that concept and the category of 'queer.'11 I insist that the difference(s) among us be acknowledged.12 We simply are not all the same because we are queer. In the absence of this recognition, queer people of colour, who for the most part have no choice but to acknowledge our race(s), cannot exist in the framework of 'sexual orientation' as defined by many queer activists and academics. The category of
"queer" based exclusively on "sexual orientation" must be revitalised through an exploration of the several, often divergent communities of interests which make-up that category.

This process should not, however, be understood as purely an exercise in self-interest: an attempt to simply ‘stake-out’ our identity(ies) as queer people with colour. Such an exercise is surely valid, however, given the painful marginalization of our identity(ies) as queer people with colour within mainstream political and legal discourse among queer people. As Marlon Riggs, a gay Black poet has written:

I was mute
tongue-tied,
burdened by shadows and silence.
Now I speak
and my burden is lightened
lifted
free.¹³

However, as I shall argue, the recognition of all of our difference(s) is also an important aspect of a process which will better enable us to challenge or ‘queer’ the boundary of sexual orientation itself, and consequently heterosexism.¹⁴ It is only when our difference(s) are acknowledged, that we will be able to get beyond the stumbling block of the difference between us and incorporate our ‘political identity(ies)’ as in the drive for liberation, no longer stymied by ‘identity politics.’¹⁵ Paradoxically, it is only once our difference(s) have been embraced that we will be able overcome the difference between us and cultivate our ‘inter-connectivity’ as a tool in a united challenge to heterosexism.¹⁶

I focus in this chapter on the issues of race and racism because as a gay man with colour, faced with either silence or explicit marginalization within queer communities, I must. But I should not be understood as prioritizing difference(s) related to race over other, equally relevant ones within queer communities, including among others: class,
The effects of these forms of oppression will be discussed more extensively in subsequent chapters. Depending on the particular situation or relationship one dimension of difference may be more pertinent than others; however, the understanding of difference(s) that I propose does not rely upon any conceptual (or 'universal') hierarchical ordering of difference. The concept of 'difference(s)', unlike that of 'difference', is equally applicable to all people; it should not be understood as a flag used to identify or demarcate an area in which only one 'type' of people may congregate. The difference(s) to which I refer do not inhere in any particular person, group of people or even identity. The differences about which I will speak are an aspect of the relationships between and among all people, between different communities of interests.

Moreover, difference(s) do not exist exclusively as an aspect of law (whether understood as a coercive or constitutive force, or both), but as experiences which should be allowed to permeate the interdependent fields of law and society. Lastly, as alluded to above, the difference(s) that I will articulate should not be understood as a re-articulation of identity politics. Indeed, if anything is to come of this chapter, it is hoped that the reader will appreciate my attempt to construct a theory of difference(s) that is anathema to several of the less constructive aspects of identity politics. Rather, recognition of the difference(s) which exist among queer people should be understood not as an end in itself, but as part of a process which will help us to understand how heterosexism works to disenfranchise and marginalize queer people. Until this is recognized we remain 'queer' communities separated from an essential source of our liberatory potential: our shared community of interest.

This is primarily a methodological chapter. My goal is to open rather than conclude discussion on the subject of difference(s) related to race, and otherwise, among queer
people. To that end, I shall introduce examples of the ways in which that notion has been (mis)represented in several interdependent areas: the lived experiences of queer people; as an aspect of mainstream political discourse and action; and lastly, as an aspect of legal theory. I do not claim to offer an exhaustive description of any of these areas in this piece, but wish merely to highlight certain important aspects of the treatment of our difference(s) in all three areas. I hope through this approach to draw the reader into a methodological framework that will prove useful for more detailed studies—such as the ones contained subsequent chapters—further political discourse and possibly action.

**Establishing Difference(s) in the Experiences of Queer People Related to Our Race(s)**

We, all of us, including queer people, share experiences that in some way correspond to our race(s). Moreover, in this multi-racial society, although race may not be a universal or even biological truth, racism is a social fact which influences all our lives, including the lives of queer people who bear the brunt of heterosexism, but not racism. It serves, sadly, to privilege some over others in a plethora of ways, to demarcate different communities of interests even within the same “group of people.” But it is not my intention to indict those with a particular type of privilege, or even simply to lament the injustice experienced by those without. Rather, it is the function of this section to establish, to introduce and even embrace the fact of our race(s) as an aspect of the difference(s) among us as queer people. This might seem an inflammatory, exclusionary, trite, or worst of all, a self-indulgently irrelevant exercise; however, I shall argue that it is a basic step—and although difficult, not as painful as one might at first assume—in the process of realizing our full potential of our ability to challenge oppression.
Within discourse about human rights the images of the race(s) of people with colour are distorted. In this context the race(s) of people with colour becomes synonymous or even derived from the concepts of discrimination and oppression. This is sadly an all too understandable misperception. It is true that many people with colour suffer racism motivated by the racial identity(ies) which has been constructed and foisted upon them. But the fact of racism should not be automatically linked conceptually with the race(s) of people with colour.

Racism does not inhere, as a natural aspect of the race(s) of people with colour. It is rather a social force, an oppressive impulse which exists among us all, in our relations with each other. Arguably, all people with colour in this society at a certain level begin to experience their race(s) as a source of oppression. Sadly many of us may even internalize this feeling of the connection between oppression and our race(s). But for me this process of internalization of oppression, of racism, and its connection to (my) race(s) is a false consciousness that I must strive to overcome. It is only when we all strive to overcome this false connection between our race(s) and racism that we will be able to appreciate that which is positive about our race(s). Perhaps I am using language incorrectly by using the word 'race(s)' in this way. I might be better understood if I write about culture or ethnicity. But to my mind, the distinction is at a certain level disingenuous because it obfuscates the fact that (our) race(s), like racism, cannot be divided from their performance. Race(s) are not a set of biological facts: skin colour, the texture of hair or level of intelligence. Race(s) are social constructions that are expressed by the assignation of attributes—like a behavioural characteristic, e.g. 'Black people are lazy'—to those biological features, however arbitrarily. Whether expressed in terms of physical and/or behavioural 'biology,' race(s) are social constructions that
inform our relationships with each other and have resulted in certain communities of interest and affiliation.

Although we may wish to challenge the legitimacy of the social construction of race(s)—whether as viciously negative (i.e. racist) or simply mistaken—it is equally mistaken to ignore the effects of that construction. Our race(s) are now a part of our identity(ies) in their performance and as a part of our being: they have been epistemologically grafted to our skin tone, our hair’s texture and the width of our noses.

Our race(s) can and are, however, also expressed as shared experiences, communities of interests, and a connection to others of the same race(s). Sadly, for people with colour in this society, many of those shared experiences may be negative. But not all of those experiences are negative and the connection is certainly not negative. That connection is both important and potentially positive. The recognition of the various communities of interests related to race is vital.

Therefore, when I speak of my race(s) as a person with colour, both its importance to me and as a source of the difference(s) among us (as queer people, for example) that statement should not be assumed to be a charge of racism nor as an attempt to challenge the validity of the racial identity(ies) of others. It is merely an assertion of one important aspect of my identity(ies), and that of others, including those without colour. It is an assertion of one community of interest of which I am a member.

I would suggest that it is in part this reflexive connection between race and racism which is the source of much misunderstanding between queer people with colour and other queer people. The subject of race seems to have become fused on an emotive level with an indictment of racism, which in turn elicits the responses of guilt, defensiveness, conflict and even recalcitrance. Although these may well be ‘understandable’ responses to a charge of racism, they are not appropriate responses in
every discussion about the implications of race for queer people, discussions about our difference(s).

In saying this I am not suggesting that racism does not exist, or for that matter that it is an insignificant phenomenon within queer communities. That there is racism within queer communities is undeniable. It is there in the ubiquitous and omnipotent aesthetic image of the pretty white-boy or -girl and also in the various exotic sexual caricatures of the 'others': the stallion-like Black man (the 'Mandingo') or the submissive, almost asexual Asians. Sadly, in the area of sexual relations, in particular, queer people of colour are very often subjected to two extremes: either they are completely invisible to the gaze of those who hold cultural dominance in Canada, or, they are hyper-visible under the sexual lens of others who magnify race as a central aspect of their sexual attraction. It is there in the eyes of both types of people at a dance club, and in that feeling in the pit of your stomach. It is here...among us queers.

But as I stated above, my goal is not to indict those within the queer community for their racism or as racists per se. This chapter is simply not meant to speak to those people who maintain consciously racist attitudes or refuse at any level to even acknowledge the existence of racial difference or racism, and its implications for queer people with colour. Challenging these people and these perceptions is of course important, but is a moral imperative beyond the scope of this thesis. Rather, the purpose of this chapter is to challenge the conceptual integrity of severing the issue of race(s) in the formulation of a 'queer' category that only refers to one's 'sexual orientation.' For the reasons I articulated above, any attempt to sever and categorize these two issues separately is disingenuous. Race is an important aspect of all of our identity(ies) and results in difference(s) among us; to ignore it is to "erace" all those
queer people who share political and social change communities of interests related to race.

Perhaps for some people with colour this aspect of our identity(ies) has been elevated to the level of primary importance, as it often must, being a communal shield from racism. As a person with colour in this society, I simply cannot speak of myself, even my queer self, without speaking of my race(s).

Perhaps it is also more natural for those who are not people with colour to ignore this aspect of their identity: do white people need or have race(s) in this society? Regardless, I insist and embrace the fact of our difference(s): we all have racial identity(ies) and these are both diverse and important. To ignore this aspect of our identity(ies) is not simply unwise, dishonest, or conceptually flawed, it is also hurtful and marginalizing, particularly to people with colour who seldom have the choice to ignore race, and racism.

Sadly, the issue of our race(s) is important also because as people with colour, we are queer(ed) in this society not only because we are not heterosexual, but also because we are people with colour. To ignore or minimize the importance of this aspect of my identity(ies) is to adopt an approach which robs us all of the synergistic potential of a challenge to the boundary(ies) of heterosexuality from many, as opposed to one perspective. This approach categorically denies us, and denies others the full power of our 'Queer' voice, our varied perspective(s). Therefore, it is an approach which is not only conceptually dishonest—insofar as it falsely limits our reality(s)—it is also ineffective because it limits our ability to raise our voice against oppression; this is the point to which I turn.
ESTABLISHING ‘DIFFERENCE(S)’ AS A PLATFORM FOR ACTION (OR ‘KNOW THINE ENEMY’)  

Racism can affect queer people with colour in similar ways that it affects our brothers, sisters, mothers and fathers who may be ‘within’ the dominant heterosexual norm. In other words, race and the experience of racism are communities of interests that we may share with people who are not queer. Indeed, as I will discuss more in the next chapter, it is important to note that being a good heterosexual—having a nuclear family: one or two kids with a mother and father, one or both employed—is itself often limited by ones race(s). It is trite that whether we ‘come out’ or not, racism will always precede heterosexism as a source of our oppression, as a site of our ‘queerness.’ Moreover, the fact of ‘coming out’ as a sexual queer, however potentially liberating a process that may be, cannot erase the realities of racism. Our race(s) remains important both as a positive aspect of our identity(ies) and as one potentially distorted by racist oppression. As a result, it is often impossible to know which aspect of our difference is the motivating factor for an individual act, or the more systemic manifestations of oppression. Arguably, even the attempt to divide the sources of our oppression is a futile or ever counterproductive exercise. 

As queer people, we also experience racism in a way that may not be shared by all heterosexual people with colour. The racism we experience is at times multidimensional insofar as it is informed also by our transgressive sexuality(s). Consider the situation of a gay black man who is discharged from his employment for ‘hyperbolic display[s] of homosexuality’ when other gay white men who engaged in similar conduct, were less severely penalized. Is this situation the result of racism or heterosexism, neither or both? In this case, sexual orientation being an unprotected category, the court went on to dismiss the claim of ‘race’ discrimination. As Eaton has wryly observed: ‘[The Complainant’s] race disappears as a concern of any legal consequence because he
was much too queer to be black or, to put matters somewhat differently, because the rouge was thick enough to conceal the noir. Therefore, even our ability to resist oppression may be contingent upon both the fact of multidimensional oppression and whether its complexity is acknowledged and considered.

One's feeling of helplessness as a queer person with colour is compounded if we are only conditionally welcomed by queer communities: as long as we don't make too much noise about race and racism. As I shall argue below, such a posture makes it exceedingly difficult for the process of 'coming out' to be fully liberating for queer people with colour. Rather than being encouraged to embrace that which is a natural aspect of us, our full queerness, we are cudgelled into adopting a foreign identity (a 'sexual orientation' untarnished by colour) which in its limited form may offer little more to us than the risk of additional oppression. I would be unable to suggest which is the more painful reaction from the queer community, to be confronted with ambivalence and disrespect, or with (un)familiar forms of patent oppression and discrimination. But whichever feels worse, as a person with colour, the former is more insidious, almost silently conspiring against our ability to work together, in coalition against oppression. But the silence is now being challenged by many voices. Unfortunately, many of these voices are understandably distorted by anger.

Obviously, the process of having to continuously reassert both one's identity(ies) and the relevance of a varied, as opposed to a unidimensional conception of oppression, is no small task. It is in the best of situations a psychically draining challenge; but, when efforts to do so are met with ambivalence, particularly within the context of an allegedly progressive social movement, it is downright vexatious. Sadly, as a result, many queer people with colour choose simply not to participate in either mainstream 'gay and
lesbian social movements or even more coalitional organizations. As Vaid has observed:

I find myself torn about the question of race-specific versus multiracial organizing. My confusion comes from experience with the deep resistance to antiracist work and to multiracial organizing that continues to exist within white gay and lesbian organizations. It is tiresome to have to explain that our repeated assertions about being a multiracial community require our movement to respond to racism and to take a strong stance on what some consider "nongay" issues. It feels much more satisfying and productive to choose to work with like-minded people - people you don't have to convince that working on racism is important.

If it is axiomatic that there is strength in numbers, it is equally so that strength is diminished in division.

There is now an unfortunate paradox. The narrow vision of the mainstream gay and lesbian social movement—namely a so-called exclusively sexual orientation based agenda—has prompted the formation of smaller groups targeted to particular segments of the queer community, or communities of interests, such as those shared by lesbian women of colour. But, even though these (sub-)groups cater to specific communities interests, they also often foster a vision of oppression much broader than that of many mainstream organizations. Some of these organizations are social in nature, simply giving us a space in which to celebrate our culture(s) and speak unfettered by any obligation to continuously assert or defend who we are as queer people with colour. Others are geared to providing resources specifically for queer people with colour because it is believed that these needs are not being met by the "mainstream" queer community. Those organizations with a political mandate often foster a broader vision of social change because they recognize difference(s) within the queer community and the multidimensional nature of oppression.

But these organizations and their members are not without their problems; some even replicate those negative patterns of behaviour that may have motivated their
formation in the first place.\textsuperscript{47} For example, some are geared quite narrowly around one particular ‘racial group’ or “community of interest” and may neglect to even attempt coalition building with other groups who are also oppressed in similar ways. Even when coalition building is attempted, it is often a struggle.\textsuperscript{48}

As one might expect, queer people with colour are both weary and wary of any potential challenge to their identity(ies). Is it any surprise that many prefer to accept that they are different, rather than having to constantly establish and defend the notion that all of us share difference(s). Our experience with difference has generally not been a positive one, even within the ‘progressive’ environment of queer social movements. Particularly for those who remain a part of mainstream queer social movements it is therefore a great challenge to envision our shared difference(s).

The silence of the ambivalence to our difference(s), whether racial or otherwise is, ironically, quite deafening. Consequently, people who do not fit within a unidimensional notion of ‘sexual orientation’ oppression (a single community of interest) are left feeling that they have no option but to raise their voices louder and louder. If our difference(s) are considered unimportant, it may seem that the only option left is to emphasize that we are indeed different. In this way, an inherently counterproductive pattern is engendered within social movements, often called identity politics. This politics focuses not on the difference(s) which exist among us or our shared community of interest, but rather on the difference between us. And of course, if we are truly different from each other, coalition becomes impossible, or certainly more remote a possibility. To quote from Vaid again:

The bitterness on all sides is deep and growing. People are in well-dug bunkers, and few people—of any color—attempt to break out of their entrenched positions. The atmosphere of trust and respect that is a prerequisite for work across racial lines is sorely lacking in the gay and lesbian community’s struggles with its own diversity. Instead of dialogue,
we engage in public attack. Instead of multiracial organizations, we keep inventing more single-race groups.49

At best, all we can hope for is to find some common ground, such as the simple fact that we transgress compulsory heterosexuality, in which to meet and exchange 'positions' or 'identities' without ever being able to share a vision of our shared identity(ies) as queer people.

As each particular identity becomes entrenched, it seems more and more natural to defend your particular identity, your position. Therefore within this context, this atmosphere, competition is more common than coalition, or even conversation. For if we are each to have a particular position, surely it is safest to prioritize our particular position. People may end up jockeying with each other in an attempt to establish identity hierarchies.50 Perhaps I am being too harsh and simplistic in describing the complex causes and effects of identity politics within social movements. What is clear however, is that through this process identities become fixed and entrenched. Consequently, a person may only speak 'effectively' about issues which pertain to her identity(ies). Authority to participate in conversation are limited by the 'authority' to claim a particular identity. In other words, the fact that all of us have many identity(ies), many perspectives, becomes a red herring: relevant only insofar as it authorizes one to speak.

Within this political climate, as a queer man with colour I am often only able to speak only about 'my' experiences as a person with colour and as a person who is a gay male. I cannot articulate any general vision of how to challenge and move beyond 'our' multidimensional oppression nor can I explore our shared communities of interests.51 My identity(ies) are artificially fragmented into identities at the discursive level, so that I am rendered unable to speak in one voice. But, if I cannot speak as I am, how can I
know myself? If I cannot know myself, how can you know me. And if you cannot know me, how can we possibly be able to work together?52

But even if the vocabulary of identity politics limits us all, its syntax would seem to favour some more than others.53 Let us assume for the purposes of this argument that one’s ‘sexual orientation’ should be the primary identity, or prioritized perspective within the political discourse of the mainstream G.L.B.T. social movement.54 It is likely that the identity of those people who are primarily oppressed in relation to their sexual orientation (if such a calculus is possible) are most benefited by the agenda which results from that discourse.55 Put simply, only one community of interest is reflected, namely, that of those who only experience oppression related to sexual orientation. This criticism could be equally applied to social movements formulated exclusively around race and racism, etc.

In saying this, I do not mean to impugn en toto the right, or even the value of challenges to heterosexism by those who would not be oppressed ‘but for their sexual orientation.’56 To reject these efforts reflexively would be (purely from the perspective of self-interest) unwise, because there is at least potential benefit to me as a gay man with colour. Nevertheless, I would also insist that there is no value in ignoring the question: ‘How might a unidimensional perspective limit the potential benefits to all of us?’ Stated conversely, there is value simply in uncovering all the implications of adopting an approach which prioritizes ‘sexual orientation’ at a discursive level, even if we may disagree about what we then do with that information.

For example, what is the benefit or the limitations of a policy or statute that prohibits discrimination on the basis of ‘sexual orientation’ in a society in which so many lesbians cannot find work at all, or if they do, it is neither rewarding, meaningful nor sufficiently remunerative to permit them a fulfilled life?57 That questions such as these are
important, at least to some, is evident in the raging debate among, or perhaps, between queer people about the issue of 'same-sex marriage'\textsuperscript{58} and spousal status.\textsuperscript{59} Some have argued, for example, that even were the institution of marriage to be extended to same-sex couples, the potential benefits of that extension would vary depending upon one's race(s), gender or class.\textsuperscript{60} Surely these questions are at least pertinent simply because our race(s), gender(s) and class(es), among other identity(ies), vary among all of us in same-sex relationships? These questions are pertinent because we queer people have different communities of interests in terms of the recognition and regulation of spousal relationships, same- or opposite-sex.

I would argue that essentially there are only two reasons one could rely upon to answer this seemingly rhetorical question in the negative: 'those questions simply do not pertain to the issue of sexual orientation,' or, 'those questions are irrelevant to me as a person who does not suffer any oppression other than heterosexism.' The former answer sacrifices both the lived reality(ies) of many (and a broad political vision) to the detriment of us all for the sake of conceptual simplicity. The latter is more a moral stance than a conceptual position. To those who maintain this stance I can offer no challenge in this thesis, only perhaps a few nagging questions.

Obviously, the implications of ignoring these questions are more than rhetorical for those who experience multidimensional oppression, they are tangible. However, I would also argue that an unexamined emphasis on sexual orientation—to the exclusion of other issues—can adversely impact the ability of self-identified gay and lesbian activists to effectively frame challenges to those manifestations of oppression which affect us all as queer people. For example, violence motivated by hatred is a sad reality which threatens many groups in this society, including (but certainly not limited to) people with colour and queer people. As discussed above, for queer people with colour who are
victims of such violence it may simply be impossible to tell whether the motivation for a particular attack was racism, homophobia or some combination of both.

One such attack was upon a 29 year-old gay Puerto Rican man named Julio Rivera in Queens, New York in 1990. This man was attacked and killed by three members of a neo-Nazi/white supremacist gang, one of whom later confessed that Rivera was killed because 'he was gay.' Both the media and the police seemed intent on ignoring the obvious homophobic aspect of the crime, the latter refusing to list it as an 'anti-gay crime.' Activists in turn challenged the police refusal, arguing that this murder was precisely that: an 'anti-gay' crime. They argued furthermore that the police reaction was itself tantamount to 'homophobia.'

One of many disheartening observations that can be made about these events—the crime, the investigation, media portrayal, and the reaction of activists—is that since the debate, as framed by activists, seemed to contemplate only 'homophobia' the issue of race was left unexamined and the evidence of racism unchallenged. Both the police and the media were permitted to utilize racist stereotypes about gay men and Latino people generally to obfuscate the issue of homophobia. Rivera became the stereotypical poor Latino man: a drug addict and/or dealer (read 'death: typical and unimportant') and certainly too much of a hot 'Macho Latino' to be gay (read 'too butch to be a femme'). Whether the police were blinkered by their own stereotypical assumptions or more consciously racist/homophobic in motivation, as Darren Hutchinson has trenchantly observed: 'The activists' essentialist framing of the crime as a "gay" bashing, rather than a racist-homophobic attack, may actually have invited the police to use Rivera's race to erase his gayness' (emphasis added).

Assuming that the issues of those who would not experience oppression 'but for their sexual orientation' have been prioritized within mainstream G.L.B.T. social movements,
what factors have contributed to the development of this situation? It may be that having a relatively privileged position, these people are simply best able to voice and emphasize 'their' perspective.\(^{63}\) And for them, an identity politics centred around 'sexual orientation' might be described as a comfortable, even natural perspective: a prioritization of that issue which seems most tangible to them.\(^{64}\) And for queer people with colour and others who experience multidimensional oppression, identity politics is an inevitable reaction: it is a response to a politic approach which marginalizes and clearly disfavours them.

The point I wish to emphasize, however, is that regardless of the causes of the various manifestations of 'identity politics' (read 'who is to blame'), as political approaches they obscure both our shared identity(ies) and difference(s) in ways that disfavour us all. Identity politics is often less of a political discourse and more of a premature end to discourse. In entrenching a particular identity, rather than exploring our shared identity(ies), we drain and polarize the collective energy which facilitates our ability to effectively challenge oppression. We obscure important connections and complexities that frustrate our ability to use our 'interconnectivity' so essential to our ability to challenge oppression.\(^{65}\) Perhaps there is no alternative, or more accurately what alternative there is resides only within the minds of academics. After all, academics do not face the realities of communities that may not be so amenable to utopian inspired, esoteric talk of 'coalition' and 'communities of interests'. These ambitious goals may not translate well into the language of self-defence, understandably of primary concern to people under siege. But as the Rivera case so sadly demonstrates, the unwillingness to recognize our shared difference(s) and complex identity(ies) does not result only in animosity within social movements; it also
limits our ability to recognize and challenge the multidimensional causes and implications of oppression.

Oppression is in one sense about the entrenchment of difference: the creation of boundaries that submerge shared communities of interests. This process can be vividly seen in the use of racism in the southern United States in the turn of the 20th century to deflect poor whites away from the class-oppression that they endured, an oppression that they shared with their poor black neighbours. These entrenched boundaries may be difficult to perceive, but they are boundaries nonetheless. As I have argued, these boundaries not only separate us from each other, they separate us from ourselves, conspire to hide our shared community of interests. One of these boundaries is 'sexual orientation' as manifested in the form of 'heterosexism.' In this society the concept of 'sexual orientation' is on one level a very crude instrument used to categorize both people by conduct.

Although it would be imprudent to suggest that 'identity politics' is the cause of oppression, it is an approach that holds limited potential for challenging it. It is to my mind an inherently limited posture because it does not, because it cannot, affirmatively challenge the boundaries that result in oppression. It cannot challenge or problematize these boundaries because it emphasizes them itself. This does not mean that the only option left is a rejection of the notion of boundaries or categories, that we should adopt an approach that attempts to 'pretend away' the boundaries which society imposes upon us? The identification and use of communities of interests related to sexual orientation and heterosexism, for example, is vital. Nor however does it mean that we should uncritically adopt these boundaries within liberatory discourse. We must question the implications of the manner in which we both conceptually (i.e. in our discourse) and
methodologically (i.e. in our activism) adopt and incorporate these boundary setting notions into our agendas.⁶⁷

That an uncritical adoption of the notion of ‘sexual orientation’ is wrought with danger is not a new insight. Indeed, it is implicit in many of the most animated and long-lasting debates within queer people’s social movements. For example, the notion of ‘sexual orientation’ has been problematized (and sometimes rejected) by many lesbian theorists on the grounds that it has been historically, and continues to be imbued with a meaning which has at its core the experiences of men. It’s utility to lesbians is therefore questionable because of, among other things, its apparent inability to contemplate issues of gender discrimination and patriarchy.⁶⁸ Another issue that has been flagged as a danger is that if we use the concept of ‘sexual orientation’ in attempts to establish that ‘homosexuals’ are no different from ‘heterosexuals,’ we may unwittingly comply in the creation of new categories of oppression: the good vs. the bad homosexual.⁶⁹ There are a plethora of similar discussions within queer social movements. These are issues of great complexity and range, some of which will be highlighted in upcoming chapters.

However, I would suggest that there is a basic insight manifest in all these criticisms capable of succinct articulation: any potential challenge to the oppression of those who do not conform to the dominant heterosexual norm which automatically prioritizes a one-dimensional and uncritical notion of ‘sexual orientation’ has limited efficacy and dangerously hegemonic potential. As Wayne Morgan has observed:

[...activists who push a gay liberation “rights” agenda...are accused of failing to problematize difference, equality, identity and the intersections of different identities (race, gender, class as well as sexuality). Within our legal system, containment of diversity is achieved through tolerance and co-option, and this tolerance and co-option is facilitated by a movement intent on proving “sameness” to the heterosexual standard. But tolerance by law is forthcoming only if those who identify as gay or lesbian do not threaten the status quo.⁷⁰

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Equally capable of succinct articulation is a possible method to avoid these limitations and dangers: the consideration and incorporation of numerous, as opposed to one perspective, within political discourse about all of our experiences as queer people. Our difference(s) must be considered and utilized without the differences between us being entrenched. Our communities of interests must be explored before we can purport to speak about categories of people. But no matter how easily the concept may be described, the practical challenges posed by its implementation are anything but easy.

Francisco Valdes has described the challenges in this way:

[...] any particular (mis)perception of sameness or difference, whether deemed substantively "real" or not, cannot become the point; the point is what we make of the perception — how we interpret sameness and difference, how we imbue perceptions of sameness and difference with cultural, legal, theoretical or political significance, and how we then accommodate each other constructively and mutually in the face of significant difference.71

Despite the obstacles, if we continue to obscure our difference(s) as queer people, the road we take, however well marked, may lead to a dead-end for many, if not all. The experiences of queer people with colour, for example, cannot continue to be marginalized in a footnote. These experiences, these perspectives must be incorporated at a foundational level. They cannot simply be an item on the agenda but must inform the process of the agenda’s formulation. Until this is done, we will be unable to clearly see and erase those boundary(ies) which limit us all as queer people, but instead will only be able to shift a particular boundary in a way which may benefit some, but never all of us. Some will get over the wall, while others will be left behind, or pushed back even further.
THE (MIS)PERCEPTION OF OUR 'DIFFERENCE(S) WITHIN LEGAL THEORY

Issues of difference do not reside exclusively within the sphere of political discourse. Our difference(s) also resonate within legal discourse, the legal process and legal theory. In this section I will examine how the discourse of legal theory—in particular doctrinal analysis—can constitute and/or reinforce notions of gay and lesbian equality which misperceive and mischaracterize the difference(s) between queer people. In subsequent chapters I will turn my focus more directly on similar processes within legal advocacy and law (both legislative and judge made.)

As one might expect, legal discussions about our difference(s) often occur in the context of legal analysis of human rights. In this vein, much has been written about the ability or inability of law and legal rights to promote progressive social change. In subsequent chapters I will discuss this question more directly. However, in this chapter I wish to discuss examples of how difference(s) among queer people have been (mis)perceived within academic discussion about 'G.L.B.T. equality' without discussing the validity of human rights law itself as an effective tool for progressive social change. I would argue that these two questions are not synonymous even though they are most certainly related. Rather, I will argue in this chapter that even though it may be that human rights laws have a role to play in the promotion of progressive social change, that potential is frustrated by many lawyers and legal academics who (at the level of legal theory) promote a false consciousness of difference which frustrates this ability. These legal theories bypass any analysis of communities of interest in favour of a much more limited discussion of groups of people.

When I began research for this chapter I avoided most treatises or articles which in their summary made reference exclusively to the subject of 'sexual orientation' without more than a passing reference to gender, race or class etc. However, my desire to be
academically rigorous (and the fact that I quickly exhausted those pieces which met my
admittedly narrow research methodology) eventually came to bear, and I began to
consider some of those pieces which I had not up to that point.

An obvious first choice for consideration was a text that contains one of the more
ehaustive treatments of legal doctrine within Canada related to the subject of ‘G.L.B.T.
equality’ and aptly titled *Lesbians, Gay Men, and Canadian Law*. The purpose of this
text is described succinctly: ‘...to consider those areas of Canadian law whose impact is
different on lesbians and gay men than on heterosexuals....’ The fact of this topic is
largely unproblematic to my mind; however, what is problematic is the ways in which the
topic is assumed to be capable of the (re)cognition of certain difference(s) and
identity(ies) between queer people, but not others.

The first two chapters of this text might be described as introductory: they set out the
perspective and methodological approach the author takes, which is a doctrinal analysis
of Canadian law. Chapter Two in particular is entitled ‘Contextualizing the Law’s
Treatment of Lesbians and Gay Men.’ The process of contextualizing can be an
important exercise that opens up a discourse, giving it greater breadth of scope and
dimension. As I have argued, consideration of our diverse experiences, our
difference(s) as queer people, increases the potential for effective discourse on the
subject of our oppression. Unfortunately, I would argue that the introductory passages
of this text articulate a context that is not expansive, but indeed both limiting and
marginalizing.

In Chapter Two, under the sub-chapter-heading (ironically) titled ‘Diversity within
Lesbian and Gay Communities’, two and only two aspects of our so-called ‘diversity’ are
identified. The two communities of interests that are identified are ‘[t]he social and
economic situations of women, including lesbians, [which] are profoundly different from
those of men (including gay men)’ and also the ‘different approaches that lesbians and gay men may take on legal issues...[both between and among those groups].’ To be accurate, these are not the only references to the differences between us as queer people, or different communities of interest. However, other than these two—which are specifically articulated—the only references to the diversity among queer people in these introductory chapters are unspecific and perfunctory. For example, the authors says: ‘[a]nd on it goes, taking account of the diversity of viewpoints among individual lesbians and individual gay men’ and that ‘[t]he importance of recognizing issues of diversity and different political perspectives within the lesbian and gay communities is increasingly accepted.’ Other aspects of our diversity, such as that related to our race(s), are not even identified in these chapters, far less considered or incorporated into its analysis.

I have chosen these chapters of this text for review not because the doctrinal analyses that they introduce are incorrect, or even automatically inapplicable to queer people with colour. No doubt the analysis contained in this text at least has the potential to be applicable to queer people with colour insofar as they are gay, lesbian, bisexual (and transgender), in other words, insofar as they share a community of interest related to sexual orientation oppression. But this potential does not, because it cannot alter the discursive limitations introduced in these passages.

