
LITIGATING FOR LESBIANS

LEAF'S REPORT ON CONSULTATIONS WITH THE LESBIAN COMMUNITY

JUNE 1993

**The Women's Legal Education and Action Fund (LEAF)
489 College Street, Suite 403
Toronto, Ontario
M6G 1A5
(416) 963-9654**

TABLE OF CONTENTS

Introduction

The Project

1. Phase One: The Income Tax Act

Introduction

Overview of the Tax System

Examples of Discriminatory Tax Provisions

- * The Definition of Spouse

- * Child-Care Expenses

- * Tax Credits

Conclusion

2. Phase Two: The Consultations

Introduction

The Vancouver Consultation

- * Structure

- * Family Panel

- * Summary of Discussions

- * Sexual Orientation Panel

- * Summary of Discussions

The Halifax Consultation

- * Structure

- * Family Panel

- * Summary of Discussions

- * Sexual Orientation Panel

- * Summary of Discussions

The Toronto Consultation

- * Structure

- * Family Panel

- * Summary of Discussions

- * Sexual Orientation Panel

- * Summary of Discussions

- * Summary of Small Group Discussions

3. Phase Three: What Does It All Mean?

Conclusion

INTRODUCTION

In 1988, the Women's Legal Education and Action Fund (LEAF) adopted the case of Carol Nielsen who was denied coverage for her same sex partner under her employer's benefits plan for extended medical, dental and group life/accidental death insurance. As LEAF formulated its legal argument in this case, it became clear that we should be developing alternative formulations for lesbian equality claims in general. As a result, LEAF applied for and obtained funding from the Court Challenges Program (CCP) and the Ontario Women's Directorate (OWD) to:

1. engage in research to identify the policies, objectives and provisions of the Income Tax Act which in effect disadvantage lesbian and gay relationships; this would include a review of lesbian and gay equality cases to date;
2. consult with lesbians from diverse communities including aboriginal, Black, and disabled communities, in order to begin the process of developing viable and effective strategies for challenging legislation such as the Income Tax Act.

Originally it was intended that these consultations would provide an opportunity to discuss theories for arguing that discrimination against lesbians and gay men is sex discrimination. However, discussion of the proposal that the Canadian Human Rights ACT (CHRA) be amended to include sexual orientation as a prohibited ground of discrimination provided added focus to the direction of the LEAF consultations. Therefore LEAF structured its consultations to look at two issues: the legal definition of the term "family" and the merits of alternative approaches to lesbian equality claims. This latter issue focussed on sexual orientation protection and whether it can effectively overcome the compound oppression which lesbians face.

Carol Allen, a Black feminist law student who had worked at LEAF for a number of years and had participated on the Nielsen sub-committee, was hired to organize the consultations and prepare this Report. Ms. Allen prepared a package of consultation materials (Appendix A) which was distributed to 300 individuals and organizations across Canada. (Appendix B). Through the consultations, LEAF met with 150 individuals and organizational representatives.

There is currently an intense ongoing debate among and between lesbians and gay men. In part, the struggle has centred on two litigation strategies. The first adopts a formal equality approach which uses heterosexuals as the comparator. This approach argues that lesbians and gays are just like heterosexuals in all respects except for who they sleep

with. Its strategy is to secure the same benefits for lesbians and gays currently enjoyed by heterosexuals. The second approach utilizes a substantive equality analysis. It differs significantly from the formal equality approach in that it does not seek to compare lesbians and gays to heterosexuals. It considers how alike or different these two groups are to be largely irrelevant, since "differences" are often a product of socio-political hierarchies. A substantive equality analysis therefore focuses on domination, subordination or inequalities of power as the measure and methodology of equality. By identifying power dynamics, its strategy is to fashion remedies based on inequalities in order to end them.

LEAF's expertise lies in the area of sex equality. Its mandate is to sponsor test case litigation that will improve the status of all women. Over time, certain principles have emerged which guide LEAF's litigation strategy. (See Appendix A, pages 7-1 to 7-4) In light of this, the consultative process involved only lesbians.

Lesbians and gay men share the experience of living in a homophobic culture and society. However, because lesbians are women, their experience of oppression is compounded. As well, it becomes something quite unique when the intersection of race, class or ability is considered, as this results in a deepening of oppression that is particular to the experience of multiple discrimination. The ability to fashion legal arguments which give voice to, and seek appropriate redress for, multiple oppression is not a problem unique to lesbian and gay equality claims. However, the development of a litigation strategy for lesbian equality claims is one of LEAF's priorities.

THE PROJECT

There were three distinct phases of this project which will be discussed in the order they occurred. The first phase involved identifying specific discriminatory provisions of the Income Tax Act (ITA) which disadvantage lesbians and gay men. The second phase was the actual consultation process. The third phase is a synopsis of the factors identified through the consultation process that LEAF can incorporate in the development of a litigation strategy for lesbian equality claims.

Phase One: The Income Tax Act

Introduction

Much of the discrimination faced by lesbians and gay men in the ITA flows from the restrictive heterosexist and patriarchal definitions of "family", "dependent" and "spouse".

Many individuals will be quick to point out that this problem is not unique to lesbians and gay men but also affects individuals who are unrelated and who choose to live together and support each other. However, the effect of the ITA's restrictive definitions is not the same for all groups.

For example, an inherent element of lesbian oppression not shared by co-habiting, unrelated individuals is the rendering invisible of the sexual aspect of these relationships; this would not be an issue for unrelated individuals living together in non-sexual relationships. Therefore, using unrelated cohabiting individuals as a comparison perpetuates lesbian oppression by further obscuring the sexual nature of the relationship.

