Homosexuality And The Law Essay, Research Paper

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The issue of homosexuality has been brought to society s attention on more than one occasion, and still remains unresolved. The homosexual community should receive the same rights as the heterosexual community, thus the laws should relate to all of the society. By thoroughly researching the laws in relation to the homosexual community, it has been noticeable that homosexuals do not receive the same recognition as heterosexuals. Though same-sex relationship recognition in Canada has developed as a result of legislation, when dealing with benefits and adoption, homosexuals are still not granted full equality in regards to marriage. There have been many court casing which challenge the definition of spouse , Bills that have been passed, obligation and rights have been granted, yet still, full equality for homosexuals has not been obtained.

While the society and the law are still discriminatory against the homosexual community, gays and lesbians have come along way, considering that people had once gone to jail for being a homosexual. Just over thirty years ago homosexuals were not even really classified as human, but inhuman , and unnatural (Fight for Gay Rights: Canada Timeline, 2001). Homosexual were once literally fighting for their freedom, and now homosexuals are fighting for the right to be legally married, and obtain all the benefits and obligations that opposite-sex couples share. There is a history to how homosexuals have been treated by the law in the past forty years, and it shows that homosexuals have gained a lot of equality in the past four decades. In 1965, a young homosexual, by the name of Everett Klippert acknowledged to the police that he was gay, and had sex with men over a 24-year period. In 1967 Everett Klipper was sent to jail and labelled as a dangerous sex offender (Fight for Gay Rights: Canada Timeline, 2001). The sentence was backed up by the Supreme Court of Canada that same year. That same year, Justice Minister Pierre Trudeau proposed amendments to the Criminal Code, which would facilitate the laws regarding homosexuality. Discussing the amendments Trudeau says,

It’s certainly the most extensive revision of the Criminal Code since the 1950s and, in terms of the subject matter it deals with, I feel that it has knocked down a lot of totems and over-ridden a lot of taboos and I feel that in that sense it is new. It’s bringing the laws of the land up to contemporary society I think. Take this thing on homosexuality. I think the view we take here is that there’s no

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place for the state in the bedrooms of the nation. I think that what’s done in private between adults doesn’t concern the Criminal Code. When it becomes public this is a different matter, or when it relates to minors this is a different matter. (Fight for Gay Rights: Canada Timeline, 2001)

Two years after, Trudeau s amendment to the Criminal Code was passed, and homosexuality was no longer a crime in Canada. In the next three decades to follow, there was not a great deal of information about homosexuality and the law. Indeed there was still a great deal of controversy, but homosexuality was still viewed in a derogatory manner. A large number of homosexuals began to make a stand for themselves in the late eighties to the present day. In 1995, the Supreme Court ruled on a case involving Jack Nesbit and Jim Egan, two gay men who sued Ottawa for the right to claim spousal pension under the Old Age Security Act. The court ruled against Nesbit and Egan, however it was agreed by all of the judges that sexual orientation is a protected ground and does extend to partnerships of lesbians and gay men. Woods research (2001) found that in 1999, The Supreme Court of Canada ruled that homosexual couples should have the same benefits and obligations as heterosexual common-law couples, and homosexuals should also have equal access to benefits from social programs in which they are contributors. (Fight for Gay Rights: Canada Timeline) In the year 2000, Bill C-23 was announced by the Liberals, and it dealt with the Modernization of Benefits and Obligations Act. This would give same-sex couples who have lived together for more than a period of one year the same benefits and obligations as opposite-sex couples. Bill C-23 was passed several months later, giving homosexuals equal rights under a common-law partnership. Which leads the society to the present day, and therefore concluding that the gay and lesbian community though still discriminated against have come a long way since 1965.

A large concern to many same-sex couples is the issue to the right of legal custody and access to children. This effects the homosexual community because gay men and lesbians who have children from prior relationships are at risk of being scrutinized and disapproved by the court and may jeopardize custody rights. In many cases the current relationship in which the homosexual parent is in, affects chances of obtaining custody. For instance in Case v. Case (1974), 18 R.F.L. 132 (Sask. Q.B.), a lesbian mother was unable to acquire custody of her two children. This is because she was currently living with her homosexual partner and was involved in a homosexual club in which members of the club came to her

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home. The judge stated, I greatly fear that if these children are raised by the mother they will be too much in contact with people of abnormal tastes and proclivities. ( Case v. Case (1974), 18 R.F.L. 132 (Sask. Q.B.)) This was much the same with many same-sex relationships in regards to adoption and custody, their chances of custody were evaluated on how discreet their homosexuality was. This is all in the past, when gay men and lesbians were able to adopt children, but not as a couple or as step-parents. This is because Part VII of the Child and Family Services Act R.S.O 1990, c. C.11, s.136(1) defines spouse as the binding of a man and a woman, therefore homosexuals did not apply under this act. The definition restricted homosexuals from making an application for adoption with their same-sex partner as a couple. Homosexual partners could not even apply to adopt the child of their partner because of this act. Therefore if the legal or adopting parent of a child died, the surviving partner did not have the protection that adoption gave to heterosexuals.

