

Court File No. 684/00

*Ontario*  
**SUPERIOR COURT OF JUSTICE**  
**(DIVISIONAL COURT)**

BETWEEN:

**HEDY HALPERN and COLLEEN ROGERS**  
**MICHAEL LESHNER and MICHAEL STARK**  
**MICHELLE BRADSHAW and REBEKAH ROONEY**  
**PETER MAGEE and DAVID BRIGGS**  
**DAWN ONISHENKO and JULIE ERBLAND**  
**CAROLYN ROWE and CAROLYN MOFFATT**  
**BARBARA McDOWELL and GAIL DONNELLY**  
**ALISON KEMPER and JOYCE BARNETT**

Applicants

- and -

**THE ATTORNEY GENERAL OF CANADA**  
**THE ATTORNEY GENERAL OF ONTARIO**  
**NOVINA WONG, THE CLERK OF THE CITY OF TORONTO**

Respondents

**AFFIDAVIT OF BARRY D. ADAM**  
**(Sworn December 15th, 2000)**

I, Barry D. Adam, of the City of Windsor, in the County of Essex, Province of Ontario, MAKE OATH AND SAY:

1. I hold the position of University Professor (a rank superior to full professor) at the University of Windsor, and specialize in the study of: the dynamic of subordination and empowerment, the development of popular mobilization, the social status of lesbians and gay men, and HIV prevention and care. I have published four books and numerous scholarly articles and book chapters on these and related issues, and am a member of Canadian, United States, and international sociological associations, as well as professional associations for the study of HIV/AIDS and Latin America.

2. I have been requested by the Petitioners in the above matter to provide my opinion on the following points: Cross-cultural evidence of same-sex partnership and marriage; the evolution of cultural conceptions of homosexuality in the West; the impact of the Enlightenment and Anglo-American law reform on the status of lesbian and gay people; language, segregation, and structural constraints on life choices; and continuing forms of discrimination experienced by lesbian women and gay men. The statements in this Affidavit are based directly on my extensive involvement in this area of research and scholarship, and are true to the best of my knowledge and belief.

### **Cross-cultural evidence of same-sex partnership and marriage**

- 1 Anthropological and historical records reveal immense cross-cultural variation in the acceptance and repression of homosexual relations between men and between women. Some societies in some eras have imposed capital punishment on men engaging in homosexual acts, while others have held sexual friendships between men to be a social ideal of the most honorable, and even heroic, men. The treatment of homoerotic relations between women has often not been symmetric to those of men, being valued or constrained as much by gender conformity as by sexuality per se.
- 2 What emerges from the anthropological record is that at least some indigenous societies on every inhabited continent have socially valued same-sex relationships that include a sexual aspect. These relationships fall into a few major patterns typically defined by life stage, gender, status, and/or kinship (Adam 1985; Greenberg 1988; Trumbach 1989).
- 3 One major pattern, well-documented across North and South America and Polynesia, is the "berdache," "two-spirited," or transgendered form. In these societies, homosexual relations are a common part of a larger pattern where men and women take up some or most of the social roles and symbols typical of the other gender, and enter into marital relations with people with conventional gender attributes (Jacobs, Thomas, and Lang 1997; Lang 1998). The anthropological research literature reports numerous instances of men marrying both women and transgendered or gender-mixed men among aboriginal societies. There are also instances of women marrying transgendered or gender-mixed women in aboriginal societies in Canada and elsewhere.
- 4 A second major pattern takes the form of hierarchical, military, age-graded, and mentor/acolyte relationships, where adult men bond with younger, subordinate males (Dover 1978; Herdt 1984; Adam 1985; Halperin 1990). Examples of this pattern have been documented in ancient Greece, medieval Japan, pre-colonial Africa, and Melanesia. These male partnerships typically follow the same kinship rules as heterosexual relationships.
- 5 A third pattern, sometimes overlapping with the first two, orders homosexual relationships

along the same kinship lines as heterosexuality. Thus where particular clan members are considered appropriate marital partners—while members of other clans may be prohibited as incestuous—both males and females of the same appropriate clan may be considered attractive and acceptable partners. There are Australian and Melanesian cultures where, for example, one's mother's brother was considered both an appropriate marital partner for girls and an appropriate mentor (including a sexual aspect) for boys (Adam 1985). Similarly in some societies where the accumulation of brideprice is the prerequisite to attracting a wife, occasionally women with wealth are able to avail themselves of this system to acquire wives (Amadiume 1980) and men can provide a corresponding gift to the families of youths whom they take into apprenticeship. These kin-governed bonds have been documented in some societies of Australia, Africa, and Amazonia. In kin-based models of homosexual attachment, socially disapproved or “criminal” relationships refer to relationships formed between persons of inappropriate clans, regardless of gender.

