Queer as Work

Lesbians, Gay Men, Bisexual and Transgender People
in the Workplace

barbara findlay

prepared for Continuing Legal Education Society of B.C. May 2001

This booklet contains general legal information. It is not legal advice. The information is accurate as of May 4, 2000. But the law changes frequently. You should consult a lawyer for information about your particular situation.

This paper is a brief update on the position of queers -- lesbians, gay men, bisexual and transgender people -- in the workplace. It is current to April 6, 2001.

1. Introduction

'Queer' is a term used to include lesbians, gay men, bisexual and transgendered people. 'Queer studies' is a developing academic discipline born of postmodernism and feminism.

Lesbians are women whose primary emotional and sexual connections are with other women. Gay men are men whose primary emotional and sexual connections are with other men. Bisexual people are people who may be attracted to men or to women.

One's sexual orientation may be homosexual (lesbian or gay), bisexual, or heterosexual.

Transgendered people are people who sometimes or always present differently from their anatomic gender. Sex is commonly misunderstood as binary (male/female) and as infallibly indicated by one's genitalia. In reality, there are a variety of indicators of sex, from hormonal and chromosomal to morphological to gender identity (one's inner perception of one's gender). Transgendered people include people who are

- transsexual – someone who feels they were born in the wrong body
- transvestite or crossdresser – an individual who sometimes or most of the time presents in the gender opposite to the one indicated by their genitalia
- intersexed: people whose genitalia and other gender attributes are ambiguous or are both male and female
- drag kings and queens, who engage in crossdressing for performance

Transsexual people may choose, in consultation with a gender clinic, to have sex reassignment surgery to resolve the incongruence between their bodies and their own gender identities. Under internationally-developed standards of care, an individual contemplating sex reassignment surgery must live full time in their target gender for at least a year before the surgery. The process of moving from one gender to the other through hormonal treatment and surgery is called "transition". Under B.C. law, a person may change her/his given name at any time. A person who has had sex reassignment surgery may obtain a birth certificate showing her /his new gender.

Sexual orientation and gender identity are separate aspects of a person. So a transgendered person may be lesbian, gay or bisexual; a lesbian may be trans or non-trans.

Homophobia is an active dislike of lesbians, bisexual people, or gay men. Transphobia has a parallel meaning with respect to transgendered people.

Heterosexism is the unconscious assumption that everyone is or should be heterosexual, and an expectation that the norms of the culture will reflect and support heterosexuality.

2. Constitutional Protections for Queers in Employment

a. Sexual Orientation

In 1995, the Supreme Court of Canada decided that 'sexual orientation' is a protected analogous ground under section 15 of the Charter. In 1998, the SCC held that anti-discriminatory legislation was itself discriminatory if it did not include sexual orientation among the prohibited grounds of discrimination.

Those two decisions have effectively outlawed employment-related discrimination against lesbians and gay men with respect to employment in Canada. Other decisions have confirmed that treatment of same gender partners differently from opposite gender partners with respect to such things as employment-related insurance benefits, pension plans, or partner-related benefits under collective agreements.

The only possible exception is where a gay, lesbian or bisexual employee's right to be free from employment-related discrimination is in conflict with another Charter-protected right. For example a individual might be employed by a religious group in a position in which s/he was supposed to be observe the conditions of that religion as a legitimate term of her/his employment, and her/his employment condemns lesbian or gay sexual activities or non-heterosexual sexual orientation.[1]

b. Gender identity

Though Charter protection for gender identity has not been litigated, it is likely that protection for transgendered people will be available, either on the ground of 'sex' or by analogy to protection on the basis of sexual orientation.

British Columbia is the only province to have a superior court decision about protection for transsexual people under human rights legislation. In *Nixon v Rape Relief*[2], the BCSC held that a transsexual woman was entitled to protection from discrimination on the ground of sex. Mr. Justice Davies added in obiter that other transgendered people were similarly protected.

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1 *Caldwell v St. Thomas Aquinas Catholic School* 1984 2 SCR 603
In this case, a teacher's employment with a Catholic School Board was upheld when, contrary to the teachings of the church whose dogma she had contracted to uphold, she married a man who had been divorced. Quare what the essential elements of the employment relationship must be before freedom of religion will 'trump' freedom from discrimination on the ground of sexual orientation. It may be that Caldwell will be restricted in its application to activities (eg in Trinity Western, infra, the prohibition for people of all orientations was against sexual activity) rather than to situations implicating one's sexual orientation, which the SCC recognizes as being either immutable or mutable only at an unacceptable personal cost. (*Egan v Canada* [1995] 2 S.C.R. 513)

2 The case was a judicial review of a decision by the B.C. Human Rights Commission to refer to a tribunal the case of a post operative transsexual woman who was terminated from Rape Relief's volunteer training when the organization learned that she was transsexual. The matter was returned to the tribunal for a determination of the merits of the case. At this writing the tribunal had been held but a decision not rendered.

