

Ontario
SUPERIOR COURT OF JUSTICE
(DIVISIONAL COURT)

B E T W E E N:

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 McDOWALL 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 DR. MARGRIT EICHLER
(Sworn November 15, 2000)

I, **MARGRIT EICHLER**, of the City of Toronto, in the Municipality of Metropolitan Toronto, in the Province of Ontario, **MAKE OATH AND SAY:**

1. I am Professor of Sociology and Equity Studies in Education at the Ontario Institute for Studies in Education at the University of Toronto, and I am the Director, Institute for Women's Studies and Gender Studies, University of Toronto. One of my primary areas of

professional expertise is the sociology of families with an emphasis on policy issues. In my work in this area, I have taken a comprehensive approach to families and have dealt with a large number of topics, including in recent years, same sex couples. Attached to this affidavit, as Exhibit "A" is my *curriculum vitae*.

2. Based on my work in the area of family policy, and my expertise in the evolution of families in Canada and other highly industrialized countries, it is my opinion that same sex couples should in principle be treated in the same manner as are opposite sex couples, including the right to marry.

Changing Family Structures in Canada

3. In highly industrialized countries, like Canada, families have been undergoing drastic changes, which include: longer life expectancies, higher rates of divorce, higher rates of remarriage, steeply increased rates of births to unmarried women, greatly decreased fertility and concomitantly altered household composition. (See Inkeles, 1980; Eichler, 1984; Eichler, 1988)
4. One of the overall effects of the various changes has been a greater social tolerance of a variety of family forms. This has led to a greater visibility of a variety of family forms, which in turn has increased social acceptance of such variations. Two types of families which are much more visible as well as socially accepted today compared with several

decades ago are opposite sex common law couples and same sex couples. This is reflected in the 1996 Census data released by Statistics Canada.

5. According to Statistics Canada, there was an overall increase of 6.6% in the total number of families between 1991 and 1996 to 7.8 million families. Married-couple families still constitute the large majority of Canadian families at 74% of all families. Between 1991 and 1996, the rate of increase in common-law families was approximately 16 times that for married couples and lone-parent families. These data can be interpreted to show that "couplehood" is the most favoured relationship among Canadians.
6. The Census also shows an increase in lone-parent households. Male-headed lone-parent households have increased by approximately 16% between 1991 and 1996, and female-headed lone-parent households have increased by approximately 20% in the same years.
7. The Census has so far defined married and common-law couples as two persons of opposite sex who live together as husband and wife in the same dwelling. This does not include same sex couples. Even the most recent census in 1996 did not include same sex cohabitation as an option to describe the respondent's relationship. However, Statistics Canada, as the major data gathering organization in the country, has announced its intention to review the various definitions it employs for describing families and plans to include data about same sex couples in its 2001 Census.

9. It is widely recognized among researchers and policy makers that a monolithic definition (Eichler 1988) of the family is no longer adequate to reflect the complex reality of today's families.

Family Policies

11. Before the legislative and policy changes in the 1970s and 80s, Canadian family policies were originally based on a patriarchal model of the family, at least for white people. Such a model can be defined by the following eight characteristics:
- i. The ideology with respect to gender is premised on the notion of separate spheres, which in turn results in gender inequality.
 - ii. Legal marriage is the basic constituent of a family. Non-legal unions do not generate the same rights and responsibilities as legal marriages do. Children of non-legal unions are considered illegitimate, with no legal claims on their fathers.
 - iii. At the nuclear level, household and family memberships are treated as congruous. Hence the spouse is equated with a parent.
 - iv. The family household is treated as the unit of administration.
 - v. The husband is responsible for the economic well-being of the family household. The wife and children are treated as economic dependents of the husband, whether or not they actually contribute to the household through paid or unpaid labour.
 - vi. The wife/mother is seen as responsible for providing care and services to family members in need of care.
 - vii. The public has no responsibility for the economic well-being of a family if there is a husband/father present, and no responsibility for the care provision where there is a wife/mother present. However, if one of the spouses is missing or incapacitated, and if there are children, public assistance is seen as legitimate (although not always rendered).