## Evolution of cultural conceptions of homosexuality in the West

- 6 The roots of the political and philosophical traditions of the west are in a society deeply affirmative of homosexual relations of the mentor/acolyte model. Indeed most of the heroes of ancient Greek mythology had male lovers; the founding of political democracy is attributed to the male couple, Harmodias and Aristogeiton, who slew the tyrant, Hyppias in 514 BCE (Halperin 1990; Foucault 1978). And Socrates, in unexpurgated translations of *The Symposium*, rhapsodizes about how the love of youths leads to the love of beauty and thus to the love of wisdom. Yet the modern western tradition has suppressed, denied, and appropriated this homoerotic heritage consigning it to sin, sickness, or crime.
- 7 The gradual shaping and consolidation of Christian doctrines into the orthodox canon law articulated by medieval theologians, and the propagation and enforcement of these views by the Roman Catholic Church from the 12<sup>th</sup> to 14<sup>th</sup> centuries and onwards replaced the heroic friendships valued by the ancients with the idea of the *sodomite* (Jordan 1997). Like the traditions it suppressed, the *sodomite* cannot simply be equated with modern ideas of the *homosexual*. *Sodomy* typically referred in ecclesiastical law to a vague, sometimes comprehensive category of sexual practices which lack pro-natalist objectives, including for example, non-reproductive heterosexual acts and bestiality, as well as homosexual practices. The consolidation of church power through the first millenium of the Christian era included the gradual eradication of indigenous, European forms of sexual friendship (Boswell 1994). By the 15<sup>th</sup> and 16<sup>th</sup> centuries, sodomy became a charge pursued by the Inquisition, with varying degrees of rigour in different countries, along with its campaign to suppress Jews, witches, and other forms of religious nonconformity. In the 16<sup>th</sup> through 20<sup>th</sup> centuries, Christian orthodoxies, imposed by military conquest on indigenous populations of the Americas, Africa, and Asia, actively extinguished local forms of homosexuality as part of larger campaigns of cultural colonialism, or forced these local forms underground (Trexler 1995). The conceptualization of *homosexuality* as a sinful, non-reproductive sexual act, then became widely established where governments and empires acted in concert with institutional churches to enforce cultural and juridical dominion over much of the world's population in the Christian realm.

8 As nation states emerged from empires in the 18<sup>th</sup> through 20<sup>th</sup> centuries, many of them organized their criminal codes out of the legacy of canon law, depending on the social ingredients that went into state formation and their relation to church control. With the rise of nation states in the context of a Eurocentric, Christian, modern world-system, has emerged the modern conception of *homosexuality*, a sexual act attributed to a class of people subject to social sanction and criminal penalty (Adam 1995; Stychin 1998). As the world economy mobilized masses of people in cities, and as states devised more efficient systems of supervising, regulating, and policing their populations, homosexual men (and later women) began to fall into the criminal justice systems of Europe. From the early example of the 15<sup>th</sup> century Venetian Republic, to 18<sup>th</sup> century campaigns to catch and suppress organized sodomy—that is, the nascent gay world—in Britain, Holland, and Switzerland, state agencies (and at least in Britain, Societies for the Reformation of Morals, as well) swept up hundreds of men and some women in its punitive nets. The Dutch campaign alone resulted in 70 executions. The legacy of this nexus of church and state building has been the disciplining of same-sex eroticism, the categorization of its adherents as a people apart, and the invention of *homosexuality* as a juridical and medical category.