In *Sheridan v Sanctuary Investments*[3], a tribunal held that BJ's, a gay bar in Victoria, had discriminated against Tawni Sheridan on the basis of sex and/or disability when it refused her permission to use the women's washroom.

In *M.L (Maison)*[4], a Quebec tribunal held that the employer of a male to female transsexual discriminated against her in terminating her employment after she advised her employer that she was going to transition on the job.

Ferris v OTEU[5] held that a union had discriminated against Leslie Ferris in refusing to pursue a grievance on her behalf. The genesis of the grievance had been a complaint by someone that Ms Ferris, a preoperative male to female transsexual, was using the women's washroom.

Sex reassignment surgery is paid for by B.C. MSP. The Canadian Armed Forces has a policy permitting its members to transition. So does the Vancouver Police Force. Corrections Canada has settled a human rights complaint permitting Synthia Kavanagh to have sex reassignment surgery and to be moved from a male correctional institution to a female correctional institution. School boards in the Lower Mainland have had teachers who have returned to work teaching the same subject in the same school after transition.

Assistance for employers or trade unions who have an employee who is transitioning is available through the Vancouver Gender Clinic at Vancouver Hospital. Where an employer takes a proactive and supportive position the impact of an employee transitioning in the workplace is minimal.

An employer who dismisses an employee for transitioning[6] is open to a suit for constructive dismissal[7], and it is possible that *Wallace v United Grain Growers*[8] would be applied to increase damages depending on how the termination is carried out. An employer in such a situation is independently liable under human rights legislation.

Employers have a duty to accommodate transitioning employees. So transitioning employees should be permitted to use the washroom of the target gender. Any other solution – including having trans people using the washroom outfitted for employees with disabilities, which centres them out – are likely discriminatory. Though the issue has not been litigated, one can expect that employers will be held to treating sex reassignment surgery as any other medical absence.

There is only one sex reassignment facility in Canada, in Quebec. Many :British

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3 [1999] B.C.H.R.T.D. No. 43

4 C.D.P. (M.L.) c. Maison des jeunes (T.D.P.Q. Montreal, No. 500-53-000078-970)

5 [1999] B.C.H.R.T.D. No. 55

6 Or crossdressing, at least if the employee makes a choice to live full time in the target gender

7 *Gill v. Fairview Chrysler Dodge Ltd.* [1996] O.J. No. 4691

8 1997 3 SCR 701

Columbians go to facilities in the United States, which is expensive. And some cognate procedures such as electrolysis can be both time consuming and expensive. Health care insurance plans should be reviewed to make sure that their coverage is non-discriminatory. Unionized employers face exposure under the collective agreement if the agreement's definition of 'health care' is wide enough to include sex reassignment surgery when the contract of insurance does not. Both unionized and non-unionized employers may be liable under human rights legislation may face a human rights claim that a health care or medical leave policy which does not treat sex reassignment surgery in a manner similar to other elective surgeries.[9]

3. Working In/Working OUT

For queer employees, there is always the question of whether they can be/should be/can't be open about their sexual orientation and / or their gender identity in the workplace.

Sexual orientation and sex are both species of "personal information" which may not be released to third parties under the *Freedom of Information and Protection of Privacy Act,* which governs most public sector employers. Both employers and trade unions should be careful not to disclose the information inadvertently in the workplace.[10]

Conversely, some employers attempt to prohibit lesbian, gay, bisexual (and, if it were to come up, transgendered) employees from disclosing their sexual orientation and/or gender identity.
In a recent Manitoba case, a school board's directive to teachers not to discuss their sexual orientation was upheld by the Court of Appeal.[11] The union had taken a policy grievance to determine the reasonableness of a response to an inquiry by a teacher about whether she could disclose her sexual orientation as a lesbian as a way of combating homophobia. The board's response was that such a disclosure was never

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9 *Stephens v. Services de sante du Quebec* (Que. C.A.) [1994] Q.J. No. 178

10 In *Dawson Creek and District Hospital and Health Sciences Assn. of British Columbia (Perry Grievance)* [1996] B.C.C.A.A.A. No. 297 the Union speculated, in a recall grievance meeting with management, that the reason that the grievor had not been recalled was because of his sexual orientation. The meeting erupted and ended. Management proceeded to interview all hospital staff with authority to call in workers and asked inter alia whether they had been influenced by the grievor's sexual orientation, thereby effectively outing him to his coworkers. The grievor was very much in the closet, having for example not told his family he was gay. The union grieved the employer's choice to conduct those interviews, demanding $50,000 in damages. The arbitrator held that, since the union was the body which raised the serious allegation of discrimination, and did not when they raised the matter specify that the information was confidential, the grievance failed (Don Munro, Arbitrator).