- viii. Homosexuality is seen as an illness or a crime and partners within same sex couples are not publicly recognized as having any social, economic or legal obligations towards each other. The issue is seen as irrelevant for family policy, since same sex couples are regarded as antithetical to the nuclear family.
12. There is a vocal minority that clamors for a return to the patriarchal family. This longing is based upon a nostalgic view of that type of family life. Using this model as a basis for policy is not only unrealistic but actively harmful: by putting forward an idealized version of family life that does not correspond to the actual range of families in existence today (or, for that matter, in the past) and by pressuring for policies that will privilege this one family type over other types of families to the detriment of families not thereby privileged. Its proponents usually have a bias towards ignoring problems of violence and domination. They endow a certain structure with the inherent capacity to function well, despite much evidence to the contrary. (Eichler 1997: 15)
13. In the 1970's & 80's, legislative and policy reforms, such as the *Family Law Reform Act* in Ontario, moved away from the patriarchal model of families to what can be identified as the "individual responsibility" model of families. This model can be defined by the following characteristics:
 - i. The ideology is one of gender equality.
 - ii. Legal marriages are no longer the sole basic constituent unit of a family. Instead, functioning relationships are recognized as creating this basic unit. Consequently, common-law partners are held responsible for each other's economic support, both during the union and after the union has broken up. There is no legal distinction between legitimate and illegitimate children.

- iii. At the nuclear level, household and family memberships are mostly treated as congruous. This being so, a spouse is equated with a parent. Conversely, an external parent is largely treated as a non-parent.
 - iv. The family household is treated as the normal unit of administration (with a few exceptions).
 - v. Husband and wife are equally responsible for the economic well-being of themselves, each other, and any dependent children. Children are considered economic dependants of both their parents, and spouses are considered economically interdependent rather than one as the dependent and the other as the head of the household.
 - vi. Fathers and mothers are equally responsible for providing care and services to family members in need of care.
 - vii. The public has no responsibility for the economic well-being of a family or for the provision of care if there is either a husband/father or wife/mother. It will provide *temporary* help if one of them is absent or incapacitated, but the basic assumption is that a parent is responsible for both the economic well-being and care of dependent children.
 - viii. Same sex couples are starting to be recognized as valid family form.
14. In my view, neither of these models works well for modern families (see Glendon, 1981; Eichler, 1997; Hudson and Galaway, 1993). In particular, I support a social responsibility model of the family. This model is associated with the following characteristics:
- i. There is an ideological commitment to minimizing stratification on the basis of sex.
 - ii. Functioning relationships constitute a family unit. Legal marriage is present but not privileged over the other relationships.
 - iii. At the nuclear level, household and family memberships *may* be but are not *assumed* to be congruous. Therefore spousehood is not automatically identified with parenthood, and parenthood is not automatically identified with spousehood.
 - iv. The individual is the unit of administration (with a few exceptions).

- v. All dependency relations are socially recognized regardless of whether they are between kin or non-kin. Adult members of an interdependent unit are responsible for their own and each other's economic well being. Fathers and mothers are both responsible for their children's economic well being, whether or not they live with them.
- vi. Mothers and fathers are both responsible for providing care for their children. Parents retain parental responsibility – which are not tied to parental rights – even if they do not live with their children.
- vii. The public shares the responsibility with both parents for the care of dependent children. If one parent is genuinely absent or unable to contribute his or her share, society will pay the cost of his or her contribution. The cost of care of inevitably dependent adults is a public responsibility (while the delivery of the care may be rendered by a family member).
- viii. There is no distinction between same sex or opposite sex couples in terms of their treatment by the state.

Analytical Framework for the Study of Families

- 15. While there continues to be a debate on what is the best way of defining families, most Canadian scholars use a broad definition of some kind, either explicitly or implicitly (see Baker and Dryden, 1993; Cheal, 1991; Mandell and Duffy, 1995; Eichler, 1997; Fox, 1988; Vanier Institute of the Family, 1994). In my view, a dimensional approach to understanding families is particularly useful in this respect. Dimensions of familial interactions which are of particular importance include the procreative, socialization, sexual, residential, economic, emotional and personal services dimensions.
- 16. What is required is an analytical framework which is capable of accommodating the existing diversity of family types. Central to the question of family types is the question of marriage and who the state will permit to marry. I find a dimensional approach to understanding

families particularly useful in providing an analysis on the issue of capacity to marry.