I have chosen these passages for review because they are all too typical examples of the ways in which legal theories about ‘G.L.B.T. equality’ (as opposed to ‘G.L.B.T. people’) adopt methodological approaches which obscure the difference(s) among us in a manner that is both counterproductive and marginalizing. This approach by passes all but a very few communities of interests among queer people.
Recalling discussions above regarding the conceptual and practical disadvantages which may result from focusing on a particular identity, or boundary, consider the following description of the methodology of the text: "[s]ince this book focuses on how the law treats lesbians and gay men differently from heterosexuals, the primary distinction throughout is between "lesbians and gay men" and "heterosexuals" (emphasis added.)" There is therefore an unambiguous, explicit and unquestioned prioritization of the boundary of sexual orientation. What is implicit in this description is the concomitant marginalization of those ‘other’ identity(ies) and oppressions which may play an equally, if not more significant role in the oppression of many ‘G.L.B.T. people.’ Perhaps even more importantly, by purporting to fold the identity(ies) of G.L.B.T. people into sexual orientation, exclusively, the author obscures the reality that the nature of ‘sexual orientation oppression’ may itself vary according to race, gender, class etc.

Rather than questioning and discussing the validity of adopting the perspective of the relatively privileged, it is reasserted and adopted in this text. Defining the ‘identity’ and ‘oppression’ of G.L.B.T. people solely in relation to ‘heterosexuals’ has two effects. First, the category of ‘heterosexuality’ is itself assumed and centred, thereby limiting the potential to problematize that concept and to treat it as socially constructed and therefore contingent upon numerous factors. Secondly, only a one-step divergence from the norm of ‘heterosexuality’ can be considered, and the ability to address multidimensional oppression is consequently lost. Duclos describes this type of perspective in this way:

If one is at the centre, one can see divergence in alternative directions: by race (not-white), or by sex (not-male), or by religion (not-Christian), and so on. In this way the various grounds of discrimination contain hidden assumptions about who is likely to invoke them.
Therefore, although the 'primary perspective' is stated, the unstated norm remains that of the person who would not be discriminated against *but for* sexual orientation. The consequence is that queer people with colour, to name only one example, simply disappear from the pages of this text.\(^{60}\)

Still, as indicated above, this text does identify two of the ways in which we differ from each other, despite a shared sexual orientation, namely: our gender and political positions. I would argue however that the explicit recognition and consideration of these, and only these sources of the differences between us, has the following implications: an implicit hierarchical ordering of the sources of our difference(s) or identity(ies) and the concomitant marginalization of the 'others.' Difference(s) related to gender are, of course, an important consideration. However, any recognition of this difference, to the exclusion of other aspects of women's identity(ies), is a conceptually inadequate tool for understanding even gender oppression. One need only remember that many 'women' are also oppressed by virtue of their class, for example, in order to emphasize the weakness of this approach.\(^{81}\) The irony is that the discursive potential opened up with one hand by recognizing that '[l]esbians are disadvantaged both as women and as lesbians'\(^{82}\) is therefore closed with the other hand, because the feminization of poverty and the implications of class oppression are obscured. Put simply, one of the most central communities of interests shared by women, namely the need to resist the oppression of poverty, is ignored.

Of course, it is not only the experiences of poor lesbians, but also of all queers with colour, among many others, that are marginalized by the identification of gender, to the exclusion of all other sources of our difference(s) as queer people. This brings me to the second difference identified in these passages: namely, political positions. I would argue that an issue far more fundamental than our political differences is our communities of...
interests which invariably inform these divergent political positions. And as I have argued above the kind of approach taken in these passages is one that not only fails to consider our difference(s), but also one that engenders a sense of exclusion and marginalization, which in turn leads to a further entrenchment of more identity politics, or political differences.

Therefore, at a discursive level this text approaches the topic of ‘gays and lesbians’ in a manner which obscures our shared difference(s) and the ways in which these difference(s) modify the oppression(s) we face as queer people. At best it is an approach which is only capable of contemplating specific examples of how G.L.B.T. people differ. These discursive limitations detract from the value of analysis contained in the body of the text. Put simply, the limiting approach adopted results in a doctrinal analysis that has proportionately limited relevance to queer people with colour and others who experience multidimensional oppression.

For example, in Chapter thirteen the topic of ‘Visitors, Immigrants, Refugees and Citizenship’ is discussed. Much of this analysis is likely to become outdated because of proposed reforms to Canadian immigration law to, among other things, introduce a new category within the sponsorship system for unmarried same- and opposite-sex ‘spouses.’ (In the next chapter these and other proposed reforms to Canadian immigration law will be discussed in depth.) In Lesbians, Gay Men, and Canadian Law, on the subject of immigration it is noted that ‘homophobia among immigration officials persists as a significant problem in a system that is highly discretionary’ (emphasis added.) This is so because currently a person in a same-sex relationship wishing to ‘sponsor’ his/her partner may often have to rely upon an application for exemption on humanitarian and compassionate grounds [hereinafter ‘H. & C.’] because a same-sex partner cannot be sponsored as a ‘spouse’ or ‘fiancé(e).’ In other words, a same-sex
spouse cannot be sponsored as part of the regular family class. And as is recognized, '[t]he key to admission under [the H. & C. process] is the considerable discretion permitted to individual immigration officers in assessing...[these] applications.'

In the two case studies used to analyze H. & C. applications very few details about the same-sex couples are given beyond the names (from which 'sex' can usually be inferred) and the citizenship of the partners. The descriptions do not include explicit information about, for example, their class, age, race, occupation or employment status. But surely in as highly discretionary an application as an H. & C. these 'other' factors may also have been influential in the officer's decision? Was the Canadian-citizen partner gainfully employed or collecting social assistance? What was the level of education and occupation of the non-Canadian partner? If 'homophobia' might be an impulse which influences an immigration officer's discretion, might not 'racism' be another? The notion that the Canadian immigration system has elements of direct, overt, and more systemic manifestations of racism is not a novel one.

My point is that the exclusive focus on the issue of how 'homophobia' (or 'heterosexism') may or may not inform the discretion of an immigration officer is flawed. One is given a very meagre portrait of the implications of G.L.B.T. people having to rely upon such a highly discretionary remedy. As a highly discretionary remedy, it is one more amenable to the decision-maker considering various, not just one '-ism.' Therefore, the pertinence of the analysis is limited for those people considering the efficacy of a H. & C. application who may be faced with multidimensional sources of discrimination.

As a consequence of the limitations of this analysis, one is left with the rather unsatisfying conclusion that:
However, it is obvious that the more 'strikes' against a couple—such as the lack of education or knowledge of French or English of the potential immigrant-partner, or the inability of the Canadian-citizen partner to fully support the 'spouse'—the less likely an immigration official is to be 'convinced' to grant the application due to the threat of a Charter challenge based on 'sexual orientation' discrimination. The reason for this is that 'courts are generally reluctant to interfere with an officer's exercise of discretion' and the more 'strikes' against a potential same-sex couple, the less likely a court is to find that the officer exercised his/her discretion based upon 'some wrong or improper principle or acted in bad faith.' An officer may be able to use the existence of multidimensional identities, and multiple sources of oppression, to obscure the role of 'homophobia' in his/her decision. In a manner sadly analogous to the approach taken by activists in the Rivera tragedy discussed above, the exclusive focus upon the phenomenon of 'homophobia' in this text leaves unexamined and unchecked the reality of multidimensional oppression, and its potential significance in the H. & C. applications of same-sex couples. In this way, the analysis itself is rendered incomplete and, in my opinion, flawed.

What is at least implicitly recognized is that the potential benefit of both a H. & C. application and a Charter challenge is entirely contingent upon whether the same-sex partners 'can “come out” and openly challenge the unfairness....' But again, what is left unstated and unanalyzed is that our ability both to 'come out' and to challenge our oppression may itself be curtailed by the existence of multidimensional oppression. This is a topic that brings me to the next part of this section: legal analyses about
'G.L.B.T. oppression' which do not simply ignore or obscure, but which explicitly marginalize the relevance and experience of multidimensional oppression.

In 'Outing: The Law Reacts to Speech about Homosexuality' it is argued that the law should remain silent on the issue of 'outing,' that it should not penalize or otherwise discourage the 'revelation of a person's sexuality without that person's consent and contrary to that person's wishes.' I am uncertain, and therefore will take no position on whether or not the practice of 'outing' is generally efficacious or/and morally justifiable as a liberation strategy for queer people. However, I will argue that the process of reasoning by which it is 'justified' in this article is flawed. 'Outing' may facilitate the destruction of 'the closet,' but in its place may be left a 'lavender bubble' through which the implications of multidimensional oppression are filtered out, making it an uncomfortable abode for queer people with colour.

In discussing the 'social interest' of the freedom of speech, as it pertains to 'homosexuals,' the social context is described in this way:

That is not to say that there is one homosexual culture in Canada or anywhere else. Lesbians, gays, and bisexuals have many things in common, but the most common element among them is their historical persecution and the fact that non-homosexuals lump them together (references omitted & emphasis added.)

The concept of common(ality) is used here to formulate an essentialist notion of the experiences of all queer people. The assumption that queer people share one common interest (that we are all lumped together) is used, without further explanation, to erase all the divergent communities of interests within the group of people posited. Leaving aside for the moment the political (in)efficacy of this approach, it is one which quite simply ignores the reality of multidimensional identity(ies) and oppression(s). As I have argued above, coming out as sexually 'queer' cannot erase, for example, our race(s) nor the implications of racism, whether we are privileged or oppressed by this
social pathology. Indeed, even ‘our’ sexuality as queer people with colour may be informed by cultural norms and racists stereotypes both within and outside of the queer community. Therefore, we are not always ‘lumped together’ by either the straight or queer communities.

However, even though in this article ‘our difference(s)’ are obscured in the construction of a queer identity, the ‘differences of some’ are identified and addressed as potential arguments against the practice of ‘outing.’ Not surprisingly, these arguments are promptly rejected:

The same principles ought to apply where the outed person is a member of a particular ethnic, cultural, geographical or religious community where the reaction to the outing may be more than usually negative to the outed person and those around her. There is a myth in many cultures that homosexuality is a ‘white man’s disease’. This can make homosexuality especially difficult for members of non-white groups. The law ought not to accept different levels of tolerance for homosexuals in different parts of the country or in different segments of it.

Although it may indeed not be appropriate for the law to ‘accept different levels of tolerance for homosexuals’ nor should legal theories ignore the social context of all queer people, the reality of multiple and intersectional oppression, and its implications or causes.

People with colour are all too familiar with the phenomena of racially based sexual roles being foisted upon them—over-sexed deviants who can consequently be vilified, feared, exoticized or raped with impunity—by ‘white’ people and cultures. The desire, among people with colour communities to silence ‘their’ queer people may therefore be informed by fear: a desire to keep sexuality private and therefore beyond the dangerous gaze of dominant cultures. By focusing exclusively on ‘heterosexism’ as ‘sexual oppression’ this analysis limits its ability to deal with the reality of hetero-racism.
hetero-racism I mean simply oppression whose character is informed both by racism and heterosexism.

What makes ‘homosexuality especially difficult for members of non-white groups’ is not only the myth of homosexuality as a ‘white man’s disease’ but also the reality of multidimensional oppression. The reification of ‘coming-out’ not only belies the fact that it is more difficult for some more to ‘come-out’ than others, but also that ‘being out’ may hold less benefit for those who experience multidimensional oppression. As Hutchinson has observed: ‘The coming out process...does not automatically “liberate” people of colour, who, by revealing their sexual orientation and attempting to integrate themselves within white gay and lesbian communities, may encounter racial hierarchy.’

I would argue, therefore, that the elevation of the issue of ‘homophobia’ (narrowly understood) over racism, or vice versa, within our respective communities inherently prevents consideration of our multidimensional oppression as queer people with colour. But this is precisely what is done when our race(s) and our sexuality(ies) are articulated not only as separate categories, but as competitive: when ‘homosexuality’ is understood as a white man’s disease and when our ‘ethnic community’ (rather than racism) are conceived of simply as obstacles, preventing the full realization of our ‘homosexual’ selves. The rejection of queer people with colour by their families and communities, whatever the rationale, cannot be defended. However, neither is it productive to simply dismiss this reaction by people with colour simply as a misplaced myth that ‘homosexuality’ is ‘a white man’s disease.’ It indeed is a ‘myth,’ but it is one whose content and power have in many ways been inherited from and in defence of the white man’s treatment of people with colour, his racist gaze upon their sexuality.
On the ultimate question of whether or not the ‘outing’ of queer people, with colour or otherwise, should be immune from legal penalty I take no position. However, by focusing exclusively on the ‘homophobia’ of particular ‘ethnic’ communities (read ‘not-white’) rather than the difference(s) in our race(s), our identity(ies) and our shared oppression as queer people, this article takes an approach which adopts rather than challenges the dilemmas of difference. The better alternative has been summarized well by Valdes: ‘Difference, recast as diversity, confirms the reality that we constitute cross-communities with cross-interests. Difference as diversity paves the way for a blend and balance, rather than a hierarchy or dichotomy, of identity and affinities.’

I would suggest that rather than asking whether or not the law should ‘accept different levels of tolerance for homosexuals in different parts of the country’, one should first try to appreciate why ‘outing’ results in different levels of harm and benefit for some people, as opposed to others. One should first try to identify the communities of interest we share in terms of nurturing and safeguarding our ability to come out. A younger friend once told me that when she came out to her mother, her mother reacted by suggesting that it was surely mistaken for her to be openly lesbian when she was already a poor Black woman. According to the framework in the article ‘Outing’, the only pertinent question would be: ‘Should this mother’s reaction be “tolerated”?’ I would suggest, however, that this young woman and people like her would not be any better off if we determine that it should not? Even though I could not help but notice its naiveté, I have always admired the daughter’s response to her mother: ‘Yes, but now I have another community to support me in my struggles as a poor Black lesbian woman.’ I wish I could endorse her optimism.

Of course, not all legal theory has obscured or rejected the relevance of multidimensional oppression to queer people. Indeed, I have heavily relied upon a
wealth of published theory on these issues. Writers such as Kimberley Crenshaw, Nitya Iyer (née Duclos), Mary Eaton and Darren Lenard Hutchinson just to name a few. Unfortunately, there is a common refrain among many of these writers: that the law is either incapable (or judges unwilling) to adequately address the issue of multidimensional oppression. For example, in one of her articles Duclos argues that human rights laws, with its emphasis on discrete categories or grounds of discrimination, result the identity(ies) and experiences of women with colour being almost entirely erased. And specifically on the subject of queer people, Mary Eaton has argued that the legal concept of 'sexual orientation', as a ground or category of prohibited discrimination, has come to be coded 'white' in a manner which works to the disfavour of those who are queer people with colour.

As I will argue in the next two chapters the Canadian legal process, the structure of human rights/anti-discrimination laws and equality jurisprudence do indeed limit the potential of law to provide effective redress for those who experience multidimensional oppression and foster progressive social change. However, as Mary Eaton has written: 'Nevertheless, the difficulty that arises when the exigencies of the system are offered as reasons in themselves to shelve questions of difference is that the need to inquire into the nature and extent of difference often is downplayed or dismissed altogether.' But these questions simply cannot be left unexplored.

Indeed, it may be that anti-discrimination laws can be developed, changed in such a way that they will be better able to effectively address the issue of multidimensional oppression. Regardless, what I have attempted to articulate in this chapter is that the obfuscation and marginalization of our difference(s), and the fragmentation of our complex identity(ies) as queer people, does not first occur as we enter the courthouse. It is a process which conspires against us in our everyday lives—when we are told not
to bring home the 'white man's diseases' or are told 'not to confuse the issue of sexual orientation oppression with race and racism.' The corollary is that until we begin the process of exploring and embracing our shared difference(s)—in all aspects of our lives, personal (and) political—we will be unable to effectively utilize any positive developments within human rights law.

**Conclusion**

Throughout writing this chapter I have recalled the potent words of Sojourner Truth, recorded in 1851. She had been shushed by white women who did not want to 'obscure' the matter of a universal franchise with the issue of abolition. But tired of listening to the claims of white men—that 'women' could not have a public life because of their 'delicate nature'—she finally declared:

> Look at my arm! I have ploughed and planted and gathered into barns, and no man could head me—and ain't I a woman? I could work as much and eat as much as a man—when I could get it—and bear the lash as well! And ain't I a woman? I have born thirteen children, and seen most of 'em sold into slavery, and when I cried out with my mother's grief, none but Jesus heard me—and ain't I a woman?

In the debates about the liberation of queer people within this society, both race and racism are issues, among others, that are either often either ignored or confused. The concept of 'sexual orientation' has been constructed in a manner that categorizes, and the categories it creates seemingly do not permit considerations of racially based differences.

Even if the term 'queer' may be commonly used to avoid patently discreet categories—like gay, lesbian, bisexual, transgender etc.—it has a hollow ring in the mouths of some. I would argue that for many, but certainly not all, the term 'queer' is an unexamined concept, little more than a linguistically convenient tool for avoiding the
epithet that one is being ‘exclusionary.’ The concept of ‘sexual orientation’ has despite challenges remained like blinkers through which issues ‘unrelated to sexuality’ are deemed non-issues for the ‘queer’ community. I hope I have given some pause to reconsider the morality and honesty of that approach.

Although all queer people share one or more communities of interests related to heterosexism and homophobia, in order to challenge these we must also (perhaps first) recognize our difference(s). For in the recognition of these difference(s) lies a wealth of perspectives that may be used to challenge the integrity of the boundary of ‘sexual orientation’ and ‘heterosexism’ themselves. As Hutchinson has written:

Multidimensionality exposes the various layers of social power that inform heterosexism and homophobia. Multidimensional analysis also reveals the multiple dimensions of social identity categories and offers a comprehensive framework for conceptualizing sexual subordination that neither “destroys” nor “fragments” our lives.¹¹³

The concept of ‘Queer’ is now like a mineral rich field, discovered and then prematurely left fallow. Within the queer community there is a rich diversity of people. We must utilize our difference(s), our diversity, rather than shelve away the reality that we differ from each other. It is only by doing this that we will be able to discover and use our inter-connectivity in the struggles against heterosexism and homophobia, in all their complex forms:

Queerness, a construct created in part as a reaction to such retrenchments, facilitates sexual minority resistance to hetero-patriarchy through inter-connectivity and coalition-building because it represents a conscious effort to transcend and reconfigure outmoded conceptions of identity and identity-based politics...integral strategies for sexual minority solidarity and toward sexual minority success in the anti-subordination project.¹¹⁴

In the chapters to follow, I will continue the exploration of this concept, and the intersectional nature of the oppression facing queer people. Consequently, I will expand
my focus to include extensive discussion not only of race, but also of the implications of oppression related to gender, class and immigrant status, in particular.

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1 I have used this unusual phrase, rather than the more typical ‘people of colour’ because in my opinion it emphasizes that although ‘white’ people also have a race, a colour, in this society non-whites are largely viewed as just that, not-white.

2 I have used the spelling ‘difference(s)’ and ‘identity(ies)’ instead of their accepted spellings to emphasize two interrelated concepts: the first is that although socially, culturally and politically we tend to emphasize one or more aspects of the differences between people, between us, we are all different from each other in a plethora of ways at the same time; the second idea is that the differences we emphasize are often conceptualized as sever-able or severed from our whole selves. Both of these approaches obfuscate the complex reality that the differences between us, and our positions in society are simultaneously and continuously being modified by many, not just one, two, three, four etc. aspects of our identities.


6 See Morgan, supra note 3 at 10 - 12 where it is argued that one of the most basic missions of ‘Queer’ theory is the Derridian style deconstruction of the epistemological dichotomy or binary of ‘Hetero/Homo’ and the most basic binary of ‘Identity/Difference.’

7 Nevertheless, I shall continue to use the term ‘queer’ not only because it is linguistically convenient, but also because if used properly it can be an effective conceptual tool in queer liberation. Of course, my use of that term should not, however, be understood as an implicit acceptance of the notion that as ‘queer’ people we have a homogenous or fundamental identity. (See my ‘Conclusion’)


9 Hutchinson, supra note 3 at 622.

10 *Ibid.* in which it is observed that: ‘Although several members of the gay political community explicitly reject the importance of incorporating antiracist and poverty concerns in gay and lesbian politics, issues of racial and class subordination are more often marginalized by omission, silence, and neglect.’

11 As Mary Eaton has argued, ‘sexual orientation’ has come to be coded as ‘white.’ Therefore ‘[i]f the very notion of homosexuals as an outsider class requires the erasure of race, then to attempt to re-racialize homo-sexuality is to call into question homosexuality’s own conception of itself in perhaps the most productive ways.’: “Homosexual Unmodified: Speculations on Law’s Discourse, Race, and the Construction of Sexual Identity” [Hereinafter ‘Eaton’] in *Legal Inversions, supra* note 4 at 69.

12 Supra note 2.


14 Morgan, supra note 3 at 31: ‘Queer is about making boundaries between categories problematic. It is an umbrella label for a diversity of “deviant” sexualities: any sexual practice of identity marginalized and
"other"-ised by the mainstream...the real queer threat lies in its claim to "transcend" identity by pointing out the fluidity of identity boundaries." (Italics added).

15 See Valdes, supra note 8 at 69 where he suggests that by moving beyond 'fixed identity primacies' and consequently the 'difference divide/dilemma' we can begin constructing new subjects using 'political identities.'

16 Ibid. at 33: '...difference is neither fatal nor debilitating to the mutual affinity of communities of men and women defined by a shared minority sexual orientation. Neither sex nor race difference should preclude or obstruct sexual orientation coalitions. Nor can sexual orientation coalitions obscure sex and race difference.'

17 Many of these other identity(ies) will be the subject of greater focus in other chapters of this thesis.

18 For a general discussion of the notion of difference(s) and the dilemma of difference see: Martha Minow, Making All the Difference: Inclusion, Exclusion and American Law (Ithaca, NY: Cornell University Press, 1990) [hereinafter 'Minnow'].
same way she says: ‘A lesbian or gay identity is formed, at least in part, in response to, or in resistance of, oppression... As to that repression, especially legal enforcement of societal homophobia, lesbians are not all similarly situated. Perhaps the point be made stronger by comparing anti-gay repression directed at two homosexuals: one male, one female; one professionally powerful, one working class; one white and privileged, one Latina.’ at 165.

33 Minnow, supra note 18 has observed that in the context of law, certain assumptions are made about the perspective that matters in judging the world. Regarding these she observes that '[s]uch assumptions about knowledge, categories, and boundaries usually remain implicit and unexamined. Making them explicit permits debate and the exploration of alternatives.' at 12. This, of course, cannot be accomplished effectively if the social movements which seek to challenge those boundaries themselves insist and rely upon one perspective.

34 Isabelle R. Gunning, “Stories from Home: Tales from the Intersection of Race, Gender and Sexual Orientation” (1995) 5 S. Cal. Rev. L. & Women’s Studies 143 [hereinafter Gunning] at 147: ‘Most of us grew up understanding that we were black, and that bad things could happen to us because of that, long before we discovered that we were lesbian or gay.’

35 For one of the first pieces written on the subject on the subject of those who experience ‘intersectional’ oppression and the futility of ignoring this reality, see: Kimberley Crenshaw, “Demarginalizing the Inter-section of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics” (1989) 89 University of Chicago Legal Forum 139. [Hereinafter 'Crenshaw']

36 Discussed in Eaton, supra note 11 at 54 - 56.

37 Ibid. at 56. In this context, it is also interesting to note that some gay black men represent their oppression due to racist-heterosexism in their fantasy drag ball performances: ‘What viewers [of Paris is Burning] wit-ness is not black men longing to impersonate or even to become like “real” black women but their obsession with an idealized, fetishized vision of femininity that is white.’ bell hooks, “Is Paris Burning?” in Black Looks: Race and Representation at 147 - 48 (cited in Hutchinson, supra note 3 at 574, fn 57)

38 See Hutchinson, supra note 3 at 583: ‘Moreover, because race and class also create privilege, these statuses may offer some insulation from forces of oppression.’

39 Vaid, supra note 3 at 284 has observed that: ‘[…] I believe that most gay and lesbian people neither understand nor value the importance of multiracial and multi-issue politics. They remain uninterested and unmotivated.’

40 Supra note 9.

41 Gunning, supra note 34 at 147: ‘Maybe it is especially frightening for black women because, as Barbara Smith once noted, “heterosexual privilege is usually the only privilege that black women have.”’

42 For a ‘parable’ presented and then discussed which demonstrates the divisiveness in part engendered by the obfuscation of difference(s) see Valdes, supra note 8 at 36 - 47.

43 Vaid, supra note 3 at 291.

44 For example, as Valdes, supra note 8 observed at 38 - 39: ‘First, it seems more than simple coincidence that the two panelists who were persons of colour elected to address subjects emphasizing the inter-connectedness and relevancy of other sexually subordinated communities to the legal situation of lesbians, whereas the remaining three panelists, all white, elected to focus exclusively on lesbian issues as such.’


46 For the devastating impact this has had in terms of the rates of infection with the HIV virus in the communities of people with colour, and the consequent formation of organizations formed to specifically address the needs of these communities, see: Alonso, Ana Maria, and Maria Teresa Koreck, “Silences: ‘Hispanics,’ AIDS, and Sexual Practices” in Lesbian and Gay Studies Reader supra note 5 at 110 - 126. Also see Vaid, supra note 3 who argues that the ‘mainstream’ gay and lesbian community failed to incorporate into policy making regarding the struggle against AIDS issues of race and class through a process that she calls ‘Decoupling AIDS from Systemic Reform’: at 86 - 105.

47 In speaking about her experiences of racism and sexism within queer communities, Vaid, supra note 3 at 276 notes that “[s]ometimes the insensitive or frankly racist or sexist behaviour came from white gay men and women. Other times, it came from feminists and people of colour.”

47
For example, Powell, supra note 45 at 84 describes an event at which both Latinas and black lesbians were invited. It was not a great success. Speaking about the reaction of members of her organization - geared towards black lesbians - after the event: 'But they were so upset with us. We learned that we have to do more educating, we have to do more consciousness building and we have to build more working relationships. We are just going to have to get together more so that we have a consciousness as an entity; so we know "house" music is not the only kind of music that we can have fun with.'

Vaid, supra note 3 at 278.

Valdes, supra note 8 describes and rejects this practice, saying at 40: 'Neither sex, race nor sexual orientation can "come first" in the configuration of human identities, politics and communities. I reject this notion of fixed or unitary identity because the sense of primacy it protects belies human experience, not to mention the compelling objections of recent works. Any proposition expressly or impliedly flowing from that notion is therefore untenable. In fact, this notion of fixed identity is not only conceptually unsound, but also politically naive.' (References omitted).

An inability which goes against the grain of the lived reality of multidimensional oppression: 'We also find it difficult to separate race from class from sex oppression because in our lives they are most often experienced simultaneously. We know that there is such a thing as racial-sexual oppression which is neither solely racial nor solely sexual..." (Combahee River Collective, "A Black Feminist Statement" in This Bridge Called My Back: Writings by Radical Women of Color (New York: Kitchen Table Press, 1983) at 213.)

Valdes, supra note 8 says at 41: 'This reductive and categorical approach to identity not only obscures complexities that truncate discourse, but also creates a politics of exclusion which is detrimental to the necessary politics of coalition that sexual minorities must mount to triumph in a world of majoritarian rule...an exclusionary and self-defeating divisiveness.'

Vaid, supra note 3 at 269 observes that 'I think one of the main reasons that gay and lesbian political organizations have been unable to tap into larger numbers of supporters is the middle- to upper-middle-class orientation of their agendas, outreach, and representation.' For a general discussion about the way in which particular 'political' perspectives marginalize others within the 'gay and lesbian' social movements see: Didi Herman, Rights of Passage: Struggles for Lesbian and Gay Equality. (Toronto: University of Toronto Press, 1994)

This is an assumption which is largely supported by the reality of 'gay and lesbian' social movement activism. The relevance of issues and experiences 'unrelated' to 'sexual orientation' are both explicitly rejected by many, and even more often implicitly ignored - given the nature of those issues which are chosen for action and the 'essentialist' descriptions of the gay or the lesbian. For a discussion of these phenomenon generally see: Vaid & Hutchinson, supra note 3 and Valdes, supra note 8. In particular, Hutchinson at 563 observes that in 'the "dominant" gay and lesbian culture and scholarship...issues of racial and class subordin-ation are neglected or rejected and...a universal gay and lesbian experience is assumed.'

Minnow, supra note 18 at 152 has observed regarding the construction of an 'abstract individual' that: 'Despite the implied aspiration of universal inclusion, the social contract approach has been deeply exclusionary...this conception amounts to a preference for some points of view over others; it takes some types of people as the norm and assigns a position of difference to others (thus adopting the assumptions behind the difference dilemma).'

I first came across this 'but for' concept in an article written by Crenshaw, supra note 35. Discussing the experiences of Black women in relation to anti-discrimination law she argues that their oppression is left to an extent unanswered because those laws have as their narrow objective only the regulation of treatment based on race or sex. As she says at 151: 'Notions of what constitutes race and sex discrimination are, as a result, narrowly tailored to embrace only a small set of circumstances, none of which include discrimination against Black women.' See also: Nitya Duclos, "Disappearing Women: Racial Minority Women in Human Rights Cases" (1993) 6 Canadian Journal of Women and Law 25 [hereinafter 'Duclos']. For the purposes of this piece, I would argue that an analogous process occurs in the formulation of agendas within mainstream gay and lesbian social movements plagued with identity politics.


An important line of discussion in these debates concerns whether those who experience multidimensional oppression will benefit as much as those who 'do not' experience oppression 'but for' their
sexual orientation. For a bibliographic footnote about these debates, see Hutchinson, supra note 3 at 586 - 87, fn 108 & 109.

59 This issue will be discussed in greater detail in the following two chapters.
61 This tragic incident is described in detail by Hutchinson, supra note 3 at 567 - 573.
62 Hutchinson, supra note 3 at 571.
63 Vaid, supra note 3 observes at 268: ‘The emergence of an institutionalized gay and lesbian civil rights movement is in fact linked to the emergence from the closet of professional and middle-class gay, lesbian, and bisexual people. In this respect, we are no different from other reform movements of modern times; reformers seem to be people with the time, luxury and security to engage in the political process.’ Also see: Marlee Kline, “Race, Racism, and Feminist Legal Theory” (1989) 12 Harvard Women’s Law Journal 115 [hereinafter ‘Kline’] also notes at 116 that within the feminist movement, ‘[white women have] the power to portray our own experiences as wholly representative of the experiences of all women.’

64 Vaid, supra note 3 says that ‘[o]n an ideological level, resistance to tackling racism and sexism comes from gay legitimationists who believe that broadening the movement’s scope to encompass race and gender will involve it in issues that are not “our issues.”’ at 282.
65 See Valdes, supra note 8 at 48: ‘As I have shown elsewhere, the past and present enforcement of sex/gender norms and hierarchies under the conflation of sex, gender and sexual orientation is designed to ensure the cultural and political subordination of lesbians, gay men and other “sexual aberrations” that defy Euro-centric hetero-patriarchy.’ and also Hutchinson, supra note 3 who states at 640 that: ‘Ultimately, I view multidimensionality as a discursive project aimed at unveiling the complexity of subordination and identity...’
66 For example, in regards to the notion of ‘immutability’ - often used as a basis for protection from discrimination related to ‘sexual orientation’ - Nitya Iyer has observed that: ‘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.’ (Nitya Iyer, “Categorical Denials: Equality and the Shaping of Social Identity” (1993) 19 Queens Law Journal 179).
67 For a general theoretical description of the kind of coalition based political action - one which does not adopt a pre-configured category such as ‘sexual orientation’ inherited from law - that I would suggest is preferable, see Bower, supra note 3.
68 See for example: Diana Majury, “Refashioning the Unfashionable: Claiming Lesbian Identities in the Legal Context” (1994) 7 Canadian Journal of Women and Law 286; and, Peterson, supra note 4 at 119.
70 Morgan, supra note 3 at 28.
71 Valdes, supra note 8 at 35.
73 Donald G. Casswell, Lesbians, Gay Men, and Canadian Law (Toronto: Emond Montgomery Publications, 1996) [hereinafter ‘Casswell’]

74 Ibid. at 1.
75 Casswell, supra note 73 at 18.
76 Casswell, supra note 73 at 18.
77 Casswell, supra, note 73 at 17.
78 Morgan, supra note 3 at 12.
79 Duclos, supra note 56 at 42.
80 As did women of colour in human rights law enforcement, as described by Duclos, supra note 56.
81 See for example: Crenshaw, supra note 35 and Kline, supra note 63.
82 Casswell, supra note 73 at 18.
83 Casswell, supra note 73 at 556.
84 See Casswell, supra note 73 at 567 - 574. An opposite-sex ‘fiancée’ can on condition that the sponsor and fiancée marry each within a limited period of time after arrival in Canada.
85 Casswell, supra note 73 at 572.