11 *The Assiniboine South Teachers' Association of the Manitoba Teachers' Society and The Assiniboine South School Division No. 3* [2000] M.J. No. 324

appropriate. In agreeing with the arbitration panel that the grievance was inarbitrable[12] the Court of Appeal noted that the directive, as worded, was inarbitrable as a policy grievance of the "work now, grieve later" variety in part because it failed to distinguish among the situations isn which such a disclosure might be made.[13] The implication of the Court of Appeal's decision is that there may be some situations in which it is, and some in which it is not, reasonable for a teacher to disclose her sexual orientation.

In *Chamberlain*[14], the Surrey School Board was found to have discriminated against Chamberlain, a gay kindergarten teacher, when they moved a child out of his class at the request of his parents, who did not approve of Chamberlain's sexual orientation. The arbitrator found that the principal had acted in what she understood to be the best interests of the child and the teacher, but the decision was contrary to the collective agreement because it was based in part on Chamberlain's sexual orientation.[15]

4. Hiring

People who are homophobic or transphobic – whether for religious reasons or otherwise – do not want to hire queer people and feel morally justified in their position. If queer employees are hired, they are expected to be in the closet. Conversely, queers want a workplace in which they are welcome and free to be expressive about their lives in the same way that heterosexuals are. Homo/transphobes regard queers as immoral; queers regard homo/transphobes as discriminatory and anti-egalitarian. The tensions between these positions and variations of these positions continue to be worked out.

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12 A majority of the panel had held that the determination of whether disclosure of a teacher's sexual orientation should be made was a management right, as opposed to company rule which could be tested by the board for reasonableness, inter alia because the determination could interfere with the board's right to set curriculum.

13 "[T]he policy statement here is very broad and covers all manner of circumstances in which disclosure of a teacher's sexual orientation might occur. It may be reasonable, of course, to prohibit disclosure in some of those circumstances while not in others. Thus it might be reasonable to prohibit a teacher from discussing intimate details of his or her sex life - or even from disclosing the teacher's sexual orientation - as a means of encouraging students to choose the teacher's lifestyle, but unreasonable to prohibit a teacher from using the fact of his or her homosexuality as a means of combating intolerance of homosexuals. The problem presented by the grievance in the form it took is that it only permitted a judgment on the reasonableness of the policy as a whole regardless of the circumstances in which a breach might occur. It is no sensible, in my view, to make such a judgement."

14 *Surrey School District No. 36 and Surrey Teachers' Assn. (Chamberlain Grievance)*1998] B.C.C.A.A.A. No. 522 (Kelleher)

15 It is trite law in the human rights context (a) that "customer preference" can never operate as a defence to an allegation of discrimination; and (b) that to be contrary to human rights law, the challenged decision need not be based entirely on the discriminatory ground. It is enough if the discriminatory ground was one of the factors taken into account.

One would expect that it would go without saying in 2001 that it is discriminatory and unlawful to refuse to hire someone because of their sexual orientation or gender identity. Since the earliest cases were brought, human rights legislation has been amended to include sexual orientation protection and the *Charter* has established the constitutional basis for that protection. Gays and lesbians have been litigated into the military.[16] The notorious practices of Canada's intelligence agencies of keeeping track of homosexuals and refusing to hire them has been challenged[17]

However religious institutions are entitled to rely on a section of the Human Rights Code exempting them from the application of the Code to their operations if a primary purpose of the institution is to give a preference to its members.[18] So it is possible that the decision of the Supreme Court of Canada in *Caldwell* could operate as a justification for a school, at least for a religious school, to refuse to hire a teacher who was lesbian, gay, bisexual or transgendered. In *Caldwell* the S.C.C. upheld the decision of a Catholic School Board not to renew the contract of a teacher who had contracted to observe the dictates of the faith but, notwithstanding that contract, married a divorced man in contravention of the teachings of the Church. It is likely that in the post-*Charter* era that case will be held to apply, if it does at all, only to situations which legitimately implicate the employee's religion, such as schools or churches.

Transgendered employees may face difficulties in being hired where an employer is a women-only organization. The employer may succeed in an argument by analogy to *Caldwell* that the fact of the individual's transgender history makes her unsuitable for work in the organization. This was the argument made by Rape Relief before the Human Rights Tribunal in a case in which the decision is still pending[19]. Rape Relief argued that a post operative transsexual woman, whose birth certificate had been changed and who had experience with counselling abused women, was unsuitable to work in their organization because she did not share the same socialization experiences of other women in the organization.