## Enlightenment and modern conceptions

- 9 The seeds of an alternative to the old order germinated in the Enlightenment where scientific and humanist thinking, and a rediscovery of the ancient Greek legacy of democratic politics and esthetics grew into a countermovement to theocracy. The rise of liberal democratic conceptions of citizenship initiated the disestablishment of sexual orthodoxy, permitting greater individual freedom, and extracting the state from the regulation of homosexuality. With the advent of the Napoleonic legal code, sodomy disappeared from criminal law, and as Napoleon swept through Europe evicting the mainstays of the old order, he left new nation-builders in his wake who founded legal systems without a category of *sodomy*. The modern world of most of western and southern Europe, as well as its territories principally in Latin America, then, broke the medieval link between homosexuality and criminality in the early 19<sup>th</sup> century.
- 10 Germany, Britain, the United States, and their territories, who held out against Napoleon, remained unreformed for the next century or more. When the German states united under the auspices of Prussia in the late 19<sup>th</sup> century, they retained the Prussian sodomy law, Paragraph 175, in some instances overturning the decriminalization that had occurred in such component states of the new German empire as Bavaria and Hannover. One Hannover jurist, Karl Ulrichs, made a lifetime of advocacy against Paragraph 175 and was a precursor to the first organized gay and lesbian movement organization, the Scientific-Humanitarian Committee. Founded in Berlin in 1897, the Committee worked for many years to overturn Paragraph 175 in Germany. British elites had earlier reacted to the French Revolution with widespread crackdowns on dissidents and wave of imprisonments of men for sodomy. A century later, the primary public event around the criminal labelling of homosexuality was the show trial that condemned Britain's leading playwright, Oscar Wilde, to two years hard labour in Reading Gaol.
- 11 With reactionary forces coming to power in Germany in 1933, the law became a tool used to strike out against the symbols of modernism such that all of the out-groups identified by the

orthodox worldview—Jews, national minorities, the disabled, religious dissidents, and homosexuals—fell under criminal sanction, and suffered genocide in the Holocaust. Russian Communism under Stalin moved in a similarly authoritarian direction, re-criminalizing homosexuality at a time when the Soviet state was inventing and destroying a wide range of supposed internal enemies.

- 12 The end of World War II brought little solace to homosexual peoples, as the criminalizing states, most notably the Soviet Union, the United States, the United Kingdom, and the Federal Republic of Germany showed little sign of reform, or even initiated new campaigns of persecution against their gay and lesbian citizens. When ruling elites become fearful during times of national or international upheaval, criminal law is often a tool of repression directed against those imagined to be enemies of national identity and community. Just as Britain included homosexuals in its repression of dissidence during the French Revolution, the Cold War fed state searches for “traitors” and dissidents. In the United States, McCarthyism criminalized a wide range of people, imagined to be the “un-American *other*,” as “communists” driving many out of their careers and into exile. Again, among its fantasy enemies were homosexuals pursued as “security risks” and forced into jails and mental hospitals (D’Emilio 1983).

### Anglo-American law reform

- 13 A thaw in the repressive climate of the early post-World War II period began to occur in the late 1950s on several fronts. In Britain, as in most western European countries and the United States, gay and lesbian people began to organize in small, cautious groups in major cities. These *homophile* groups attempted to provide mutual support in an environment characterized fear and harassment. Criminal laws gave police and citizens alike a warrant to persecute: gays bars were subject to raids, people were vulnerable to losing their jobs when a newspaper or a gossip informed on them to employers, some were pressed into mental hospitals and prisons, and no one could count on sympathy from courts or professionals when seeking redress against discrimination. Indicative of the times was the 1954 death of Alan Turing, a master cryptographer during World War II responsible for breaking Nazi codes and today recognized as an originator of the modern computer. When his homosexuality was found out by police in 1952, he was forced to undergo destructive hormone treatments and hounded to suicide (Hodges 1984). But in 1954, as well, an unrepentant Peter Wildeblood spoke out against his persecutors in a well-publicized trial by demanding “the right to choose the person whom I love” (Adam 1995). The courts responded by sending him to prison, but by 1957, a royal commission found its way to a recommendation that homosexual relations between consenting adults in private be decriminalized (Weeks 1977). It took another ten years before a Labour government enacted the recommendation in a period when laws were liberalized on a series of “moral” and family issues, such as divorce and abortion.
- 14 In the United States, Illinois became the first state to de-criminalize by adopting the Model Legal Code of the American Law Institute in 1961. Twenty years later a bare majority of the states had followed suit either through legislative reform or court rulings. Similar changes were occurring in the same era. Canada and Germany decriminalized in 1969, and Australia

decriminalized the federal capital and Northern territories in 1973 beginning a process that worked its way through state legislatures.