Casswell, *supra* note 73 at 572.

Casswell, *supra* note 73 at 572.

Casswell, *supra* note 73 at 570.

For example Hutchinson, *supra* note 3 at 607 - 608 argues that it is more difficult for 'poor' queer people to be openly queer. Also see *supra* note 29.

Bruce MacDougall, "Outing: The Law Reacts to Speech about Homosexuality" 21 Queen's Law Journal 79 - 124 [hereinafter 'Outing'].

*Casswell, supra* note 73 at 572.

*Casswell, supra* note 73 at 570.

*Casswell, supra* note 73 at 572.

For example Hutchinson, *supra* note 3 at 607 - 608 argues that it is more difficult for 'poor' queer people to be openly queer. Also see *supra* note 29.

*Casswell, supra* note 73 at 572.

Casswell, *supra* note 73 at 572.

*Casswell, supra* note 73 at 570.

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*Casswell, supra* note 73 at 572.

*Casswell, supra* note 73 at 570.

For example Hutchinson, *supra* note 3 at 607 - 608 argues that it is more difficult for 'poor' queer people to be openly queer. Also see *supra* note 29.
from some of the hard and painful work of dealing with their racism, personally as well as organizationally. Perhaps, it allows them to avoid becoming multicultural and multiperspectival."

105 Valdes, supra note 8 at 61.
106 See for example: Crenshaw, supra note 35.
107 Duclos, supra note 56.
108 Eaton, supra note 11.
109 Ibid, at 50.
110 See for example: Mary Eaton, “Patently Confused: Complex Inequality and Canada v. Mossop” Vol. 1, No. 2 Review of Constitutional Studies 203 - 245. At 206 she notes that: ‘The subject of my critical intervention is the attempt of the majority of the court to forge a new analytic for addressing complex equality claims. Specifically, the majority seems to have signaled that it is prepared to abandon the so-called “water-tight compartments” approach to human rights interpretation, and that it will not construe sexual orientation and other non-discrimination guarantees in the same restrictive way the lower courts have in the past.’
111 Quoted in: Crenshaw, supra note 35 at 153.
112 As Duclos, supra note 56 has argued (at 50) that in the context of anti-discrimination law jurisprudence the problem is not the use of 'categories' per se but the manner in which they are used: as 'blinkers' rather than 'as a "jumping off" point, a springboard providing the opportunity to construct an intricate picture of the stereotypes and relationships involved.' I would argue the same holds true in political discourse and legal theory about queer issues.
113 Hutchinson, supra note 3 at 640.
114 Valdes, supra note 3 at 71.
Chapter Two: 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

**INTRODUCTION: THE CENTRALITY OF ‘CATEGORICAL’ EQUALITY**

In this chapter I focus more directly upon one of two branches of law, namely, legislation and statutorily regulated systems. In the chapter immediately following this one I will turn my attention to another important branch of law, that being judge made law, including in particular the application and interpretation of the Charter.

In February of 2000 Bill C-23, *An Act to modernize the Statutes of Canada in relation to benefits and obligations* was introduced in Parliament. This Bill, if passed, will extend the status of “common-law partner” to same-sex conjugal relationships—where it had previously been limited to opposite-sex unmarried couples—for the purposes of most federal statutes. This new, unified category will therefore incorporate the relationships of both opposite and same-sex unmarried conjugal couples as a basic legal ‘unit’ in several federally regulated systems and institutions, such as the income tax system.

One of the few federal statutes omitted from the Bill is the Immigration Act. Nevertheless, the Government of Canada released the report *Building on a Strong Foundation for the 21st Century: New Directions for Immigration and Refugee Policy and Legislation* (hereinafter ‘New Directions’) in 1998. As the title suggests, ‘[t]his document...establishes the government’s ten broad directions’ for immigration and refugee policy. One of those directions is the ‘recognition of common-law and same-sex relationships through regulatory changes.’ The specific type of ‘recognition’ that is proposed is the extension of the ability of a Canadian to sponsor the immigration of a
same-sex ‘spouse’ as part of the Immigration Act’s ‘family class’ (hereinafter ‘family class’). The primary practical advantage of inclusion within the family class is clear:

The application is processed because of the close relative in Canada. Applicants for an immigrant visa whose applications are sponsored by a Canadian citizen are not required to meet any of the selection criteria that are applied to other applicants...In essence, membership in the class becomes the selection standard.

Although membership within the ‘family class’ does not mean that a person cannot be excluded from Canada for reasons of criminal inadmissibility, for example, it does exempt a person from the requirement to pass a points-based assessment. Currently, the only way a person can migrate to Canada based upon a same-sex spousal relationship with a Canadian is through an ‘Humanitarian and Compassionate Application’ (hereinafter ‘H&C’). But as a primary method of facilitating the immigration of same-sex partners to Canada H&Cs are problematic. The highly discretionary nature of these administrative decisions results in inconsistency and a lack of transparency that can be problematic given the possibility of homophobia among individual officers. The discretionary nature of the process means there are no fixed criteria. Consequently, decisions are difficult to challenge while homophobia is easy to hide.

Unlike with H&Cs—in which officers have the flexibility to turn their minds to a potentially infinite range of circumstances that call for ‘humanitarian and compassionate’ treatment—explicit regulatory inclusion within the family class is key because it is a finite list. If your relationship is one of the categories/types identified, you are in the class; if it is not, no matter how important a relationship, or how closely it functionally resembles one that is included, you are simply not on ‘the list.’ Importantly therefore, the proposal on the table is to ‘expand the definition of spouse to include common-law
and same-sex partners (emphasis added) within the category which currently only includes married couples.

Equally important, the proposal to recognise same-sex couples as a type of 'spousal' (or marriage-like) relationship largely accords with the demands of some prominent gay and lesbian social movement activists and community groups. For example, the Lesbian and Gay Immigration Task Force summarised its demands in this way: a single category which would include 'married heterosexual relationships, common law heterosexual relationships and same-sex relationships...our basic concern is that there be a single category.'

This paramount concern for what I have termed 'categorical equality' is also reflected in the response of Equality for Gays and Lesbian Everywhere (hereinafter 'EGALE'):

The important question is the criteria used to identify a qualifying relationship, rather than the specific label used to describe it. As a result, Immigration may choose to use language referring to "spouses", "relationships of interdependency", "intimate partnerships" or simply "qualifying relationships". Two important considerations need apply, however:

(i) Whatever language is used must not create hierarchies. For example, it would be objectionable to describe heterosexual relationships as "spousal" in nature and relegate same-sex relationships to some "other" class....

It is not surprising that the proposed recognition of same-sex relationships as equivalent—both functionally and categorically—to opposite-sex conjugal relationships is considered as reason to celebrate by many. First of all, it should be recognized that it has been a long and arduous struggle to get politicians and governments to recognize, in any way whatsoever, the value of same-sex spousal relationships. Moreover, the demand for categorical equality must be understood in the context of a broader shift within gay and lesbian social movements in recent years. In the early 1970s gay and lesbian activism was more often characterised by highly charged,
liberatory inspired demands for recognition and respect of the different sexualities and lifestyles of gays and lesbians. However, by the 1990s most social movement groups were fixated on eschewing any and all differences between gays and lesbians and mainstream heterosexual society, or as I shall argue, its ideological model.\textsuperscript{16} Generally, demands for the liberation of gay and lesbian sex from the social and legal shackles of heterosexist normativity have been replaced with claims for incorporation within the mainstream based upon the fundamental ‘sameness’ of same-sex and opposite-sex relationships:

By the late 1980s..."homosexuals" were portrayed...in short, as a class not decidedly distinct from heterosexuals and wrongfully stereotyped as sexually odd or different. That the types of cases which have been brought forward have shifted so markedly in the direction of spousal or family claims is evidence of this, as is the way those claims themselves have been framed.\textsuperscript{17}

The three main aspects of these types of claims, such as that for inclusion within the family class, are these: (1) we are the same, therefore (2) we want to be treated similarly, through (3) inclusion in the same categories as married people and opposite-sex unmarried spouses. These three distinct aspects, when combined, constitute what I shall refer to in this chapter as the ‘formal equality’ approach to reform.\textsuperscript{18} Although the first of these is the thematic focus of this chapter, as I shall discuss in the Conclusion it is when all three combine—forming an impenetrable core ‘truth’ about the tenets of gay and lesbian equality-seeking—that the ability to even imagine, let alone strive for broad-based progressive social change for the benefit of queer people is severely hampered.

Turning now to the central focus of this chapter, one of the most troubling aspects of the formal equality approach to reform is not always its goals, \textit{per se}, but the essentialist assumption which underlies the approach itself: that is, that there is a group
called ‘gays and lesbians’ (and/or people who have ‘same-sex relationships’) which is homogeneous. As Nitya Duclos has observed: '[i]n arguing that a same-sex marriage bar is bad (or good), we implicitly assume a universal same-sex family.' In other words, this approach assumes a universal and singular commonality of interest based on sexual orientation.

Conversely, we also tend to assume a universal opposite-sex family. The most obvious implication of this is that the differences among queers, in our relationships and even in our different aspirations and interests, are all submerged. However, categories are necessary, since without them we would be incapable of holding the complexity of the world in our minds. Nevertheless, we must be vigilant about the ways in which we utilize categorical thinking. Categories do not simply mirror reality. In many ways they create it, they mould it like carnival mirrors. As such, we must be cautious of the ways in which categories are applied, in particular, in assuming that they demarcate a singular and universal commonality of interest.

In this chapter I will continue the process of vigorously interrogating ‘our’ differences, the extent to which our interests as ‘queer people’ both converge, and diverge. I will question the ways in which ‘we’ differ generally and in particular as regards our interests and aspirations vis-à-vis the Canadian immigration system. Is it likely that we, all of us, will benefit from the proposed redefinition of ‘spouse’ in the immigration regulations? Will there be any correlation between the ability to access the benefits of these proposed reforms and race, class, gender, ability etc.? Who among us is positioned to suffer greater disadvantage, or the increased potential of harm in connection with ‘success’? How can we tailor our demands so that the least harm is done to those least able to absorb more disadvantage? Ultimately, the central question explored in this
chapter is: ‘Should gay and lesbian equality-seeking groups be seeking the
recognition of gay and lesbian relationships through a redefinition of the term “spouse”
within the immigration regulations?’

This type of question, sadly, is all too uncommon within political and academic
analyses about how best to recognise the value and equality of gay and lesbian
relationships. One of the primary benefits of being recognised as ‘same-sex spouses’
(namely formal equality with opposite-sex relationships) is as clear as ink on paper,
whereas substantive disadvantages and limitations must be searched for, explained and
proven; a burden of proof difficult to discharge given the complexity of the issues and
the apparently hegemonic consensus regarding the benefits of incorporation within
spousal categories. This view is reflected in the leadership of John Fisher, executive
director of EGALE:

As Fisher points out, EGALE needs a “cohesive response that we can put
to MP’s.” Trying to redefine benefits so that they are not based on
relationships at all would be very difficult because “it would divert the
debate away from lesbian and gay equality issues to policy issues which
we’re not really mandated or competent to propose.”

Even when these complexities are discussed, attempts to problematize or de-centre the
formal equality approach to same-sex relationship recognition are often resisted by
reference to three arguments: first, the affirmation of the equality of ‘gay and lesbian
families’ is of paramount importance; secondly, most objections are pedantic in their
emphasis on abstract theory (usually of feminist origin) about either remote, or
downright inapplicable, risks of harm; and thirdly, all that is being sought is the right of
those who wish it, to ‘choose’ spousal recognition. I intend to use the amendment of the
family class as a case-study to illustrate and clarify the ways in which these three
arguments in particular are, in my opinion, improperly deployed to rhetorically silence
those who are legitimately critical of, or simply question the value presumptively
ascribed to same-sex relationships of queer people being incorporated generally into
the legal system as 'spousal.'

Fundamentally, formal equality is extremely difficult to de-centre because although I
have spoken of it as an 'approach,' as Smith has argued it is no longer considered
simply an approach, or strategy for reform, but has become 'the' ultimate goal of reform.
For example, EGALE's work is described in this way:

For EGALE, lesbian and gay rights were defined in terms of formal
equality or similar treatment...EGALE's push for equality and
antidiscrimination measures was not connected to any broader social and
political analysis of the power relations affecting sexuality and sexual
orientation identity.  

To be fair, the assumption of groups such as EGALE is that the 'legal' recognition of
same-sex 'spousal' relationships will in large measure rectify the historic 'social'
invisibility of gay and lesbian families, or so the argument goes. Nevertheless, I think
that for the most part, Smith is correct in that the formal equality has become a self-
justifying legal objective held high aloft of political discourse and contest about the
appropriate goals of and strategies for achieving social change.

In this chapter, however, I will insist upon understanding formal equality as just one
among many possible approaches to social and political reform. Conversely to the
approach taken by EGALE, I will focus upon a rigorous exploration of some of the policy
issues associated with same-sex 'spousal' recognition. By resisting the assumed
universal commonality of interest of queer people, and instead studying the proposed
reforms from the complex and multi-dimensional perspectives and social locations of
queer people, I hope to demonstrate that it is indeed the formal equality approach to
reform which has become pedantic in its dogmatic assumption of its own value. Far
from being reflective of some neutral truth about queer existence (such as, for example, that we would all benefit from same-sex 'spousal' recognition) the formal equality approach to reform is very political indeed insofar as it centers and naturalises a perspective which is quite middle-class, white and male in its partiality.

It is this partiality of perspective, I will argue, which promotes the obfuscation of the contradictory implications of queer relationships being recognised—whether by choice or as a consequence of more coercive mechanisms\(^\text{23}\)—as 'spouses.' The formal equality approach to reform is one which cannot even comprehend the reality that at the same moment that 'spousal' status is being transformed to include some same-sex couples, the trend towards the privatisation of social and economic responsibility for 'dependants' is gaining strength by equal measure. On an interrelated, yet separate point, Susan B. Boyd has commented that '...the incorporation of lesbians and gay men within family law may be as much about the domestication of deviant sexualities within a safe, useful and recognisable framework than about the transformatory confounding of normative sexualities.'\(^\text{24}\) Therefore, any reform to Canadian immigration law based strictly and exclusively upon the dictates of formal equality may prove, for those queer people who are too poor, too ethnic or too gender(ed) female, to be little more than an illusory benefit, or worse yet, an additional burden.

THE THEORETICAL FRAMEWORK: TRADITIONAL FAMILIAL IDEOLOGY & DECONSTRUCTING GROUP IDENTITIES

Many of the legal concepts and institutions related to family, spousal status and marriage have become ideological insofar as their meaning, value and role within the distribution of benefits has become a matter of common sense.\(^\text{25}\) James Hathaway has clarified how 'family' is naturalised in the context of the immigration system:
If it is true that family reunification is "the cornerstone" of Canadian immigration policy, the question remains why one would opt for such a policy. The usual answer is simply that family reunification is "a sacred subject," that is only "natural" that "families" be allowed to live together... Yet the empirical basis for this facile position has recently come under overdue scrutiny... (emphasis in original).

Yet, it is based upon precisely this sort of naturalised concept of 'family' that the amendment of the definition of 'spouse' to include same-sex couples is premised. The proposed change is described as part of a natural evolution of the meaning of 'family' and therefore required because of the importance of promoting that institution within the immigration system through 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. In recent years, the characteristics of Canadian families have changed. New immigration and refugee protection legislation should support family reunification by responding to new social realities.27

It should be noted that by framing the changes in this way, New Directions erases years of active discrimination against and oppression of same-sex spousal families. Same-sex couples are portrayed as having no history prior to more recent, progressive social changes—soon followed by the endorsements of Courts and governments. The alleged centrality of family reunification begins to look a bit tenuous, however, when it is considered that the number of family class immigrants that the government of Canada has planned to allow into the country has dropped in relation to total immigration from 47% of total in 1996 to 31% for 1999 (a drop of 16 per cent in three years); a policy trend which is matched by an actual decline in landings of members of the family class.28 Conversely, economic-based immigration has experienced an impressive upsurge from four per cent of arrivals during parts of the 1980s to approximately 50 per
cent more recently. Family reunification seems therefore to be an increasingly weak ‘cornerstone’ indeed.

Given this conflict—between the rhetoric of centrality employed to justify the ‘expansion’ of the family class, and the reality of ever diminishing numbers—it seems only sensible to examine more closely the meaning and place of ‘family’ within the immigration system. In this regard the feminist concept of ‘traditional familial ideology,’ which has often been applied in the relationship recognition debate, is a useful analytic tool. The family ideology/family reality (or realities) distinction allows us to hypothesise that although ‘the’ family remains a pivotal concept, strategically employed at various moments within the discourse of immigration, in certain ways the types of acceptable families are getting fewer and the boundaries of ‘the’ family getting tighter. In other words, the proposed amendment to the definition of ‘spouse’ to include some same-sex spousal units is only one aspect of a broader redefinition, rather than simple expansion, of the ‘family class’ category. The authors of the New Directions report summarised their proposals in this way: ‘a reinforcement of the family class as the traditional cornerstone of Canada’s immigration program, with significant liberalisation in some areas coupled with equally significant restriction in others...’ (emphasis added).

Consequently, the amendment of the family class within the immigration context ‘might be understood as more multivalent, carrying both the charge of containment and the positive charge of liberation.’ Particularly within the highly policed immigration system, the charge of containment may be a significant force indeed. As Satzewich has argued, ‘the state not only plays a central role in selecting and defining who is an appropriate individual...but also...in the engineering, the formation of immigrant families.’ As I shall argue shortly, one of the ways the immigration system ‘colonizes’
immigrant families is through the division of spousal units into the strictly hierarchical and stringently enforced roles of a ‘dependant’ who is reliant upon a private ‘sponsor’ for all his or her needs.

Given this potential, at the very least, for colonisation, it seems only logical to explore in detail which aspects of membership within the family class are appealing, which are not, and to whom. The retort that ‘we just want gay and lesbian families to be affirmed’ seems vapid with the addition of ‘as what?’. When the same-sex/opposite-sex distinction becomes the sole point of comparison, analysis of the benefits (and disadvantages) of inclusion within a category is inappropriately truncated such that an exploration of the complex nature of an institution, such as ‘spousal status’, becomes a theoretical impossibility. Gavigan has made this point by reference to the problematic concept of ‘heterosexual privilege’:

Heterosexual privilege posits a [false] bifurcated gender-neutral dyad of homosexuality/heterosexuality...The analysis must be extended to explain core familial phenomena in our country such as: wife assault and child abuse; the presumed dependency of a woman in need of either social assistance or a job upon a man; the enforced dependency, or poverty, of many sponsored immigrant women; and the terrible isolation of the battered woman whose first language is not one of the official languages...The concept of heterosexual privilege does not even begin to do this.3

Once the specious simplicity of the heterosexual privilege framework of analysis is revealed, it also becomes possible—perhaps even conceptually necessary—to explore the implications of inclusion within a category from various perspectives or social locations.

The assumed universal commonality of interest of queer people begins to fracture when the actual life circumstances of different people are considered. For example, the implications of inclusion as a ‘dependant’ within the family class is different for a poor
immigrant woman who is unemployed and unable to speak English than for a professionally employed immigrant man. Whereas for the man, in the scenario described, the implications of being deemed a 'dependant' upon his spouse might well be merely terminological, it is impossible to say the same for the woman. It is no doubt true that both individuals share a common interest in the recognition of the dignity of their same-sex relationship; however, it surely cannot be said that they share the same interests in being recognized as dependants upon their spouses.

A person’s class, gender, race, ethnicity etc. will therefore all intersect, simultaneously influencing whether, how and where one fits within a legal institution and the traditional family ideology upon which it may be patterned. This complexity does not weaken, but rather reconfirms the family ideology critique; it demonstrates that insofar as our social locations are varied, so too are the plethora of ways in which we may be disadvantaged by our dissimilarity, or advantaged by our similarity to that ideological norm. In other words, an exploration of our various social locations not only helps to trace out the gaps between the ideological norm and people’s actual lives, but also to shade in the ways in which these norms actually infuse our lives.

Henning observed this about activists who lobbied for the creation of ‘registered partnerships’ which would be available to same-sex couples in Denmark: ‘The emphasis lay on the principles of equality, freedom and justice. The realization of these principles was often presented as a value in itself....’ Using the concepts of family ideology and anti-essentialism, I will challenge the value automatically ascribed to the principles of formal equality. The amendment of the definition of ‘spouse’ in the family class to include certain same-sex relationships is not inherently positive; on the contrary, its implications will be complex, biased and even contradictory in its potential to affirm the
dignity and equality of queer people and recognise queer families. The formal
equality approach to reform falsely denies this complexity thereby severely limiting the
progressive potential of the recognition of our relationships. I turn now to just such a
detailed identification of some of the components of the family class so that the
implications of inclusion within that category can be analysed from several perspectives.

**MERELY ‘IDEOLOGICAL’ CONCERNS (FOR WHOM)?**

Susan B. Boyd has written that ‘[t]he ideological role of law is to transform “the
human subject into a legal subject” and thus “influenc[e] the way in which participants
experience and perceive their relations with others.”’⁴³ Along these lines, a key feminist
critique of marriage and other legally regulated ‘spousal’ relationships is that they are
patriarchal institutions that convert women into dependants upon men and
consequently, reinforce their vulnerability to oppression and abuse.⁴⁸ Therefore,
although not an automatic consequence, one of the potential dangers associated with
same-sex marriage has been described in this way:

> By favouring relationships similar to heterosexual marriage, it would
> induce women—or homosexuals in general—to form such relationships,
> and thus place them in economic dependency, social isolation, emotional
> stagnation, physical violence, and repressed conflicts.⁴⁹

A separate yet interrelated issue is that these risks must be set against the larger
context of the trend to privatise social and economic responsibilities within family units.⁴⁰
For example, Margot Young described some of the factors influencing the content of the
Social Union Framework between the federal government and the provinces, except
Quebec, in this way:

> The first is the course of evolution of the Canadian welfare state, in
> particular, the current ascendance of neo-liberalism as the orthodoxy of
> state restructuring. Advocacy of restricted state involvement in social and
> economic spheres is paired with an enhanced emphasis on individualism
and the role of private structures – the market, community and family – in providing support services and distribution of resources previously delivered by the state. The result has been government retrenchment and the reduction of social program funding at both the federal and the provincial level.\(^{41}\)

The discourse of privatisation of social responsibility is not, however, limited to the sphere of government policy-making. In the recent decision of *M. v H.*\(^ {42}\) the Supreme Court of Canada considered the claim—made by a woman who had been in a same-sex relationship for a number of years—that the Ontario *Family Law Act* (hereinafter FLA) was discriminatory contrary to section 15 of the *Charter* insofar as it limited the ability to apply for spousal support to opposite-sex couples (married or common-law).

The Supreme Court of Canada found that this limitation did indeed constitute unfair discrimination contrary to section 15 that was not justifiable under section 1. Writing for the majority of the Court, Cory and Iacobucci, JJ. identified the legislative objectives of the FLA as:

\[\ldots\] a means to provide “for the equitable resolution of economic disputes that arise when intimate relationships between individuals who have been financially interdependent break down” and to “alleviate the burden on the public purse by shifting the obligation to provide support for needy persons to those parents and spouses who have the capacity to provide support to these individuals”.\(^ {43}\)

Having defined the objective in this way, Cory and Iacobucci, JJ. concluded that excluding same-sex couples from this part of the FLA was not rationally connected, but was rather counter to the objective of this legislation and reasoned further that:

\[\ldots\] in contrast to *Egan, supra*, where Sopinka J. relied in part on incrementalism in upholding the impugned legislation under s. 1 of the *Charter*, there is no concern regarding the financial implications of extending benefits to gay men and lesbians in the case at bar. As already pointed out, rather than increasing the strain on the public coffers, the extension will likely go some way toward alleviating those concerns because same-sex couples as a group will be less reliant on government welfare if the support scheme is available to them. Thus, I conclude that
government incrementalism cannot constitute a reason to show deference to the legislature in the present case. 44

In the context of the immigration system, the legal conversion of immigrant ‘spouses’ into ‘dependants’ is also quite explicit, indeed, it is identified as a policy goal supported by codified definitions and draconian enforcement measures. In the New Directions report the authors are clear that the extension of spousal status to same-sex couples should very much be contingent upon the ‘proper’ roles—a Canadian ‘sponsor’ responsible for a ‘dependant’ immigrant spouse—being maintained: ‘Proposed measures would recognise the evolution of the Canadian family; at the same time, they would ensure that sponsors live up to their obligations to provide support to newly arriving family members.’ 45 Mandating this support is a regulatory definition of the term ‘dependant’ as including ‘spouse[s]’ and a requirement that the Canadian ‘sponsor’ sign a contract in which he or she ‘undertakes to provide for the essential needs of the member and the member’s accompanying dependants for a period of 10 years.’ 46

Most importantly, the purpose of the undertaking is not to ensure that family class immigrants get support, but rather to ensure that they not seek support outside their ‘family’. The sponsorship undertaking (and the several statutory provisions that refer to it) serve to restrict the access of immigrants to a broad range of social services. 47 For example, pursuant to section 51 of the general regulations of the Ontario Works Act, 1997, S.O. 1997, c.25-A—the Act which regulates the provision of general welfare assistance—a person with respect to whom an undertaking was given will have, in certain circumstances, an amount deducted from available payments even though he or she no longer resides with or in fact receives any financial support from the sponsor. 48 The result of this type of legal binding of immigrant spouse to sponsor, combined with
systemic oppression, is that 'for many immigrant women in Canada, especially the poor, the opportunity to be independent from their spouses, both in fact and in law, is virtually impossible.'

Within the context of debates about the implications of being recognised as same-sex spouses, this kind of analysis is often dismissed as having little predictive value because, it is argued, same-sex relationships avoid the hierarchical pull of gender. For example, as one supporter of the right of same-sex couples to get married puts it: 'same-sex couples getting married can powerfully challenge gender roles and thus destabilise sexism....'

But consider then the experience of same-sex spousal immigration in Australia:

A question raised by the research is about the forms of relationships which, beyond the dependency imposed by migration, do not apparently exhibit the dominant Western ideology of equality in relationships. In the male study group relationships that are unequal in terms of age, education, and financial status may have been entered into precisely because of these factors. This applies to both Australian resident and overseas partner. It is my impression that the desire for a partner, combined with attraction to younger men, socialisation in the old patron-protégé system, and the economic advantages of North Americans over Third World peoples, all combine to lead a disproportionate number of older homosexual men to seek a partner from the populations of those Third world countries where youth is still socialised to respect and defer to elders....

How should the Australian experience be understood? One might argue that it demonstrates that there are numerous axes, 'other' than gender, upon which power inequalities within legally regulated relationships can develop. I think, however, that in the context of this debate it is perhaps also insightful to understand that these 'other' axes may become for same-sex couples a gendering force. Often within the context of spousal relationships in particular, gender is a factor of how dependent one person is upon another more empowered party in the relationship. Although this inequality often
corresponds to the respective sexes of the parties, sex is not necessarily the source of that inequality. One important source is usually traceable to the complex network of laws that regulate various aspects of the institution of 'spousal' status.

Examples of this type of 'dependency enforcing' law are legion. They range from the obscenely explicit example of the ‘spouse in the house’ rules\(^52\) (used to force recipients of social assistance to rely upon a person deemed to be their ‘spouse’ for financial support even though they prefer, often with very good cause, to maintain their independence\(^53\)) to the more general promotion of spousal relationships of economic dependency within the income tax system.\(^54\) Therefore, the assertion that same-sex couples will automatically avoid the dependency promoting influence of legal institutions, historically mainly experienced by those in opposite-sex relationships, obfuscates the fact that these institutions do not simply act upon 'gender' but create it and reinforce it. They are not only 'gendered' but 'gendering' insofar as they promote and reinforce dependency within spousal relationships. Whether or not this understanding of 'gender' is accepted, at the very least it is folly to assume that same-sex relationships are inherently immune to the institutional promotion of dependence within spousal relationships, whatever it is called.

More fundamentally, starting from the position that same-sex relationships are devoid of power inequalities is clearly mistaken. For example, spousal abuse is usually considered as a problem that affects women in opposite-sex relationships. As such, abuse within same-sex intimate relationships remains pitifully under-researched. However, the literature suggests that within male-male relationships violent abuse may be even more common than in male-female relationships.\(^55\) The situation of those in female-female relationships is no better. One study indicates that of those surveyed,
39% were in abusive relationships and 72% of all respondents considered violence/abuse to be a problem among lesbians. Given this and other forms of potential power inequality within same-sex relationships, it seems unwise to dismiss the institutional promotion of dependency within ‘spousal’ legal systems and institutions as merely ‘ideological’ concerns which do not pose any risk of ‘real’ harm for those in same-sex relationships.

These issues may themselves be complicated by a person’s class or race, to name only two factors. For example, the choice and ability of a woman to leave a relationship in which she is being abused is very much constrained by her level of economic dependency upon the abusive partner. Island has noted that, ‘[s]imilar to many straight battered women, many battered gay men are...financially dependant on their violent partners....’ The situation may be worse for lesbians who, given the feminisation of poverty, are more likely than gay men to be poor and consequently unable to survive without someone with whom to pool resources and share expenses.

Susan B. Boyd has pointed out that like women of colour, who often experience the state as oppressive, lesbians (regardless of their race) may also reasonably perceive state involvement in their lives as threatening and may therefore be particularly reticent about inviting state intervention into their family life, even if it is abusive. For immigrant spouses, this reluctance to contact the police or other state authority might also be motivated by fears of losing immigration status. If they are awaiting landing within Canada, until they are landed, their immigration status is indeed precarious and their vulnerability to abuse great: ‘The greatest fear of those whose status to remain in Canada is uncertain or unknown to them is intervention by immigration authorities....’ For a same-sex spousal immigrant this fear may be compounded if their country of
origin is particularly homophobic and they have effectively severed ties with their
support networks back home, or 'encouraged' persecution at the hands of state
authorities, by coming out as a 'same-sex spouse.'

It should be noted that there is provision within the H&C process for immigrant
spouses who leave abusive relationships. However, this is a highly discretionary
remedy lacking in transparency and consistency. Moreover, even this remedy of last
resort is imbued with class-related obstacles: one of the factors explicitly identified as
relevant is whether 'there is a significant degree of establishment in Canada' which is
demonstrated by, among other things, a 'stable employment' and 'sound financial
management.' A truly vicious cycle of enforced dependency is thereby completed for
many immigrant spouses: a spouse who is economically dependant upon an abusive
sponsor is by equal measure less likely to receive a positive H&C discretionary
exemption, and as such, is even more dependant upon their abusive spouse for
immigration status. This need not be so. Section 37 of the Immigration Act authorises
the Minister (and by proper delegation, senior immigration officials) to issue 'Minister's
Permits' allowing a person without permanent residency or citizenship to remain in
Canada for up to three years, without being landed, even if they are otherwise
removeable from the country. Despite years of lobbying by both immigrant and women's
rights groups, the government of Canada has yet to adopt guidelines making the
issuance of Minister’s Permits standard for women who have credible claims of being
abused, thereby affording them an opportunity to establish themselves within Canada
before having to apply for permanent residence.

This cycle is sadly all too consistent with the broader situation of spousal abuse
insofar as it is characterised by the individuation and privatisation of systemic
inequalities. In other words, not only do many of the laws regulating spousal status encourage the dependence of one party upon another, when that power imbalance is abusive, the responses tend to ignore (and thus exacerbate) the systemic aspects of inequality and oppression. The inadequacy of the H&C response to spousal abuse is therefore open to the same criticism levied against the broader practice of 'dealing' with it as if it were exclusively a private criminal matter:

By its very nature, a criminalization strategy is completely inattentive to the role of power, its inequitable distribution based upon gender, race, class, disability, and sexual orientation, and the role which the public state plays in perpetuating these imbalances of power.\textsuperscript{67}

For example, it has been argued that many abused spouses will be unable to leave until there are general 'welfare reforms that ensure women can survive economically without their husbands income...'.\textsuperscript{68} Currently, a poor abused spouse economically dependent upon his or her partner may be effectively trapped, unwilling even to call the police for fear of becoming destitute if the abusive spouse is jailed. For an immigrant 'spouse'—including one that is 'landed' as a permanent resident—the situation may be even more grim since he or she is, by regulation, defined as a spousal 'dependant' and as such not expected to receive social assistance.\textsuperscript{69} Consequently some social service agencies will presumptively reduce by law their already meagre monthly allowances.\textsuperscript{70}

The ways in which the immigration system and the legal system more generally respond to spousal abuse can be understood, therefore, as the privatisation of systemic oppression. Insofar as these responses fail to address, and consequently exacerbate systemic inequalities they trap abused spouses, privatise and contain their systemic inequality and oppression, within those relationships.
Of course, what I have termed the privatisation of systemic oppression will not affect all spouses similarly. Obviously, it is those who experience systemic oppression who risk its privatisation within a spousal arrangement:

It is also important to observe that the potential for harms described above, and thus the experience of fear, are not evenly distributed among women. Rather, their distribution is demarcated along class, race, ethnicity, and citizenship status lines. The various reasons identified above suggest that it is racial minority women, poor women, and immigrant women, (these are of course not mutually exclusive categories) who are likely to be exposed to the greatest risk of harm.