On the other side of the argument, it is arguable that employment equity programs which do not invite people from those communities run counter to the rationale in *Vriend*, which prohibits anti-discriminatory programs which do not act to counter homophobia.[20] Transphobia would be in the same category.

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16 *Douglas v Canada* [1993] 1 F.C. 264

17 *Stiles v. Canada* [1986] F.C.J. No. 974

18 Notwithstanding *Caldwell*, quare whether that exemption should operate to permit the institution to discriminate *among* its members contrary to the Code and claim immunity.

19 Supra, fn 2

20 Many employers now doing "inclusive advertising" include lesbians and gay men among the categories of people particularly invited to apply, along with women, people with disabilities, aboriginal people and people of colour. The situation of queer workers in relation to employment equity programs is problematic. There is little doubt that they experience discrimination in the workplace. But since no one counts queers, the traditional way of establishing whether a target group is over or underrepresented relative to their cohort in the population at large is not available. Arguably it makes it impossible to include queers in employment equity programs. Mandatory

In *Trinity Western,* the B.C. Teachers Federation has argued that it has the right to refuse teacher certification to students who graduated from Trinity Western, a bible college in the Lower Mainland, because the college requires students to sign a contract that they will (inter alia) refrain from homosexual acts. The Federation justified its decision on the basis that students taught exclusively in that environment will be unsuited to teach in the pluralistic school system in British Columbia. The case is being decided by the Supreme Court of Canada.[21]

A transgendered person should be treated as a member of the gender s/he is living as. It is arguably discriminatory to require birth certificates as "proof of gender" unless one does it for all employees; and since all spousal benefits are available to heterosexual as well as same sex genders, and the law dictates that a trans worker has the right to use gendered facilities in their gender of identification, there is no need for further inquiry into an employee's gender or gender status.

5. Harassment

It is now trite law that sexual harassment by someone of the same gender is sexual harassment, and therefore discrimination on the ground of sex. It is beyond the scope of this paper to outline the general law with respect to harassment in the workplace and reference should be had to a text on the subject if the issue arises.

An emerging concern for lesbians and gay men in the workplace is the situation of lesbians and gay men *against whom* a complaint of harassment may be laid. In developing sexual harassment policies in the first instance, regard was had to the experience of women victimized by workplace harassment. Some of the dynamics included an expectation that a woman would not lay a complaint without merit, since the fallout for her own career was likely to be significant.[22] That expectation about the power dynamics does not necessarily hold, however, when the "more powerful" person

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employment equity programs, such as the contractual requirements imposed by the federal government, do not include queers among the target groups for the program.

21 The Court of Appeal noted that Trinity was exempted from application of the Human Rights Code as any contravention arose from a preference given to a member of an identifiable group characterized by a common religion. There was no discrimination based on sexual orientation that fell afoul of section 15(1) of he Charter. A large measure of deference was not required to Council to have regard to the public interest in the establishment of standards but this did not empower Council to consider whether Trinity discriminated against persons under the Charter and Human Rights Code. Even if the decisions were within Council's jurisdiction, they reflected an error in law and were patently unreasonable as there was no evidence that the proposed program discriminated against homosexuals. With regard to Lindquist, there was no proper foundation for Charter analysis as she was not excluded from Trinity's program as a result of Council's decisions. The trial judge was correct in directing Council to approve Trinity's application. If Council had properly instructed itself, there would have been no need of further conditions for granting approval of the program.

22 That assumption is changing: cf *Blencoe* with *the one from SFU and the one from UBC*

(eg a supervisor) is a gay man or lesbian. A worker may calculate, correctly, that if they make a complaint against a lesbian or gay supervisor the assumption will operate the other way, and there will be an effective presumption against the supervisor.[23]

A second concern is that a worker may lay a complaint about "sexual harassment" with respect to behaviour which, were it between a man and a woman, would be regarded neither as sexual nor as harassing. The same is true across race. The complaining employee may genuinely believe that the behaviour was inappropriate– but the belief is itself rooted in homophobia. Investigations of allegations of harassment by a lesbian, a gay man, or a heterosexual person of colour must take into account the dynamics of homophobia and racism.

The case law establishes that it is sexual harassment (a) to call someone gay if they are not[24] (b) to call someone gay if they are or (c) to make a homosexual advance, whether seriously or as an insult, to another employee.[25]

When dealing with a complaint of harassment against a queer employee, it is essential to consider whether the remedy requires physical protection. Queers are at physical risk in homophobic/transphobic workplaces. Safety mechanisms could include such things as an emergecy alarm[26].