- 15 Decriminalization came about as part of a larger set of socio-economic changes that have led to a public rethinking of the meanings and functions of family and sexuality, especially in the advanced, industrial nations. The increasing entry of women into paid employment created the foundation for feminist movements and challenged traditional presumptions about gender and family. Women's movements struggled for a right of personal and sexual self-determination, successfully pressing for reform of divorce and abortion laws. Families shifted from being units of production in traditional, agrarian societies, to units of consumption in wage-labour systems, resulting in a fall in the birth rate and a corresponding questioning of pro-natalist ideologies. All of these changes are associated with a gradual reconceptualization of marriage as voluntary, egalitarian, and romantic—all criteria that have equal applicability to same-sex unions. Same-sex relationships have been part of this reorganization of the elements of gender, sexuality, and family, and have come to seem less “different” as heterosexual relationships have themselves changed over time. And of course, lesbian and gay people have organized, as well, to throw off the disabilities imposed on them by law and psychiatry.

### From criminal to human rights law

- 16 In the last decades of the 20<sup>th</sup> century, many governments have taken steps to rectify discriminatory regulations imposed on citizens' freedom to form the sexual and affective relationships of their choosing. As justice, rather than crime, has come to define public discourse around homosexual relations, governments have increasingly recognized their gay, lesbian, bisexual, and transgendered populations as subordinated and vulnerable peoples whose fundamental rights to life, livelihood, and democratic participation have been unjustifiably compromised by social prejudice and misuse of state power. Redress for discrimination experienced in employment or housing was a demand first pressed by several labour unions in the 1970s, and adopted by voluntary associations and municipal governments. Norway became the first country to adopt a national anti-discrimination law in 1981. By the end of the 1990s, human rights legislation including *sexual orientation* as a protected category had become widespread in the European Union, including Sweden, Denmark, Iceland, France, Spain, Finland, Netherlands, Luxembourg, and Switzerland (International Lesbian and Gay Association 2000). In Canada, human rights law reform came province by province, first with Québec in 1977 and culminating in a Supreme Court decision in 1998 that ordered the last hold-out among the ten provinces and the federal government to adopt anti-discriminatory law. Australia undertook a similar state-by-state process; New Zealand adopted its law in 1993.
- 17 The frontier of full citizenship rights at the end of the 20<sup>th</sup> century has turned out to be the legal recognition of same-sex partnerships. Denmark initiated a *registered partnership* program for same-sex couples in 1989. Initiatives toward the comprehensive legal recognition of gay and lesbian relationships have been proceeding apace in the rest of Scandinavia, the Netherlands, France, Canada, and Hungary, and partial or local legal recognition has occurred in Australia, Austria, Belgium, Brazil, Colombia, Czech Republic, Germany, Portugal, Spain, and the United Kingdom (International Lesbian and Gay Association 2000)