Consequently, spousal status has the capacity to exacerbate systemic oppression not only within relationships, but also between them, because even the risks attendant upon participation in the institution—such as the inability to escape abuse—corresponds to the level of systemic oppression one faces more generally. Thus as Jacobs has observed: ‘the fight for alternative families does not confront the structures of women’s economic oppression that have become increasingly significant with the development of public patriarchy, and thus it does not threaten gay men’s economic privilege with respect to women.’

Therefore, although for some, the risks associated with inclusion within dependency promoting institutions may be ‘merely’ theoretical, for others they are quite severe and real. Not surprisingly, these risks correspond quite closely with one’s race, gender, class etc. However, it is not only the risks, but also the benefits, of participation within these institutions that vary along the lines of race, class and gender.

The ‘formal equality’ approach to same-sex spousal relationship recognition is assimilationist because it assumes, rather than interrogates, the ideological representation of ‘spousal status’ as inherently beneficial. To this point, I have focussed on simply establishing, or surveying some of the ways in which this assumption
eschews quite real risks of harm associated with inclusion within legal systems as spouses, particularly for those who face systemic oppression. Now, I change focus somewhat to discuss the ways in which inclusion itself can be quite partial.

**DECONSTRUCTING THE ‘OUR’ IN RELATIONSHIPS**

Duclos has said: ‘I do not believe that it is coincidental that those whom marriage is most likely to benefit are those who are already fairly high up in the hierarchy of privilege that pervades society at large.’ Nor do I. The socio-economic ‘benefits’ linked to these types of institutions are based upon a universal model of the family, therefore, the more one diverges from that norm, the less well the system works as a distributor of benefits. Thus, for example, Claire Young has demonstrated that within the income tax system it is those couples with one wealthy spouse upon whom the other, economically dependant spouse is reliant, that benefit most from the system of tax preferences linked to spousal status.

One of the most central aspects of the model immigrant family can be inferred from the following policy statement: ‘the privilege of sponsoring the immigration of a family member must be balanced with the responsibility to provide for that person once in Canada.’ The favoured and normative model, then, is a family unit in which one party (namely the Canadian) can and does take financial ‘responsibility’ for the other (the immigrant ‘dependant’). This model is quite common in benefits distribution schemes. Nitya Iyer has demonstrated, for example, that the availability of maternity benefits is largely contingent upon whether one has a person, usually a spouse, with sufficient income to adequately supplement that ‘benefit.’ However, despite its frequency this model of spousal benefits distribution is problematic because it exacerbates systemic
oppression, both symbolically and materially; indeed, as will become apparent, the two are often interconnected.

Family class immigrants are defined as 'dependants' and, as such, are considered both non-contributing and potentially threatening to the Canadian welfare state. The overall contribution of immigration, and more particularly, family class immigration, to the Canadian economy and society is a very complex question, subject to much debate among analysts, and unlikely to result in a definitive response any time in the near future. Indeed, the place and value of immigration changes over time as do the societal and economic conditions in Canada. However, more specifically, there is good evidence to suggest that despite the difficulties associated with moving to a new country, recent immigrants are less likely, on the one hand, to be in receipt of social assistance than native born Canadians and, on the other hand, actually contribute to the Canadian economy.

How is this inconsistency between the representation of immigrants as a threat to the Canadian network of social services, and the reality of immigrants explained? The roots of the inconsistency, can in part, be found in an examination of the changing ‘face’ of Canadian immigration over the years. As William Foster, et al, has observed:

Both Australia and Canada have experienced unprecedented change in the national origins of their intakes in recent decades. Canada abandoned its official preference for immigrants of European (or United States) origin by the mid-1960s...Prior to 1963, European immigrants constituted over 80 per cent of Canada’s annual intake, but in the last decade over 70 per cent have come from Asian, African, Caribbean or Latin American countries.

Importantly, this move away from patently racist immigration policies may well have been less the result of a growing understanding of racial (in)justice, as much as a calculated reaction to the reality that Europe simply could not supply Canada with
enough immigrants to meet its labour needs.\textsuperscript{84} Bearing this historical context in mind, Jakubowski has observed that the government:

\begin{quote}
[...] is quick to characterise “the marriage” between Canada and its immigrants as successful, but the success seems to be linked, albeit implicitly, to the more traditional, white immigrant of the past. It is interesting that “today’s immigrants” (the majority of whom are visible minorities) have come to be depicted as dependant, socially maladjusted people who are prone to crime.\textsuperscript{85}
\end{quote}

This racially-charged assumption of dependency is problematic because, in turn, it often becomes the basis upon which immigrants \textit{are turned into} dependants. In the current context, the following findings regarding the operation of Regulation 8 of the family benefits scheme—the predecessor to still extant provisions used to reduce the amount of social assistance payable to immigrant ‘dependants’\textsuperscript{86}—are far from surprising: ‘caseworker Kathleen Lawrence has alleged that a disproportionately high number of racial minority family benefits recipients have “Regulation 8 charges” deducted from their allowance.’\textsuperscript{87}

As the example above demonstrates, the symbolic value or ‘social purchase’ which comes with being ‘recognised’ as same-sex families—to refer back to one of the central justifications for the formal equality approach to reform—may itself be priced quite differently white and/or middle-class than it is non-white and/or poor. No doubt many will be eligible for social recognition as the ‘model same-sex family’ within the immigration context, but others may find they are more commonly \textit{recognised} as ‘potential drains to the Canadian welfare system,’ ‘welfare abusers’ or quite simply ‘more of those new immigrants who don’t fit in to Canadian society.’ This process of symbolic (de)valuation, which comes with being recognised as a dependent spouse—positive or negative depending upon how well one fits the ideological norm—can become the basis for quite
material oppression. The denial of benefits becomes part of a vicious cycle in which systemic oppression is once again exacerbated. In the context of the maternity benefits, Iyer has described the situation in this way:

From a feminist perspective, the reality of exclusion obscured by a state benefit that is presented as universal is troubling for two reasons. First, the provision of the benefit exacerbates the economic oppression of poorer women....The second way in which the benefit fails as a feminist reform is that it exacerbates the oppression experienced by Aboriginal women, women of colour, women with disabilities, women who are single parents, and lesbians (with respect to the parental leave component of the benefit) as mothers.88

In the context of the immigration system, members of the family class are depicted as a threat to Canada. This depiction generates animosity informed by racism and xenophobia and the denial of benefits that in turn contributes to the formation of a racialized and gender based underclass that confirms the animosity.89 Therefore, it is mistaken to assume that all same-sex couples will equally benefit from the re-definition of spouse in the Immigration Act. There is clearly no singular and universal common interest in this respect. This is not to say, however, that there are no shared interests among queer people vis-à-vis the recognition of same-sex relationships for immigration purposes. Clearly, we all benefit from having our relationships recognized as real types of families in the immigration context. The difference between these two concepts can be demonstrated by a simplified hypothetical. Consider a conservative wealthy gay man who wishes to sponsor his equally wealthy same-sex lover, with whom he has had a committed commuter relationship for several years. Now consider a single mother on social assistance who has had a four-year long committed relationship with a woman who is an illegal immigrant to Canada and working for below minimum wage for several years. Clearly, both couples share in interest in the recognition of the validity of their relationships; however, their interests may well diverge 76
in terms of which types of same-sex relationships they wish to be recognized, and under what terms.

The problem with tying the 'privilege' of sponsoring an immigrant spouse with the obligation to be financially responsible for that person is that some people may simply not be able to support another, no matter how intimate and important the relationship. And pursuant to section 19(1)(b) of the Immigration Act an aspirant immigrant will be 'inadmissible' if the immigration officer has 'reasonable grounds to believe [they] are or will be unable to support themselves....' Therefore, even in regards to a spouse 'the visa officer must be satisfied that the applicant can support him- or herself in Canada, or that other adequate arrangements for support have been made.' Even the compassion of the H&C cannot be extended so far as to embrace those spouses who are so poor as to be inadmissible.

Chapter OP 2 (Oversees Processing) of the Immigration Manual, which is used as a guideline by immigration officers, explains the situation in this way:

A19(1)(b) is not satisfied where proper arrangements have not been made [for care and support of the immigrant]. This could apply where the situation in Canada is such that it would require the immigrant to seek public/governmental assistance upon landing. However, because of the acknowledged humanitarian aspects of family reunification, officers are encouraged not to refuse sponsored spouses and/or dependent children unless arrangements for care and support are virtually non-existent and offer no prospect of improvement. Refusals should be extremely rare if the sponsor is employed, however marginally.

Although in the past, as the guidelines above imply, section 19(1)(b) was rarely enforced against 'spouses,' immigration officers may not be so willing to overlook economic unsuitability when considering the visa applications of same-sex couples. I would argue that this is indeed a reasonable possibility for a couple of reasons. For example, the homophobia and heterosexism of individual officers may incline them towards rejecting the applications of same-sex couples whenever possible, especially if
they do not fit the *ideal* model. Also, as I have argued above, Immigration Canada is increasingly emphasising in its public statements the need to close the system to immigrants, even those who are part of the family class, who will be *likely* to (ab)use Canada's system of social services. But once again, the risks associated with rejection will not be evenly distributed, but rather will likely fall along historically well established axes of oppression.

Lesbians are less likely to fit within the ideal, self-supporting model of an immigrant spousal unit given the feminisation of poverty. For example, in the US, Lee Badgett’s research revealed that ‘married couple households and male same-sex households have roughly equal household incomes, while female same-sex couples bring home 18-20% less income that a similar married couple’s income.’ But, of course, the lines of poverty are not only related to gender. As Herbert observed: ‘West Indian women [of colour] earned $3,000 less on average than other non-visible immigrant women.’ More generally, Satzewich has demonstrated that:

[...Immigrant families from traditional sources of the United States, Britain and Western Europe are less likely to have low income status than immigrant families from “non-traditional” source countries. The former [viz. ‘white’ people] therefore have more resources at their disposal to qualify for sponsorship than the latter.]

But even if the rules of inadmissibility are not applied more routinely against same-sex couples, many gay, lesbian, bisexual and transgender people will be unable to access the benefits of the proposed redefinition of the term ‘spouse.’ This is so because the presumptive prioritisation of the ‘spousal’ category within the immigration system operates to exclude those that do not *appear* enough like the ideological family. Thus, as I shall argue, the ‘spousal’ category may also operate to exclude those who do not conform to a heterosexist and ethnocentric model of family.
The proposed changes to the definition of 'spouse' should not, in my opinion, be understood simply as an 'extension.' After all, the proposed redefinition is part of an inverse process of 'liberalisation' and 'restriction' of the family class within the context of an immigration system in which both the planned and also the actual number of family members gaining entry into Canada has decreased every year of the past three. As such, it is likely that inclusion within a restricted family class will be part of a broader trend in which only those same-sex couples that 'mirror as closely as possible traditional heterosexual relationships' are recognised.

In an analysis of the Australian example of same-sex spousal immigration it was noted that '[m]ere companions, good friends, or lovers who were neither cohabiting nor exclusive were not allowed under the arrangement.' In Canada, although the definition of 'same-sex spouse' remains unspecified, the regular references to 'close family members' and 'core family' make it unlikely that 'spouse' will include anyone other than a same-sex 'conjugal' partner—a term which is generally understood to mean 'marriage like'—with whom one intends to permanently reside.

The observation of Bech regarding the registered partnership laws of Denmark will likely be applicable therefore: 'The law discriminated against traditions of life-style among homosexuals, such as non-permanent relationships and the primacy of friendship networks.'

I would also argue that the likelihood that only 'marriage like' same-sex relationships will be recognised (to the exclusion of all others) is significantly increased by the insistence of gay and lesbian equality groups for inclusion within the same category as married and opposite-sex spousal relationships; I have referred to this as the demand for categorical equality. As Brodsky has wryly observed, in equality litigation 'evidence is...advanced to show that lesbian and gay relationships are just like
common-law heterosexual relationships, only straighter. But this is an issue that I will discuss in more detail in the conclusion to this chapter.

This presumptive prioritisation of ‘spousal’ family units, however, is not only heterosexist, but also ethnocentric. It should be considered, for example, that in many cultures members of the ‘extended’ family, such as parents and grandparents, are often equally important as spouses. Not surprisingly, the number of parents and grandparents that the government has planned to admit to Canada has been declining at an even sharper rate than that of the family class generally. In the face of this obscenely ethnocentric trend can there be little wonder that the ‘expansion of the family class’ to include same-sex spouses is being packaged as part of a process in which ‘the scope of the family class would be enhanced, not diminished.’

The redefinition of ‘spouse’ to include same-sex partners should not, however, only be understood as diverting attention away from the growing ethnocentrism of the immigration system, but also as itself part of, and therefore limited by that trend. Given the myopic focus of many gay and lesbian equality activists on the recognition of same-sex ‘spousal’ relationships, it bears comment that those queer people who are single or would prefer to sponsor a parent or close friend more than a ‘conjugal’ partner stand to lose just as much as, if not more than straight people from the growing trend within Canadian immigration policy to prioritise ‘spousal’ status, to the exclusion of other forms of intimate relationships. As Claire Young has observed:

Currently state subsidised benefits are provided to some persons (spouses) solely because they are in a relationship with another person. Single persons are discriminated against. Extending the definition of spouse to include the partners of lesbians and gay men would, to some extent, reinforce this inequity. Single lesbians and gay men will continue to receive no part of this subsidy, regardless of the responsibilities they may have to other individuals, while lesbian and gay couples stand to benefit.
In summary I will rely in part upon the words of Gwen Brodsky, who captured quite succinctly what I have attempted to demonstrate in this paper using the example of the redefinition of the category ‘spouse’ in the family class:

[...] in 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. 113

As currently articulated in New Directions, the redefinition of ‘spouse’ within the family class to include same-sex partners will facilitate the recognition of the relationships of some queer people, while other relationships—both queer and not—are further marginalized. Depending upon how ‘spouse’ is ultimately defined, and how strictly the model of the ideal, self-supporting immigrant family is applied to applicants in same-sex relationships, the proposed reform will provide few, or no benefits at all, for those who do not fit within a heterosexist, ethnocentric and classist ideological family norm. Moreover, given the trend to privatise social responsibility (and consequently oppressive relations) within families, it is a model that can severely penalise those who try and fail to meet the standards of that norm. Inclusion within the category of ‘spouse’ in the family class of the Immigration Act does indeed hold the potential to recognise some gay and lesbian families, but it will also promote a new class of ‘bad homosexuals’ who will not only be marked ‘as’ non-spousal for the purposes of the family class, but also ‘by’ their poverty, blackness and femaleness.

In her recent book, Are We “Persons” Yet: Law and Sexuality in Canada, Kathleen Lahey lays out one of the most comprehensive and thought provoking analyses of the
potential socio-economic implications of inclusion of same-sex couples as ‘spousal’ units. And although she ultimately supports the pursuit of formal equality, she is also clear it is not only the benefits of inclusion that will be unevenly distributed, but also the costs of exclusion:

The distribution of the benefits of inclusion along class, race, sexual orientation, ability, and gender lines would certainly reinforce the appropriation and dependency paradigms associated with heterosexual relationships. But the allocation of the costs of exclusion also disproportionately burden those who are already disadvantaged by class, race, sexuality, gender, and ability as well.  

Therefore, I would suggest that the argument that the formal equality approach to reform 'simply seeks the right of same-sex couples to choose to be recognised as spouses' is at best specious in the partiality of its perspective, and at worst, ugly in the selfishness of its objectives.

CONCLUSION: REPLACING THE DEMANDS OF FORMAL EQUALITY FOR THE POTENTIAL OF PROGRESSIVE STRATEGIES

To this point I have focussed primarily on two themes: first, the policy implications of changes to the Immigration Act grounded in a formal equality approach to reform; and secondly, how these implications vary depending upon one’s social location(s) or community of interest. In the conclusion of this chapter I want to change the focus somewhat by turning the gaze back onto the formal equality approach itself.

Miriam Smith argues that the current trend within lesbian and gay rights groups to focus on formal legal equality (a focus that reflects the broader assumption that gaining legal rights is tantamount to social change115) is in part the result of the entrenchment of the Charter of Rights and Freedoms, but is also linked to the nature of the composition of the groups themselves:
EGALE [for example] was rooted in the emerging middle-class communities of out lesbians and gays who potentially stood to benefit economically from the recognition of lesbian and gay relationships in law. Its leadership, especially in its early period, was provided mainly, although not exclusively, by white male professionals.\textsuperscript{116}

It is important to recognise that the ideological value presumptively ascribed to the formal equality approach by many gay and lesbian rights groups is, in part, related to the more general assumption that legal rights equal social change (the hegemony of liberalism, as it were). However, it is equally important to recognise that this assumption is \textit{valid}, at least for some communities of interests.

The formal equality approach to reform should not be understood as correct or incorrect, or somewhere in between: it is a political choice to prioritise and pursue certain objectives, or interests, rather than others. To suggest otherwise would be to fall into the same, in my opinion, mistaken mindset reflected in this analysis:

Trying to redefine benefits so that they are not based on relationships at all would be very difficult because “it would \textit{divert} the debate away from lesbian and gay equality issues to policy issues which we’re not really mandated or competent to propose.”\textsuperscript{117} (emphasis added)

This analysis eschews the fact that not pursuing the redefinition of the way in which socio-economic benefits are distributed is itself a choice, and that what constitutes equality for gays and lesbians varies depending upon one’s race, gender, class etc. Therefore, what I referred to in the introduction to this Chapter as ‘essentialism’ is better understood as the presumptive privileging of one perspective, or community of interest, namely that of those who only face discrimination based on their sexual orientation.

Moreover, the ‘assimilationist’ nature of this approach is also not incorrect, but rather should be understood as the natural inclination of those who will, for the most part, benefit from mere inclusion into classist, racist and gendering institutions. To use a metaphor I learnt at a workshop on racism, for those who do not experience complex
oppression it is natural to comprehend oppression as a line which one must simply get over; whereas, for those who experience complex oppression, it seems more natural to try to erase the line completely.

But even when the formal equality approach is acknowledged as a political choice and means to an end, as opposed to some naturally occurring and self-justifying goal, it is put forward as the only politically feasible approach to reform. More progressive broad-based social change agendas are dismissed as 'all or nothing' approaches. Essentially, the argument goes that once 'we' are on the inside, we can then pursue progressive reforms through incremental change, rather than striving for perfect solutions all at once. I will, therefore, return to the case study of the reform of the *Immigration Act*, to briefly explore these arguments.

It is possible, in my opinion, to formulate policies that advance our shared interest in seeing the intimate or even 'conjugal' relationships of gays and lesbians recognised, while minimising the exclusions and exacerbation of the oppressions of 'others.'

In the context of immigration, one solution might be to advocate that membership within the family class be based upon a more 'functional' definition of family rather than a mere redefinition of a static categorical definition of legal and biological relationships. For example, in a report produced as part of a national consultation about family class immigration, James C. Hathaway recommended that:

> [...] recognition that there is no single, "natural", or preferred paradigm of "family" should be the basis for a more considered and rational approach to social planning. Rather than continuing to define "family" through description of observed patterns of relationship, which vary markedly from one culture to another and over time, emphasis should more reasonably shift to the definition of "family" on functional terms.
Such a solution would not eliminate all of the problems I have discussed in this chapter. However, at least with an explicitly functionally-defined test there is transparency regarding the type of family model that is being recognised and promoted. This transparency in turn opens up avenues for political debate about what kind of immigrant family should be encouraged rather than assuming, incorrectly, that ‘the’ family has static qualities derived somehow from nature.\textsuperscript{121} For example, it was stated in the report quoted directly above that:

\begin{quote}
It was agreed that the definition of intimate partners for the purposes of family class immigration should avoid reliance on symbolic or traditional representations of intimate partnerships, and, instead, reflect the real, functional relationships found in contemporary Canadian society.\textsuperscript{122}
\end{quote}

Unlike a categorical approach based upon ‘spousal’ status, a functional approach, based upon flexible criteria, at least has greater capacity to resist the automatic prioritisation of a traditional, heterosexist and ethnocentric model of family to the exclusion of other equally important relationships, both same- and opposite-sex.

Let us assume, however, as many formal equality proponents would, that although it might be ideal, it would not be politically feasible to advocate that all of the categories within the family class, including that of ‘spouse,’ be swept away and replaced with one unified, functional definition of family. I would still argue that it would be politically feasible to lobby for the creation of a separate category for gays and lesbians, one which is based upon a more functional understanding of the families of gays and lesbians and their value, rather than equivalence to ‘spousal status.’ As argued above, the use of categories is not inherently objectionable; even if they were, categories are necessary for us to comprehend the complexities contained in both law and life. In this context, therefore, the challenge is to envision a category that will advance the broadest cross-section of communities of interests within the queer community.
Using as the starting point an emphasis on 'substantive' rather than 'formal' equality (a focus on communities of interest rather than pre-defined groups of people) it seems to me that we could formulate some arguments to support a claim that 'our' relationships, and therefore our needs, tend to be different than those of heterosexuals. For example, it could be argued that because of the stigmatisation of our sexualities and our sexual relationships, non-conjugal friends are more likely, as compared with heterosexuals, to be the most important and intimate 'family' members in our lives. Most importantly, this argument need not be framed in such a way as to suggest that gays and lesbians are incapable of forming intimate conjugal relationships of permanence. Rather, what would be argued is that in addition to the recognition of our 'spousal' relationships, the principle of substantive equality requires that we have access to a broader definition of 'our' families.

Even if there was little evidence to support that kind of claim or simply insufficient political will to justify demands for a broader and more functional definition of 'gay families,' it still seems to me strategically preferable to demand a separate category for same-sex 'spouses.' The benefit of such a category—as opposed to a single category in which married, opposite- and same-sex couples are all included—is, quite simply, that it would be 'ours.' Activists would have a solid footing, at a politically opportune time in the future, to begin exploring whether we have unique and shared needs, interests, or political aspirations, as gays and lesbians. Unfettered by the need to compare or distinguish the relationships of gays and lesbians from those of heterosexuals, activists would have plenty of room to advocate for reforms to the definition, or even application of 'our' category to suit a broader cross-section of our communities of interests.
For example, based upon the assertion that many gays and lesbians prefer, and/or fit within a model of family based on inter-dependency, as opposed to the dependency of one partner upon the other\textsuperscript{124}, activists could advocate for reforms to reduce the hierarchical distribution of wealth and power within legally recognised gay and lesbian relationships. Furthermore, the increasingly common privatisation of social and economic responsibility for the well being of individuals within family units could be challenged on the grounds that it replicates a heterosexist, classist and patriarchal economy which is both inapplicable and unacceptable to gays and lesbians. We could, as gays and lesbians, turn our attention more directly to exploiting our ‘disruptive potential’ vis-à-vis the ‘dominant relations of production and ruling.’\textsuperscript{125} In this way, gay and lesbian relationships, or more accurately, their legal definitions, could become the fulcrum upon which demands for even broader, progressive social change are based. Heterosexuals might actually begin to emulate our relationships and envy their legal status, rather than the reverse.

But of course, for the proponents of the formal equality approach to reform, proposals such as these would be entirely unacceptable because they violate all three tenets of that approach. Rather than emphasising our being the ‘same’ as heterosexuals, they suggest that some of us may be different in significant ways. Rather than presumptively demanding similar treatment, the proposals above rely upon an assertion that different models may be required if ‘our’ relationships are to be afforded substantive equal value. Lastly, and perhaps most importantly, the approaches outlined above do not necessarily prioritise same-sex ‘spousal’ relationships, and their formal recognition. Nor, however, is pursuit of the recognition of same-sex ‘spousal’ relationships automatically rejected. Rather, it is the actual relationships of gays and lesbians—not an ideologically sanitised
(i.e. heteronormative) model—that are prioritised. One need only review the 
vehemently negative reactions of several gay and lesbian rights groups to the creation 
of a separate definition of 'same-sex partner' in Ontario to confirm the centrality of 
'spousal' recognition and categorical equality to the agenda of these groups. As one 
EGALE press release put it: 'All we ask is to be treated equally—in substance and in 
form.' The problem with such a position is of course that the two goals are not 
synonymous, indeed they may not even parallel each other.

Deconstructed in this way, it is the formal equality approach to reform that is more 
accurately described by the statement 'all or nothing.' There is nothing about a 
progressive or multi-dimensional approach to equality that inherently insists that reform 
be either immediate or perfect. On the contrary, I would argue that it is the formal 
equality approach—with its implacable desire for the inclusion of same-sex relationships 
within those categories currently inhabited by married and/or opposite-sex 'spousal' 
relationships—which potentially thwarts the potential for strategic and incremental 
progressive legal and social reform.

Kathleen Lahey has argued that '[t]he best progressives can hope for, in my opinion, 
is that once queer communities are fully empowered to participate in every political 
debate on equal terms, more of the implications of hierarchy will become visible and 
less tolerable to the body politic.' I must disagree. I see little in the formal equality 
approach to reform—the zealous pursuit of 'spousal' recognition, no matter what—to 
support this optimism. The problem with Lahey's supposition is that using the formal 
equality approach to reform, 'queer communities' will never be able to 'fully participate in 
every political debate on equal terms' (emphasis added). Quite the contrary is likely, I 
would argue. For the most part, it will only be those gays and lesbians who only
experience sexual orientation oppression who will experience, unequivocally, the privileges of full citizenship. And sadly, there is little to encourage a reasonable belief that these few will be happy to then dismantle the house to which they have just been admitted.

I return then to the question that I articulated at the beginning of this chapter, namely, should gay and lesbian equality-seeking groups pursue inclusion within the family class as 'spouses.' Having come down the road of researching and writing this chapter, I must beg to reformulate the question because, as it is, it is not answerable by reference to some impartial, logical or natural formula of law or equality. Rather, it is a political question, the answer to which depends on one's political objectives and social perspective.

I think that the far more interesting question is this: 'how should we determine who gets to participate in the process of deciding what "our" questions are, what it is we seek to pursue, and why?' This is a question that I touched upon in the Introduction to this thesis, and will address in greater detail in its Conclusion. However, I would reject the formal equality approach to reform as I have described it in this chapter. It presumptively and unfairly privileges and naturalises certain perspectives or communities of interest within the queer community, more than others. The formal equality approach to reform is so problematic because it is a false and premature end to analysis; it flattens our differences: our different aspirations, our different social locations, the different benefits, harms and dangers which will come with inclusion within the category of 'spouse.'

These political questions—such as how, or whether 'our' relationships should be incorporated into different legal institutions—should be contested on a political terrain
which at the very least strives to recognise as many perspectives as possible, not presumptively elevated to the rarefied atmosphere of liberal legal theory. These questions, it seems to me, should not be left in the hands of lawyers, but debated among as wide a cross-section of queer communities as possible. Absent these kinds of discussions, it seems to me that the gay and lesbian equality-seeking groups will remain inhospitable terrain for those who experience complex oppression.

Personally, as gay male person of colour, I have made the (very political) choice to resist the incorporation of same-sex relationships as 'spousal' within the family class of the *Immigration Act*. But again, this choice is grounded in my perspectives. I simply cannot, as the child of immigrant parents, think exclusively about 'sexual orientation' when considering the reform of the *Immigration Act*. As someone who has worked with poor immigrant women, trapped in abusive relationships, I cannot, even tacitly endorse immigration laws that bind women to 'dependent' relationships.

Consider these words of Cory and Iacobucci JJ. in the *M. v. H.* decision:

 [...] differences of opinion within the same constitutionally relevant group do not constitute a reason to defer to the choices of the legislature. Indeed, as noted by EGALE, given that the members of equality-seeking groups are bound to differ to some extent in their politics, beliefs and opinions, it is unlikely that any s. 15 claims would survive s. 1 scrutiny if unanimity with respect to the desired remedy were required before discrimination could be redressed.\(^{129}\)

As someone who largely works within the field of law, I am driven to continually make the connections between complex oppressions and law to make sure that both the courts and also advocates for legal reform never forget, at the very least, that there indeed is not 'unanimity.' I must, at least strive to erase the line(s), not just hop over them, leaving behind (ir)relevant aspects of myself.
In April 2000, after substantial completion of this chapter, the Government of Canada introduced Bill C-31, *An Act respecting immigration to Canada and the granting of refugee protection to persons who are displaced, persecuted or in danger*, 2nd Sess., 36th Parl., Canada, 1999-2000. If enacted into law this Bill would introduce a wide range of changes to the immigration and refugee law of Canada.

Because of the complexity of these changes, even a cursory analysis of them is beyond the scope of this addendum. However, I do wish to briefly flag a couple of aspects of policy statements about the Bill issued by the Government of Canada. In an internet document titled “Questions and Answers for Bill C-31, The Immigration and Refugee Protection Act” the core conflict of the Canadian immigration system—namely, family reunification ‘versus’ the apparent strain on the Canadian social welfare state—was highlighted. It was noted that ‘[t]he proposed changes are intended to recognize the evolution of the Canadian family and strengthen one of the cornerstones of Canadian immigration policy: family reunification’ by ‘broadening the definition of “dependent child”,’ ‘enhancing adoption provisions,’ ‘eliminating the bar for health reasons in the case of sponsored spouses and dependent children’ and ‘establishing an “in-Canada” landing class for spouses and children who are already in the country so that they do not have to leave the country to apply.’ However, the document also stressed that Canada would be adopting tougher measures to “to speed up the resolution of the [refugee] claims, deport bogus refugees more quickly, and enforce stiff penalties on those who bring these people to our shores illegally.” It also emphasized that importance of the “Social Union Framework Agreement” and recognized ‘the impact immigration can have on social services.’
Within that rhetorical context, the extension of 'spousal' status to same-sex couples was prominent. The simultaneous expansion/contraction of the ideologically acceptable form of 'family' for immigration purposes is apparent in the following section, quoted in full:

Question 4: Why does the Act expand the definition of spouse to include both common-law and same-sex couples?
Answer 4: In keeping with the Omnibus Bill on Modernizing Benefits and Obligations (C-23), the immigration legislation is consistent with equal treatment under the law. This equal treatment ensures that both common-law and same-sex couples are treated fairly in all Canadian legislation.

Question 5: What does the new Act do to tighten up sponsorship rules so that newly sponsored immigrants do not become a burden on taxpayers?
Answer 5: The new legislation will introduce collection criteria so that the Government of Canada can collect from deadbeat sponsors, if they do not live up to their obligations and do not repay the provinces for any debt arising from a default of a sponsorship resulting in welfare costs.

As well, the government will be able to deny the right to sponsor to anyone who is in default of court-ordered spousal or child support, as well as to persons convicted of a crime related to domestic abuse. Persons on social assistance (excluding disability pensions) will not be allowed to sponsor unless the Minister gives consent (italics added).

Interestingly, two days after its initial posting to the Canada Immigration web-site, the document had been changed, completely omitting the reference to 'deadbeat sponsors.'

The nature of the 'collection criteria' as well as many other important aspects of the new immigration and refugee system remain unspecified and will no doubt be the subject of much debate, both within Parliament and more generally. Nevertheless, what is clear is that the Government of Canada will promote immigrant families that are — regardless of the sex of the spouses — self-sufficient, no matter what.


\[2\] R.S.C. 1985, c. I-2 (hereinafter cited as 'Immigration Act'). Please note that as discussed in an addendum to this chapter, the federal government has now introduced a Bill, not yet passed, to
specifically amend the Immigration Act to redefine the category of 'spouse' to include same and opposite-sex common-law partners, in addition to married couples.

3 Citizenship and Immigration Canada (Minister of Public Works and Government Services Canada, 1998). Available at: http://cicnet.cl.gc.ca (hereinafter cited as 'New Directions').

4 Ibid. at i.

5 New Directions, supra note 3 at 25.

6 For the general provision for spousal and a description of the 'family class' selection criteria see Immigration Act, supra note 2 at s. 6 and also Immigration Regulations, 1978, SOR/78-172 (hereinafter cited as 'Immigration Regulations') at s. 2(1) and 4. In these sections, 'spouse' is currently restricted to opposite-sex married couples.