An employer has an obligation to maintain a workplace free of a poisoned atmosphere. But if the employer takes prompt steps to counter the effects of a potentially poisonous workplace factor, it will have discharged its responsibility.[27]

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23 The same dynamic may operate when a white woman worker complains about a supervisor of colour – when unconscious stereotypes about sex between men of colour and white women may colour the investigation into the allegation.

24 *Brotherhood of Maintenance of Way Employees v. Canadian Pacific Ltd.* [1997] Q.J. No. 466 the Quebec trial court upheld on judicial review the decision of an arbitrator that a shop steward be dismissed because he taunted two employees about being gay lovers till the workplace came to believe it.

25 *Fehr v. Canadian Pacific Railway Co.* [2000] C.L.A.D. No. 47 (Schwartz), a case involving gestures and suggestions of oral sex by a supervisor to an employee he was supervising intended as a demeaning insult, contains a review of the relevant factors to take into account when assessing penalty.

26 I have dealt with cases in which employees have suffered assaults and death threats in addition to routine and concerted taunting.

27 In *Chamberlain*, supra, the Surrey School Board had received a "Declaration of Family Rights" which purported to be from a parent enjoining the school from exposing a child to any information which would suggest that homosexuality was "normal, natural or to be tolerated." The board promptly sent a memo saying that the declaration was void and of no effect. The arbitrator held that the Board had fulfilled its duty to maintain a discrimination-free workplace.

6. Particular circumstances

There are two employment fields where queer employees are most likely to encounter problems: the education system, and any personal care workplaces.

In the education system there is a currently-unresolved tension between the rights of lesbian, gay, bisexual and transgender teachers and students, on the one hand, and the rights of parents opposed to homosexuality on moral grounds. *Chamberlain* and *Assiniboine South Teachers' Association* are examples. As *Chamberlain* indicates, homophobic parents do not want their children "exposed" to gay or lesbian teachers who might then be a role model. Since it is now illegal to prohibit gay , lesbian or transgender teachers[28], the next best thing is to forbid those teachers or principals from talking about sexual orientation or gender identity at all in any context. LGBT teachers suffer from the stereotype which equates sexual orientation or gender identity with sex: queers are only what they do in bed. A discussion of families with two moms is seen through that lens as a discussion of (homo)sexuality, though a discussion of a family with a mom and a dad would never be automatically assumed to be about sexuality.[29]

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28 Such was not the case till B.C.'s Human Rights Code was amended to add sexual orientation in 1992. Though gender identity has not been added to the code, transgender teachers can rely on protection on the basis of sex: *Vancouver Rape Relief Society v. British Columbia (Human Rights Commission)* [2000] B.C.J. No. 1143

29 In the "Surrey Book Banning Case", *Chamberlain v. Surrey School District No. 36* [2000] B.C.J. No. 1875; 2000 BCCA 519 the B.C. Court of Appeal reversed the trial court decision that, in banning three books (Asha's Moms; One Dad Two Dads Brown Dads Blue Dads; and – all primary school story books) the school board had improperly acted on the basis of religious conviction. The Court of Appeal took the view that the fact that a moral position is informed by a religious conviction does not ipso facto make the position improper. The disappointing aspect of the Court of Appeal's decision is its failure to understand that a belief that homosexuality is immoral is, itself, indefensibly discriminatory. Consider what the result would be if the Surrey School Board had banned story books about aboriginal children on the ground that in their moral view, aboriginal people are savages and ought not to be held up as role models. The court said "The division of moral conviction on this subject cuts across society and divides religious communities as well as people of no religious persuasion. The moral position of some on all sides of particular issues will be

The law also holds with respect to teachers that off work conduct which might impair the teacher's duty as a role model is disciplinable and may be grounds for discharge. In *Caldwell*[30], a human rights tribunal even held that a Catholic school board, which required that its Catholic teachers observe the practices of the faith, was justified in not renewing the grievor's contract because she had wed a divorced man, contrary to the teachings of the church.[31] Gay and lesbian teachers are vulnerable in situations where their school board regards homosexuality as "immoral".