For lesbians in particular, their relationships are not recognized because the heterosexism* and homophobia* inherent in Canadian society spills over into tax policy. When this is coupled with the economic fact that, as women, lesbians live in a society where sex inequality prevails, the real effect of lesbian disadvantage becomes apparent. This disadvantage is multi-layered. However, one place in which it is clearly discernable is in its economic impact.

The problems with the ITA may extend far beyond simply expanding definitions to include and recognize lesbian and gay relationships. There are currently diverse opinions as to whether the legal strategy to obtain equality should continue to utilize the similarly-situated type of argument which has been the basis for most lesbian and gay equality litigation to date.

One opinion is that it would not be in the best interests of lesbians to simply expand the definition of spouse or family in any legislation, if only those relationships that look like traditional heterosexual relationships are recognized. Relationships are much more diverse and complex than the traditional heterosexual nuclear family model. "Spouse" and "family" are often inadequate or inappropriate proxies for the extension of benefits,

* The terms "homophobia" and "heterosexist" are problematic. Although they do draw attention to the fact that the oppression lesbians experience stems partly from the fact that they are lesbians and therefore a group distinguished from heterosexual women, they do not adequately convey the gendered nature of lesbian subordination. It would be preferable if there were a term which captured the unique and compound experience of lesbians under conditions of hetero-patriarchal domination, but unfortunately no such term exists.

rights or responsibilities. The focus should be on the nature of the benefit, right or responsibility and the rationale for its extension or imposition. From this perspective, a fundamental overhaul of taxation policy is required which recognizes changes in the types of relationships individuals are entering into, and which also reflects the kinds of commitments and responsibilities willingly incurred.

Other lesbians are of the opinion that lesbian and gay relationships are very much like heterosexual relationships and as a result there should be no differentiation in the legal and social status afforded to such relationships. Of primary concern is the right to choose and that right should be upfront and centre in any argument placed before the courts. From this perspective, changes to tax legislation would simply involve the extension of existing policies, as they apply to heterosexual couples, to include lesbian and gay couples. While fairly minor in terms of practical execution, these changes could be of major significance in the lives of lesbians and gays and in redefining the social and legal meanings of spouse and family.

As stated earlier, it is the ITA's narrow definitions of "family", "dependent" and "spouse" that are mainly responsible for discriminating against lesbians and gay men in the area of tax legislation and tax policy. It is undeniable that the debate and discussion on these issues extend far beyond any specific challenge to the ITA. Lesbians and gay men may never reach a consensus on the meaning of equality although there can be little dispute that they want it and continue to fight hard for it because they recognize themselves to be living in conditions of inequality.

Overview of the Tax System

The Canadian tax system is comprised of a number of different taxes. These include excise, sales, property and income taxes. The effect of the entire tax system on individuals determines their tax burden. Lesbians, because they are women and because they are lesbians, are treated unequally by the tax system and consequently bear a disproportionate burden of tax liability.

Income taxes are the primary means of taxation in Canada. Legally, all Canadians are regarded as taxpayers regardless of their relationships with other individuals. However, an individual's relationship to other members of society is a factor in determining tax liability. A number of tax credits, including the marital amount credit, the child tax credit, transfer of unused non refundable credits, RRSP deductions, and dependency deductions are contingent on marital and family status. These credits, which in economic terms actually work out to be tax advantages, only apply to certain relationships that are precisely defined by the ITA. Lesbian (and gay) relationships and/or families unrelated by blood, marriage or adoption are legislatively excluded from eligibility for these

credits.

Although the Canadian income tax system uses the individual as the basic tax unit, tax liability is also determined on the basis of family and marital status. While it may be true that the use of the family as a tax unit is an exception, it is also clear that, with respect to a number of provisions, the ITA assumes, recognizes and reinforces the existence of a marital or heterosexual common law unit.

Examples of Discriminatory Provisions

There are numerous provisions within the ITA which in effect discriminate against lesbian and gay relationships. The following is not an exhaustive list but is illustrative of the problem.

The Definition of Spouse

Many sections of the ITA have their own definitions of spouse. Without exception this definition is heterosexual. For example, s.146(1.1) defines spouse for the purposes of annuities, RRSP premium refunds, retirement income, retirement savings plans and transfer of funds under RRSP's, as an individual of the opposite sex who is married or who has cohabited in a conjugal relationship for at least one year or who is a parent of a child within that relationship. Private pension plans receive many tax advantages if they are registered under the ITA. However, only those plans which have an opposite sex definition of spouse will be eligible for registration under the ITA. Section 252(3) provides an extended definition of spouse with respect to, among other things, alimony and maintenance income and deductions, but this definition does not extend to lesbians and gay men. Therefore, any tax advantages, and to be fair, tax penalties, which flow from a spousal relationship do not apply to lesbians and gay men.

Child Care Expenses

Child care expenses are defined in section 63(3)(a). These expenses permit a maximum deduction depending upon the age of the child. Regardless, the actual deduction reflects only a small percentage of real child-care expenses. The expenses are only deductible for an eligible child if they allow a parent or supporting person to earn income from employment or self employment, take an occupational training course for which an allowance under the National Training Act is received, or carry on research for which a grant is received. The expenses cannot be claimed if the child is cared for by a parent or supporting person, by anyone who is not a resident of Canada, or by anyone under 21

connected to the taxpayer or his/her spouse by blood, marriage or adoption. Usually the parent with the lowest income claims child care expenses.