## Language and structural constraints on life choices

- 18 Despite many important legal changes, gay and lesbian people and their relationships have yet to gain full citizenship rights in a number of ways. Beneath the oscillations of repression and tolerance suffered by lesbians and gay men over time can be detected a limitation of life possibilities structured on a group basis. These limitations affect all aspects of social life. They can be found in the text of laws, in the structures of social institutions, and even in attitudes that lesbians and gay men have had toward themselves.
- 19 As a medium of communication and as the way in which social structures and values are transmitted, language is critical to the reproduction of these limitations. For example, active campaigns of persecution have employed both structural constraints and legally segregated categories to restrict the choices and life opportunities for lesbian women and gay men. Often the cessation of active oppression leaves in its wake segregated categories and legal terms which themselves reinforce old patterns of exclusion.
- 20 Educational institutions, churches, the mass media, the publishing industry, and other agents serve as conduits of cultural reconstitution by continually reproducing the language and symbolic universe of a society. The systematic selection of attributes of lesbian women and gay men for public presentation by agents of cultural transmission constructs images that rationalize their inferiorized status.
- 21 At the most basic level, cultural transmission is the practice of language. It is people speaking to one another, parents to children, individuals to peers. The accumulation of knowledge expressed in language transmits power over given reality, and officially propagated 'knowledge' demarcates the lives of those alien to its symbolic universe.
- 22 Inferiorized people such as lesbians and gay men discover themselves as symbols that are manipulated in the transmission of the dominant culture. Cultural images of self, institutionalized by cultural agents, exist alien to their own experience and self-expression. A word such as 'marriage' operates in just this manner. The selection and combination of images associated with 'marriage' become routine. The value and significance of such a word acquires the mark of habitual contexts. Generations of distortions are shape perception mediated by linguistic categories. Subordination then becomes inherent in labels—'marriage' becomes a medium of exclusion at the same time that it transmits value and respect to those it includes.
- 23 Awareness of the social production of words and symbols and their deployment through the power of law is easily lost. Language then becomes one-dimensional as values are equated with the term that communicates them: 'The meaning of words is rigidly stabilized. Rational persuasion, persuasion to the opposite is all but precluded. The avenues of entrance are closed to the meaning of words and ideas other than the established one' (Marcuse 1969:96). One-dimension language thus cuts off reflection about the real meaning or purposes of words like 'marriage' as the process of reflections ends where it started, in the given conditions and relations that constructed oppression to begin with.

- 24 It is often assumed that questions around the social and legal status of lesbians and gay men are a question of “sexuality,” and that sexuality is a clearly “private” realm with no place in the public domain. Yet this chain of reasoning has several faulty links and disturbing implications. Confinement of (homo)sexuality to the “private” sphere entails a set of social implications that impose special disabilities on gay and lesbian people. The difficulty with the “private” category is the inequity in the language applied to heterosexuality and homosexuality. While heterosexuality is quickly distinguished from its “non-sexual” public manifestations, such as romance, courtship, marriage, and family—which are documented and celebrated in the arts, and institutionalized in the legal system—homosexuality is often not accorded the same amplitude. Same-sex courtship, romance, partnership, home-building, mutual support, and communication through the arts are not always allowed the same public manifestation, but rather are often subjected to the linguistic “squeeze” of the ‘sexuality’ category and thus consigned to the private. Exclusion from the legal category of ‘marriage’ constitutes one of these limitations on full public participation in contemporary Canadian society.
- 25 A strict separation between “public” and “private” turns out to be virtually unattainable in practice. Apart from the emotional and psychological toll this strategy takes, staying in the closet can have serious ramifications, for example, in the workplace: “Men who try to avoid the issue of sexuality altogether find their productivity sapped in a different way. They can become isolated within their organizations, excluded from the social networks they need to do their jobs. They dodge intrusive, personal questions only to find themselves without mentors, advocates, and friends.” (Woods 1994:234)
- 26 When gay and lesbian people are identified with a private sexual activity, and even subject to penalty for “exceeding” the private sphere, a special range of social limitations are thereby imposed on them. This closet rule, which confines gay and lesbian lives to the “private,” allows for the growth of a climate of fear in other aspects of life such as seeking employment, accessing state and commercial services, finding an apartment, or just being in the street. Failure to protect gay, lesbian, bisexual, and transgendered people in civil society leaves them vulnerable to various forms of social predation.
- 27 Exclusion from the public affirmation of relationship through marriage is a form of withholding access to the full exercise of citizenship rights in the public sphere. Linguistic categories carry valuations; marriage in modern times has served to distinguish valued relationships from “other” relationships through a range of legal and symbolic ramifications. Exclusion from valued categories, or confinement to subordinate categories, reproduces moral hierarchies that provide warrant for a range of social disabilities.
- 28 Citizenship rights are *not* just about *not* being excluded from the public sphere, but is more positively about being able to participate fully in civil society. Gay and lesbian people are not unlike 19th century European Jews, the Kurds of contemporary Turkey, the Bahá’ís of Iran, or the aboriginal people until recent years in our own country, all of whom have had to deal with state campaigns to suppress their languages, traditions, cultural rites, and literatures. Being permitted to be Jewish only in private, but subject to the withdrawal of public services should one be found out, could never be considered equitable. Being permitted to speak one’s own language only at home but not in public, or being prevented from building community



institutions, such as community centres, newspapers, or archives, scarcely qualifies as equal participation in civil society. Similarly being restricted from affirming relationships and domestic life in the public sphere through the virtually universal currency of marriage constitutes a curb on public recognition as a valid actor in civil society.