Interestingly, several teachers in the Lower Mainland have transitioned (had a social and surgical change of gender) and continued to work in the same school, teaching the same subjects, without incident. An employer may not discipline or fire an employee because s/he changes gender on the job[32]

In residential care facilities, hospitals, or correctional institutions – any setting in which an employee is involved with the personal care of residents, and especially settings such as facilities for people with mental or psychiatric disabilities, – lesbian and gay employees are particularly vulnerable. Often in such facilities there will be staff, a board of directors, volunteers, and the families of residents all involved with the care

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influenced by their religion, others not. There is no bright line between a religious and a non-religious conscience. Law may be concerned with morality but the sources of morality in conscience are outside the law's range and should be acknowledged from a respectful distance. Can "strictly secular" in s. 76(1) of the School Act be interpreted as limited to moral positions devoid of religious influence? Are only those with a non-religiously informed conscience to be permitted to participate in decisions involving moral instruction of children in the public schools? Must those whose moral positions arise from a conscience influenced by religion be required to leave those convictions behind or otherwise be excluded from participation while those whose spouse similar positions emanating from a conscience not informed by religious considerations are free to participate without restriction? Simply to pose the questions in such terms can lead to only one answer in a truly free society. Moral positions must be accorded equal access to the public square without regard to religious influence. A religiously informed conscience should not be accorded any privilege, but neither should it be placed under a disability. In a truly free society
moral positions advance or retreat in their influence on law and public policy through decisions of public officials who are not required to pass a religious litmus test."
The Court of Appeal concluded that the Chambers judge had erred in deciding that a religiously-informed view was bad for the reason of its religious roots. By the time the case got to the Court of Appeal, the School board had conceded that the books were entitled to be in the library; so the remaining issues were moot.

30 *Caldwell v. St. Thomas Aquinas High School* [1984] 2 S.C.R. 603. *Quare* whether the result would be the same post-Charter.

31 And see also, for example, *Wellington Board of Education and O.S.S.T.F* 24 L.A.C. (4th) 110 (1991) Shime, Richardson, Riddell) where a high school teacher was charged for indecent exposure as a result of a bathhouse raid. Though there were mitigating circumstances – his wife's and mother's recent deaths – and though he had been a role model in the community, the offence involved an innocent party and was publicized so that the community was aware of the incident; therefore the grievor could not maintain the confidence and respect of students and parents and discharge was justified

32 *M.L.,* supra fn 4

of the patient. A queer employee who stays in the closet may be insulated from accusations of impropriety; but only till someone outs him or her...and then s/he may be seen as suspect not only because s/he is queer, but also because s/he has "hidden" an important fact. But if an employee is "out" the facility may experience and bow to pressure from family of the resident not to assign the queer employee to their family member since they disapprove of homosexuality.

At schedule A is a draft of a policy which I developed for use in residential care facilities in light of the high number of queer employees in that industry who were consulting me about issues of being out in the workplace. The case law establishes that employment equity is a proper factor to take into account in assigning workers to residents, even over concerns for the privacy of the residents.

7. Spousal Benefits

It has been settled law in British Columbia since the 1992 *Knodel* decision of Madam Justice Ann Rowles, as she then was, that "spousal benefit plans" must treat same gender relationships on the same basis as opposite gender relationships. In that case, the issue was whether or not MSP could offer a $6 per month premium break to heterosexual partners but not offer the same benefit to same sex partners. The answer under the *Charter* was no.

It was in fact in the context of union grievances about denial of same sex spousal benefits in the workplace that much of the jurisprudence about queer equality has been developed in Canada. Case by case, benefit by benefit, public and private employers have been required to treat same sex partners on the same basis as opposite sex common law partners.[33]

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33 *Watson and Treasury Board (Indian and Northern Affairs Canada)* [1990] C.P.S.S.R.B. No. 91 (T.W. Brown) held that bereavement leave for the funeral of one's "sister in law" was not available to a man whose male partner's sister had died;
Hewens and Treasury Board (Public Works) [1992] C.P.S.S.R.B. No. 164
(Chodos) held that marriage leave with pay was not available to a gay man because "marriage" "means" a union between a man and a woman; therefore a gay man cannot marry and the non-discrimination clause has no application; *Canada (Treasury Board -- Environment Canada) and Lorenzen* (1993) 38 L.A.C. (4th) 29 (Galipeau) held, following *Haig*, that sexual orientation

The courts were faced with the issue of same sex partners' entitlement to "spousal benefits". In the first case, *Mossop*[34], which had been filed as a human rights complaint alleging discrimination on the basis of 'family status' under the Canadian Human Rights Act[35], the court held that the denial of benefits under the collective agreement was did not discriminate on the ground of family status. The second case, *Egan v Canada*[36], concerned the question of whether a gay man could make a claim under the *Old Age Security Act* on the basis of his 40 year relationship with his partner. The majority held that sexual orientation was a protected ground under the *Charter.* However Egan lost because Sopinka, in the majority on the question of inclusion of sexual orientation protection, held that the government was justified in its refusal of coverage under section 1, since the claim was a "novel" one involving the expenditure of government funds. This approach to section 1 alarmed all queers, and all other equality seeking groups. Sopinka's view however did not prevail.