The existence of a supporting person is an interesting one in the tax system with respect to this deduction and the dependency credits. A supporting person is defined in section 63(3)(d) as the parent of the child, their spouse, or any individual who has deducted an amount under s.118 for the year in respect of the child, as long as the parent, spouse or individual resided with the taxpayer at any time during the tax year and at any time within sixty days after the end of the year. The creation of a supporting person category reflects a recognition on the part of the ITA that the financial responsibility for children may be shared between the parents and other individuals who are not the parents. Unfortunately it is not possible for a person to make a deduction under s.118 for any financial support provided to another individual unrelated by blood, adoption or marriage.

In a case involving a lesbian couple with dependent children, any financial contributions for recognized child-care expenses made by the non biological co-parent cannot be claimed as a deduction. Further, she cannot claim the children as dependents because, for the purposes of s.118(1)(d) and 4(4), dependents are defined as being only the child or grandchild of the parent or spouse, or the parent, grandparent, brother, sister, uncle, aunt, niece, or nephew of the taxpayer or the taxpayer's spouse. Since the definition of spouse is exclusively heterosexual, lesbians have limited access to this deduction.

Tax Credits

Entitlement to claim tax credits has a direct bearing on the calculation of an individual's ultimate tax liability. Theoretically, the policy objectives behind tax credits are twofold. First, they are designed to reduce the tax liability of individuals who are financially least able to pay income tax. Credits are supposedly more progressive than deductions which increase as income rises. Secondly, from a tax perspective, credits provide incentives which are designed to maximize an individual's financial well being.

There are two types of tax credits, non-refundable and refundable. The non-refundable tax credit is most easily understood and likely to form the basis of a challenge. It reduces an individual's tax liability but only to the extent that any tax is owed. There is no actual refund to the taxpayer because this credit works to offset the actual amount of tax payable. Among the most important non-refundable credits are personal credits, which are supposed to take into consideration the basic living expenses of individual taxpayers and members of their families who are classified by the Act as dependents. Included are any credits resulting from the age amount, pension income amount, disability amount and tuition and education amount. If a taxpayer does not require all of her non-refundable credits for a given tax year to reduce her federal tax payable to zero, the Act allows the

unused amount to be transferred to the taxpayer's spouse to reduce that person's income. Again, lesbians and gay men are caught by the definition of spouse and unable to access this tax advantage. Any unused tax credits are simply lost.

Section 118(1)(b) provides a credit to unmarried taxpayers for someone considered to be wholly dependent on them, who is related to them, and (unless a parent or grandparent) under the age of eighteen, or dependent due to a mental or physical infirmity. The amount of the deduction depends upon the income of the dependent. After the taxpayer reaches a certain level of income her tax credit vanishes altogether. Section 118(6) also defines dependent for the purposes of specific credits. Here a dependent can be a child or grandchild of the taxpayer or her spouse, or the parent, grandparent, brother, sister, uncle, aunt, niece, or nephew of the taxpayer or her spouse. Clearly the purpose of such a definition is to recognize that individual taxpayers may be a source of financial support to more than their immediate family. Unfortunately, these provisions are worded so restrictively that they apply only to those related by blood, marriage or adoption. Lesbians and gay men may take advantage of these credits as individuals but not as family units. Therefore, the contribution a lesbian makes in assisting with the financial costs of maintaining her partner's dependent family members cannot be claimed.

Conclusion

Over the past twenty five years there have been many changes which have occurred that are relevant to the position of lesbians and gay men within the tax system. Two feature prominently. First, the construction of the family has been radically altered. Second, the enactment of the Canadian Charter of Rights and Freedoms and, in particular, section 15(1) has had a dramatic impact on how equality claims are framed. What this will concretely mean in the area of tax law is unclear. To date lesbians and gay men have not challenged any provision of the ITA claiming that it violates their equality rights and is therefore unconstitutional. As a result, the door is wide open in this area and the strategy chosen has the possibility of either seriously eroding or perpetuating the existing inequities within our tax system.

Phase Two: The Consultations

Introduction

During the summer of 1992, LEAF consulted with lesbians in Vancouver, Halifax and Toronto on May 30, June 13, and June 20, 1992 respectively. A consultation package was developed and distributed to lesbian and gay organizations across the country and to numerous individual lesbians who expressed an interest in the issues. (Appendix A).

Lesbians who were unable to attend were invited to send in their written comments on the issues. Because there were clear differences in the current issues and priorities of the lesbian communities involved in the consultation process, the agendas in the three cities were not identical.

LEAF representatives attended all of the consultations. In Vancouver, local volunteers prepared the agenda and the guest list; LEAF participated in the organization of the consultation package. The meetings in Toronto and Halifax were primarily organized by LEAF.

Toronto had the greatest diversity in participants. However, a major shortcoming of all the consultations was the lack of representation from lesbians of colour, First Nations lesbians and disabled lesbians. There are many reasons for this. Certainly, more outreach to these communities could have been done, and the locations could have been more carefully chosen to make the consultations more accessible.

While acknowledging that part of the responsibility for the small numbers of lesbians of colour, First Nations lesbians and disabled lesbians may be the result of the way the consultations were organized, it is also important to identify and recognize the ways in which these lesbians may be particularly alienated by our legal system and therefore unwilling to participate in consultations in which the legal system is a primary focus.

In each of the cities, LEAF met to discuss the way in which lesbian equality claims have been litigated to date and how, or if, the legal strategy needs to be changed. These discussions were much broader than identifying any specific problem with the ITA. The results will necessarily have a direct impact on any test case litigation strategy involving lesbians.