8 Immigration Act, supra note 2 at s. 114(2). The revised H&C guidelines recognise for the first time that '[t]he separation of common-law or same-sex partners who reside together in a genuine conjugal-like relationship is grounds for H&C consideration': Immigrant Applications in Canada Made on Humanitarian or Compassionate (H&C) Grounds, IP-5, February 23, 1999 (hereinafter cited as 'H&C Guidelines') at 8.2.


10 As EGALE has commented, 'Whatever criteria are used to identify a qualifying [same-sex] relationship, there will always be couples, family members or other individuals, who do not fall within the established criteria': Equality for Gays and Lesbians Everywhere (EGALE), "Recommendation to the Department of Immigration on reforming and enhancing Canada's immigration laws and policies." Available at http://www.egale.ca (hereinafter cited as "EGALE Recommendation") at 5.

11 Citizenship and Immigration Canada, "Strengthening Family Reunification" News Release 99-02, January 6, 1999. There are, of course, other ways in which the relationships of queer people could be 'recognised'. For example, rather than being recognised only insofar as they are 'spousal,' same-sex relationships could be afforded immigration status on the basis that they are of relative importance to the Canadian sponsor, whether 'spousal' or not. See my 'Conclusion.'


15 I will often in this paper refer only to 'gay[s] and lesbian[s]' not because of a desire or oversight to consider bisexual, transgendersed and other 'sexual minorities,' but as a reflection of the sad reality that within political organising and movements the focus is often squarely on only gays, and to a lesser extent lesbians.


18 For an extensive and informative discussion of this and other aspects of movements for gay and lesbian equality in Canada see, for example: Miriam Smith, Lesbian and Gay Rights in Canada: Social Movements and Equality-Seeking, 1971-1995 (Toronto: University of Toronto Press, 1999) (hereinafter cited as 'Lesbian and Gay Rights in Canada').

19 Nitya Duclos, "Some Complicating Thoughts on Same-Sex Marriage" (1991) 1 Journal of Law and Sexuality 31 (hereinafter cited as "Some Complicating Thoughts") at 34.

20 By which I mean those people who derogate in some way from heterosexual normativity.

21 Lesbian and Gay Rights in Canada, supra note 18 at 98.

22 Lesbian and Gay Rights in Canada, supra note 18 at 85.

23 See for example Shelley A.M. Gavigan, "Legal Forms, Family Forms, Gendered Norms: What is a Spouse?" (1999) 14-1 Canadian Journal of Law and Society 127 – 157 (hereinafter cited as "What is a Spouse?").
Spouse”) who lays out in some detail the ways in which the ‘spouse in the house’ rule has been ‘mean in its application’ (at 143) to ‘welfare mothers’ (at 143–151) and notes the ways in which the form of ‘spouse’ in property law is quite different from that in welfare/poverty laws. More importantly, the latter form, she argues, ‘is a form that shapes and is shaped by class and gender relations’ at 151.


25 See Shelley Gavigan, “Law, Gender, and Ideology” in A. Bayefsky (ed.) Legal Theory Meets Legal Practice (Edmonton: Academic Printing and Publishing, 1988), 283 - 295 (hereinafter cited as “Law, Gender, and Ideology”) at 291: ‘...the importance of analyzing law as ideology is best illustrated by a consideration of “the family,” writ large as it often is. “The family” is presented both in law and in popular culture as the basic unit of society, a sacred, timeless and so natural an institution that its definition is self-evident.’


27 New Directions, supra note 3 at 10.

28 The actual number of family class landings has also been on the decline. See the “Annual Immigration Plan[s]” for recent years are available at http://cicnet.ci.gc.ca (hereinafter cited as “Annual Immigration Plan[s]”). Also see: Vic Satzewich (ed.), Deconstructing a Nation: Immigration, Multiculturalism and Racism in ‘90s Canada (Halifax: Fernwood Publishing, 1992) (hereinafter cited as ‘Deconstructing a Nation’).


30 New Directions, supra note 3 at 6.

31 “Reversing the Progressive Hypothesis,” supra note 17 at 131.


35 “Paradise Lost,” supra note 33 at 623: ‘I have attempted to illustrate that the analytical and political challenge posed by diverse experiences in family life strengthens, rather than undermines, the critique of “the family.”’


38 See Didi Herman, “Are We Family?: Lesbian Rights and Women’s Liberation” (1990) Vol. 28, No. 4 Osgoode Hall Law Journal 789 - 815 at 796: ‘These theorists contend that hegemonic familial ideology is a primary contributor to the oppression and exploitation of women.’


40 For a more full discussion of these issues, see “Family, Law and Sexuality,” supra note 24 and Susan B. Boyd, ed. Challenging the Public/Private Divide: Feminism, Law and Public Policy (Toronto, University of Toronto Press, 1997).


42 [1999] 2 S.C.R. 3. This case and several others will be discussed in much greater detail in the chapter following this one.
Ibid, at paragraph 93.

Ibid, at paragraph 130.

New Directions, supra note 3 at 23.

Immigration Regulations, supra note 6. See definitions of ‘dependant,’ ‘undertaking’ & ‘sponsor’ at s. 2(1); and, the requirement of an undertaking at s. 5(2)(h).

Immigration Regulations, supra note 6, at s. 2(1) and Schedule VI which lists unavailable sources of support.

Ontario Regulation, 134/98 s. 51 (as amended). Equivalent provisions also occur in section 40 of the regulations to the Ontario Disability Support Program Act (formerly the Family Benefits Act). These provisions are currently the subject of a Charter challenge brought in the Superior Court of Justice pursuant to Rule 14.05 of the Ontario Rules of Civil Procedure (Jeeveratnam et al. v. Ontario).

“Paradise Lost,” supra note 33, at 609.


See for example, Ontario Regulation, 134/98, supra note 48 at s. 1.

This type of regulation, as contained in the Family Benefits Act (now replaced by the Ontario Disability Support Act) was declared unconstitutional by a majority of the Superior Court of Justice (Ontario), General Division, in Falkiner v. Ontario (Ministry of Community and Social Services, Income Maintenance Branch), reported at [2000] O.J. No. 2433. That decision is now in the process of an expedited appeal to Ontario Court of Appeal. Pending the resolution of that appeal, the Court has granted a stay of the order of the General Division: Falkiner v. Ontario (Ministry of Community and Social Services, Income Maintenance Branch), Ontario Court of Appeal, [2000] O.J. No. 2750.

Claire F.L. Young, “Taxing Times for Lesbian and Gay Men: Equality at What Cost?” 17 Dalhousie Law Journal 534 - 559 (hereinafter cited as “Taxing Times”). At 535 Young questions the desirability of redefining ‘spouse’ in the Income Tax Act to include same-sex couples in part because she ‘conclude[s] that it is those couples in which one partner is economically dependant on the other that would benefit most from being included as spouses under the Act.’ For a discussion of the ways in which the system of maternity benefits privileges women in dependent relationships see: Nitya Iyer, “Some Mothers Are Better Than Others: A Re-examination of Maternity Benefits” in Susan B. Boyd, ed. Challenging the Public/Private Divide: Feminism, Law and Public Policy (Toronto, University of Toronto Press, 1997), 168 - 194 (hereinafter cited as “Some Mothers Are Better”).


Men Who Beat, supra note 55, at 23.

Susan B. Boyd “(Re)Placing the State: Family, Law and Oppression” (1994) 9(1) Canadian Journal of Law and Society 39 – 73 at 53 - 54. The homophobia of police and other state enforcement agencies also results in a similar reluctance on the part of gay men: Men Who Beat, supra note 55. Immigrant women of colour may not wish to call the police or may be at a disadvantage even if they do because of
the racism of police, language inability, historically informed fear of the state/police, fear of loss of economic support should their abusive partner be imprisoned or deported and community censure: see "A License to Abuse," supra note 51 and Dianne L. Martin and Janet E. Mosher, "Unkept Promises: Experiences of Immigrant Women With the Neo-Criminalization of Wife Abuse" (1995) 8 Canadian Journal of Women and the Law 3 - 44 (hereinafter cited as “Unkept Promises”)

60 Many aspirant immigrant spouses apply for landing from within Canada under the H&C system and await 'landing' while residing with their spouse. Exemptions from the requirement to apply for permanent residency outside Canada (pursuant to Immigration Act, supra note 2 s. 9(1)) is authorised pursuant to s. 114(2) of the Immigration Act, supra note 2 and s. 2.1 of the Immigration Regulations, supra note 6

61 For example, the H&C Guidelines, supra note 8, describe the situation in this way at 1.7.2: 'To be granted landing, the applicant must meet the requirements of subsection 5(2) of the Act which states that an immigrant shall be granted landing if he is not a member of an inadmissible class and otherwise meets the requirements of the Act and Regulations [such as having a ‘sponsor’ if coming in as part of the ‘family class’]. A FINAL POSITIVE determination about admissibility and whether the applicant meets landing requirements can only be made at the time of the landing interview.' (emphasis is as shown in original).


63 H&C Guidelines, supra note 8 at 8.10: Immigration 'officers are reminded to consider using their positive [H&C] discretionary authority where the spouse...of a Canadian citizen of permanent resident leaves an abusive situation and, as a result, does not have an approved sponsorship... .'

64 See discussion of H&Cs in 'Introduction.'

65 H&C Guidelines, supra note 8 at 8.10.

66 H&C Guidelines, supra note 8 at 6.2.


68 See “Unkept Promises,” supra note 59 at 41.

69 Immigration Regulations, supra note 6 at s. 2(1).

70 For example, see the social assistance regulations referred to, supra note 48

71 See, for example, "Women's Stay/Leave Decisions," supra note 57 at 305: ‘Abused women's unemployment has been associated with staying in, or returning to, an abusive relationships, whereas having a job has been associated with successful separation... .’

72 "Unkept Promises," supra note 59 at 35.


74 By which I mean an approach which insists that we are no different from heterosexuals, as opposed to demanding respect for our right to be different and our actual differences, where they may exist.

75 “Some Complicating Thoughts,” supra note 19 at 58.

76 Ibid. For an example of a legal challenge to this practice of basing benefits upon a universal model of the family see: Jody Freeman "Defining Family in Mossop v. DSS: The Challenge of Anti-Essentialism and Interactive Discrimination for Human Rights Litigation" (1994) 44 University of Toronto Law Journal 41 - 96 (hereinafter cited as "Defining Family")

77 “Taxing Times,” supra note 54 at 535.

78 New Directions, supra note 3, at 10.

79 “Some Mothers are Better,” supra note 54.


81 Compare the work of Don DeVoretz, ibid., with some of his earlier analyses contained in Don DeVoretz, Immigration and Employment Effects (Ottawa: Institute for Research of Public Policy, 1989) (hereinafter cited as "Immigration and Employment Effects").


83 “Economic Effects of the Host Community,” supra note 29 at 452.
Immigration and Employment Effects, supra note 81 at 2.

Immigration and the Legalization of Racism, supra note 82 at 65. See also "Migrant and Immigrant Families," supra note 32 at 332: "...immigration officials have been concerned that people of the "wrong" origins make excessive use of family reunification provisions...The issue of family migration is at present racialized, in part, because immigration officials wish to "prevent Canada's immigration movement from becoming concentrated in a small number of developing countries" (Star-Phoenix, Sept. 1, 1990: A12). The terms "developing countries" or "non-traditional source countries" are simply euphemisms used by immigration officials used (sic.) to describe the migration to Canada of "non-white races" who are seen as "problem creating."

"Paradise Lost," supra note 33 at 622.

"Some Mothers are Better," supra note 54 at 176.

"Migrant and Immigrant Families," supra note 32.

A person who wishes to 'sponsor' a member of the 'family class' must generally establish that he or she earns sufficient income to take financial responsibility for the member. This requirement is 'waived' in the case of the sponsorship of, inter alia, a 'spouse.' However, the rules of inadmissibility still apply: Immigration Regulations, supra note 6 at s.5(2)(f) & Schedule IV: the 'Low Income Cut-off.'

Immigration Law and Practice, supra note 7 at 13.31.

The H&C is an application to be exempt from regulations; the rules of inadmissibility are set out in the Immigration Act, supra note 2.


See for example, New Directions, supra note 3. Of course, as I have also argued above, this must be understood as part of a larger trend of erosion of the Canadian welfare state in favour of privatised responsibility for people's well-being.


"Migrant and Immigrant Families," supra note 32 at 333.

New Directions, supra note 3 at 6.


"A Cocktail of Alarm," supra note 51 at 125.

New Directions, supra note 3 at 21 - 26.


At 54.


Immigration and the Legalization of Racism, supra note 82 at 75.

See "Annual Immigration Plan[s]," supra note 28. For example, the amount planned for 1996 was 34,700 whereas for 1999 it is a mere 17,300. As a percentage of total number of immigrants planned parents and grandparents accounted for 19% in 1996 and only 9% in 1999.

Emphasis added.

New Directions, supra note 3 at 23.
“Taxing Times,” supra note 54 at 556.

113 “Out of the Closet,” supra note 107 at 532.

114 Kathleen A. Lahey, Are We “Persons” Yet: Law and Sexuality in Canada (Toronto: University of Toronto Press, 1999) at 266.

115 What she terms ‘rights talk,’ Lesbian and Gay Rights in Canada, supra note 18, Chapter Four. For a more general description of this typically liberal assumption, and the implications of the entrenchment of the Charter of Rights and Freedoms in particular, see Joel Bakan, Just Words: Constitutional Rights and Social Wrongs (Toronto: University of Toronto Press, 1997). For an earlier, but still trenchant analysis of some of these issues, also see, Michael Mandel, The Charter of Rights and the Legalization of Politics in Canada (Toronto: Thompson Educational Publishing Inc., 1989).

116 Lesbian and Gay Rights in Canada, supra note 18 at 78.

117 Ibid. at 99.

118 For a description of a legal strategy which works towards this goal see the description of the Intervenor’s Factum submitted to the Supreme Court of Canada in Mossop in “Defining Family,” supra note 76.

119 The “EGALE Recommendations” supra note 10 hints at such an approach: ‘In EGALE’s view, the objective should be to identify relationships which are bona fide, rather than just relationships which fall within certain artificially-constructed criteria’ at 4.

120 “Towards a Contextualized System,” supra note 26 at 4.

121 This process of open debate about the function of family may avoid some of the pitfalls of ‘additive’ reform described in “Some Complicating Thoughts,” supra note 19 at 34 in this way: “Reforms that attempt to modify current laws by “adding on” newly recognized family forms tend to assimilate these new forms to the core model of the “traditional” family in order to maintain uniformity in the law. Some families still get left out and the families that are added in may be pushed into shapes not of their own choosing.”

122 Report of the National Consultation on Family Class Immigration, Refugee Law Research Unit, Centre for Refugee Studies, York University, June 1994 at 3.

123 For example, in “Family, Law and Sexuality,” supra note 24, Susan B. Boyd says this: ‘...in M. v. H., although heteronormativity was of course challenged, the ways that the legal arguments had to be formulated meant that the potentially disruptive lesbian subject was absorbed back into familiar roles and, to a large extent, her disruptive potential was displaced.’ at 381.

124 See for example the judgement of Cory and Iacobucci JJ. in the Supreme Court of Canada’s decision in M. v. H. [1999] 2 S.C.R. at paragraphs 110 and 127.

125 See “Family, Law and Sexuality,” supra note 24 at 381.


128 Kathleen A. Lahey, Are We Persons Yet?: Law and Sexuality in Canada (Toronto: University of Toronto Press, 1999) at 266.

129 M. v. H., supra note 42 at paragraph 127.

130 Downloaded from http://www.cic.gc.ca/english/about/policy/imm-faq_e.html on April 7, 2000.
Chapter Three: The Limited Language of Law

INTRODUCTION

In this last chapter of the body of this thesis I turn my attention to another very important branch of law, namely judge made law. In particular, I focus on the decisions of the Supreme Court of Canada interpreting the Canadian Charter of Rights and Freedoms \(^1\) [hereinafter ‘Charter’]. Both before and since the ratification of the Charter, it has been the subject of criticism by ‘progressives’ and ‘conservatives’ alike. For example, from a progressive perspective, Michael Mandel cautioned against the ‘legalization of politics’—the apparent replacement of "conflicts of interest" with "matters of principle"—\(^2\) and criticized the Charter as an inherently undemocratic instrument. More recently, authors such as Joel Bakan, Judy Fudge and Harry Glasbeek have not only criticized the form and process of the Charter, \(\textit{per se}\), but have also taken aim at the Charter's apparent functional inability to effect the type of socio-economic change or normative political vision they supports.\(^3\)

For example, in his book, \textit{Just Words: Constitutional Rights and Social Wrongs} \(^4\) [hereinafter ‘\textit{Just Words}’] Bakan openly associates his criticism of the Charter with a 'normative standpoint': his vision of 'social justice' and 'progressive' social change.\(^5\) Put simply, he questions whether the Charter has an effective role to play in bringing about the type of society in which he wishes to live. This type of methodology steps outside of traditional legal discourse or doctrinal analysis in two ways. First, the normative and admittedly political values by which judgments are judged operate outside the allegedly scientific and value free body of rules referred to as ‘doctrinal’ or ‘internal legal’ analysis.
Secondly, the result of a given case is examined not only in terms of the success of the claimant, but also in terms of its systemic and societal impact more broadly.

Doctrinal analysis, need not, however, be applied to the exclusion of an exploration of the policy implications of particular decisions, or vice versa. In her article “Symes v. M.N.R.: Where Sex Meets Class” Audrey Macklin juxtaposes classic doctrinal analysis with a more external, contextual analysis. In the Federal Court of Appeal decision (ultimately upheld by the Supreme Court of Canada on different grounds) the Court found that the term ‘business expense’ could not be interpreted to include child care expenses and that this exclusion did not violate the Charter equality rights of the claimant, a lawyer with her own practice. Macklin effectively employs internal legal analysis to challenge the Court’s section 15 analysis. In a crisp and eloquent deployment of legal logic, she demonstrates the aridity of the Court’s application of section 15 to the facts of this case:

The gist of Mr. Justice Decary’s position is that it is absurd to grant Symes parity with businessmen if, in so doing, she is placed in a superior position to other women. To put it another way, it is preferable that all women be equally disadvantaged relative to men if the alternative is to improve the situation of the best-off women.7

On the other hand, considering the broader context that ‘tax deductions are inherently regressive,’ that ‘full deductibility widens the gap between the economically privileged and others’ and ‘does nothing to assist parents currently unable to purchase child care services’8, she also concludes that ‘Symes’ cause [is] one which champions class privilege as opposed to sex equality9 and should not, therefore, be supported as a ‘feminist’ cause. But even though she surveys the decision from both perspectives, they remain mutually exclusive on a functional level. She does not apply contextual factors to classic legal discourse.
Macklin concludes that although from a ‘doctrinal’ perspective the Federal Court of Appeal got it wrong, from a contextual or ‘policy’ perspective, a positive result in Symes’ favour would have been undesirable. From the doctrinal perspective she concludes that ‘[a]t worst, Symes is attempting to redress a disadvantage she experiences as a woman while leaving intact the current system’s preferential treatment of business people, a class to which she belongs.’ However, she also concludes that ‘from the perspective of feminist legal strategy, the hazards of promoting Beth Symes’ claim...far exceed the potential benefits’ because it will widen the gap between ‘upper-middle class, self-employed, professional women’ who will be able to fully deduct their child care expenses and those salaried women who will only be able to deduct a portion of their expenses, as well as those who cannot afford child care at all. But surely, it would be a very impoverished version of section 15 ‘doctrine’ which would permit, or demand this kind of social (in)equality?

Where Macklin and I differ is that in my opinion, the ‘doctrine’ which, according to her should have resulted in Symes’ being successful—namely, section 15 equality analysis—should itself incorporate a broader contextual analysis of the equality of all women in their access to child care. As Macklin herself notes:

If the goal of section 15 in this context is to redress the discriminatory impact of tax laws on members of disadvantaged groups, there can be no pretext for confining the inquiry to section 18(1) [a business deduction] of the Act or the remedy to business women. Insofar as tax deductions are concerned, the real issue would be the inadequacy of the partial deduction under section 63 in facilitating self-employed and salaried women’s access to the paid workforce.

Nevertheless, it is precisely this sort of artificial ‘confinement’ of analysis which Macklin tacitly endorses in Symes’ right as the claimant to frame the equality issue as a comparison between businessmen and businesswomen, to the exclusion of all others.
According to her approach, although the feminist movement should promote an equality that considers the circumstances and benefits of a broad cross-section of women, once the matter gets into court, the Charter's doctrine and process demands that the circumstances of the claimant be universalised to the exclusion of all others.

Macklin's rigid separation of internal (legal) versus contextual (policy) analysis results in two separate normative versions equality—one doctrinal and the other socio-political—which sit very uncomfortably next to each other. The conflict springs from her inconsistent application of the principles of anti-essentialism to feminist legal discourse. Macklin finds fault in the history of feminist litigation because of its 'essentialist' presentation of the needs of middle-class, and largely white women as those of all women:

Contemporary feminist theory and practice [has] been criticized (not without justification) for a propensity to not only give priority to the problems most likely to be encountered by middle class, white women, but also to universalize these experiences and represent them as emblematic of “women’s condition”. In my view, depicting Symes as a section 15 case displays this essentialism in action.\textsuperscript{13}

Yet, in her doctrinal analysis of the application of section 15, she dismisses the negative class implications of a finding in favour of Symes as irrelevant. Macklin argues that the Federal Court of Appeal’s analysis of section 15 in the Symes case should have been limited to a consideration of the type of ‘disadvantage she experiences as a woman.’\textsuperscript{14} Macklin assumes, rather than interrogates Symes’ ability to blinker the Court’s comprehension of a complex system to a consideration of one ground of discrimination, as it is experienced by her, as a relatively privileged woman.

In this paper, it is precisely this aspect of section 15 equality doctrine and litigation that I wish to critically examine. Can the Charter’s section 15 doctrine comprehend non-essentialized subjects? In the context of Charter litigation by a ‘non-essentialized’
subject I mean a litigant who is not reduced to the one or more characteristics which correspond to the listed or analogous ground(s) claimed as the basis of the discrimination. It is my hypothesis that because section 15 doctrine has been developed in relation to “grounds” of discrimination and homogenised “groups” of people, it tends to privilege an understanding of discrimination that universalizes the experiences of those who only experience oppression in relation to one Charter ground or social characteristic. The converse formulation of this theory is that the Charter is now largely incapable of redressing, or even comprehending, the burdens of people who experience ‘intersectional’ discrimination and oppression. By ‘intersectional’ I mean the experience of a combination of multiple forms of oppression, which results in new and unique forms of oppression.

In the first section of this chapter I will survey several aspects of Charter process and jurisprudence—particularly that of the Supreme Court of Canada—which generally impede the ability of courts to comprehend intersectional discrimination. This survey is not, therefore, meant to provide a broad overview of the Supreme Court of Canada’s equality jurisprudence; rather, I intend simply to highlight some of the doctrinal and operational obstacles that, in my opinion, prevent the remedy of intersectional oppression.

In the second section of the paper I will contextualise the discussion by considering equality rights litigation related to the ground of ‘sexual orientation’. I will argue that once the ground of ‘sexual orientation’ is invoked in Charter litigation, all other characteristics of claimants, and of gays and lesbians more generally, are effectively erased. In this section, as in the previous chapter, I will focus on a more contextual
analysis of the broader policy implications of these decisions from multiple perspectives, or communities of interests.

In the conclusion to this chapter I will propose an alternative approach to understanding equality, discrimination and oppression in the Courts. It is incumbent upon the Court to investigate and explicitly identify those communities of interests who will and will not benefit from a proposed remedy. I will argue that, as opposed to categories of people and mutually exclusive grounds of discrimination, the concept of "communities of interests" will encourage Courts to grapple with the complex nature of oppression.

**'GROUNDS & GROUPS' AND OTHER ESSENTIALIST UNDERTOWS IN SECTION 15 DOCTRINE**

An anti-essentialist methodology, in my opinion, is one which at least strives to comprehend the possibility of an infinite variety of social locations, of unique identity(ies), rather than 'fixing' homogeneous categories of people. Unfortunately, as Martha Minow explained, we are incapable of holding the complexity of the world in our minds: 'We do not know how to describe individuals as unique except by reference to traits that actually draw them into membership in groups of people sharing those traits.' In the context of section 15 legal analysis, this inability is reflected in the centrality of 'grounds' to the process, and the use of a claimant's membership in a 'group' as the basic units of section 15 analysis. Nevertheless, Nitya Duclos has observed:

The error in the current approach lies not so much in the use of categories, which may well be intrinsic to the way we think, but in the assumption that the particular categories we are using now are natural, objective, and permanent. We can continue to use the categories we have, in this case the grounds of discrimination, but we should strive to make them flexible, dynamic, and relational. A complaint alleging discrimination on one ground should not immediately focus...
that particular characteristic of the complainant. Instead it should provide an occasion for considering the whole picture...\(^{17}\)

As I might put it, the problem lies not with positing categories, but with their peremptory fixation, without debate or in depth analysis.

In *Canada (Attorney General) v. Mossop*\(^{18}\) [hereinafter 'Mossop'] a gay man had applied for, and was denied 'bereavement leave' to attend the funeral of his same-sex partner's father because his collective agreement defined 'spouse' exclusively as someone of the 'opposite-sex.' He argued that this definition constituted discrimination on the ground of his 'family status' contrary to the *Canadian Human Rights Act*.\(^{19}\)

Although the Ontario Court of Appeal had already determined in *Haig* that the Charter required that 'sexual orientation' be 'read in' as another protected ground within that Act, the Charter was not relied upon by the claimant in that argument. Essentially, Mr. Mossop argued that his relationship constituted a 'family' and was consequently protected from discrimination based upon the ground of 'family status,' regardless of the sex of his partner or whether or not 'sexual orientation' was recognized as a separate ground of discrimination. In rejecting this argument, Lamer C.J. said:

> It is thus clear that when Parliament added the phrase “family status” to the English version of the CHRA in 1983, it refused at the same time to prohibit discrimination of the basis of sexual orientation in that Act. In my opinion, this fact is determinative. I find it hard to see how Parliament can be deemed to have intended to cover the situation now before the Court in the CHRA when we know that it specifically excluded sexual orientation from the list of prohibited grounds of discrimination contained in the Act. In the case at bar, Mr. Mossop's sexual orientation is so closely connected with the grounds which led to the refusal of the benefit that this denial could not be condemned as discrimination on the basis of “family status” without indirectly introducing into the CHRA the prohibition which Parliament specifically decided not to include in the Act, namely the prohibition of discrimination on the basis of sexual orientation.\(^{20}\)

Mr. Mossop’s sexual orientation erased his family status: his identity—who he was, his intimate familial relationships—became completely overwhelmed, and therefore defined
by his sexual orientation. Although Lamer C.J. added that this ‘does not mean that
the hypothesis of overlapping grounds of discrimination should be ruled out in other
contexts’ he concluded that no such overlapping could occur in this case because
Parliament had decided not to include sexual orientation in the list of prohibited
grounds.

Nitya Duclos said this about the legal fallacy upon which the grounds-based
approach to understanding discrimination is based:

It is only when one becomes immersed in the world of law that race and
gender are extracted from the whole person and become mutually
exclusive categories of discrimination. It is only when engaged in legal
thinking that race discrimination and sex discrimination become separate
observable things.

Ironically, Lamer C.J. defends the right of Parliament to recognize (and alternatively
ignore) multiple grounds—or ‘legal identities’—at the expense of permitting courts the
ability to comprehend the complex ‘real identities’ of people, their inseparable,
‘intersectional identity(ies)’ described by Duclos. His acknowledgement of the potential
for ‘overlapping grounds’ amounts to an endorsement, rather than a challenge to the
process of the piecemeal extraction and (in)comprehension of the ‘intersectional
identity(ies)’ of people facing discrimination. His focus on the ‘grounds’ codified in the
Canadian Human Rights Act clouds his ability to see the nature of their intersection, the
inseparability of the sexual orientation discrimination in the lived family status
discrimination experienced by Mr. Mossop:

Family status is connected to the other bases of discrimination, then, in
that it has served as a conduit or mechanism by which sexism, racism and
homophobia (to name just three) have been secured and perpetuated. To
put matters somewhat differently, the families which members of these
groups form are not legitimized as “families” because of the “nature” of
their members, not the nature of their families...

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Given that the denial of family status or denigration of certain family forms is, at least for historically disempowered groups, a vehicle through which their subordination is maintained and perpetuated, it also follows that the relationship between the ground "family status" and other groups of discrimination is an overlapping one. It is nonsensical to ask whether cases which implicate one of these other grounds and family status are "really" about family status, or about race, or sex, or sexual orientation, as if these characterizations were mutually exclusive. Nor is it necessary to try and discern whether family status plus one of the other heads of discrimination in combination produce compound or intersectional inequalities. The nature of the interaction between family status and the other prohibited grounds of discrimination is overlapping.  

In her dissent, L'Heureux-Dubé J. argued that the then Chief Justice's position was based on an underlying assumption that the grounds of "family status" and "sexual orientation" are mutually exclusive. L'Heureux-Dubé J. also endorses the ability of the courts to recognize the overlapping of grounds of discrimination:  

It is increasingly recognized that categories of discrimination may overlap, and that individuals may suffer historical exclusion on the basis of both race and gender, age and physical handicap, or some other combination. The situation of individuals who confront multiple grounds of disadvantage is particularly complex...Categorizing such discrimination as primarily racially oriented, or primarily gender-oriented, misconceives the reality of discrimination as it is experienced by individuals. Discrimination may be experienced on many grounds, and where this is the case, it is not really meaningful to assert that it is one of the other. It may be more realistic to recognize that both forms of discrimination may be present and intersect.  

However, unlike Lamer C.J., she comes to the conclusion that 'where a person suffers discrimination on more than one ground, but...only one form of discrimination is a prohibited ground...one should be cautious not to characterize the discrimination so as to deprive the person of any protection.' Essentially, her disagreement with Lamer C.J. amounts to a disagreement about the proper application of a grounds-based approach of 'overlapping'—as opposed to 'intersectional'—discrimination to the facts of this case. Unfortunately, although in subsequent decisions L'Heureux-Dubé J. challenges the use of a grounds-based approach to understanding discrimination, in her dissent in
Mossop, her deference to the centrality of a grounds-based approach ultimately also results in an incomprehension of lived intersectional identity(ies) and discrimination.

She posits a 'practical' solution to situations of intersectional discrimination that, she suggests, permits one to 'ignore the complexity of the interaction, and characterize the discrimination as of one type or the other'\(^{29}\) where both are prohibited. Some of the problems with this approach are made apparent by its hypothetical application to the American case of *DeGraffenried v. General Motors*\(^{30}\) [hereinafter 'DeGraffenried']. In that case a group of black women sought to challenge their employer's seniority system on the ground that it discriminated against them as 'black women', distinct from both black and female employees in general. Because the employer had only begun to employ black women in 1964 after the passage of the civil rights legislation prohibiting race discrimination, they all lost their jobs under the application of a seniority system in a subsequent recession. The Court refused to certify them as a class, saying:

> [P]laintiffs have failed to cite any decisions which have stated that Black women are a special class to be protected from discrimination...The plaintiffs are clearly entitled to a remedy is they have been discriminated against. However, they should not be allowed to combine statutory remedies to create a new 'super-remedy' which would give them relief beyond what the relevant statutes intended. Thus, this lawsuit must be examined to see if it states a cause of action for race discrimination, sex discrimination, or alternatively either, but not a combination of both.\(^{31}\)

The Court then summarily granted judgement in favour of the defendant on the grounds that 'prior to 1964 General Motors did hire women—although they were of course white women—who were unaffected by the layoff....'\(^{32}\) And rather than attending to the (judicially-excised) race discrimination aspect of their circumstances, 'the Court recommended that the plaintiffs join cause with a group of black men who were also suing General Motors for its racist employment practices.'\(^{33}\) L'Heureux-Dubé J.'s assertion that although 'multiple levels of discrimination may exist, multiple levels of ...
protection may not is analogous to the District Courts refusal to ‘create a new “super-remedy”.’ As Mary Eaton points out, L’Heureux-Dubé J.’s suggestion that courts

[...] “ignore the complexity of the interaction” and reduce the claim to a simple single head is to return to the flaws of DeGraffenried, and ensures that any remedies fashioned will prove inadequate. Characterizing the complaint as either, but not both, race and sex discrimination thus misses the point [of intersectional discrimination and oppression] altogether.