- 29 The question at hand is the kinds of limitations that may be acceptable to participation in civil society. The “separate but equal” doctrine advanced in the United States in the 19th century and by the apartheid regime in South Africa in the 20th claimed that limited access to public institutions was acceptable because different racial communities would be able to develop a full range of community institutions for themselves and did not need to avail themselves of institutions in the dominant society. This doctrine was belied by social realities. Permitting the denial of publically available legal affirmation to some people and not others resulted not in equal development but in the reproduction and amplification of social inequalities and the virtual expulsion of large categories of people from participation in democratic institutions.

### **Context of Continuing Prejudice Against Lesbians and Gay Men**

- 30 As some of the last groups to be added to human rights legislation in Canadian jurisdictions, lesbians and gays have lived under the protection extended by such policies for shorter periods of time than have other groups that are considered to be historically disadvantaged. As a consequence of this long-standing prejudice, the overall context of lesbian and gay life still reflects that historical disadvantage. Lesbian women and gay men still live in social and economic contexts characterized by lack of family support, vulnerability to suicide, violence, negative social attitudes, and lower incomes.
- 31 Lack of family support: Members of many groups exposed to social prejudice because of race, religion, ethnic origin, or similar characteristics can face that prejudice together with their families, provide each other with on-going understanding and support, and help create bonds with other members of those communities of interest. In contrast, lesbians and gays are usually raised in families consisting of heterosexual persons. Isolated in the family unit often from an early age, lesbians and gays rarely experience a sense of mutual understanding from other members of their families around issues of sexuality, and thus enter life with less emotional and social support within the family and in relation to the family's connections with the outside community. As their lives unfold, they are often denied the level of support that heterosexual people routinely expect as they form long-term relationships, have children, and become active in lesbian or gay communities. Some lesbians and gays who become parents raise children who are themselves the focus of homophobic views, or who themselves begin to express homophobic views at some points in their lives. Even in families whose members do not actively practice prejudice against lesbians and gays, lack of open acceptance or understanding takes its toll on emotional security and self-esteem as lesbians and gays form their own images of self in society.
- 32 Prejudice in schools: Despite official educational policies against prejudice and violence in schools, there is very little done to counter homophobic harassment through the curriculum or administrative action. Social attitudes are transmitted quickly among young people as they

enter the educational system. Research on violence against lesbians and gay men shows that young men between the ages of 15 and 25 make up the largest category of perpetrators (Comstock 1991). Homophobic harassment, use of stereotyped insults, and violence in schools add to the sense of social disapproval that young lesbians and gays acquire as they move through the school system on their way into the larger community.

- 33 Vulnerability to suicide: Suicide, especially youth suicide, is higher among those who are or think they may be lesbian or gay than it is among those who identify as heterosexual. One study has found that because gay and lesbian youth face a hostile and condemning environment, verbal and physical abuse, and rejection and isolation from their families and peers, they were two to three times more likely than others to commit suicide (Rofes 1983; Kroll and Warneke 1995).
- 34 Violence: Fear of disclosure is reinforced by continuing exposure to violence against sexual minorities. The most recent Ontario research on the prevalence and forms of violence against lesbians and gays has found that 77 percent of the respondents have been verbally assaulted because someone perceived that they were lesbian or gay; 51 percent reported that they had been threatened with physical violence, 38 percent reported sexual harassment, 37 were chased or followed, 27 percent had objects thrown at them, approximately 22 percent had been punched, kicked, beaten, or harassed by police, and roughly 18 percent had been sexually assaulted, spat upon, or had property damaged. The forms and frequency of violence experienced by lesbians and gays is affected by their sex. Lesbian women reported higher rates of assault with a weapon, sexual harassment, and sexual assault, and gay men reported significantly higher rates of verbal assault and physical violence (44 and 32 percent for men, 32 and 18.5 percent for women) (Faulkner 1999:135-144)
- 35 Social attitudes: Attitudinal surveys demonstrate that large numbers of people in North America continue to hold negative attitudes toward lesbians and gays. Canadian attitudinal studies have documented the existence of significant levels of prejudice (Rayside and Bowler 1988). United States studies have also reported significant levels of prejudice based on sexual orientation
- 36 Employment discrimination: Lee Badgett, a United States economist, reported that a survey of 191 employers revealed a high level of intent to discriminate: 27 percent of employers said that they would not hire homosexuals, 18 percent said that they would fire them, and 26 percent said they would not promote them (Badgett, Donnelly, and Kibbe 1992:728). They are also consistent with levels of employment discrimination reported by lesbians and gays in the United States -- between 16 percent and 46 percent (Klawitter and Flatt). Smaller Canadian research studies have produced similar findings. A 1990 New Brunswick study found that a total of 49 percent of lesbian and gay respondents experienced some form of employment discrimination because of their sexuality: 19 percent had been denied employment; 6 percent had been fired; 26 percent had been asked about their sexual orientation at work; 11 percent had been threatened at work because they reported discrimination; 8 percent had been pressured to resign from work (New Brunswick Coalition for Human Rights Reform 1990). Vancouver statistics are higher: 21 percent respondents reported that they had not been hired because of discrimination on the basis of sexuality; 22 percent reported performance