Two major issues were prominent at all three consultations and formed the basis for much of the discussion. The first is the definition of family. Lesbian and gay relationships are not generally recognized in legal definitions of family. The second major issue involves the recent Federal government initiative to amend the Canadian Human Rights Act (CHRA) to include "sexual orientation" as a prohibited ground of discrimination. Although protection from discrimination on the basis of sexual orientation has had a short history in Canada, there now exists enough jurisprudence to conduct an analysis of how much protection including "sexual orientation" offers and to whom. Those who are uneasy about the inclusion of this terminology in the CHRA point to the way in which the meaning of sexual orientation discrimination is deeply gendered. They raise fears that because of this, sexual orientation protection may be at best less than helpful, and at worst decidedly detrimental, to lesbian equality interests. Others, while not unsympathetic to these concerns, regard sexual orientation protection as "the best that can

be got" from the legal system at this point.

There are no broad principles which can be extrapolated from these meetings since consensus was not reached on any issue. However, the importance and necessity of the discussions was voiced by all participants and many of the concerns raised were common in all three. While many participants confessed to not having given much thought to the issues prior to receiving the consultation documents, they were unanimous on the need to keep the discussion going. What follows is a synopsis of the discussions held in each city.

The Vancouver Consultation Structure

The Vancouver consultation was organized by LEAF in conjunction with the Vancouver Lesbian Connection and the Lesbian Working Group. Organizers in Vancouver worked hard to publicize this event and a number of articles appeared in local newspapers preparing the community for the discussions that were to take place at the consultation. The consultation packages sent to participants in Vancouver also contained articles written by members of the local community.

Family Panel

The consultation structure provided for both panel and small group discussions. The morning panel, "Are we family?", and the afternoon panel, "What do we need to protect us?", brought together lesbians who were actively involved in litigating for lesbian equality rights as lawyers, litigants and activists. On the family panel, Gwen Brodsky discussed the advantages and disadvantages of spousal benefits. Brodsky represented a coalition of equality seeking groups who intervened before the Supreme Court of Canada in the Mossop case. At issue was whether the denial of bereavement leave to a gay man, whose partner's father had died, violated the Canadian Human Rights Act. Brodsky provided the participants with an interesting and entertaining overview of the numerous problems associated with the development of an inclusive definition of family in the context of the case.

Diana Smith focused on the issue of whether or not lesbians want to be family and concluded that basically lesbian and gay relationships are very similar to heterosexual relationships and that arguments based on emphasizing the similarities were effective legally and politically. In support of this she shared her experiences as a long time trade union activist who has worked hard to get protection for lesbians and gays within the

labour movement. In her opinion, much of the success in this area can be attributed to emphasizing similarities rather than differences. Lee McKay provided some thoughts in the area of lesbian custody battles including issues such as maintenance and access between lesbians. The main focus of her presentation was the burnout that results from long term feminist activism. Carol Allen gave a brief outline of some of the possible problems with fighting for family/spousal benefits given the current basis of entitlement. (See Appendix A, pages 5-1 to 5-7).

After the presentations, participants broke into small groups to discuss the issues raised on the panels. Participants also had the opportunity to form caucuses based upon their own self identification. At the end of the day the small groups reported back to the larger gathering with a summary of their discussion.

It is a challenge to attempt to capture the essence of the discussions. To say that there is significant difference of opinion would be overly simplistic. The fact that consensus was not reached on any issue in Vancouver was a strong intimation of what was to follow in Halifax and Toronto.

Summary of Discussions

"We need to be careful about what we are doing. We need to be smart about it. We need to be brave and politically very tough. We need not settle for a facile, overly simple solution such as just changing the definition of spouse and making it gender neutral right across the board."

"Emphasizing the similarities between lesbian couples and heterosexual couples is a valid strategy. It's a strategy that is limited, that has lots of dangers, that is not visionary, but it is the best one to bring about concrete change. We are similar to heterosexual couples and it is politically expedient to emphasize our similarities."

One of the panellists used the terms revolutionary and reformist to describe the types of strategies being used to fight for lesbian equality rights in the area of family/spousal benefits. These descriptions are useful in setting out the general themes upon which the discussions became polarized. Some lesbians favoured a "radical" transformative approach while others took a more practical or "reformist" approach. However, the majority, regardless of their position on the political spectrum, expressed concerns about the traditional definition and structure of family. They identified it as heterosexist, patriarchal and deeply oppressive.

Clearly, some lesbians choose to structure their relationships in ways that look very similar to those of heterosexuals, and others do not. In recognition of this, a notable amount of apprehension was expressed about benefitting some at the expense of others. Not all lesbians are monogamous; not all lesbian couples live together, or if they do live together, not all do so in economic partnership. Yet, if the definition of spouse as it now exists is opened up to include lesbians, it will only include and recognize a certain type of lesbian relationship. In so doing this definition will continue to privilege one relationship structure over others.

At the same time, some lesbians were supportive of the idea of opening up the definition of spouse so that it recognizes certain lesbian and gay relationships because this would be, in and of itself, a formidable tool in the fight against homophobia.

Sexual Orientation Panel

The second panel was equally controversial. The panellists included Shirley Masuda who gave a thorough outline of the issues that are important to consider when discussing the needs of disabled lesbians. Mary Eaton provided an analysis of the problems with "sexual orientation" protection under human rights legislation and under the Charter. Most of Eaton's presentation focused on a discussion of why sexual orientation terminology has failed to truly protect lesbians, and why continuing to fight for its inclusion in other anti-discrimination legislation may be detrimental to lesbians. In contrast, Barbara Brown addressed how to work within the framework of "sexual orientation" protection. This approach is the one most familiar to lesbians and has been consistently utilized by lesbian and gay litigants to date.