The remedial crudeness of a strictly grounds-based approach to intersectional identity(ies) is also manifest in the reasons given, by both the majority and dissents, in Thibaudeau v. Canada [hereinafter ‘Thibaudeau’]. In this case, however, the ‘categorical’ thinking of the Court is not reflected in discussions about the proper definition and application of the appropriate ‘grounds’ of discrimination. In Thibaudeau, the emphasis, and the crux of the disagreement between the justices of the Supreme Court of Canada, was on the proper ‘group’ or ‘constitutional unit’ to be considered: the nature of the people (or person) within the category or ‘ground.’ And as I shall discuss, how the relationship/connection between the two concepts are understood is an important issue, and one, in my opinion, given too little thought by the Supreme Court of Canada.

Thibaudeau involved a challenge to the provisions of the Income Tax Act that taxed child support payments in the hands of the (recipient) custodial parent. The (payor) non-custodial parent, on the other hand, was permitted to deduct the amount of child support payments. These provisions constituted a reversal of the general principle of taxation law that income is taxed in the hands of the earner. On that basis, all of the judges of the Supreme Court of Canada agreed that the provisions at the very least drew a distinction related to some description of separated/divorced custodial parents. Though
McLachlin is the only member of the Court who dealt with the matter at any length in her dissenting opinion, it appears that all the judges accepted that the distinction was an analogous ground of discrimination.\textsuperscript{38}

The objective behind these provisions was that since recipient spouses (mostly women) were in a lower marginal tax rate than the payors (mostly men) in about 67 per cent of cases, taxing the payments in the hands of the recipient resulted in an ‘overall’ tax-saving in terms of the income used to make child support payments. Theoretically, that tax saving was to be carried over to the recipient by way of a ‘grossing up’ by the Family Court judges of the amount of the child support in order to reflect that saving. And according to the evidence before the court, in some cases, the system did work as anticipated.

The majority of the Court dismissed the claim on the basis that the provisions caused no burden to the relevant constitutional unit, which they identified as the post-divorce/separation couple. As Gonthier J., for the majority, reasoned:

In view of the substantial savings generated by the inclusion/deduction system, it is clear that the group of separated or divorced parents cannot as a whole claim to suffer prejudice associated with the very existence of the system in question. On the contrary, it was shown that on the whole members of the group derive a benefit from it: as most of the recipient parents are subject to a marginal tax rate lower than that of the payors paying the maintenance, it can be said that the purposes for which the system was created have been to a large extent achieved.\textsuperscript{39}

McLachlin J., however, based her analysis of whether or not there was a ‘burden’ for the purposes of section 15 on a smaller group or unit of analysis. In dissent, she focussed upon the particular facts of Ms. Thibaudeau’s case, namely, that because the judge did not, in fact, gross up enough in her case, her tax burden was increased. Essentially, the perspective of Ms. Thibaudeau, as an individual, became the basis for the definition of the relevant constitutional unit. Based upon this understanding of the
relevant constitutional unit, she conducted a direct comparison between 'custodial' parents and 'non-custodial' parents:

The impugned taxation scheme imposes a burden on separated or divorced custodial parents, which it does not impose on separated or divorced non-custodial parents. The custodial parent must include child support payments from which she gains no personal benefit. The non-custodial parent may deduct support payments from his taxable income. He is taxed only on his actual personal income less this deduction. On its face, this demonstrates adverse unequal treatment of custodial parents. The evidence in this case suggests that taking into account the amounts from which she benefited in the form of tax credits, Ms. Thibaudeau was obliged to pay from her own resources an additional $2,505 in federal tax for 1989 as a result of the inclusion of child support payments in her taxable income: testimony of Jean-Francois Drouin, a tax lawyer.  

Because both Gonthier and McLachlin JJ. based their remedies upon particular categories of people, neither is able to fashion an appropriate remedy. As Pothier comments:

In different ways, all of the judges of the Supreme Court of Canada dealt with this care on a categorical basis. They all ultimately ignored the fact that the inclusion/deduction system has differential impacts depending on the circumstances. By looking only at the level of the couple and only at the aggregate effect, the majority assumed without question that the family law system is capable of properly allocating the tax saving in the 67 per cent of cases where there is one, and ignored the fact that for a substantial minority of cases (29 per cent), the inclusion/deduction system produces a net loss. On the other hand, the two dissenters, in looking only at the recipient spouse, ignored the cases where the works, both theoretically and practically, as it is supposed to, and ordered a remedy applicable independently of whether there was, in the particular circumstances, a demonstrated detriment in cumulative effect.  

Unfortunately, even though L'Heureux-Dubé J. and Cory and Iacobucci JJ. adopted a more nuanced, effects-based rather than an exclusively grounds/group based approach, ultimately, neither avoid the 'all or nothing' pitfalls of categorical thinking. L'Heureux-Dubé J. adopts a multi-stage process of thinking about whether Ms. Thibaudeau is part of a group that suffers a burden for the purpose of section 15:
Thus, although Ms. Thibaudeau and Mr. Chainé fell within the 67 percent of couples that the government claims benefit as “couples” from the inclusion/deduction system, the regime in practice not only uniquely disadvantages Ms. Thibaudeau by cutting into the money she available for the children, but also uniquely enriched Mr. Chainé to the extent that he saved tax because his marginal tax rate would have been higher than that of Ms. Thibaudeau [because the judge did not ‘gross-up’ enough]. It is, therefore, absolutely indisputable that Ms. Thibaudeau suffered a significant inequality. The question then becomes, is she simply an individual who fell through the cracks of an otherwise equitable system, or is the system itself generally unequal to custodial parents as a group?

In my view...[i]mportant systemic factors preclude the family law system from properly filing the lacuna left by the inclusion/deduction provisions of the ITA. 

Eventually, however, she bases her conclusion upon the prioritisation of one particular sub-group of people:

A denial of equality does not necessarily require that all members of a group be adversely affected by the distinction. It suffices that a particular group is significantly more likely to suffer an adverse effect as a result of a legislative distinction than any other group...

And as the extract from the analysis of Pothier quoted above implies, this prioritisation results in a concomitant de-emphasis of the interests of others within the larger group.

Cory and Iacobucci JJ. also distance themselves from the approach adopted by Gonthier J.: ‘[...] the functional values/relevance approach of Gonthier J. focuses narrowly on the ground of distinction and, as a result, omits an analysis of the discriminatory impact of the impugned distinction.’ Essentially, Cory and Iacobucci JJ.’s disagreement with L’Heureux-Dubé J. and McLachlin J. relates to their factual conclusion regarding the overall efficacy of the system and the source of any fault in its operation:

If there is any disproportionate displacement of the tax liability between the former spouses (as appears to be the situation befalling Ms. Thibaudeau), the responsibility for this lies not in the Income Tax Act, but in the family law system and the procedures from which the support order
originally flow. This system provides avenues to revisit support orders that may erroneously have failed to take into account the tax consequences of the payments. Therefore, in light of the interaction between the Income Tax Act and the family law statutes, it cannot be said that s. 56(1)(b) of the Income Tax Act imposes a burden upon the respondent within the meaning of s. 15 jurisprudence.\textsuperscript{45}

Through a little causal 'slight of hand', Cory and Iacobucci JJ. are able to characterize Ms. Thibaudeau, and her circumstances as anomalous within the broader group of custodial parents. This analysis follows statements made by Iacobucci J. in the earlier case of \textit{Symes v. Canada}\textsuperscript{46} [hereinafter 'Symes']:

\begin{quote}
[...] it would seem self-evident that if only some women were adversely affected by a provision, it might be possible to fashion remedies to respond only to the affected subgroup, rather than to all women...Following upon this acknowledgement, however, the important thing to realize is that there is a difference between being able to point to individuals negatively affected by a provision, and being able to prove that a group or subgroup is suffering an adverse effect in law by virtue of an impugned provision. As already noted, proof of inequality is a comparative process: \textit{Andrews, supra}.\textsuperscript{47}
\end{quote}

Ironically, in my opinion, the remedy which would have been ordered by L'Heureux-Dubé J. also largely ignores her own valuable caution in \textit{Egan v. Canada}\textsuperscript{48} [hereinafter 'Egan']:

\begin{quote}
We will never address the problem of discrimination completely, or ferret it out in all its forms, if we continues to focus on abstract categories and generalizations rather than on specific effects. By looking at the grounds for the distinction instead of at the impact of the distinction on particular groups, we risk undertaking an analysis that is distanced and desensitized from real people's real experiences. To make matters worse, in defining the appropriate categories upon which findings of discrimination may be based, we risk relying on conventions and stereotypes about individuals within these categories that, themselves, further entrench a discriminatory status quo.\textsuperscript{49}
\end{quote}

In fashioning a remedy, both the decisions of the dissenters and that of the majority in different ways reinforce stereotypes. As Pothier puts it:

\textit{Thibaudeau} amounts to sex discrimination because it bases policy on sexual stereotypes without regard to the accuracy of those stereotypes...It
is not, as the dissent in *Thibaudeau* concludes, the taxation of child maintenance payments in the hands of the custodial parent per se [which is discriminatory]. Rather, it is the fact that the inclusion deduction system is *mandatory*, without regard to the particular circumstances.\(^50\)

Whether the Court defines the relevant group, or ground, by reference to the individual claimant or adopts a more systemic perspective, once it engages in a comparison between 'categories' of individuals or groups it suppresses differences within both categories. Therefore, in *Thibaudeau* for example, 'no one asked whether section 15 is amenable to tracking...differential effects.'\(^51\) Or as I would put it, none of the judges considered a comparison of the many, not just two, communities of interests raised by this case. As Nitya Iyer argues: '[I]nevitably, categorising involves making assignments of similarity and difference: things within the category are relatively similar, they are collectively differentiated from things outside of the category.'\(^52\)

As the *Thibaudeau* decision reflects, another problematic aspect of categorical comparison making within equality discourse is that it generally lacks the potential to undermine, or challenge normative notions. The reason the norm cannot be effectively challenged is that it constitutes the central comparator. As Duclos explains, the comparative process in equality discourse 'takes that privileged group as the unstated model upon which antidiscrimination law is based...The categories are separate because they represent a set of possible paths of divergence from the central group norm.'\(^53\) This aspect of equality discourse is reflected even more clearly in the reasoning of Lamer C.J. in *Mossop*, discussed above. In that decision, in trying to come to terms with the meaning of 'family status' in the *Canadian Human Rights Act*, the then Chief Justice seems to cite with approval the following excerpt from the reasoning of Marceau J.A. of the Federal Court of Appeal:
A status, to me, is primarily a legal concept which refers to the particular position of a person with respect to his or her rights and limitations as a result of his or her being member of some legally recognized and regulated group. I fail to see how any approach other than a legal one could lead to a proper understanding of what is meant by the phrase "family status". Even if we were to accept that two homosexual lovers can constitute "sociologically speaking" a sort of family, it is certainly not one which is now recognized by law as giving its members special rights and obligations.  

This line of reasoning, of necessity, leads Lamer C.J. to the conclusion that 'family status' must be understood by reference to its 'normative' meaning: heterosexual.

In a related issue, because the norm becomes the central comparator, comparative equality discourse can only comprehend situations of discrimination that result from a one-step divergence from the norm. This explains Lamer C.J.'s position in Mossop that because 'sexual orientation' is not specifically listed as a 'separate' ground, 'family status' can bear no meaning other than a heterosexual one. In this way, the norm which constitutes the root of the discrimination—which in the case of Mossop was the heterosexism within the concept of 'family'—not only remains unchallenged, it is virtually erased. This type of erasure is also manifest in the reasons of Sopinka J. in the case of Eaton v. Brant County Board of Education [hereinafter 'Eaton']. He says this about the status of being disabled:

The principal object of certain of the prohibited grounds is the elimination of discrimination by the attribution of untrue characteristics based on stereotypical attitudes relating to immutable conditions such as race or sex. In the case of disability, this is one of the objectives. The other equally important objective seeks to take into account the true characteristics of this group which act as headwinds to the enjoyment of society's benefits and to accommodate them.

Eaton was a case in which the parents of a disabled girl claimed that a decision to place their daughter in a special class, outside of the regular class setting, constituted discrimination based on disability contrary to section 15 of the Charter. Sopinka J. came
to the conclusion no ‘burden’ had been imposed on the girl because the decision was made in her ‘best interests’ considering her ‘true’ characteristics and abilities. As Claire Young explains, Sopinka J.’s description of the ‘true characteristics’ of disabled persons is essentially an attempt to define ‘them’ as inherently different, without comparator. The flaw with this analysis is that difference is inherently a relational concept, which has no meaning without a comparator.

The premise is that the disabled are truly different. However, lost in the analysis are two important insights about difference and disability. The first involves the practical recognition of the role that stereotyping and social construction play in our understanding of disability and accommodation. What Sopinka J. might consider as “true” is actually much more complex and variable than his analysis admits. Put slightly differently, “the biological condition...needs to be] conceptually disentangled from the...social ramifications...of the condition.” Disabled individuals are no less vulnerable and subject to negative misunderstandings than other disadvantaged groups within Canadian society. Received truths about what such individuals can or cannot do often dissolve upon scrutiny, revealed as simply falsehood.58

As Margot Young puts it, '[e]quality analyses, at their best, involve critical examinations of how difference is recognized, given meaning, and valued.'59 Unfortunately, this is precisely the aspect of equality analysis that tends to be obfuscated, or even completely omitted, within the categorical framework employed by the Supreme Court of Canada. Again in Eaton, Sopinka J. says:

It follows that disability, as a prohibited ground, differs from other enumerated grounds such as race or sex because there is no individual variation with respect to these grounds. However, with respect to disability, this ground means vastly different things depending upon the individual and the context.60

Sopinka J. posits truly essentialized subjects. Leaving aside for the moment the added complexity of intersectional discrimination, even within the category of race, for example, there is most certainly difference. In significant ways, a South Asian in Canada may experience his or her ‘race’ differently than someone of African origin. A
fourth generation Anglo-Saxon Canadian most certainly would experience their race
differently from a person of colour. A wealthy person of colour would also be racialized
quite differently than someone who is poor. Even Sopinka J.'s concession regarding the
differences within the category of 'disability' is flawed because as Margot Young points
out:

Sopinka J. does not draw from his observation of this variation the
important conclusion that the category is itself artificial and that this
reduction of infinite traits into a single named strand of difference is the
means by which the powerful exclude the powerless. And this, ultimately,
is no less true of gender and race.61

The power to exclude—and to obfuscate the oppression of all but those who are only
one-step away from the central norm—is also apparent in the nature of claimants who
are successful. In contrast to the Eaton case where the claimant was clearly 'different'
from the other children in a regular classroom, in Re Blainey and Ontario Hockey
Association et al.62 [hereinafter 'Blainey'] the claimant argued that her exclusion from a
boys' hockey team because she was a girl was discriminatory. Because she was hardly
different at all from the boys on the hockey team to which she demanded admission,
she was successful.63

Given that 'difference' is a relational concept, it is also important to pay attention to
how the central norm or comparator is assumed and understood: what, or who it
represents. For as Radha Jhappan explains, although many middle-class white
feminists, by their essentialism, have 'pitted all women against all men, in reality, they
crave equality with only certain men.'64 This phenomenon is manifest in the claim of
Symes, who wanted to be compared exclusively to businessmen. As L'Heureux-Dubé
insisted:

This is not a case about the advantageous position in society some
women garner as opposed to other women, but, rather, an examination of
the advantaged position that businessmen hold in relation to businesswomen.\textsuperscript{65}

The inability of categorical equality analyses to cope with the reality of complex lives and oppression is so clearly apparent in \textit{Symes} because the split in the Court forced it to grapple with the judicial fallacy of essentialized subjects or homogeneous groups of people. In \textit{Symes},  Jacobucci found that s. 63—which limited the amount that could be claimed as a deduction for child-care expenses—could only be found to impose a 'burden' if the claimant could establish that he or she was a member of a sub-group which disproportionately incurred the actual monetary cost of child care. In this case, he found that:

\[\ldots\] the appellant is unable to demonstrate a violation of s. 15(1) of the \textit{Charter} with respect to s. 63 of the Act, since she has not proved that s. 63 \textit{draws a distinction based upon the personal characteristic of sex}. In reaching this conclusion, however, I wish to note that I do not reject that such a distinction might be proved in another case. The appellant in this case belongs to a particular sub-group of women, namely, married women who are entrepreneurs. It is important to realize that her evidentiary focus was skewed in this direction.\textsuperscript{66} (Italics added.)

Iacobucci J.'s categorical reasoning has curious results. He repeatedly chastises \textit{Symes} for neglecting to provide the court with a broad picture of women's experiences in regard child-care experience:

I pause to note that the appellant's focus upon self-employed women to the exclusion of women employees is a very curious aspect of this case...Undoubtedly, it was the juxtaposition of s. 8(2) with s. 9 of the Act which led the appellant to take the position she took. By virtue of s. 8(2) of the Act, employees are generally prohibited from making any deductions from employment income. Accordingly, the appellant thought it desirable to distance herself from employees in this case. When considering her arguments with respect to statutory interpretation, this approach is understandable. When considering her \textit{Charter} arguments, it is less so.\textsuperscript{67}

Yet, it is precisely just such a narrow category in which \textit{Symes} is placed for the purpose of identifying whether or not she experiences a burden. Iacobucci J. reasons that even
though there may be other sub-groups of women which experience a burden in relation to child care expenses, Symes is not a member of those sub-groups, and cannot therefore rely on their experiences to establish discrimination. Symes' experiences are erased in two ways: first, her membership within the larger group of women who experience a 'group-based [inequality] in power' are ignored; and consequently, her 'sex-based' inequality in relation to men, namely, the disproportionate responsibility for childcare—as compared to all men, businessmen and men who earn incomes—is also erased. Her shared interest with all women to overcome the patriarchal allocation of the burdens of child-care is completely erased. As Iacobucci J. himself puts it:

[...]

L'Heureux-Dubé J., on the other hand, flatly rejects Iacobucci J.'s conclusion that Symes did not prove a burden related to her sex:
This is the reality in which Ms. Symes lives -- as a lawyer and as a mother. A reality in which she suffers disproportionately to men and, as such, is discriminated against on the basis of her sex. She has proven that she has incurred an actual and calculable price for child care and that this cost is disproportionately incurred by women.\textsuperscript{72}

\ldots

I certainly agree that all women suffer severe social and financial costs associated with child-bearing and rearing and that these costs are incurred whether a woman is a self-employed small business owner, a lawyer, an employee or a fulltime homemaker and caregiver. In fact, it is my view that all women, as a consequence of gender, suffer disadvantages associated with caring for children.\textsuperscript{73}

However, although she comes to the opposite conclusion to that of Iacobucci J., she also engages in a form of bracketing of relevant social circumstances other than gender. Put simply, she ignores the ways in which Symes' interests diverge from those of many less privileged women. L'Heureux-Dubé J. starts out with a broad survey of the situation of women vis-à-vis the responsibility for child-care:

I am not unaware that income tax deductions are undoubtedly not the best way for government to provide assistance with regard to the high cost of child care and that the allowed deductions under s. 63 are not representative of the real cost of child care. Perhaps child care should not even be subsidized through the tax system but, rather, provided for in another manner. As is obvious, income tax deductions benefit only those who have a taxable income and, as such, are a form of upside down subsidy which allows a person with more income to spend more on child care and, consequently, to receive a greater portion of the government tax expenditure program in return and the deduction does not help families who cannot afford child care in the first place. Finally, this type of government subsidy provides no assistance to the development of badly needed child care facilities...Neither am I ignorant of the fact that the disparate treatment of employed persons and businesspersons under the Act is problematic and may require future examination.\textsuperscript{74}

Nevertheless, ultimately she effectively dismisses the relevance of this context:

However, these are not the issues before the Court. Ms. Symes has not put in issue the enormously complex quandary of the disadvantagement of women generally through the continuing social and economic cost of child care. She has raised the much narrower question, although not in any way insignificant, of the discrimination suffered by businesspersons -- primarily
women -- under an interpretation of the Act that disallows child care expenses as a business expense incurred for the purpose of gaining or producing income from her business. That issue, specifically the distinction between business taxpayers, must be answered.

Ms. Symes' claim cannot be addressed simply by pointing to the greater issue of the position of women generally. To grant her a deduction to which she is clearly entitled under the Act in no way diminishes the larger issue of child care as it applies to all parents, particularly women, a matter to be left for another day. I agree with the intervener the Charter Committee on Poverty Issues that the appellant does not challenge s. 63 on the basis of either its inadequacy or its inclusiveness; Ms. Symes challenges the constitutionality of s. 63 only to the extent that it affects the court's interpretation and application of other provisions of the Act governing business deductions.

My colleague refers to family status as a possible alternative approach, as well as to the fact that single mothers may provide a clearer example of hardship suffered as a consequence of child care than does Ms. Symes. This may well be true, but this is no reason why the appellant's rights, under the Act or under s. 15 of the Charter, should not be protected. Discrimination cannot be justified by pointing to other discrimination. This is not the standard to which Mr. Andrews was held in Andrews v. Law Society of British Columbia, supra. In Andrews, the Court did not look at the respondent and justify the infringement of his rights under s. 15 on the basis that, in all other aspects of his life, as a white male lawyer of British descent, such discrimination on the basis of citizenship was acceptable, since he was likely better off than most other persons in the disadvantaged group of non-Canadian citizens. Neither can this be the standard to which Ms. Symes is to be held. This is not a case about the advantageous position in society some women garner as opposed to other women, but, rather, an examination of the advantaged position that businessmen hold in relation to businesswomen. If each claim under s. 15 of the Charter required that all the problems of discrimination with respect to a particular group be remedied as a result of one investigation, Andrews would probably not yet have been decided. The fact that Ms. Symes may be a member of a more privileged economic class does not by itself invalidate her claim under s. 15 of the Charter. She is not to be held responsible for all possible discriminations in the income tax system, nor for the fact that other women may suffer disadvantages in the marketplace arising from child care. As the appellant argues, we cannot "hold every woman to the position of the most disadvantaged women, apparently in the name of sex equality."75

This approach is mirrored in the subsequent decision of McLachlin J. in Thibaudeau, discussed above:

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[Section] 15(1) was designed to protect *individuals* from unequal treatment. Its opening words state: 'Every individual is equal before and under the law and has the right to the equal protection and benefit of the law' (emphasis added). Where unequal treatment of one individual as compared with another is established, it is no answer to the inequality to say that a social unit of which the individual is a member has, viewed globally, been fairly treated.\(^76\)

In this way, both L'Heureux-Dubé and McLachlin JJ. throw the baby out with the bathwater. I would agree with L'Heureux-Dubé J. that Symes should not be 'held responsible' for the broader systemic inequalities of providing child-care subsidies through a regressive tax system. However, I would not agree that as a Charter claimant she should be able to demand that the Court base its understanding of what 'sex' oppression is *exclusively* from her perspective, that of a relatively privileged woman. Her approach effectively reinforces a kind of 'additive' analysis that at best can only deal with conflicts between sub-groups of women, but can never comprehend the intersectional identities and communities of interests shared by *all* women, including those who are relatively privileged. As Gotell put it:

> Here we can observe the construction of 'sexism' as a first order category, while 'other' forms of 'discrimination' are presented as distinct and are relegated to qualifiers.

... Paradoxically, while the discourse of 'double disadvantage' purports to emphasize relevant 'differences' among women, it functions to reinforce the notion that we all share an essential 'womanhood'. The experience of 'womanhood' that is affirmed is, not surprisingly, the experience of the white, middle-class, able-bodied, heterosexual woman. This is because, when we 'subtract' all 'additional' forms of 'discrimination' — race, class, sexual orientation, ability and so on — it is she who remains.\(^77\)

Ultimately, in *Symes* neither L'Heureux-Dubé nor Iacobucci JJ. are able, or perhaps willing, to consider the connections between the oppression of women vis-à-vis child-care generally. Through his categorical reasoning, Iacobucci limits himself to a
consideration of the 'facts' of a manufactured sub-group of women: 'married women who are entrepreneurs.' While L'Heureux-Dubé—in strong defence of the right of claimants to demand a myopic consideration of complex issues—adopts a line of reasoning which sounds more like a description of bush-survival tactics than a doctrine of equality: whoever makes it to Court, gets the spoils.

Ironically, both Iacobucci and L'Heureux-Dubé JJ. acknowledge that equality might better be served by a consideration of the broader, systemic issues of the ways in which child-care responsibilities tend to oppress all women. Iacobucci divides consideration of what he terms an 'instrumental' perspective versus a broader perspective in this way:

Instead of focusing upon the manner in which s.63 of the Act operates as a child care system, the present appeal focused only upon the propriety of an instrumental result. This Court was invited to use the Charter to rectify a disadvantage allegedly suffered by businesswomen vis à vis businessmen, and, in the process, this Court was invited to ignore the effect of allowing a complete deduction on the rest of the system. At the s. 1 stage of Charter analysis, however, such an instrumental approach is inappropriate. In order to examine properly the validity of legislative objectives in a case such as the present one, it is important to consider both the operation of the Act as a whole, and the operation of other government systems relating to child care.

In a similar fashion, I do not believe that the tax deduction for child care expenses could be properly examined by this Court without consideration being given to the entire range of government responses to family and child care issues. If inequities are proved to exist within s. 63, surely it must be relevant to consider the extent to which other government programs respond to those inequities. I do not, by any means, wish to suggest that a complete response to child care exists in Canada, nor do I say that courts need only arrange the pieces of a complicated child care puzzle. Instead, I simply wish to recognize that proper examination of a taxation response to child care expenses requires one to contextualize the fiscal response to the greatest degree possible, in order to determine whether an apparent inequality discloses a justifiable legislative objective of a much broader kind.
According to this approach, a claimant must prove an adverse effect related to the particular sub-group of which she is a part. Stated conversely, a woman cannot rely upon a more general 'social burden' (or common interest with all women) as proof of discrimination in the section 15 stage of the analysis. However, the government can utilize the full range of systemic and social benefits to justify any infringement.

For her part, after engaging in a relatively nuanced review of the larger issues associated with child care and women's oppression generally, L'Heureux-Dubé J. simply dismisses this 'larger issue of child care as it applies to all parents, particularly women [as] a matter to be left for another day.' The 'first come, first served' approach to Charter equality doctrine is also problematic for reasons related to the final obstacle that I will discuss preventing the Charter from being used to address the experiences of intersectional discrimination and oppression. In his book Just Words, referred to earlier, Joel Bakan trenchantly points out a shortcoming of many other Charter analysts:

My concern is with the tendency in their analyses, whether in favour of the Charter or against it, to pay insufficient attention to the constraining influences of economic, social, and political conditions on the operation and effects of the Charter. That is what I try and avoid here. I argue throughout this book that the Charter, and particularly its failure to advance social justice, must be explained in relation to the specific conditions in which it operates. All political institutions, including the Charter and rights, are necessarily constrained in their operation by the wider social system that they are established to govern. That is why it is necessary to be sceptical of both Charter optimism and pessimism when they are based on allegedly essential features of the Charter or rights. The emancipatory and egalitarian potential of the Charter ultimately depends on the social and historical circumstances surrounding its use...

(Emphasis added. References omitted.)

The operational aspect of Charter litigation, and all litigation-based models of rights for that matter, which I wish to briefly discuss, is accessibility. There are numerous factors that influence a person's, or group's, ability to access litigation-based models of
rights. For example, in the context of provincial human rights claims, Nitya Duclos commented as follows:

There are at least four reasons that might explain the underrepresentation of racial minority women complainants in human rights cases. First, these women may simply lack awareness that they have legal rights to be protected from discrimination and of the procedures for remedying violations of those rights.

... 

[...] a third reason why racial minority women in general may not assert human rights claims, is that these women may distrust the legal system. They may feel, with good reason, that the law is not there to help them or that is they make a claim, it will backfire against them.

...

Fourth, the complaints adjudication process may not respond to the reality of these women's lives.⁸²

In addition to these briefly outlined points, I would add that in the Charter context especially, cost may be a determinative factor. It is trite that litigation is an expensive process and one that is beyond the financial means of many Canadians. The implications of this fact should not, however be thought of as a strictly 'class' related issue since '[p]overty and economic inequality are rooted in intersecting relations of class, gender and race'⁸³ to name just a few.

Although recognition of Charter enshrined rights may not always require litigation, it is one of the primary methods for both defining and enforcing those rights. The trouble with L'Heureux-Dubé J.'s claimant focussed approach is that Symes (and others who share her privilege) not only have the ability to pursue a section 15 case all the way to the Supreme Court of Canada to enforce their individual rights, but also to define the very meaning of equality in general.
To review, in this section I have attempted to identify and discuss the obstacles currently preventing the courts from understanding the Charter's guarantee of equality in ways that are likely to remedy the oppression of people who experience intersectional oppression and discrimination. My central point has been that a primarily ground or group-based approach is an oversimplification of people's complex lives and social locations; it is one which generally only permits a one-step divergence from a central, and therefore unchallenged, norm. Even when Justices, such as L'Heureux-Dubé and Iacobucci JJ., reject a strictly grounds-based approach, they inevitably revert to a kind of myopic categorical or group-based comparative model of equality. This model incorrectly elevates all of the interests of individual claimants within a group of people to the level of a singular and universally applicable group interest. Lastly, because of the costs and other practical operational aspects of Charter litigation, the Charter process also tends to exclude many people who experience intersectional oppression. All of these factors result in the perspective of those who are relatively privileged being disproportionately reflected in the Court's understanding of equality.

In the next section of this chapter I will continue to develop these themes by focussing on Supreme Court of Canada of decisions arising from claims of 'sexual orientation' discrimination in particular. And whereas in the last section I focussed on a discussion of doctrine, in this section I will devote equal attention to the substantive impact of 'positive' decisions, on 'people'—rather than only 'claimants'—of varied circumstances. I will use these decisions as a case-study to demonstrate the ways in which the broader political and socio-economic circumstances operate to reinforce the doctrinal privileging of people who would not experience systemic oppression 'but for' their 'sexual orientation'.
After Mossop, the *Egan* case was the next challenge to a law based upon a claim of 'sexual orientation' discrimination to be heard by the Supreme Court of Canada. The claimant in *Egan* was a gay man whose same-sex conjugal partner of several decades wished to claim an allowance 'which accord[ed] to spouses of pensioners under the [Old Age Security Act] whose income falls below a stipulated amount, an allowance when they reach the age of 60, payable until they themselves become pensioners at age 65.' The subject of the challenge was the exclusively opposite-sex definition of 'spouse'—which included eligible unmarried co-habitants—that prevented the benefit from being extended to *Egan* and his partner.

The Supreme Court of Canada split right down the middle, with Sopinka J. writing the swing decision. La Forest J. (for Lamer C.J., Gonthier and Major JJ.) found that because the distinction of 'sexual orientation' was 'relevant' to the legitimate legislative objective of supporting elderly, opposite-sex couples who formed the fundamental procreative unit of Canadian society, there was no violation of section 15. L'Heureux-Dubé J. (for herself), McLachlin J. (for herself) and Cory and Iacobucci (for themselves) all found that there was a violation, and that it was not justifiable under section 1. Sopinka J. rounded off the majority of five Justices who found a section 15 violation, but also found that this violation was justified pursuant to section 1. Because Sopinka J.'s finding in regards to section 1 was adopted by the La Forest and the three with him, ultimately, the exclusively opposite-sex definition of spouse was upheld.

In *Egan*, the decision authored by La Forest J. is the clearest example of a categorical approach in which two judicially imagined groups—the central norm and the
group to which the claimant 'belongs'—are compared against each other in order to
determine whether or not discrimination exists. The first category, or group, posited by
La Forest J. is a highly normative and ideological vision of the heterosexual family. He
defines the objective of the Old Age Security Act in reference to this group:

[...] its 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, and that they are
generally cared for and nurtured by those who live in that relationship. In
this sense, marriage is by nature heterosexual. It would be possible to
legally define marriage to include homosexual couples, but this would not
change the biological and social realities that underlie traditional
marriage.\textsuperscript{85}

No evidence is cited in support of his 'factual' conclusions. In this way, La Forest J.
centres a normative version of family which, by definition, resists challenge from those
with non-heteronormative sexualities. As Dianne Pothier observes:

[The conclusions] of La Forest were prefaced by the following introduction:
"Suffice it to say that marriage has from time immemorial been firmly
grounded in our legal tradition, one that is itself a reflection of long
standing philosophical and religious traditions." The fundamental difficulty
with Justice La Forest's analysis can be demonstrated by the fact that the
just quoted sentence still rings true when only one word, "marriage," is
changed: "Suffice it to say the homophobia has from time immemorial
been firmly grounded in out legal tradition, one that it itself a reflection of
long standing philosophical and religious traditions." The juxtaposition is
meant to convey that the idea that traditional attitudes toward marriage
have been highly relevant in fostering homophobia. In other words, the
concept of relevance is apt to reinforce the anti-egalitarian sentiments that
section 15 was supposed to challenge.\textsuperscript{86}

La Forest J.'s approach vividly demonstrates the ways in which a categorical and group-
based approach to equality discourse is, at the very least, highly amenable to the
obfuscation, rather than elucidation, of one of the primary sources of oppression: the
unequal distribution of the power to define groups, manufacture difference and name
categories. This power is precisely what he exercises in his dismissal of those non-
heteronormative families who do, in fact, 'occasionally adopt or bring up children' as 'exceptional and in no way [affecting] the general picture.'