discrimination; 20 percent believed they had been discriminatorily fired; 11 percent felt that they had lost clients or customers because of their sexuality. Lesbian women appear to be affected more than men by employment discrimination (Samis 1995:74-77).

- 37 Lower incomes: The lack of reliable research data on lesbian and gay incomes in Canada has made it difficult to carry out valid studies on this point in Canada. However, research findings in the United States over a long period of time indicate that sexuality has a measurable impact on incomes in that country. In an early study based on surveys of 6,000 couples in the early 1980s, Philip Blumstein and Pepper Schwartz (1983:598) found that married men were over-represented in high-income brackets and that gay men and lesbian women were both over-represented in low-income brackets and under-represented in high-income brackets. In a multivariate regression analysis of the effect of sexual activity on incomes collected in the General Social Survey, Lee Badgett (1995:734) found that heterosexual men had the highest incomes, followed by gay/bisexual men, heterosexual women, and lesbian/bisexual women, in that order. When Badgett included controls for other factors influencing income, she found that the income penalty for gay or bisexual men could be as much as 24.4 percent, and increased to as much as 26.7 percent when occupation variables were included. She also found that lesbian/bisexual women earned only 57.2 percent of the average gay/bisexual man's income, compared with a ratio of 64.8 percent for heterosexual women and men. Although some of Badgett's results cannot be fully explained without further research, her multivariate analysis has demonstrated that behaviourally gay/bisexual men earn from 11 percent to 27 percent less than behaviourally heterosexual men, and that behaviourally lesbian/bisexual women earn between 12 percent and 30 percent less than behaviourally heterosexual women. Mariëka Klawitter and Victor Flatt (1995:20) have also concluded that lesbian women and gay men are disadvantaged by their sexuality in terms of incomes. They found that within the categories of coupled individuals, after controlling for other regression factors, married heterosexual couples had the highest household incomes despite the fact that married women have the lowest incomes of all women; this reflects the very high incomes of married men. They also found that while lesbian women's incomes were higher than those of heterosexual women, lesbian couples had the lowest household incomes, and that gay male incomes were lower than those of married heterosexual males.
- 38 Family formation: In the intimate area of reproductive decisions, lesbian women find that they commonly experience discrimination on the basis of sexual orientation in obtaining access to alternative conception services, and both lesbian women and gay men who wish to form families through adoption find that social service providers often discriminate. See, for example, *Benson v. Korn*, [1995] CHRR D/319 (4 August 1995) (B.C. Council of Human Rights), per Patch, Council Member, in which a lesbian couple had filed a complaint arising out of denial of access to artificial insemination on the basis of their sexuality. Their complaint was successful.
- 39 Housing and accommodation: Lesbians, gays, and same-sex couples frequently report being denied a lease or rental, experiencing discrimination in purchasing a house, or being evicted because of their sexuality. In a 1995 study of discrimination in Vancouver, 24 percent of respondents reported rental-related discrimination. Sex appeared to be a factor in the level of responses in this area of research as well. While only 43 percent of the gay men in that study

reported that they feared future housing discrimination on the basis of their sexual orientation, 63 percent of the lesbian women in the study reported such fear (Samis 1995). In research conducted in Windsor and London, Ontario, Stewart Page (1998) reports that landlords are much more likely to tell a gay or lesbian caller that their rental accommodation is “unavailable.” Calls were made to 60 landlords in Windsor by research assistants, half of whom were male and half, female. Half the time, the caller also said, “I guess it’s only fair to tell you that I’m a gay person” or “lesbian.” The results were that “gay” callers were twice as likely to be told that the room was not available.