17. The dimensions of familial interactions thus provide an analytical framework within which family structures, functions, problems, and other characteristics can be meaningfully discussed. Rather than relying on the monolithic, and inaccurate, notion that families have a particular fixed structure, the dimensional approach allows for and reflects the reality of varying structures and types of familial interaction. I have worked with this dimensional approach for about two decades, and have applied it in varying contexts.

18. Each dimension has its own range of possibilities in familial interaction. Economic relationships regarding support provisions and the rendering of financially valuable but unpaid work, such as childcare, may be considered an important familial interaction between members of a couple. Economic co-operation ranges from one family member being totally responsible for the support of all family members as well as for performing financially valuable but unpaid work, to a family in which all members are totally economically independent (e.g. by purchasing their own food or shelter or by paying their share of expenses). In between are various degrees of partial support provision: for instance, one person being responsible for some but not all family members (e.g. when a husband-father provides for himself and his children, but his wife pays for her own expenses including her part of the shelter and food when shared), or one family member being only partially responsible for some other family members, such as when spouses pay their own expenses and share all expenses related to the support of children.

19. Sexual interaction ranges from a couple having sex only with each other, to having sex together as well as with other partners, to having sex only with other persons or being celibate.

20. Residential interaction could be all family members sharing the same residence, all or some of them living in completely separate residences, or a multiplicity of intermediate arrangements.

21. Emotional interaction ranges from all family members being positively emotionally involved with each other, to being negatively emotionally involved or not being emotionally involved at all. Emotional involvement may also be asymmetrical: one person may love a family member who is emotionally uninvolved or negative towards that person (e.g. an emotionally absent parent/spouse).

22. Personal service interactions range from all members in the family rendering personal services to all other members of the family, to one person providing services to other members of the family without receiving any in return, or to no one providing services to anyone.

23. With respect to the procreative dimension, it ranges from a couple having child(ren) only with each other, to one or both of them having child(ren) with other partners plus having

them together, to their having children only with other partners or having none at all.

24. The socialization of children could be the responsibility of both parents or only one of them being involved (e.g. in the case of a divorce in which only one parent has custody and the other does not even have visitation rights), neither of them being involved (e.g. when the child has been given up for adoption) or when there are no children to socialize.

25. The dimensional approach allows us to capture the variation of behaviour patterns within families which have the same structure as well as between families with different structures. This approach is commonly characterized in legal literature as a "functionalist approach". It is noteworthy that this approach was not originally developed to be applied to same sex couples, but rather to accommodate the variance among opposite sex couples and all types of families in general.

Familial Interactions Between Opposite Sex Couples

26. If we consider only opposite sex couples, we will note a great degree of variety in their familial interactions. For example, the economic co-operation dimension has a wide range of familial interaction for opposite sex couples. A family may depend both financially as well as in terms of unpaid but economically valuable work on one person only. In other families, all family members may depend on one member for all the financial support, while depending on the other partner for all of the unpaid work like childcare. In two income families, the family may depend on both incomes and the unpaid work is divided among the

- two partners in either equal or unequal shares.
27. With respect to sexual interaction, we find likewise empirical examples which range from the lowest to the highest degree of interaction.
 28. The same applies to the interaction patterns with respect to the residential dimension (commuting couples may live in two separate residences), emotional interactions (an abusive husband/father may have no positive emotional interactions with other family members), the personal service dimension (a wife/mother may be the only service provider without receiving any services in return).
 29. We can find examples of families which have low or no interaction in the procreative dimension (childless couples or step families in which only one spouse is a biological parent, the other is a social parent). There are also different degrees of interaction in the socialization of the child(ren), where there are children. Both parents, one parent, or neither parent may be actively involved in the socialization of children.
 30. There is a high degree of variation among opposite sex couples. For fuller development of this point see Eichler, 1988 and 1997. For a sample of some other literature see McKie and Thompson, 1990, Sev'er, 1992, Kruk, 1993, Vanier Institute of the Family, 1994.

Familial Interactions Between Same Sex Couples

31. In my opinion, same sex couples should be treated for policy purposes the same way in which opposite sex couples are treated, including the right to marry. This opinion is based on the structural similarities between opposite sex common law couples and same sex couples.