Unlike La Forest J., Iacobucci and Cory JJ. attempt to avoid the centering of a normative model of family as the ideological fulcrum upon which comparison is based:

In this case, a great deal of time was spent demonstrating the nature of the way, compassionate, caring relationship that very evidently existed between the appellants. In passing, it is, I think, worth mentioning that this need not be done in every case. It is not necessary that the evidence demonstrate that a homosexual relationship bears all the features of an ideal heterosexual relationship for the relationship of many heterosexual couples is sometimes far from ideal. The relationships between heterosexuals must vary as infinitely as of the personalities of the individuals involved.

These sentiments reflect earlier statements by L'Heureux-Dube J. in Mossop in which she not only challenged the traditional two-parent heterosexual notion of 'family' as ideological, but also went on to specifically undermine the normative value unthinkingly ascribed to it:

The reality is, as Didi Herman writes in "Are We Family?: Lesbian Rights and Women's Liberation" (1990), 28 Osgoode Hall L.J. 789, at p. 802, that families are "sites of contradiction". Some people find family life oppressive, others seek supportive family relations but cannot find them. While the family may provide emotionally satisfying experiences, it may also be the site of brutal, violent and terrifying experiences. However, despite the very real potential for oppression within the family, most people continue to believe that the family also has the potential to be the site of our most important human connections, and that it is there intimate connections that offer the greatest possibilities for individual fulfilment.

Unlike in Mossop, in Egan L'Heureux-Dubé J. goes on to challenge another central aspect of the categorical reasoning employed by the Court in its equality/discrimination doctrine, that being the grounds-based approach. Although this challenge was not adopted by any of the other Justices of the Supreme Court of Canada, because it relates to a central topic of this paper, I will quote it at length. She starts out by
reviewing prior statements made by the Supreme Court of Canada about the

essence of discrimination:

I believe that the essence of “discrimination” was largely captured by McIntryre J., speaking for the majority of the Court in this point, in Andrews, supra, at p. 171:

“It is clear that the purpose of s.15 is 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 recognized at law as human beings equally deserving of concern, respect and consideration.”

Equality, as that concept is enshrined as a fundamental human right within s. 15 of the Charter, means nothing if it does not represent a commitment to recognizing each person’s equal worth as a human being, regardless of individual differences. Equality means that our society cannot tolerate legislative distinctions that treat certain people as second-class citizens, that demean them, that treat them as less capable for no good reason, or that otherwise offend fundamental human dignity. In a similar vein, I refer to the words of Wilson J. in McKinney v. University of Guelph, [1990] 3 S.C.R. 229, at p. 387 (dissenting, but not on this point):

“It is, I think, now clearly established that what lies at the heart of s. 15(1) is the promise of equality in the sense of freedom from the burdens of stereotype and prejudice in all their subtle and ugly manifestations. However, the nature of discrimination is such that attitudes rather than laws or rules may be the source of discrimination.”

To summarize, at the heart of s. 15 is the promotion of a society in which all are secure in the knowledge that they are recognized at law as equal human beings, equally capable, and equally deserving. A person or group of persons has been discriminated against within the meaning of s. 15 of the Charter when members of that group have been made to feel, by virtue of the impugned legislative distinction, that they are less capable, or less worthy of recognition or value as human beings or as members of Canadian society, equally deserving of concern, respect, and consideration. These are the core elements of a definition of “discrimination” -- a definition that focuses on impact (i.e. discriminatory effect) rather than on constituent elements (i.e. the grounds of the distinction).
She then goes on to specifically challenge the efficacy of a grounds-based approach as a tool for uncovering discrimination:

[...] the current vehicle of choice for fulfilling the purposes of s. 15, the "grounds" approach, is incapable of giving full effect to this purpose.

This approach inquires into whether the characteristics of the ground are sufficient to constitute a basis for discrimination, rather than into the absence or presence of discriminatory effects themselves.

We must remember that the grounds in s. 15, enumerated and analogous, are instruments for finding discrimination. They are a means to an end. By focusing almost entirely on the nature, content and context of the disputed ground, however, we have begun to approach it as an end, in and of itself. Such an approach, in effect, approaches s. 15 not by giving primacy to the word "discrimination", but rather by giving primacy to the nine 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. 93

At this juncture, an important question must be asked. If the purpose of s. 15 is really to provide a broad guarantee of protection against discrimination in all its forms, then why does it matter if the basis for distinction is abstractly "analogous" to the enumerated categories? The answer, I think, is that it does not matter. As this Court has frequently acknowledged, the essence of discrimination is its impact, not its intention. The enumerated or analogous nature of a given ground should not be a necessary precondition to a finding of discrimination. If anything, a finding of discrimination is a precondition to the recognition of an analogous ground. The effect of the "enumerated of analogous grounds" approach may be to narrow the ambit of s. 15, and to encourage too much analysis at the wrong level.

We will never address the problem of discrimination completely, or ferret it out in all its forms, if we continues to focus on abstract categories and generalizations rather than on specific effects. By looking at the grounds for the distinction instead of at the impact of the distinction on particular groups, we risk undertaking an analysis that is distanced and desensitized from real people's real experiences. To make matters worse, in defining the appropriate categories upon which findings of discrimination may be based, we risk relying on conventions and stereotypes about individuals within these categories that, themselves, further entrench a discriminatory status quo. More often than not, disadvantage arises from the way in which society treats particular individuals, rather than from any characteristic inherent in those individuals.
For all of these reasons, I am led inevitably to the conclusion that a truly purposive approach to s. 15 must place “discrimination” first and foremost in the Court’s analysis. This is not to say that the essential characteristics of the nine enumerated grounds are irrelevant to our inquiry. They are, in fact, highly relevant. I turn now to a discussion of their important role in an approach that looks to groups rather than grounds, and discriminatory impact rather than discriminatory potential.\(^{94}\)

Finally, L’Heureux-Dube J. proposes an alternative process for determining whether or not discrimination is evident in a particular situation:

In my view, for an individual to make out a violation of their rights under s. 15(1) of the Charter, he or she must demonstrate the following three things:

1. that there is a legislative distinction;
2. that this distinction results in a denial of one of the four equality rights on the basis of the rights claimant’s membership in an identifiable group; and,
3. that this distinction is “discriminatory” within the meaning of s. 15.

The following remarks are devoted to elaborating upon the last criterion.

A distinction is discriminatory within the meaning of s. 15 where it is capable of either promoting or perpetuating the view that the individual adversely affected by this distinction is less capable, or less worthy of recognition or value as a human being or as a member of Canadian society, equally deserving of concern, respect, and consideration. This examination should be undertaken from a subjective-objective perspective i.e. from the point of view of the reasonable person, dispassionate and fully apprised of the circumstances, possessed of similar attributes to, and under similar circumstances as, the group of which the rights claimant is a member.

The means by which courts may give principles expression to this notion is perhaps best illustrated by a simple analogy. If a projectile were thrown against a soft surface, then it would leave a larger scar than if it were thrown against a resilient surface. In fact, the depth of the scar inflicted will generally be a function of both the nature of the affected surface and the nature of the projectile used. In my view, assessing discriminatory impact is, in principle, no different. In order for a court to determine from a subjective-objective perspective whether the impugned distinction will leave a non-trivial discriminatory “scar” in the group affected, it is instructive to consider two categories of factors: (1) the nature of the group adversely affected by the distinction and (2) the nature of the interest
adversely affected by the distinction. In my view, neither is completely meaningful without the other.\textsuperscript{95}

By abandoning a strictly grounds-based approach, L’Heureux-Dubé J. opens the door much more widely for the consideration of intersectional oppression. By minimizing the need for a claimant to squeeze him or herself into one or more \textit{pre-defined} categories, her approach reflects the reality that people do not start out in separate categories, which can only then be (re)incorporated by some convoluted system of overlapping grounds (as was proposed by Lamer C.J. in \textit{Mossop}). Rather, L’Heureux-Dubé J. takes an approach reflecting the fact that people do not fit into watertight compartments in the first place:

To expand briefly upon the example of domestic workers, under traditional adverse effects doctrine, what percentage of the group would have to have been women in order to succeed in a sex-based discrimination claim? Fifty percent? Ninety percent? As this Court found in \textit{Symes v. Canada [1993] 4 S.C.R. 695}, it is difficult to draw a principled distinction along such lines. I believe that it is both easier and more intellectually honest to examine the effect of the distinction on the group affected. In this case, that group would be domestic workers, and the only decision is: does the distinction discriminate against domestic workers.

As I noted in \textit{Canada (Attorney General) v. Mossop, [1993] 1 S.C.R. 554} at p. 645, categories of discrimination cannot be reduced to watertight compartments, but rather will often overlap in significant measure. When assessing the social context of the impugned distinction, it is therefore of relevance that a significant majority of domestic workers are immigrant women, a \textit{subgroup} that has historically been both exploited and marginalized in our society. Awareness of, and sensitivity to, the realities of those experiencing the distinction is an important task that judges must undertake when evaluating the impact of the distinction of members of the affected group. Discrimination cannot be fully appreciated or addressed unless courts’ analysis focuses directly on the issue of whether these workers are victims of discrimination, rather than becoming distracted by ancillary issue such as “grounds”, be they enumerated or analogous.\textsuperscript{96} (Emphasis added)

However, as this excerpt makes clear, it is clear that the new process that she proposes still emphasizes \textit{the claimant’s} membership within a particular \textit{group}, which in turn is
based upon a particular, prioritized distinction. My point being, that no matter how narrowly, or broadly, the group is defined, it remains a form of categorical thinking. As such, it inherently homogenizes individuals, both inside and outside of the category. Diversity within that group can only be comprehended by the addition of sub-distinctions, resulting in sub-groups. Thus in the example above, domestic workers only became a group because they could be comprehended as a sub-group of women who also faced the added sub-distinction of immigration status. Therefore, L'Heureux-Dubé J. potentially reincorporates many of the problems of 'additive analysis' discussed above: the perspective of relatively privileged women is inherently prioritized because without the addition of other oppressions—race, class, ability etc.—you are left with a white, middle-class able-bodied women.

For example, under L'Heureux-Dubé J.'s revised process, Symes could still be understood as facing a (purely) sex-based distinction in relation to businessmen. Because she does not personify any additional sub-distinctions—such as being non-white, not middle class or disabled—she could still demand that the Court ignore these perspectives despite the fact that the vast majority of women are not relatively privileged self-employed women. To paraphrase L'Heureux-Dubé J.'s example of 'domestic workers' in Egan quoted above: 'In this case, that group would be self-employed women, and the only decision is: does the distinction discriminate against self-employed women.'

Ironically, by de-emphasizing the grounds of discrimination, L'Heureux-Dubé J. in one very significant way furthers the ability of claimants—many of whom will likely be relatively privileged given the costs of litigation—to demand that the Court consider their group's perspective, to the exclusion of all others who may face 'other discrimination.'
Returning to the decisions of L'Heureux-Dubé J. and Cory and Iacobucci JJ. in 
_Egan_, both decisions construct a category of 'sexual orientation' that is relatively class 
privileged. For example, L'Heureux-Dubé J. says this:

> We can further inform our understanding of the purpose of s. 15 by 
> recognizing what it is not. The _Charter_ is a document of civil, political and 
> legal rights. It is not a charter of economic rights. This is not to say, 
> however, that economic prejudices or benefits are irrelevant to 
> determinations under s. 15 of the _Charter_. Quite the contrary. _Economic 
> benefits or prejudices are relevant to s. 15, but are more accurately 
> regarded as symptomatic of the types of distinctions that are at the heart 
> of s. 15: those that offend inherent human dignity._

(Emphasis added.)

I take this to be an acknowledgement of the systemic manifestation of poverty in groups 
such as women, people of colour and the disabled. Yet, L'Heureux-Dubé J. limits her 
awareness of this aspect of discrimination to the hypothetical. Thus, in _Symes_, for 
example, she did not consider the feminization of poverty as it would interact with the 
regressive taxation benefit to which Symes claimed right. Nor did she consider that 
perhaps it would be women or colour and disabled women who might disproportionately 
be _unable_ to access this benefit, and would as a consequence, end up funding the 
child-care of women relatively more privileged than themselves.

This flawed reasoning is, in my opinion, repeated in _Egan_. Egan and his partner have 
obviously decided that they can afford to be recognized as a spousal unit, even though 
it may result in a decrease of their combined income. As such, they are in a position to 
benefit from the cultural purchase that comes with being recognized as a same-sex 
couple. The Court, consequently, is able to adopt the perspective of the claimants, while 
minimizing those of others:

> To summarize, tangible economic consequences are but one 
> manifestation of the _more_ intangible and invidious harms flowing from 
> discrimination, which the _Charter_ seeks to root out...

...
It should be noted, finally, that neither s. 1 nor s. 15 calls for a balance sheet approach to discrimination (i.e. summing up all direct and incidental economic benefits to a particular distinction and comparing them against the sum of the economic prejudices, in order to see if there is a net economic prejudice). Such an approach to discrimination loses the forest for the trees... 101

... For the reasons he sets out, I agree with Cory J. that it is clear that homosexual couples are denied the equal benefit of the law in the basis of the legislative distinction in s. 2 of the Old Age Security Act, which defines couples as relationships of "opposite-sex". That Egan and Nesbit are able to claim higher benefits as separate individuals does not alter the fact that they have been denied the benefits, both tangible and intangible, of filing for old age benefits as a couple. It would take too narrow a view of the phrase "benefit of the law" to define it strictly in terms of economic interests. Official state recognition of the legitimacy and acceptance in society of a particular type of status or relationship may be of greater value and importance to those affected than any pecuniary gain flowing from that recognition. 102 (Emphasis added)

Then again, it may not be of greater importance. Indeed, the two may be inversely related. The error with this reasoning is that it assumes that there is one particular type or status of same-sex relationship. For example, the cultural purchase that may accrue to Egan and his partner Nesbit by virtue of the recognition of their relationship may have an inverse result for a person in a same-sex couple who is collecting social assistance. In the current socio-political climate, the cultural labels which are likely to attach to this 'type' of relationship, once 'recognized' (or more accurately 'discovered') are more likely to be 'deadbeat' and 'fraud'. Therefore, it might also be important to ask how many same-sex couples will, for the first time, feel compelled to go back into the closet about their relationship—to prevent any public recognition of it, to hide from the prying eyes of their social assistance workers—as a result of the expansion of the definition of 'spouse'. The privileging of a classless perspective is even more patent in the decision of Cory and Iacobucci JJ who write:

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The appellants are not alleging that the discrimination is unique or particular to their personal situation but, rather, that the Act discriminates against all homosexual common law couples who are living in a state which is comparable to heterosexual common law couples. It follows that the appellants must demonstrate that homosexual couples in general are denied equal benefit of the law, not that they themselves are suffering a particular or unique denial of a benefit. The precise mathematical calculation of benefits which could be paid to couples either as individuals or as a couple is of little assistance as it will inevitably vary from case to case depending upon the particular economic circumstances of each couple and each member of that couple. Rather, a reading of the legislation reveals that it denies the spousal allowance to all homosexual common law couples and thus, it is established that the Act has denied equal benefit of the law.  

Cory J. could have simply acknowledged that from the perspective of Egan and Nesbit, and those in similar situations, the economic advantage of the closet is outweighed by the costs of enforced invisibility. However, because of the perceived need to connect all burdens and privileges to one distinction—in this case, 'sexual orientation'—he explicitly and incorrectly homogenizes the experiences of all same-sex couples.

The potentially negative implications of this approach for people who experience intersectional oppression, with class aspects, may not be as apparent in the context of Egan because that case was, and largely remains framed as one involving simply the extension of a benefit. However it is specious to consider the implications of the extension of spousal status to same-sex couples in relation to only one benefit given the vast array of legal institutions and systems organized around that status.

Most importantly, contrary to the assumption underlying the following statement of Cory J. in Egan, the status of 'spousal unit' is not always voluntarily chosen:

To force homosexual common law couples to claim federal and provincial support as individuals because they would get more money would be to imprison them in their privileges. Heterosexual couples might also be better off financially if they claimed government subsidies as individuals rather than as a couple. Yet, cohabiting heterosexual persons have the right to make a choice as to whether they wish to be publicly recognized as a common law couple. Homosexual couples, on the other hand, are
denied the opportunity because of the definition of "spouse" set out in the challenged Act. The public recognition and acceptance of homosexuals as a couple may be of tremendous importance to them and to the society in which they live. To deny homosexual couples the right to make that choice deprives them of the equal benefit of the law.\textsuperscript{104} (Emphasis added.)

Again, as argued above, the nature of the 'public recognition', and most certainly its 'acceptance' will vary depending upon 'other' factors which determine a person's position within society. The combination of these factors, not to mention the type of same-sex relationship at issue, may ultimately result in the compounding of certain axes of oppression. The 'benefit' assumed by Cory J., and others, is therefore more accurately portrayed as a complex calculus, which may have multivalent results. As I discussed in the last chapter, amidst this complexity there nevertheless appears to be discernible patterns reflecting who is more likely to benefit from the acquisition of the status of 'spousal unit' and who is not.

Consider the incorporation of same-sex couples—by designation, \textit{not} voluntary adoption—into the income tax system as 'spousal' units. Just as the regressive nature of the \textit{Income Tax Act} would have resulted in relatively privileged women having the costs of their full-time nannies being supplemented by those relatively less privileged (had Symes been successful) so too the incorporation of same-sex couples will result in those least able to absorb it, facing a higher tax burden.\textsuperscript{105} While those couples who are relatively poor will face an overall \textit{increase} in tax burden, same-sex couples in which one relatively wealthy spouse, supports another who has a very low or no income, will benefit from a decreased tax burden. Consequently, because of their relative wealth, 'gay men will, on average, benefit more than lesbians by being included as spouses under the Act.'\textsuperscript{106} I would add that people of colour and disabled people would also disproportionately bear an additional tax burden for analogous reasons.
Indeed, Claire Young has argued that in general, the incorporation of same-sex couples into the income tax system as spousal units will result in a net revenue increase for the government of Canada:

Indeed there is one particularly compelling reason for the government to consider redefining "spouse" in the Act to include the partners of lesbians and gay men. Such a change would likely result in a significant revenue gain for Revenue Canada. When the definition of spouse was amended in 1993 to include "common law" spouses the Department of Finance estimated that the change would result in increased tax revenues over a 5 year period of 9.85 billion. The bulk of the increased revenue was attributable to the rules that require the combining of spouses income for the purpose of the refundable GST tax credit and the refundable child tax benefit. This resulted in the overall reduction in the value of the tax credits owing to taxpayers.107

Ironically, in Rosenberg v. Canada (Attorney General)108, which was a successful challenge to a particular opposite-sex definition of spouse in the Income Tax Act, the government of Canada found themselves using the Statistics Canada 1990 Survey of Consumer Finances 'to demonstrate that lesbians and gays had more to lose than to gain by winning the Charter challenge....'109 One of the important points which this example highlights, is that 'a Charter victory for one litigant who challenges the tax system may reinforce the oppression of others subject to the same system because of the inherent biases of the system itself.'110 As I shall discuss shortly, in my opinion, the Court has yet to develop a systemic approach to these kinds of conflicts of interests.

Given the multivalent implications of being recognized as a 'spouse', it is very important to interrogate how much choice is involved in relation to 'acquisition' of spousal status. For example, in relation to the Income Tax Act Claire Young has pointed out that:

Unlike the granting of employment benefits, the Act is not about the exercise of options. The income tax return under the Act requires an individual to state the name of her spouse and to certify that the information on the return is correct. The Act makes it an offence to make a
false or deceptive statement in a return. Therefore lesbians and gay men will, if they are considered to be spouses under the Act, have to declare the name of their partner.¹¹¹

In the context of public assistance, mentioned above, the level of personal choice involved is arguably even less. For example in Ontario, as of March 1, 2000 applicants or recipients of social assistance who reside with anyone other than certain relatives¹¹² 'must provide the Director with information so that the Director can determine if the co-resident meets the definition of a spouse or same-sex partner¹¹³ and consequently part of the same 'benefit unit.' It is the total income of the benefit unit that is used to determine both eligibility for and the level of social assistance to be paid to applicants. The extension of spousal status to same-sex couples is, therefore, consistent with (as opposed to 'caused by') the trend to force a growing range of people to rely upon another individual for support when they cannot fully provide for their own basic needs.

The ability to choose to rely upon another individual for support, or to form a relationship of economic interdependence is, in this current socio-political climate on the decline. This is related to the continual claw back of 'public' social benefits in favour of a more privatized model of support of those who cannot provide for their own and their dependants basic needs without assistance. Margot Young gave the following general overview of the socio-political climate:

The first [noteworthy trend] is the course of evolution of the Canadian welfare state, in particular, the current ascendance of neo-liberalism as the orthodoxy of state restructuring. Advocacy of restricted state involvement in social and economic spheres is paired with an enhanced emphasis on individualism and the role of private structures – the market, community and family – in providing support services and distribution of resources previously delivered by the state. The result has been government retrenchment and the reduction of social program funding at both the federal and the provincial level.¹¹⁴
This ascending ideology of the privatization of social costs is also apparent in the
decision of the Supreme Court of Canada in *M v. H.*\(^{115}\) [hereinafter *M. v. H.*], which is
the last decision related to 'sexual orientation' discrimination that I will discuss in detail
in this paper.\(^{116}\)

*M. v. H.* was a challenge to the exclusively opposite-sex definition of 'spouse' in the
post-breakdown spousal support provisions of Ontario's family law. Essentially, a
lesbian claimed that these provisions discriminated against her on the basis of 'sexual
orientation' insofar as they denied her the right to apply for an order for support against
her former partner, simply because she was of the same-sex as that partner. All but one
member of the Supreme Court of Canada—namely, Gonthier J.—agreed with the
claimant. Although it would be incorrect to suggest that the majority's decision was
based on the fact that an extension of the definition of 'spouse' in this context would
save the money for the government, it was clearly a factor they considered. As Andrée
Lajoie, writing with two others, wryly observed:

> [...] this recognition of equality and the consequent prohibition of
discrimination against gays and lesbians have remained at the level of the
abstract affirmation of principle or have implied little or no expenditure of
public money: including sexual orientation as a prohibited ground of
discrimination in *Haig* and *Egan* and reading it in in *Vriend*, or including
same-sex couples in the definition of spouses, but only for alimony
purposes in *M. v. H.* It has never entailed the application of that principle
when conflicting dominant values would suffer in consequence: a formal
conception of equality, coupled with respect for traditional family values
and deference toward the legislator have kept the core-majority (Lamer,
Ma forest, Sopinka and Major) from recognizing gay and lesbian families
and couples and granting them social benefits in *Mossop* and *Egan*, a
position that only a new majority on the Court could overpass in *M. v. H.*
and then only after reiterating 21 times in as many paragraphs that it
favored reducing public money expenditure and four times that it had no
impact on the interests of heterosexual couples and families...\(^{117}\)
(Emphasis added.)
In terms of class analysis, the most obviously problematic aspect of the privatization of the social costs of individuals in need, is that not everyone has a spouse, former spouse, or any person for that matter, who is capable, far less willing, to provide for their basic needs. Moreover, it is trite that given the history of abuse within ‘spousal’ relationships, some women in particular may, for very good reason, not want to turn to another individual for support. And sadly, this risk of abuse, and more importantly, the ability to escape abuse is itself related to the financial means of the victim.

In M. v. H. therefore, the court once again adopts a perspective which, in several ways, tacitly prioritizes the perspective of those who are relatively class-privileged while conversely ignoring the perspectives of those who are class-oppressed. And unfortunately, given the systemic aspects of Canadian poverty, those people who are poor are also likely to experience gender, race and oppression related to disability, among others. However, in terms of the Court’s approach to the potential for ‘intra-group’ conflicts of interest, the most striking aspect of the M. v. H. decision is, in my opinion, the following statement of from the judgement of Cory and Iacobucci JJ., writing for six others:

I acknowledge that some individuals in same-sex relationships, including H. herself, have expressed reservations about being treated as "spouses" within the family law system (see, e.g., OLRC Report on the Rights and Responsibilities of Cohabitants Under the Family Law Act, supra; B. Cossman and B. Ryder, Gay, Lesbian and Unmarried Heterosexual Couples and the Family Law Act: Accommodating a Diversity of Family Forms (1993), a Research Paper prepared for the OLRC, at pp. 135-39). However, these differences of opinion within the same constitutionally relevant group do not constitute a reason to defer to the choices of the legislature. Indeed, as noted by EGALE, given that the members of equality-seeking groups are bound to differ to some extent in their politics, beliefs and opinions, it is unlikely that any s. 15 claims would survive s. 1 scrutiny if unanimity with respect to the desired remedy were required before discrimination could be redressed.118
With all due respect, this statement succinctly captures the crudity of the Supreme Court of Canada's approach to the complexity of people's identities and the process of constitutional litigation. This analysis ignores the reality that people who have an aspect of their identities in common, do not thereby share one common identity. In *M. v. H.*, the Court held firm in its reliance upon blunt categories of people 'within the same constitutionally relevant group.' The Court did not even attempt to deal with the reality that the attribution of the rights and responsibilities of 'spousal' status to same-sex couples carries with it the potential to entrench 'other' oppressive charges inherent to that status and the institutions which incorporate it. Instead, it dismissed the shared interests of many queer women, people of colour, poor people and people whose relationships are not patterned upon the 'spousal' ideal, as mere differences in 'politics, beliefs and opinions.'

In my opinion, there is no escaping the conclusion that this statement reinforces an essentialist understanding of 'sexual orientation' discrimination, one which clearly prioritizes the perspective of those who would not experience oppression but for being non-heterosexual. Nevertheless, it is also fair to conclude that the majority in *M. v. H.* did not set out to privilege the perspective of those same-sex couples who did not experience intersectional oppression. This holds true for many of the other decisions that I have critiqued in this paper.

Fundamentally, *M. v. H.* was framed as the simple elimination of a distinction which prevented a group of people—namely those in same-sex relationships—from being included in the category of 'spouse'. As such, it could not comprehend a challenge to the category itself. It was *not really* about the benefits of the category, the oppressions that it may or may not reinforce, or even, about the nature of those who would then be
included within that category. It was simply about whether the same-sex/opposite-sex distinction was discriminatory, no more, no less. That the case was framed in this way is not surprising. As Carl Stychin has observed:

For the white, able-bodied gay man, essentialist arguments possess tremendous power if they become widely accepted. If his sexual orientation is considered “irrelevant” and an “accident of birth”, then the gay man can take on the trappings of male gender privilege.\textsuperscript{121}

Moreover, it is not surprising that the Court dismissed out of hand the voices of those who insisted that the Court look at a much broader, much more complex set of questions. As Kathleen Jones put it:

\textit{[...]} having an official voice is...a function of what kind of voice the system is willing to hear. Those who speak in ‘different’ voices — that is, different from what has been normalized as the voice of authority — cannot become the official spokespeople...because their grammar and logic are discredited as particularistic, vernacular, or idiomatic. Official voices speak in the language of universalized discourse and engage with the rational speech of rational political actors. Other voices ramble.\textsuperscript{122}

One of the primary reasons, in my opinion, that the system or process of Charter litigation seems unable to hear the voices of those who experience intersectional oppression is that \textit{invariably}, that kind of oppression is fundamentally inter-connected with class oppression. And the complexity of class oppression is in all likelihood, simply beyond the reach of the Charter. Bakan summarised the situation in this way:

This exclusive focus on the actions of two actors in relation to one another (whether individual/state, individual/private organization, or individual/individual) leaves out the complicated and ongoing processes through which relations among multiple actors and actions combine to construct people’s actual life conditions and shape their choices, capacities, identities, and desires. Equality rights claims are thus unable to get at the causes of inequality and other social ills; they deal only with discrete symptoms, leaving underlying structures untouched. That is why, as Russell (1994) observes, ‘the Charter has done little to alter power relations, redistribute wealth, or promote social welfare within the Canadian version of welfare capitalism.’...
To take one example, the economic dimensions of social inequality, and poverty in particular, are beyond the reach of the Charter, and this would be true even were its rights interpreted to impose positive obligations on both governmental and private actors. Poverty and economic inequality are rooted in intersecting relations of class, gender and race, not in particular acts of government or private actors.123 (References omitted.)

To this point I have identified many of the obstacles within Supreme Court of Canada jurisprudence about section 15 preventing the recognition and redress of intersectional oppression. In the conclusion to this chapter I will explore (as opposed to answer in any comprehensive sense) whether the system of section 15 Charter litigation is able to hear those who experience intersectional oppression? Ultimately, I will argue that although section 15 does have some potential to serve the needs of those who experience intersectional oppression, this potential is severely limited by several core aspects of equality discourse itself.

In summary, in this section of this chapter I have attempted to identify the ways in which the Supreme Court of Canada has reinforced essentialist models in decisions about the validity of an exclusively opposite-sex definition of 'spouse'. Those members of the Court who did not find this distinction discriminatory clearly reinforced a model of 'family' that normalizes a heterosexist and illusory version of Canadian families. On the other hand, those members of the Court who found the definition discriminatory, tended to reinforce a model of same-sex spouse which was almost completely devoid of any consideration of the diversity of same-sex relationships and the people in them. In so doing, they tacitly approved an approach to these types of cases which prioritized the perspective of those who do not experience discrimination 'but for' their sexual orientation.
CONCLUSION: THE POTENTIAL USES OF ‘EQUALITY’ VS. ‘JUSTICE’ TO REDRESS INTERSECTIONAL OPPRESSION

As I have tried to demonstrate throughout this chapter, there are significant obstacles preventing people who face intersectional discrimination from being able to effectively utilize section 15 of the Charter to redress the oppression they face. Although, Charter equality discourse has been applied to recognize that multiple grounds of discrimination may overlap in a given situation to make a distinction discriminatory, the perspectives of those people who experience intersectional oppression have been consistently marginalized. To illustrate the former type of application, consider the decision of the Nova Scotia Court of Appeal in the case of Dartmouth/Halifax (County) Regional Housing Authority v. Sparks\(^{124}\) [hereinafter ‘Sparks’]. In Sparks the Court considered the validity of statutory provisions which denied tenants of public housing who had been in possession for five years or more of ‘security of tenor’ in contrast to tenants of private residential rental units. As a consequence, tenants in public housing could be evicted on shorter notice than tenants in private housing.

Early in its decision the Court noted that the ‘respondents admitted that women, blacks and social assistance recipients form a disproportionately large percentage of tenants in public housing and on the waiting list for public housing.’\(^{125}\) Based upon this, the Court found that:

[...] the impugned provisions amount to discrimination on the basis of race, sex and income; it is not necessary in this case to show adverse effect discrimination as argued by the appellant. An adverse impact analysis has been applied in cases involving legislation which is neutral on its face. Sections 10(8)(d) and 25(2) are not neutral; they explicitly deny benefits to a certain group of the population (public housing tenants) while extending them to others. The fact that the legislation describes the group (public housing tenants) by reference to a factor which is not a listed ground in s. 15(1) does not avail the respondent...argues that the legislation is not “based on” such characteristics...
The phrase "based on grounds relating to personal characteristics" as used in the Andrews case cannot be taken to mean that the personal characteristics must be explicit on the face of the legislation, nor that the legislation must be manifestly directed at such characteristics. Such an interpretation would fly in the face of the effects-based approach to the Charter, espoused by the Supreme Court of Canada.¹²⁵

The Court then went on to find that the effects focussed scrutiny required by section 15 demanded that courts:

[...] take account not merely of the manner in which the group is described in the legislation, in this case as "public housing tenants." In addition regard must be had to the characteristics shared by the persons comprising the group.¹²⁷

In so reasoning, the Court effectively moved the focus away from the proper definition of “the” group of people, to an exploration of the community of interests shared by these groups. Therefore, in this case, the Court concluded that:

As a general proposition persons who qualify for public housing are the economically disadvantaged and are so disadvantaged because of their age and correspondingly low incomes (seniors) or families with low incomes, a majority of whom are disadvantaged because of they are single female parents on social assistance, many of whom are black. The public housing tenants group as a whole is historically disadvantaged as a result of the combined effect of several personal characteristics listed in s. 15(1). As a result, they are a group analogous to those persons or groups specifically referred to by the characteristics set out in s. 15(1)...¹²⁸

The recognition of communities of interests (or “shared characteristics”) in Sparks, is a vitally important first step towards an effective treatment of intersectional oppression.