Summary of Discussions

For many participants the consultation package was the first indication that fighting for sexual orientation protection in provincial and federal human rights legislation was not supported by all lesbians everywhere, and furthermore, may not be advantageous. The legal issues involved in this discussion were understandably technically difficult and at times this made the discussions unclear, even though everyone wants equal protection for lesbians in law. As with the discussion on defining family, the divergence of opinion centred on strategy:

"We have come to be suspicious of gender neutrality because we get lost, women get lost."

"One of the problems with dumping the term sexual orientation is that we would probably lose our most natural allies, gay men."

The discussions focused on whether lesbians should continue to support the political push to get sexual orientation in the Canadian Human Rights Act, or actively oppose this, and offer an alternative that is not gender neutral and that provides more comprehensive protection. Some participants felt quite strongly that it is too late to worry about terminology. They want to move forward and get some of the protection that heterosexuals enjoy, including any benefits and responsibilities, and they want their relationships recognized. Others were just as adamant that the term sexual orientation is a step in the wrong direction. They are concerned about how that term has been interpreted to date in law and the stereotypes that have been created. They agreed that fighting for protection by lobbying for legislation that prohibits discrimination against lesbians and gay men is important. However, if they were forced to choose between sexual orientation or nothing, they would take whatever would provide some protection.

The majority of lesbians clearly needed time to absorb the materials and the discussions. This became evident when a straw vote was called by a group of women who wanted to know where everyone stood. The vote was almost evenly split between those who favoured continuing to use sexual orientation and those who were undecided. If this vote is indicative of anything, it is that some lesbians are now questioning a strategy they had previously taken for granted, while others remain committed to the sexual orientation campaign.

The consultation ended on a positive note with all participants recognizing the need to continue what they thought was an important discussion and to share the new information they had obtained with others who were unable to attend.

The Halifax Consultation Structure

There were fewer participants at the Halifax consultation, but according to the participants this was not reflective of the interest of the Halifax lesbian community. Certainly, the smaller numbers had no effect on the intensity of the discussions. Because consultation packages were sent to every lesbian and gay organization in the Maritimes as well as to individuals, some lesbians from New Brunswick also attended.

The structure of this consultation was quite different from Vancouver. Since smaller numbers of participants were anticipated there were no panel discussions. Instead, everyone participated in one discussion group. As in Vancouver, the vast majority of lesbians at the consultation felt overwhelmed by the material they had been sent. They were presented with a new and difficult analysis of lesbian equality rights which everyone agreed was both interesting and exciting.

Summary of Discussions

"We can't even start dealing with what family is when the words lesbian, homosexual and gay carries a whole package which the courts can't get past."

"Homophobia has to have the institution of marriage to exist and marriage is a rite of passage into conventional life - but we're not conventional. No matter how hard we try to be, we're at cross purposes."

"Gays and lesbians who want to get married want to for a lot of reasons and getting benefits is not at the top of the list - they want their relationships given a particular status in society so they become legitimate. They are not likely to want the definition of family opened up but would rather maintain the privileging of some relationships - not all of them. They like the fact that it means you're responsible adults and that you're committed. That is how their actions filter down to hurt us."

Much of the discussion on the issue of family focused on finding a definition of family that would not be exclusive, and that would deconstruct the privilege that currently exists for particular types and structures of family. Most felt that the definitions should be more open ended so that individuals could decide for themselves who is "family". It was immediately apparent that such a definition may promote equality but may also severely curtail what is available under present benefit schemes, especially in the area of funding for private benefit schemes. Some lesbians quickly pointed out that such constraints may be easily overcome by providing a set number of individuals who could be covered under any "family" plan with a corresponding deduction based on the number of people covered.

All participants were critical of the legal system and its ability to deal fairly with lesbians, especially in the area of family law. In particular, there was a great deal of hesitancy in having provincial family law schemes apply to lesbian relationships. In light of this, some lesbians advocate setting up an alternative dispute resolution system for lesbians that would be devoid of homophobic attitudes and heterosexual bias. Apparently there is a current plan in Nova Scotia to have lesbian mediators accessible to deal with conflicts. Obviously there are numerous problems with instituting such a system, not the least of which is how mediators are chosen and trained, and how to get the parties to abide by the decisions which are rendered.

A constant theme throughout this consultation was that the discussion focused too much on law as a tool for social change and not enough on political strategies. For some of the participants, change seemed more of a possibility through political action and education.

The point was made that judges tend to change their minds when their legitimacy is in question, that they no longer reflect reality, and that they are unfortunately often the last to realize that society is changing. As a result, some lesbians thought that they should not place too much emphasis or invest too much energy in developing strategies on how to use the legal system, since it is so slow to acknowledge what is actually occurring in society at large.

On the issue of marriage, some felt that if lesbians could marry this would resolve all of the problems. They explained that marriage does not mean monogamy, despite what most people think. Nor does it mean that you have to live together, or that you have to have children. People get married for many reasons and no one questions those reasons. However, once they do get married, they are immediately brought into a system which includes benefits, legal rights and responsibilities. Therefore, if what lesbians want is access to this system, perhaps the most expeditious route would be to fight for the right to marry.