In *Rosenberg v Canada*, where the issue was whether or not Revenue Canada was entitled to deregister CUPE's staff pension plan which included same sex partners, as it had threatened to do, Madam Justice Abella of the Ontario Court of Appeal essentially ignored Sopinka's judgement and ruled in favour of the union. Her reasoning was subsequently adopted in the unanimous judgement of the Supreme Court of Canada in *Vriend v Alberta*[37]. Vriend was an employee dismissed because he was gay. But Alberta's human rights legislation did not include sexual orientation as a protected ground. Vriend argued that the legislation was discriminatory because it purported to protect marginalized groups but offered no protection to him. In a unanimous decision, the Supreme Court of Canada agreed.

Across the country, the response of labour arbitrators, human rights tribunals, and courts was erratic as they considered the question of whether or not equality for lesbians and gay men required that benefit programs be extended to their partners on the same basis as to opposite sex partners[38].

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protection must be read in, and, applying that protection, spousal benefits have to be available to commonlaw heterosexual and common law same sex spouses. In *Canada v. Owen* [1993] F.C.J. No. 1263 the Court held that Owen, a preoperative transsexual married to RW, claimed widowed spouse's allowance on RW's death. The benefits were denied because though Owen had lived as a woman since 1951 she had not completed the sex reassignment surgery which would have entitled her to claim benefits as a widow.

34 *Mossop v Canada* [1993] 1 S.C.R. 554

35 When the complaint was filed 'sexual orientation' was not a protected ground under the federal human rights legislation.

36 *Egan v Canada* [1995] 2 SCR 513

37 [1998] 1 SCR 493

38 The first case about spousal benefits was *Andrews v. Ontario (Minister of Health)* (1988) 64 O.R. (2d) 258. In that early case, Ontario held that the denial of dependent coverage under the Ontario health care plan was not discriminatory on the ground of sexual orientation or, if it was, was a violation saved by section 1. Later cases lurched toward a

Public sector employers dragged their feet and raised every argument available to them to avoid extending benefits to same sex partners. For example in *Canada (Attorney General) v. Moore* [1998] 4 F.C. 585, the employer federal government had responded to an order by the Canadian Human Rights Tribunal that it was discriminating on the basis of sexual orientation by providing benefits to common law heterosexuals but not to same sex partners, by creating a new administrative category, "same sex partner". On judicial review the Federal Court Trial Division held that the "separate but equal"regime did not fulfil the requirements of the human rights legislation; the employer was ordered to change the definition of 'spouse' in all benefit plans which benefitted opposite sex partners.

A particular area of resistance for the federal government was participation by the partners of lesbians and gay men in employment pension plans. In order to attract favorable income tax treatment such plans must be registered with the Canada Customs and Revenue Agency.

In 1999 the Supreme Court of Canada's decision in *M v H*[39], the case which established that Ontario's *Family Law Act* had to be read to apply equally to opposite sex as to same sex employees, laid to rest any lingering doubt that regimes which treat opposite sex partners differently than same sex partners are discriminatory. That case together with *Miron v Trudel*[40], which established that it is also discriminatory to offer different benefits to married than to unmarried people, have had the effect that for most if not all public policy purposes, same sex partners must be treated equally to opposite sex partners who in turn must be treated equally with married people.

The law is now settled that all benefit programs – whether provided under a collective agreement or pursuant to a government program – must treat lesbians and gay men and their partners on the same basis as heterosexuals and their partners. Canada has passed omnibus legislation changing the definition of common law spouse wherever it occurs to include same sex partners. B.C. has also amended most of its legislation affecting common law partners to include same sex partners.

The application of the law requires that the particular situation of queer employees be taken into account. For example, in *Gold*, the employer denied parental leave to the non-biological lesbian co-mother of a child born to her partner, arguing that she was

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different result. In *Metro Toronto Reference Library and C.U.P.E., Loc. 1582*, (1995) 51 L.A.C. (4th) 69 (Rose, Mayne, Slone-Taylor) the panel concluded that denial of bereavement leave to an employee whose partner had died was a breach of the non-discrimination clause of the collective agreement; *University of Lethbridge and University of Lethbridge Faculty Assn*., (1995) 48 L.A.C. (4th) 242 held that denial of health benefits to a same sex partner was discriminatory; the Manitoba Court of Appeal held in *Vogel v. Manitoba* [1995] M.J. No. 235, (1992), 79 Man.R. (2d) 208, that denial of enrolment in a pension benefit plan was discriminatory. *Sarson and Treasury Board (Canadian Grain Commission)* held that the failure of the collective agreement to include sexual orientation specifically was not fatal to a discrimination claim with respect to relocation leave available to opposite sex partners but denied to same sex partners. *Yarrow and Treasury Board (Agriculture and Agri-Food Canada)* [1996] C.P.S.S.R.B. No. 10 came to the same conclusion with respect to bereavement leave for the death of a same sex partner.