### **Continuing Invisibility of Lesbians and Gay Men**

- 40 The context of social prejudice against lesbians and gays reinforces the historical invisibility of lesbians and gays. Long-standing social prejudice, economic disadvantage, and lack of meaningful governmental protection has resulted in lesbian and gay choice of invisibility as a method of avoiding or minimizing the effects of prejudice on them.
- 41 Fear of violence: Fear of anti-lesbian/gay violence has a significant impact on the behaviour of many lesbians and gays. As a consequence of the level of violence experienced by lesbian women and gay men, social science research has demonstrated that lesbians and gay often alter their behaviour to avoid being identified as lesbian or gay. These modifications include limiting public displays of affection, attempting to act 'straight,' maintaining constant caution in public, fear of associating with other lesbians and gays, choosing not to help those who are attacked, attending only gay bars and events, only travelling with friends, limiting social activities, avoiding public transit, limiting friendships, fearing police and hospitals, and limiting social activities to lesbian and gay bars or events. In one study, some 42.5 percent of all lesbian and gay respondents reported taking one or more of these measures (Faulkner 1999:127-8)
- 42 Fear of disclosure: One of the responses that lesbian women and gay men have to the levels of violence they experience in Canadian society is to fear disclosure of their sexuality. This fear has been identified in a wide array of contexts, ranging from employment to anonymous opinion polls and disclosures to one's personal physician. A recent Ontario study found that 35 percent of gay men and 42 percent of lesbian women (in a sample of 1,233) felt that it was not safe for them to be 'out' in their communities, 52 percent believed that their sexual orientation would be viewed negatively by their health-care providers, and 24 percent had not made any disclosure of their sexuality to their physicians (Coalition for Lesbian and Gay Rights in Ontario 1997:9). Another recent Canadian study found that lesbians and gays fear disclosure because it might mean loss of custody of children, employment, housing, or other forms of discrimination that have become commonplace for lesbians and gays who can be identified as such (Faulkner 1999:129).
- 43 'Spiral of silence': Calling this fear of disclosure the 'spiral of silence,' Kenneth Sherrill, a United States political scientist, has found that as many as 90 percent of lesbians and gays are unwilling to reveal their sexuality even in completely anonymous ballots. This is consistent with recent research findings in Ontario that 11 percent of lesbians, gays, and bisexuals are not 'out' to anyone in their lives (CLGRO 1997:9).

- 44 Official invisibility: The lack of acknowledgement, understanding, and support that surrounds lesbians and gays from youth through adulthood and that is magnified by fears of violence and ultimately of disclosure is reinforced by the continued invisibility of much of lesbian and gay existence in official government policies. At the present time, there are no categories relating to sexuality in official census or other government surveys. Therefore there is little reliable demographic information on what lesbians and gays do, how they live, or what their goals or aspirations may be. Recent changes to human rights policies and to some statutes have begun to break down that pervasive invisibility in official government policies, but visibility remains the exception rather than the general practice
- 45 The cumulative effect of continuing to live in a context of pervasive prejudice, high risks of violence, and state-sanctioned invisibility has resulted in continuing discrimination against lesbians and gays in the areas considered to be fundamental to the ability to function in contemporary society: employment, services, accommodation, education, incomes, and recognition of relationships. Although these forms of discrimination on the basis of sexual orientation have been prohibited in Ontario since 1986 and more widely in Canada since the mid-1990s, the research literature makes it clear that these forms of discrimination are deeply-seated and have not yet been significantly eradicated.

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SWORN before me at the City of )

Windsor, in the County of Essex, )

Province of Ontario, this )

day of 15 November, 2000 )

*Mayo* )



**Barry D. Adam**

A Commissioner for taking affidavits

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