While acknowledging the appeal of this strategy, some participants pointed out that it had certain shortcomings. If lesbians were entitled to marry this would not challenge the real problem of privileging some relationships over others. Further, the institution of marriage has a particularly oppressive social history for women. This may explain the extreme reluctance of some lesbians to become part of the institution of marriage.

The afternoon was spent discussing how best to protect lesbians. Ultimately the discussion focused on whether relief from discrimination on the basis of sexual orientation is the best way to get the type of protection lesbians need. The discussion began with a brief presentation by LEAF representatives outlining how sexual orientation has been interpreted in law to date. Reactions were immediate and diverse. As in Vancouver, two theoretical approaches emerged. Some lesbians were of the opinion that despite its shortcomings, recognition of "sexual orientation" in human rights legislation makes some lesbians feel protected on some basis. Others had reservations about its continued use given the way it has been interpreted to date. They were especially concerned that sexual orientation, as currently interpreted in law, provides more protection to heterosexuals than to lesbians and gay men.

A small number of lesbians thought it was a good strategy to argue that discrimination against lesbians is sex discrimination. However, they were quick to recognize that one

of the obstacles to this strategy is the fact that the judiciary has not yet warmed to a sex discrimination argument. While a sex discrimination argument which focuses on lesbians has not yet been used, some lesbians rejected this approach because they were unclear on how such an argument would work for gay men, and they were not enthusiastic about what they believed to be a split in the equality arguments used for lesbians and gay men. They therefore supported sexual orientation protection as the better solution for achieving equality for lesbians and gay men.

Toronto Consultations Structure

The Toronto consultation combined the structures of Vancouver and Halifax. As mentioned earlier, Toronto had the greatest diversity in participants. Like Vancouver, there were two panels. The first dealt with the definition of family and the issues raised by the fight for family/spousal benefits. The second panel addressed how best to protect lesbians and the sexual orientation debate.

Family Panel

"Is it the fact that we sleep with other women that makes us a vulnerable group? If that is true we need to argue for protection of our sexuality. Or do we want to reaffirm the idea that sexuality is not important to our identity as lesbians and it's ok if we get protection for acting like hets? Or are we going to integrate into our legal strategy the lesbian/feminist analysis that lesbian oppression is all about - namely an assault against the patriarchy? We need to choose".

None of the panellists professed to have the answer to the question of which direction or strategy lesbians should be using to fight for equality. All brought different, though not conflicting, perspectives to the family panel. Diana Majury provided a critical analysis of the legal definitions of family and spouse and cautioned participants to think carefully before supporting any strategy which simply advocates including lesbian and gay relationships in these definitions.

Christine Donald noted that CLGRO (Coalition for Lesbian and Gay Rights in Ontario) had been in the forefront of the struggle in Ontario for lesbian and gay rights, not only in the area of human rights legislation but also for recognition of lesbian and gay relationships. CLGRO was instrumental in getting sexual orientation added to the Ontario Human Rights Code. Donald recognized that the organization is not widely representative of lesbians. However, at a recent CLGRO conference on family there was

widespread support among lesbians for obtaining entitlement to family benefits on the same basis as heterosexuals.

The other two panellists, Milagros Paredes and Anna Willats, brought a more personal perspective to the consultation. Paredes, who was born and raised in the Philippines, discussed the interconnectedness between how individuals define family and their cultural realities. Her experiences of family are rooted in her culture. For her, family is not only extended in its structure, it is a shared everyday living experience. Currently involved in a non-monogamous relationship with a lesbian who is also non-monogamous with another woman, Milagros was able to describe, in a very personal way, her definition of family which not only conflicts with traditional heterosexual notions of family and relationships, but also with many lesbian and gay notions as well.

The issue of monogamy/non-monogamy is one that is always present in the lesbian community. Numerous theories exist on this aspect of lesbian relationships. Consequently these issues should have been included in the family/spousal benefits dialogue. Since some lesbians have relationships with multiple partners, it is crucial to discuss how these types of relationships may affect the way lesbians argue for entitlement to public and private benefits. Unfortunately, if the traditional basis of entitlement to employment benefits is extended to lesbian and gay relationships, it will fall far short of providing benefits to those with multiple partners. However, it is also fair to say that, for some lesbians, fighting for the recognition of multiple partners in employment benefit packages is clearly not an important issue.

Anna Willats shared some of her experiences as a parent of two children, one for whom she is the biological mother and one for whom she is not. She admitted that she has not given a great deal of thought to the legal definition of family and its impact on her life. For her, defining family is not an overly complicated endeavour. Her definition includes close lesbian friends and their children. Willats was distressed about the lack of knowledge available to lesbian families with children about their legal rights, especially since the problems that may arise upon the breakup of these relationship are particularly troubling. Many lesbians have little knowledge of the provincial Family Law legislation; it is viewed as simply another law in a vast legal system which is administered by a heterosexist and homophobic male judiciary.

Summary of Discussions

The question should be, what should be the basis for anyone's entitlement to benefits? We need to problematize the heterosexual basis for entitlement, the spousal basis. We need to expand the choice."

"We need to argue for everyone, not just for lesbians who have jobs and benefits. We need to argue for benefits for individuals. Do we want everything to be about a partnership? No."

The participants at this consultation expressed many of the same concerns and values as lesbians in Vancouver and Halifax; as a result, those parts of the discussion will not be repeated here.