32. Same sex couples have the same degree of variation as opposite sex couples. This has been convincingly demonstrated by various researchers, including Peplau, 1991, with respect to duration of unions, their emotional quality, gender relations and social networks, Renzetti, 1992, with respect to abuse, Rubin, 1985, with respect to friendship patterns, Weston, 1991, with respect to ideological orientations towards the family *per se*, relations towards blood relatives, the quality and nature of relationships, attitudes towards parenting and other factors. Schneider, 1986, found greater role flexibility in a small sample of lesbian couples compared to that of opposite sex couples.

33. By the same token, some same sex couples are individually as capable or more capable than some opposite sex couples to establish durable, loving, supportive, emotionally interdependent, co-residential relationships which may or may not involve children and their joint rearing. They may exchange personal services with each other and share a social network. In other words, the placement of a couple concerning the degree of intensity of familial interactions in various dimensions is not determined by their sexual composition, but by other factors.

34. There are of course differences between opposite sex and same sex couples – the most important ones being that same sex couples do not have the option to marry and that they face greater social discrimination.

35. Much is said about the lack of "procreative potential" of same sex couples. A great deal of that discussion is illusory or unreliable. Not all opposite sex couples choose to, are capable of or do in fact have children. Being infertile or beyond menopause is no reason to prohibit or annul a marriage between a woman and a man. Moreover, we are currently witnessing a mini "baby boom" among lesbian couples. (Arnup and Boyd 1995)

36. The reasons people choose to marry vary for different couples. Given the increasing popularity of common law unions, marriage is becoming more of a conscious choice than it used to be. There is considerable diversity in the reasons that stimulate heterosexual couples to marry. These reasons include adherence to tradition; mutual support and economic cooperation; spiritual or religious reasons; emotional reasons; family reasons; practical reasons; and the social legitimacy and acceptance accorded to being married. Few question the "couplehood" of married couples. Same sex couples, like opposite sex couples, may want to marry for a variety of these same reasons.

37. An important aspect of marriage that cannot be accomplished through a common law relationship is the public affirmation and state support for the relationship. This may often

be the most simple and yet the most critical reason that same sex couples wish to choose marriage.

38. It is important to recognize that in Canada today, there are many diverse forms of families. As recorded in the 1996 Census, there is an increasing number of common-law, lone-parent, and blended families in Canada since 1991. There is therefore a need to rethink the basis on which our family laws and policies are premised. In my view, we must abandon any ideas that decisions regarding family policy should be made based on the "traditional family". The "traditional family" of a husband, wife and their joint biological or adoptive child(ren) is not the only form of family in Canada today.

39. Same sex couples exhibit a similar range of within group variations as do heterosexual couples with respect to their interaction patterns. Two substantive differences between them are (1) that in the one case the couple consists of a man and a woman, whereas in the other case we are dealing with two women or two men, and (2) heterosexual couples have the right to decide whether or not to marry whereas same sex couples do not. This being so, the same rules should apply to both.

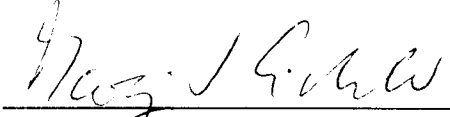
Why Marriage and not a Registered Domestic Partnership

40. At one time I believed that same sex couples ought to be free to marry legally *or* have an alternative but equivalent domestic partnership arrangement. My views on this have now changed following a conference on registered domestic partnerships. At that conference, I

heard many lesbians and gay men make impassioned pleas for the freedom to marry. This came as a surprise to many of us and led to my view that gays and lesbians ought to have the choice to enter into civil *marriage*. "Marriage" is imbued with unique cultural meaning that cannot be replicated by some other means of partnership recognition. Given the history of oppression of gay and lesbian people, the denial of the freedom to marry perpetuates and promotes stigma and invisibility. The creation of a separate regime marks lesbian and gay relationships as inherently different from and inferior to the relationships of heterosexuals.

- 41. Same sex couples ought to be free to marry legally as one *option* that is not legally privileged over other family forms. It is unsurprising that some gay men and lesbians would not choose marriage. Many heterosexuals have criticized the institution of marriage and choose to participate in other family forms. So long as heterosexuals have the choice of whether or not to marry, lesbians and gay men should have the same choice. It is an aspect of equality that ought to be reflected in family policy.

SWORN before me at the City of)
 Toronto, the 15th)
 day of November, 2000)
 J. Radbord)
 A Commissioner for taking affidavits)
 J. Radbord



 Margrit Eichler

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