39 *M v H* [1999] S.C.J. No. 23

40 [1995] 2 S.C.R. 418

not a ‘parent’ since she was neither the natural nor the adoptive mother of her son. Her grievance was allowed. The employer’s benefit plan was a ‘top up’of the employment insurance plan. Ms Gold had been held ineligible by that program. The arbitrator held that the employer was not entitled to rely on a discriminatory federal program and so was required to fund Ms Gold’s entire parental leave.[41]

7. Government Programs

The *Employment Insurance Act*, which provides that an individual has a bona fide reason for departing her employment to accompany her spouse to a new job, now applies whether the employee’s partner is a woman or a man.

The *Income Tax Act* requires that same sex partners be treated identically to opposite sex partners, which has the effect that same sex partners must identify themselves as living common law on TD1's and on their income tax returns.

Workers compensation survivors pensions are available equally to opposite sex and same sex partners.

Of course, government agencies which are themselves homophobic or transphobic are vulnerable to a human rights complaint or a *Charter* challenge.[42]

8. Unions

Unions have been the leaders in the Canadian fight for equality rights for queers in Canada.[43] As a consequence, some employees have sought an exemption from membership in the union. Their efforts have been unsuccessful.[44]

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41 British Columbia (Public Service Employee Relations Commission) and B.C.G.E.U. 69 L.A.C. (4th) 83 (Hope)

42 For example, in Decision No. 1580/99I of the Ontario Workers Compensation Board, [1999] O.W.S.I.A.T.D. No. 2225, a transsexual who had been treated with contempt by workers compensation employees was held entitled to compensation for the resulting psychological distress.

43 Many of the test cases about sexual orientation protection were brought by unions. The CLC is currently considering policy language to protect transgender people.

44 In *Reitsma and British Columbia Nurses Union* [1998] B.C.L.R.B. 515.75.50.40-01 BCLRB, the B.C. LRB held that the request for an exemption in a particular union which an employee initiated when the union formed a lesbian and gay committee must fail; the employee must oppose all unions on religious grounds, and not just the specific conduct of one union. In Sheppard and Hospital Employees' Union and Fort Nelson General Hospital [1997] B.C.L.R.B.D. No. 143 the BCLRB

Though unions have been leaders in the equality fight, nevertheless they cannot necessarily be relied upon to advance the interests of queer employees in the workplace. Workplace culture of course influences stewards. And (though the situation is improving) unions may not have the information or skills to represent queer employees effectively. A union may face an unfair representation complaint if its own policies or practices are homophobic or transphobic.[45]

If you are acting for a queer employee who is in a trade union, the most effective strategy is to offer assistance and support to the union. The alternative can involve the employee having to take on both the employer and the trade union, a daunting and often unsuccessful enterprise. Even if the employee "wins", legally speaking, the chances of surviving in the workplace after such a challenge are small.

Unions may be held liable for breach of their duty of representation if they fail to pursue a case of discrimination against queers[46]; or if they contribute to the outing of queer employees[47].

9. Conclusion

Lesbians, bisexual people, gay men, and their partners, are for all intents and purposes entitled to the same employment rights and benefits, and subject to the same restrictions, as heterosexual employees and their partners.

Transgendered people are entitled to access to gendered spaces without discrimination. With respect to other employment-related issues, it is safe to treat *Charter* and human rights cases under with respect to sexual orientation as a template with respect to rights for transgendered people.

The problem for a lawyer advising a client about an issue affecting a queer worker will be less likely to be a problem of the legal analysis, but a problem of the application of legal principle to the facts of the situation. That in turn requires that the lawyer be thoroughly familiar with the situation from the perspective of the queer employee.

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refused an employee's request to forward the equivalent of her union dues to a charity instead of paying them to the union, which supported queer equality.

45 *Kilby and Public Service Alliance of Canada* [1998] C.P.S.S.R.B. No. 28

46 *Ferris*, [1999] B.C.H.R.T.D. No. 55

47 *Daryl Jensen and International Union of Operating Engineers, Local No. 882 and The Baptist Housing Society of BC* [2000] B.C.L.R.B.D. No. 132

This pamphlet contains legal information. It is *not* legal advice. Laws change quickly, and individual situations vary. To find out how the law affects your situation, contact me. First interviews are always free of charge.

barbara findlay, Q.C.
604-251-4356 *or* bjf@barbarafindlay.com

www.barbarafindlay.com