The reports from small group discussions exemplified how important participants thought the consultation process was and the importance of continuing to talk about lesbian equality rights. Lesbians spent considerable time discussing individual definitions and meanings of family. Most want no part of the definition which a male dominant society has constructed and privileged. They find it overly restrictive in that it alienates and oppresses women, lesbians, and gays. Instead, many have chosen to redefine what family means. For some it is not so much the structure of family that is radically different; it is the relationship between family members, and the extension of family to include close friends, that is different. Above all else, individual choice was the most important factor in how each lesbian defines her family for the purposes of obtaining access to benefits.

As in the other two consultations, participants were concerned about where the struggle for equality should take place. General distrust of the law and the legal forum means that many lesbians feel their best chance for obtaining equality is through the political process, as the inherent male bias in the judicial system is particularly troubling. Therefore, for some lesbians the idea of creating their own system for resolving "legal type" problems is a better alternative; they believe this strategy would be especially effective in resolving the problems that arise upon the breakdown of a relationship.

On the issue of spousal recognition, some lesbians questioned whether lesbians want to be defined as "spouse" for every purpose. For many the answer was generally no. Of particular concern were societal conceptions and restraints that apply to a woman when she becomes a "spouse". Not only is she viewed as economically dependent (which in many cases may be true), she is also cast as emotionally and physically dependent on her male partner. In other words, she becomes but a shadow of her partner, the man. Based on these realities, there was wholehearted rejection of the baggage that comes with

spousal recognition.

The institution of marriage was examined as part of the discussion on spousal benefits. Although participants did not reject the idea of allowing lesbians and gays to marry, not all of the lesbians at the consultation would choose to marry. Rather, a large number thought that the best position to take on this issue was to neither support nor oppose it. In light of the overall theme of making space for individual choice, this position was not surprising.

Some lesbians thought that in specific areas spousal recognition may be important. For example, they want only those loved ones they appoint to make decisions on their behalf, should they themselves be unable to do so through accident, illness or death. However, it was pointed out that amending the definition of spouse may not be the best way to get the importance and relevance of these types of relationships recognized. It was also noted that in our society the entitlement of our loved ones to many public and private benefits is contingent upon falling within particular spousal definitions. Therefore, while the idea of being a "spouse" may offend the sensibilities of some lesbians, the issue is one that cannot be ignored. This is especially true for those lesbians who need the benefits that are provided by their partner's employment package because they do not have one of their own.

On the issue of benefits, participants were equally unable to provide any easy answers. Some identified benefits as being bread and butter issues since those most affected are needy women who have very few of their basic needs adequately met by existing social programs. It was suggested that a more productive approach would be to have this whole discussion focus less on rights language and more on what is necessary for survival.

Some lesbians favour getting rid of benefits schemes altogether because they epitomize heterosexual privilege. They believe that if lesbian relationships are eventually recognized, only a particular type of relationship will secure legal protection. Because of the rich diversity in the types of lesbian relationships, recognition of certain relationships may result in the creation of a hierarchy of relationships. Others believe the answer to this chaos and confusion lies in lobbying the government to change the basis of entitlement to benefits from the relationship to the individual. These lesbians believe this is the best solution to the current unequal and discriminatory basis of entitlement to family type benefits. The problem may then become one of money. Can the state realistically afford this? More importantly, how much does everyone want to give up to fight for universality? The effect of extending private benefits schemes needs to be more clearly analyzed so as to not roll back the benefits that currently exist. Obviously the individual assessment of risk depends upon where each person is situated in terms of class, race, ability, sex etc.

A number of lesbians were concerned that if benefits are individually based, the concept of relationships would be lost. They pointed out that if lesbians pursue an individual based strategy, they might not only lose recognition for their relationships but perpetuate the distinction already made in law that lesbians and gay men will only be legally protected for their status and not for their relationships. Also of concern was the reaction of the private insurance industry to the idea of individual based benefits, especially in terms of how this would affect an employee's family.

Lesbians involved in the labour movement had a particular problem with this issue because for them benefit challenges have transformed the workplace and the union movement forever. Like lesbians in Vancouver, they were reluctant to change what was considered to be a strategy that had achieved some gains, which of course need to be assessed on a workplace by workplace, bargain unit by bargain unit basis. These gains were not necessarily widespread social or legal changes but rather a more open dialogue among lesbians in unionized workplaces.

Sexual Orientation Panel

As stated earlier, the second panel dealt with how best to protect lesbians:

"Courts said historically that homosexuals are a group that commit sex crimes. This is what defines them as a class for the purposes of human rights. When homosexuals are doing homosexual things [the courts] are not going to protect that conduct. When homosexuals are just being like heterosexuals - that kind of activity is protected by human rights law. This is what they call the conduct/orientation distinction."

"No matter what language we use to protect us we must have a discussion about what sexual identity means to us and what discrimination against lesbians is all about."

"Is it not a little late in the campaign to be discussing terminology that exists in six jurisdictions across the country?"

"Enjoying pornography is part of my sexuality."

"What I am dealing with here is a bunch of privileged middle class women whose sensibilities are affronted by other women's pleasure or other women's livelihood - women who think that sex is dirty and dangerous and that men are our enemies and the policemen are our friend."

As can probably be gathered from the above quotes, the presentations and later discussions were intense and at times quite heated. Each panellist approached the question of protection from a different perspective which necessarily highlighted strong differences of opinion, not only among the panellists but, as it became apparent later, also among the participants.