Whether the distinction discussed is associated with an ‘adverse impact’ (the ‘sex’ related inequality identified in the Symes’ dissent) or is patent in a legislative distinction (the ‘opposite-sex/same-sex’ distinction in M. v. H.), the Court tends to dismiss what it has described as conflicts within the ‘same constitutionally relevant group.’ However, in my opinion the Sparks decision provides a good foundation upon which the Court can
develop an equality discourse which can cope with (rather than simply dismiss) the complexities of oppression.

The Court has erected a number of obstacles that purport to excuse it from having to deal with what it usually characterizes as a conflict within a group of people:

- it emphasizes the centrality of a single ‘ground’ of discrimination;
- this emphasis in turn results in the comparison of two artificially homogenized groups;
- the adversarial litigation process encourages relatively privileged claimants to demand that the Court consider their (pure) legal perspective to the exclusion of the multi-faceted identities of real people; and finally,
- the complexity of the systems under consideration, and the multivalent implications of Court ordered remedies, are both dismissed as outside of the Court’s limited role, and comprehension.

In claims for simple inclusion within legal systems which contain and reinforce systemic oppression related to race, gender, ability and class, all of these factors combine to result in remedies which offer limited benefit, if any, for those who experience intersectional oppression.

It may be that the Court simply cannot do any differently because of the inherent limitations of legal equality discourse. As Nitya Iyer explains, the simplicity of the legal discourse of equality comes at a price:

The virtue of its categorical approach is that it allows some people to feel as if Canadian society is becoming more egalitarian by presenting oversimplified depictions of social relations as conflicts for judges to resolve. In this way, law achieves legal equality while preserving social inequality. Real change requires us to engage directly, creatively, and politically in conceptions of, and struggles for, social justice.129

And as Radha Jhappan explains, this process of oversimplification and comparison in legal equality necessarily results in essentialized subjects and therefore, an incomprehension of intersectional analysis and complex social positions:

Such essentialism may be unavoidable in constitutional terms: section 15 of the Charter, for example, is structured in such a way as to require claimants to identify themselves by a characteristic that is implicitly
contrasted to that of the dominant "advantaged" group (such as race, national or ethnic origin, colour, religion, sex, age, or mental or physical disability). Equality means always having to say who you are equal to, always comparing one group against another, almost invariably on one axis, and, for this reason, it will not let claimants out of the similarly situated, likes alike, sameness/difference traps, regardless of the new language used. Sameness/difference is a function of essentialism and vice versa.¹³⁰

... 

[...] the equality frame is simply too narrow to contain the complex intersectional analysis because it is by nature comparative (one group compared against another), essentialist, and, as I shall argue presently, impossible.¹³¹

When faced with a conflict between those who experience discrimination related to one ground and who claim simple inclusion (which is easily categorized and processed by section 15 equality discourse) versus those who experience intersectional discrimination related to systemic oppression, the Court errs on the side of that which is easily translated into a legal algebra.

Nevertheless, the Supreme Court of Canada seems to have begun a dialogue about the appropriate process for dealing with conflicts of interests between and among historically disadvantaged groups. In the decision of Corbiere v. Canada (Minister of Indian and Northern Affairs)¹³² [hereinafter 'Corbiere'], the Court considered whether a law that denied members of Indian bands who lived off-reserve the right to vote in their Bands' elections constituted discrimination contrary to section 15 of the Charter. It was clear that some members of Indian Bands, particularly those that lived on-reserve, objected to the extension of voting rights to those who did not. Although two decisions were written, the Court unanimously held that the law was discriminatory and could not be justified by section 1 of the Charter.

True to form, in the majority decision written by McLachlin and Bastarache JJ. and concurred with by three others the Court was only able to comprehend the conflict after
squeezing the facts of the case through a convoluted analysis of "embedded"

analogous grounds:

[...] we note that the analogous ground of off-reserve status or Aboriginality-residence is limited to a subset of the Canadian population, while s. 15 is directed to everyone. In our view, this is no impediment to its inclusion as an analogous ground under s. 15. Its demographic limitation is no different, for example, from pregnancy, which is a distinct, but fundamentally interrelated form of discrimination from gender. "Embedded" analogous grounds may be necessary to permit meaningful consideration of intra-group discrimination.\(^{133}\)

Like McLachlin and Bastarache JJ., L'Heureux-Dubé J. writing for three others ultimately concluded that the analogous ground in this case was 'off-reserve band member status.'\(^{134}\) However, unlike McLachlin and Bastarache JJ., she adopted a slightly more flexible, and therefore, in my opinion, more sophisticated approach to the nature of section 15 'grounds':

I should note that if indicia of an analogous ground are not present in general, or among a certain group in Canadian society, they may nevertheless be present in another social or legislative context, within a different group in Canadian society, or in a given geographic area...The second stage [of determining whether the treatment is related to an analogous ground, and how it should be defined] must therefore be flexible enough to adapt to stereotyping, prejudice, or denials of human dignity and worth that might occur in specific ways for specific groups of people, to recognize that personal characteristics may overlap or intersect (such as race, band membership, and place of residence in this case), and to reflect changing social phenomena or new or different forms of stereotyping or prejudice.\(^{135}\)

The most problematic aspect of the majority decision stems from its reliance upon the comparison of two relatively disadvantaged groups.

I would argue that the Court could have produced a more socially sensitive analysis if it had focussed more on an analysis of the ways that the interests of on- and off-reserve natives not only diverge, but also the ways in which they converge. Such an analysis might look something like this:
The right of natives who live on-reserve to vote in band elections reflects their right to govern themselves, at least to a degree. By contrast, one of the primary ways the autonomy of native people has been thwarted in the past was through policing of their residence, whether on- or off-reserve. The law in question in this case, frustrates the dignity and autonomy of off-reserve natives in a manner that reflects the historically discriminatory treatment meted out to non-natives as compared to non-native Canadians.

One of advantages of this type of analysis is that the differences among native people can be employed in an effort to better appreciate, and hopefully challenge, the systemic oppression faced generally by native people. Instead, the Court adopted an approach in which the general oppression became secondary to an analysis of whether those who lived off-reserve faced discrimination in relation to those who did not.

The majority of the Court essentially traced the source of the discrimination to a sub-group of aboriginal people, namely those who live on-reserve:

The conclusion that discrimination exists at the third stage of the Law test does not depend on the composition of the off-reserve band members group, its relative homogeneity or the particular historical discrimination it may have suffered. It is the present situation of the group relative to that of the comparator group, on-reserve band members, that is relevant...It is accepted that off-reserve band members are the object of discrimination and constitute an underprivileged group...[however e]ven if all band members living off-reserve had voluntarily chosen this way of life and were not subject to discrimination in the broader Canadian society, they would still have the same cause of action. They would still suffer a detriment by being denied full participation in the affairs of the bands to which they would continue to belong while the band councils are able to affect their interests...\(^{136}\) (Emphasis added.)

Although there is clearly some conflict of interest between the two groups, surely it is ludicrous to ultimately trace the source of the oppression to the relative advantage of a sub-group of a larger group, both of which have been historically disadvantaged.

Therefore, when legislation impacts on various groups, particularly is those groups are disadvantaged, the subjective-objective perspective will take into account the particular experiences and needs of all of those groups.\(^{137}\)

...
When analysing a claim that involves possibly conflicting interests of minority groups, one must be especially sensitive to their realities and experiences, and to their values, history, and identity. This is inherent in the nature of a subjective-objective analysis, since a court is required to consider the perspective of someone possessed of similar characteristics to the claimant...

Because of the groups involved, the Court must also be attentive to the fact that there may be unique disadvantages or circumstances facing on-reserve band members. However, no evidence has been presented that would suggest that the legislation, in purpose or effect, ameliorates the position of band members living on-reserve, and therefore I find it unnecessary to consider the third contextual factor outlined in Law.\textsuperscript{138}

Unlike McLachlin and Bastarache JJ., L'Heureux-Dubé J. arrives at the conclusion that the treatment is discriminatory through a vigorous incorporation of the historical and current context of aboriginal people within Canadian society, and the types of oppression which they have faced:

This history shows that Aboriginal policy, in the past, often led to the denial of status and the severing of connections between band members and the band. It helps show why the interest in feeling and maintaining a sense of belonging to the band free from barriers imposed by Parliament is an important one for all band members, and especially for those who constitute a significant portion of the group affected, who have been directly affected by these policies and are now living away from reserves, in part, because of them.

All these facts emphasize the importance, for band members living off-reserve, of having their voices included when band leadership is chosen through a process of common suffrage as set out in the legislation. They show why the interest in s. 77(1) is a fundamental one, and why the denial of voting rights in this context has serious consequences from the perspective of those affected. They show why there is not only economic, but also important societal significance to the interests affected by the differential treatment contained in s. 77(1): Law, \textit{supra}, at para. 74.\textsuperscript{139}

Ultimately, however, L'Heureux-Dubé J. misses the point that ‘competing interests’ between groups can be indicative of a larger system of oppression:

Even when the interests of various disadvantaged groups are affected, s. 15(1) mandates that government decisions must be made in a manner
that respects the dignity of all of them, recognizing all as equally capable, deserving, and worthy of recognition. The fact that various minorities or vulnerable groups may have competing interests cannot alone constitute a justification for treating any one of them in a substantively unequal manner, not can it relieve the government of its burden to justify a violation of a Charter right on a balance of probabilities....

Therefore, I would argue that by focussing on discussions of shared and divergent communities of interests, rather than the proper definition of sub-groups, the Court will open up an important process for coming to terms with the complex causes of oppression.

Was the Court's decision in Symes wrong? Would the dissenting decision of the sole two women Justices of the Court have been more appropriate? Would the interests of ‘equality’ been served if Sopinka J. had swung the other way in Egan? Should ‘M.’ have been denied the right to look to her former partner for support and recuperation of the economic contribution she made through her time, effort and sacrifice of other opportunities? These questions, I think, are impossible to answer. They are impossible to answer unless and until many other questions are asked and answered. For example, would a positive decision in Symes have resulted in the government merely shifting around a ‘fixed’ amount set for childcare from public facilities available based on financial need to regressive tax deductions only available to the self-employed? How many same-sex couples would be pushed below the poverty line as a result of being deemed spouses? How will social assistance officers determine if same-sex co-residents should be deemed to be cohabitants who have a duty to support each other? How much will the freedom of those who prefer same-sex conjugal relationships to choose the form of their relationships be limited?

What is certain is that many of those who experience intersectional oppression, particularly where that oppression is inter-connected with class, will not be able to

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access the benefits of section 15 until courts begin to consider non-essentialized subjects. As Susan Boyd has said:

 [...] it seems to me that unless lesbian and gay efforts to achieve symbolic recognition of their families are accompanied by trenchant critiques of the limits of such recognition in delivering a redistribution of economic well-being, they will remain incomplete as political strategies, while they may simultaneously be the only legal strategies available.\textsuperscript{141}

It is just such a critique that I have attempted to articulate in this paper. It may be that for those people who experience intersectional oppression 'justice' is a better discourse upon which to rely in their efforts to promote progressive social change. As Jhappan explains:

Naturally, just as the meaning of equality has been disputed within, and outside, feminist movements, so too constructions of a "just society" will be contested. Nevertheless, justice, in my view, is a concept both citizens and courts would be better able to cope with since it allows difference, releases us from essentialist and assimilationist imperatives, lends itself much more to situational, rather than to abstract, analysis, and appeals to a sense of fairness and of treating people well, as worthy, and as deserving of respect.\textsuperscript{142}

... In contrast to the essentialist and assimilationist logic of equality claims and provisions, the justice approach switches the focus from the gender (or race, class and so on) identity of the claimant to the relationship in which they are oppressed. Justice is more flexible, therefore, in forwarding intersecting claims as it is unencumbered by narrow comparisons of ascribed identities. Justice can take account of the many and intricate relations of domination in various areas of economy and society.\textsuperscript{143}

\textsuperscript{1} Canadian Charter of Rights and Freedoms, Constitution Act, 1982, Part 1, enacted as Schedule B to the Canada Act, 1982, (U.K.) 1982, c. 11.
\textsuperscript{4} Just Words: Constitutional Rights and Social Wrongs (Toronto: University of Toronto Press, 1997) [hereinafter cited as 'Just Words']
\textsuperscript{5} Just Words, supra note 4 at 9 – 11.
7 “Where Sex Meets Class,” supra note 6 at 508 – 509.
8 “Where Sex Meets Class,” supra note 6 at 509.
9 “Where Sex Meets Class,” supra note 6 at 515.
10 “Where Sex Meets Class,” supra note 6 at 510.
11 “Where Sex Meets Class,” supra note 6 at 515.
12 “Where Sex Meets Class,” supra note 6 at 512. This point was not lost on Iacobucci J. who, as will be discussed shortly, also found that section 63 was the pivotal point of analysis.
13 “Where Sex Meets Class,” supra note 6 at 516.
14 “Where Sex Meets Class,” supra note 6 at 510.
15 As I will discuss shortly, in the case of Canada (Attorney General) v. Mossop [1993] 1 S.C.R. 554 [hereinafter cited as ‘Mossop’] the majority of the Court unilaterally decided to consider the claim as one related to ‘sexual orientation’ to the exclusion of all other grounds despite the claimants invocation of the ground of ‘family status.’
18 Mossop, supra note 15
19 R.S.C., 1985, c. H-6

20 Mossop, supra note 15 per Lamer C.J. at page 580.
21 Mossop, supra note 15 per Lamer C.J. at page 582.
22 “Disappearing Women,” supra note 17 at 33.
24 Ibid. at 244.
25 Mossop, supra note 15 per L’Heureux-Dubé J. at page 645.
26 Mossop, supra note 15 per L’Heureux-Dubé J. at pages 645 and 646.
27 Mossop, supra note 15 per L’Heureux-Dubé J. at page 646.
28 See in particular Egan v. Canada [1995] 2 S.C.R. discussed in Section II.
29 Mossop, supra note 15 per L’Heureux-Dubé J. at page 646.
30 413 F. Supp. 142 (E.D. Mo. 1976) [hereinafter cited as DeGraffenried]
31 Ibid. at 143.
32 “Patently Confused,” supra note 23 at 228.
33 Ibid.
34 Mossop, supra note 15 per L’Heureux-Dubé J. at page 646.
35 DeGraffenried, supra note 30 at 143.
36 “Patently Confused,” supra note 23 at 233.
39 Thibaudeau, supra note 37 per Gonthier J. at page 691.
40 Thibaudeau, supra note 37 per McLachlin J. at page 711.
41 “M’Aider, Mayday,” supra note 36 at 302.
42 Thibaudeau, supra note 37 per L’Heureux-Dubé J. at page 648 and 649.
43 Thibaudeau, supra note 37 per L’Heureux-Dubé J. at page 654.
44 Thibaudeau, supra note 37 per Cory and Iacobucci JJ. at page 701.
45 Thibaudeau, supra note 37 per Cory and Iacobucci JJ. at page 703.
47 Ibid. per Cory J. at pages 770 and 771.
49 Ibid. per L’Heureux-Dubé J. at pages 551 - 552.
"M'Aider, Mayday," *supra* note 38 at 329 and 330.

"M'Aider, Mayday," *supra* note 38 at 302.


Disappearing Women," *supra* note 17 at 302.


Disappearing Women," *supra* note 17 at 329 and 330.

Quoted in Mossop, *supra* note 15 per Lamer C.J. at pages 573 and 574.


bid. per Sopinka J. at page 272.


bid. at 150.

Eaton, *supra* note 56 per Sopinka J. at page 273.


As Margot Young explains:

Justine [the claimant] was an ideal section 15(1) claimant: she could play with the boys. The only difference between her and the other (male) members of the team, as far as playing hockey was concerned, was her sex: in this context, simple an “accident of birth.” Indeed, Justice was much more the “same” than she was “different.” (“A Tale of Two Girls,” *supra* note 58 at 152.)


Symes, *supra* note 46 per L’Heureux-Dubé J. at page 825.

Symes, *supra* note 46 per lacobucci J. at page 765 – 766.

Symes, *supra* note 46 per lacobucci J. at page 766.

“ A Tale of Two Girls,” *supra* note 58 at 162.

Symes, *supra* note 46 per lacobucci J. at page 770 and 771.

Symes, *supra* note 46 per lacobucci J. at page 769.


Symes, *supra* note 46 per L’Heureux-Dubé J. at page 821.

Symes, *supra* note 46 per L’Heureux-Dubé J. at page 823.

Symes, *supra* note 46 per L’Heureux-Dubé J. at pages 823 and 824.

Symes, *supra* note 46 per L’Heureux-Dubé J. at pages 824 – 826.

Thibaudeau, *supra* note 37 per McLachlin J. at page 716.


Symes, *supra* note 46 per lacobucci J. at page 765.

Symes, *supra* note 46 per lacobucci J. at page 774.

Symes, *supra* note 46 per L’Heureux-Dubé J. at page 825.


“Disappearing Women,” *supra* note 17 at 37 and 38.

Just Words, *supra* note 4 at 51.

Egan, *supra* note 48 per La Forest J. at page 526.

Egan, *supra* note 48 per La Forest J. at page 536.

“M’Aider, Mayday,” *supra* note 38 at 309.


Egan, *supra* note 48 per Cory and lacobucci JJ. at page 169.


Egan, *supra* note 48 per L’Heureux-Dubé J. at page 543.

Egan, *supra* note 48 per L’Heureux-Dubé J. at page 545.

Ibid. at 555.

"Taxing Times," supra note 105 at 546.


Kathleen A. Lahey, Are We Persons Yet: Law and Sexuality in Canada (Toronto: University of Toronto Press, 1999) [hereinafter cited as 'Law and Sexuality'] at 186.


"Taxing Times," supra note 105 at 555.

These being a 'parent, stepparent, grandparent, uncle, aunt, son, stepson, daughter, stepdaughter, grandchild, sister, brother, niece, or nephew.'


It was as a result of this decision that in October 1999 the Government of Ontario passed the


This Act modified 67 Ontario statutes, by adding the concept of 'same-sex partner' wherever legislation previously referred to 'spouses'. Included among the 67 statutes are the two which deal with social assistance in the province: Ontario Works Act, 1997 and Ontario Disability Support Program Act, 1997.


M. v. H., supra note 115 per Cory and Iacobucci JJ. at page 80.

M. v. H., supra note 115 per Cory and Iacobucci JJ. at page 80.

M. v. H., supra note 115 per Cory and Iacobucci JJ. at page 80.


Quoted in "Litigating Feminist 'Truth'," supra note 71at 99.

Just Words, supra note 4 at 51.

30 R.P.R. (2d) (N.S. C.A.) 146 – 160 [hereinafter cited as 'Sparks']

Ibid. at pages 150 and 151.

Sparks, supra note 124 at pages 155.

Sparks, supra note 124 at page 156.
128 Sparks, supra note 124 at 156.
129 "Categorical Denials," supra note 52 at 207.
130 "The Equality Pit," supra note 64 at 74.
131 "The Equality Pit," supra note 64 at 79.
133 Ibid, per McLachlin and Bastarache JJ. at page 15.
134 Corbiere, supra note 132 per L'Heureux-Dubé J. at page 62.
135 Corbiere, supra note 132 per L'Heureux-Dubé J. at page 61.
136 Corbiere, supra note 132 per L'Heureux-Dubé J. at page 19.
137 Corbiere, supra note 132 per L'Heureux-Dubé J. at page 65.
138 Corbiere, supra note 132 per L'Heureux-Dubé J. at pages 67 and 68.
139 Corbiere, supra note 132 per L'Heureux-Dubé J. at pages 89 and 90.
140 Corbiere, supra note 132 per L'Heureux-Dubé J. at page 98.
142 "The Equality Pit," supra note 64 at 91.
143 "The Equality Pit," supra note 64 at 96.

Who are gays, lesbians, bisexuals and transgender, or queer people? Are they reflected in the image of a couple of thirty-something, well dressed white men on a billboard advertisement for high-end condos rolling down an annual Pride Parade? What about a single mother who goes into a poverty law legal clinic to get advice about appealing a ruling that her same-sex lover is her ‘spouse’ and that this lover’s income should be deducted from her benefits? Or a man who was landed as a permanent resident of Canada after obtaining refugee status on the basis of his fear of persecution in his country of origin because of his sexual orientation who wants to sponsor his aging mother, but cannot because he does not earn enough income? What about a woman who is claiming support for herself and her eight year old son, from her ex-lover, after a 16 year relationship in which she stayed home and took care of a house owned by her lover and ‘their’ son? Or a boardroom full of lawyers, five women and five men, all white, all middle class or wealthy, deciding on the next ‘sexual orientation’ equality case which they will fund? Or pair of professionally employed, articulate young men standing in front of the local court house, discussing their intention to launch a lawsuit against the province for refusing to issue them a license to marry each other. They all are, or at least could be, queer.

Yet this diversity is often not reflected in the mainstream media images of queer people which are more and more becoming a part of our cultural understanding of gays, lesbians and bisexuals, even if not transgender people who still remain largely invisible to the mainstream. This diversity is also not reflected in the market studies funded by
the media, particularly the mainstream G.L.B.T. media, for the purpose of courting large corporations with the potential of lucrative ‘new’ markets for their advertisements. This diversity is also clearly not reflected in the following excerpt from the Factum of EGALE submitted in the Supreme Court of Canada proceedings in M. v. H. In arguing that the Court should not have any deference to Ontario’s decision not to incorporate conjugal same-sex relationships as ‘spouses’ within its family law support regime, EGALE said this:

In the absence of any competing rights and interests, the deferential approach to the ‘minimal impairment’ criterion does not apply. Contrary to the Attorney-General’s submissions (as para. 73-74 of his factum), the fact that the Ontario Law Reform Commission was uncertain about the best way to remedy the discriminatory exclusion of same-sex partners from the FLA support regime, and the fact that there is some disagreement within the lesbian and gay population about this issue, do not militate in favour of judicial deference to the legislated discrimination in this case. It is only in cases where the legislature was required to ‘make choices between disadvantaged groups’ or ‘to balance inequalities in the law against other inequalities resulting from the adoption of the course of action’ that this Court has identified a possible need for judicial deference to discriminatory legislative choices. The existence of differing opinions on a remedial issue is irrelevant to the s. 1 inquiry. (Emphasis in original).

In their zeal to characterize the legislative omission at issue in this case as simply ‘discriminatory’ (read ‘without complexity’), EGALE boldly asserted and relied upon many of the assumptions about the identity of G.L.B.T. people which I have attempted to dislodge in this thesis:

1. That G.L.B.T. people constitute an homogeneous group, or category of people, whose interests are similar, if not identical in relation to spousal status;
2. That this category of people is or should be defined exclusively by their ‘sexual orientation’ in equality analysis;
3. Therefore, there are no competing rights or interests within that category of people;
4. And consequently, that there is no need for the court to balance competing interests ‘between disadvantaged groups’ because these are ‘other inequalities’ immaterial to this category of people; and lastly,
5. That any suggestion to the contrary is indicative merely of ‘differing opinions on a remedial issue’.

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I can only hope that by this point, the readers of this thesis have been persuaded that these assertions are rife with unexamined notions of the identity(ies) of queer people which are either vapid in their unexamined simplicity, or selfish in their myopia.

Essentially, rather than attempt to convince the Court to adopt a nuanced approach to understanding the identity(ies) and inequality(s) of queer people—to mould its equality jurisprudence to fit the complexity of real people's lives, and the intersectional oppressions they may face—EGALE demanded that the Court simply ignore these complexities and focus exclusively on 'sexual orientation.' A graphical illustration of the equality analysis asserted by EGALE would like this:

Figure 1: Oppression, Inequality and/or Identities as Asserted by EGALE
In this thesis I have attempted to deconstruct and complicate this analysis of identity and oppression, in general and as specifically as regards queer people. I have attempted to argue that it is both conceptually flawed, and politically inefficacious to even attempt to understand or redress oppression through reference to the legal fiction that people can be described, fixed or boxed in by a single ground of identity, or oppression. I have argued that such an approach severely limits our ability to understand the reality of the complex oppressions people face, the dynamic and multivalent ways in which they intersect to result in systemic oppression. I have argued that it marginalizes the experiences of those who face intersectional oppression and stymies our ability to work together in coalition. Perhaps most importantly, I have argued that the type of analysis depicted graphically above does not reflect a natural or even effective political stance or legal strategy of the identities and goals of the GLBT people. Rather, it reflects the very partial and limited perspective of those who are relatively privileged within the queer community.

The analysis presented by EGALE above reflects a very flawed perception of a 'pure core' to GLBT equality issues. But unless only the most privileged of queer people are
to be benefited from these efforts, a more complex understanding of our identity(ies) and oppression must be utilised. I would argue that such an understanding can be graphically illustrated in this way:

**Figure 2: Systemic Oppression, Inequality(s) and Identity(ies)**

![Diagram showing interconnections between Race, Class, Sexual Orientation, Gender, and Ability]

Conceived of in this way, it becomes more apparent that insofar as there may be any 'purely gay' issues they are pertinent to none but a small few. It is an example of identity politics which should appeal to few who desire broad-based progressive social change.

Political or legal rhetoric and action based upon a myopic approach to the concept of identity—that there should be 'gay' versus 'non-gay issues'—is fatally flawed. 'Identity politics' such as this stymies our potential to work together because it falsely, and often callously assumes at a discursive level that all the people in the prioritized identity group are the same, thereby ironically, frustrating our ability to discover our interconnectivity, our potential for coalitional work based on are differences. And because it assumes,
and therefore prioritizes one perspective, it sacrifices the capacity for complex and
multi-layered analysis of social conditions. Consequently, it is an approach which
cannot articulate any vision of broad based progressive social change.

I would advocate for an alternative understanding of 'identity' which is more
accurately described as an understanding of our political identity(ies). This alternative
understanding challenges, rather than assumes that there are fixed and universal
identities. This approach uses dynamic and contested 'political identity(ies),' as opposed
to relying upon fixed and comfortable 'identity politics.'

No one can be described, categorized, captured by reference to one or even several
'fixed identities.' Even if we hyphenate ourselves into infinity—I am a gay -male-south
asian-person of colour-Caribbean-progressive-etc.-etc.—the complexity of our
identity(ies) cannot be articulated solely through hyphenation, or 'commaization.' This
process is not sufficiently complex to articulate a reasonable concept of our identity(ies)
because identity(ies) are dynamic, not static. For example, I both identify and am
identified as a 'person of color' when I am amongst gay white men. Yet, I both identify
and am identified as 'gay' when I am among straight people of color. The identity(ies)
which we embrace are partial, not universal. I am a person of color, yet I am also upper
middle class and have a higher degree in education. Does this mean that in a world
where people of color suffer disproportionately from economic deprivation and
disadvantage that I am less a person of color? When I am with white GLBT people I am,
and always will be known and perceived as a person of color. Does this mean that I am
less purely gay, soiled gay, tinted, or perhaps I should say 'tainted' by my color? Our
identity(ies), my identity(ies) can even at times be in conflict. I can admire a openly gay
member of the progressive conservative for his GLBT equality rights work, but I can
also detest his conservative political and economic goals. Identity(ies) are fundamentally relational, neither atomistic nor inherent. By this I mean that the identity(ies) and difference(s) do not inhere in any individual person, or even group of people, they exist in the relationships between and among people. I am not a person of color because of my race. Race itself is not a biological fact, it is a social construct. I am a person of color because I am not ‘white’ in a society premised upon the constructed superiority of ‘whiteness.’

Identity(ies) are also so complex because the societal conditions and institutions to which they are related are themselves complex, multi-layered and often even multivalent in their effects. Yet it is precisely this complexity which is obfuscated when we try to limit political analysis within the GLBT movement by reference to the question: ‘What is a ‘purely’ GLBT Issue?’ When ‘sexual orientation’ is characterized as the pure, natural and primary core of the GLBT movement analysis, we make the discussion irrelevant to all of those people who do not have the luxury, the privilege to adopt a one dimensional perspective, in other words, people who experience oppression on multiple and interconnected levels.

Equally important, when we choose a single, or even a hyphenated approach to identity politics, we bind ourselves to an inflexible and crude form of analysis, we severely limit our ability to meaningfully deconstruct and challenge complex social institutions and conditions. The debate is structured such that those people who have multiple perspectives have to continually push to have new categories, new hyphens added on to the agenda. And this can indeed be a frustrating burden, to have to continually justify questions which are inclusive of your needs and interests.
The implications of these realizations do not mean, however, that it is necessarily and universally inappropriate to pursue the extension of spousal status to same-sex couples, even if extension would result in the compounding of certain axes of oppression. It may be, for example, that the symbolic or cultural value that arguably comes with being able to get married may be worth more to a poor or low-income same-sex couple than the financial and class-based disadvantages that will come with incorporation into a regressive tax system which rewards rich couples and penalizes poor and low-income ones. But at the very least, these kinds of questions need to be incorporated into viable political debates.

Nor I am implying that we should sacrifice all reference to ‘identity(ies)’ or even ‘identity categories’ in the construction of political or legal agendas and strategies. If we eliminate all reference to ‘identity(ies)’ and ‘identity categories’ in political thought, we would be left with atomized individuals unable to make political connections with each other. If we eliminate all reference to ‘grounds’ of discrimination, we effectively forfeit the opportunity to participate in the evolution of Canadian Charter equality jurisprudence.

So what alternative is left? As Audre Lorde is reported to have said, ‘Working in coalition is never easy. If its easy, you ain’t doing it right.’ It isn’t easy because a common identity isn’t assumed, a shared identity is negotiated and discovered. I would suggest that we should embrace the fact that all of our identity(ies) are dynamic, and partial, and that sometimes we may even have conflicting identity(ies). But above all, I want to stress that our identity(ies) are not natural, they are not completely predetermined, they are constructed. And if we accept that identity(ies) are constructed, we have the ability to reconstruct them, even to reconstruct them differently depending upon the context, or the challenges we are facing.
For example, when I walk into a political forum and identify as a person of color, first it must be recognized that I have made that choice. In saying this, I do not mean that I can choose not to be a person of color in this white-supremacist society. Rather, what I mean is that within that political forum I have chosen to prioritize a particular set of goals, in terms of social change, related to race, or to people of color. And insofar as I have chosen to pursue a set of political goals, chosen a political identity, I should also take responsibility to articulate, to negotiate, to defend, and to discover whether and how my goals, how my political vision corresponds with other people within that forum. Francisco Valdes has described the challenges we face in terms of incorporating our identity(ies) in political movements, or as he talks about it, sameness/difference, in this way:

 [...]any particular (mis)perception of sameness or difference, whether deemed substantively ‘real’ or not, cannot become the point; the point is what we make of the perception - how we interpret sameness and difference, how we imbue perceptions of sameness and difference with cultural, legal, theoretical or political significance, and how we then accommodate each other constructively and mutually in the face of significant difference.³

We are left, in other words, with identity(ies) which are themselves commitments to a political vision. What I am proposing, therefore, is that we open up that uncomfortable place where coalition work is undertaken, that we open up that uncomfortable place in which shared identity(ies) are negotiated and discovered, not assumed nor derived from that same oppressive society we seek to change.

In this type of coalition, our shared identity(ies) are less about the categories in which society has slotted us and more about what we want society to look like. But perhaps even more importantly, what I am proposing is that if we commit to forming coalitions based upon a political identity, we also do so honestly and openly. So that if, for
example, a group wishes to organize only around the issue of the right of same-sex couples to get married, for example, regardless of even considering the implications in terms of class, gender and race, so be it. Let that be the basis upon which my interest in broadly based progressive social change is deemed irrelevant. Not on some specious notion about what is, and what is not a ‘Gay Issue.’ So that I do not have to continually reassert that I also am just as ‘gay,’ that my identity(ies), my interests, my needs, as a progressive gay man of color are equally as important through the hyphenation of my identity. Let us rather enter a space of political contestation on an equal footing, in which none of us has claim to a pure vision. Create a space in which I can be included whole, rather than excluded by the process of fragmentation of my identity(ies).

And I am certain, that on this field, I will have the advantage. I will have the advantage because I will have the flexibility to interrogate oppressive social pathologies and institutions from many, not one perspective; because I will have the freedom to work in coalition with others who share my desire for progressive social change; and because we will all be able to speak out against oppression in one voice, unfettered by hyphens and such.

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1 Factum of the Intervenor EGALE Canada Inc., M. v. H., Supreme Court of Canada.
2 Ibid. at paragraph 45 (references omitted.)
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