Mary Eaton presented the ideas she tabled at the Vancouver meeting. Her presentation was based upon her recent analysis of all North American cases involving lesbians and gays, but with a particular focus on lesbians. Eaton's analysis of the rationale used by the judges in these cases revealed that, in general, judges have fixed notions about lesbian and gay sexuality and what protection should be afforded to the practice of such sexuality. Judicial interpretation of lesbian and gay legal rights has led to a conduct/orientation distinction whereby lesbians and gay men are entitled to freedom from discrimination based solely on the fact they are lesbian or gay (ie. their orientation); however, they are not protected if they act on their orientation (ie. have sex). Eaton demonstrated that protection based on the recognition of sexual orientation in law has yielded very little in terms of substantive rights. As a result, she did not support continuing to push for its inclusion in other human rights legislation. Instead, she suggested that lesbians need to start discussing what lesbian identity is all about and what it means to be lesbian. Only then will lesbians be able to discuss with the courts what they need for protection.

Yvette Lemieux provided the participants with a practical discussion on some of the areas in which disabled women continue to need legal protection. She explained that there are many levels of difference, and that when talking about needing legal protection one is also talking about fear of losing autonomy. Generally speaking everyone is afraid of losing power over self-determination, mobility, or the ability to communicate their needs and desires. This fear is an everyday reality for disabled lesbians and one that able-bodied people tend to ignore.

Chris Bearchell provided a stinging attack on both the consultative process and LEAF. Bearchell explained that throughout her years of work in the forefront of the gay liberation movement it was clear that sexual orientation protection would not end oppression for lesbians and gays. Rather, it was hoped that in the process of fighting for it a community would be built and many lesbians and gay men would develop a higher level of consciousness and pride, and find it easier to come out and educate family and

friends without fear of losing their homes or jobs.

A substantial part of Chris Bearchell's presentation involved a critique of LEAF's position in the Butler case on pornography. However, while these comments were extremely thought-provoking and controversial, pornography was not an issue for these consultations.

Lynne Pearlman focussed on issues of lesbian specificity, that is, lesbian issues which differ from gay male issues and from heterosexual women's issues. Pearlman explored some examples of lesbian specific myths and stereotypes which result in lesbian inequality in employment, housing, political and economic spheres. Most notably, Pearlman examined the lesbian man-hater stereotype, and the myth that lesbians are just like heterosexuals but for the fact that they sleep with women.

Tina Kolko, a white woman working with Lesbians Against Racism, focussed on the issue of white feminists' accountability to women of colour when involved in coalition work.

Summary of Discussions

It was readily acknowledged by those who did not support sexual orientation terminology that they face an uphill battle that would likely be unsuccessful since seven provincial Human Rights Codes have been amended to include sexual orientation. If it is too late in the day to argue for new terminology, what can be done about the inadequacies of sexual orientation protection?

One suggestion was to lobby provincial governments for an amendment to the Canadian Human Rights Act which would expressly allow claimants to argue that they experience discrimination on more than one ground simultaneously. This type of amendment has become known as the "multiplier clause". Its purpose would be to recognize the experience of multiple discrimination and promote the idea that experiences of discrimination should not be examined in isolation. Another suggestion was to adopt new terminology. Perhaps Human Rights Codes should expressly prohibit discrimination against lesbians. Alternatively, it was suggested that lesbians continue to use the term "sexual orientation", but structure legal arguments which will change the way it has been interpreted by the courts.

Phase Three: What Does it All Mean

Since LEAF held its consultations there have been a number of decisions from the courts and tribunals which will necessarily affect future legal strategies in the area of spousal/family benefits. One of the most notable is the recent decision of the Ontario Human Rights Commission in Leshner. The trend seems to be that spousal/family benefits will become increasingly available to some lesbians and gay men. The concern that many lesbians voiced throughout the consultation process, that one type of relationship should not be privileged over another, has been ignored largely because of the way recent challenges have been framed.

The most controversial issue of the consultations for the lesbian community was whether to seek lesbian equality through the enumeration of sexual orientation as a prohibited ground of discrimination under human rights legislation and the Charter. Unfortunately, the consultation did not provide any clear mandate on this issue. Many lesbians clearly favour continuing to use sexual orientation, although their reasons for doing so may differ. Many others remain confused by the analysis which identifies the problems with sexual orientation. These lesbians need more time to absorb the information and to have further discussions before deciding where they stand. Then there are those lesbians, fewer in number, who favour replacing sexual orientation language with lesbian specific language.

If there is a message to be taken from the consultations by LEAF or by any other organization litigating for lesbian equality rights, it is to proceed cautiously and assess both the positive and the negative impact of the arguments on the litigants, lesbians in general, and on other disadvantaged groups. Such considerations would make it necessary to develop arguments through a coalition or consultation process with representatives from those groups directly affected by the litigation strategy.

CONCLUSION

When LEAF began this project, the goal was to obtain some direction from lesbians on how to conduct litigation on their behalf in the future. Through the consultations, LEAF provided a forum for lesbians to discuss the following issues:

- i) the ways and means by which lesbians are oppressed;
- ii) how lesbian equality claims have been litigated to date;

- iii) how lesbian equality claims should be litigated in the future.

The information LEAF has gathered through this process is a useful step in our efforts to develop a litigation strategy for lesbian equality claims.

Although we think the debate on these issues has advanced, a great deal more discussion needs to take place as the consultations revealed strongly held and divergent views about the strategies for achieving equality for lesbians. As well, it must be recognized that it is critical that any future discussions include lesbians from the disabled, aboriginal and racial minority communities.

LEAF is extremely grateful for the funding provided by the Court Challenges Program and the Ontario Women's Directorate which made these consultations possible. LEAF's work in the area of lesbian equality will continue to be a priority as we strive to eradicate lesbian oppression and achieve equality for all women.