As a result of a case in May 1995, R.v.Case, homosexual couples are able to adopt their partner s child generally without any problems. (Wexler.M, Canadian Homophile Association, 2000, April 10) The case involved four lesbian couples who challenged the definition of spouse. These women

claimed that it violated s.15 of the Charter of Rights and Freedoms, which guarantees that every individual has the right to equal benefit to law without discrimination. And that by only allowing heterosexual couples to adopt their spouse s children, but lesbian and gay couples were denied a benefit that is available to straight couples. It was upon the Government to show that the discrimination was reasonable under s.1 of the Charter. Judge Nevins of the Ontario Court Of Appeal agreed that the definition of spouse was discriminatory, and that s.15 of the Charter of Rights and Freedoms was violated, and that discrimination was not justifiable under s.1 of the Charter. Therefore the verdict was made that it was acceptable for homosexuals to adopt their partner s child, and were given the same rights and responsibilities that heterosexuals share. This case set a precedent for all same sex couples in Canada, who may use this case if denied the opportunity to adopt. Homosexual couples are now able to adopt children as a couple, instead of just one, but just because they are given the right does not make it easy. The agencies accept them, but in some cases the biological parents have a voice in who the child is adopted to, and in some situations, homosexuals are discriminated against. However the courts, have indeed approached homosexuality from

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a more progressive standpoint and as a result, have moved towards a more objective analysis of the parental fitness, as it affects the child s well-being.

Homosexuals have recently been involved with Bill C-23, which has created a great deal of controversy, because people were ill informed that the Bill was not supposed to be about marriage. Originally the bill was meant for equalization of rights and responsibilities, and as is stands, has nothing to do with marriage. Only in the Preamble, is there discussion about marriage. To clear up some confusion, Mr. Roger Gallaway (Sarnia Lambton, Lib.) states:

I will specifically address a few points that require some clarification. First, there is a misconception that the bill alters the institution of marriage and the definition of spouse. Second, the bill simply brings the federal government up to date with other governments and the private sector in expanding benefits and obligations to adults engaged in same sex common law relationships. (Egale, 2001)

The changes in Bill C-23 are about fairness, and equality of the law. The act ensures that same-sex couples have the same obligations and benefits as heterosexual common-law couples. Bill C-23 was a result of the case M v H (C23867, December 18, 1996), in which the Ontario Court of Appeal held that legislation which restricted the obligation of spousal support to heterosexual couples was unconstitutional. In this case the two women had agreed to share living expenses and household responsibilities, equally. During the period in which the women were together, they acquired a business property in Toronto, and a country property. Eventually the same-sex couple ended the relationship, and there was debate as to whom the property would belong. This debate was taken to court and the definition of Spouse was challenged under Family law, regarding spousal support. Therefore, this is the beginning to equality, and though it is a small step, it takes many steps to walk a mile. The jurisdiction to legislate who can and who cannot marry is federal. The provinces had jurisdiction over the ceremonial requirements of marriage. Though neither provincial nor federal legislation explicitly bars same sex couples from marrying, the rule in which prevents same-sex couples from marrying is common law. The definition for a Spouse includes a man or woman who, not being married to each other, live together as man and wife. A Charter challenge to the

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prohibition on same-sex marriage was the case of Layland v. Ontario (1993), 104 D.L.R. (4th) 214 (Ont.Ct.(Gen. Div.)) The Ontario Divisional Court considered an application for judicial review of a refusal made by the City Clerk s Office in Ottawa to issue a marriage licence to the applicants on the grounds that the marriage of persons of the same sex is illegal in Canada. It was agreed that sexual orientation is an analogous ground of discrimination under s.15 of the Charter of Rights and Freedoms, but prohibits against the marriage of a same-sex couple was not discriminatory. The majority of the court felt that the definition of marriage should and could not incorporate same sex unions. Finally, the court concluded The law does not prohibit marriage by homosexuals, provided it takes place betweens persons of the opposite sex. (J. Southey, (1993) Layland v. Ontario, Ontario Court (General Division))

Chiefly homosexuals are not granted the right to marriage but a loop hole in s.5 of the Ontario Marriage Act, which states Any person who is of the age of majority may obtain a licence or be married under the authority of the publication of banns, provided no lawful cause exists to hinder the solemnization. (Ontario Marriage Act) This means that a couple is able to go to a local parish and be granted a marriage licence through the publication of marriage banns. These bans involve publishing the names of the intended couples on the three Sundays prior to the marriage. Brenda Cossman, a professor of law, states, But this is where marriage law gets a little bit complicated because the province doesn t really have very much jurisdiction over marriage, the federal government has most the jurisdiction but has never used any of that jurisdiction. (2000, Loophole May Allow World s First Fay Marriage, National Post) This idea has created controversy because though by the laws of the Province, the banns regarding homosexuals should be legal, but all of the paperwork goes to Province and the Banns has been denied. The couple which were about to wed took the case to court, but it could take five, maybe ten years to come to a verdict.

Last of all, there comes the topic common-law partnerships. Common-law partnership means the relationship between two persons who are cohabiting in a conjugal relationship, having so cohabited for a period of at least one year. (Subsection 2(1) of the Public Service Employment Act ). All of the

difference is in relation to marriage in which a heterosexual couple can get married without having to wait the year period to be considered spouses, whereas since homosexuals do not have the option of marriage as stated by M. Wexler(2001) Homosexuals do not have the choice of marriage, which is the inequality.

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(Personal Communication, April 10). Therefore homosexuals have received all the rights that are stated within a common-law relationship, except for the option of marriage.

While most developments in the area of same-sex relationship recognition, in the courts, as a result of legislature, has improved to a certain extent, there is still a great deal of discrimination. Though it is clear that homosexuals have come a long way through the past 40 years when homosexuality was once a crime, there is still need for improvement, because homosexuals though achieving common-law partnership status, and gaining all the rights and obligations that a heterosexual common-law relationship would have, they still are unable to marry. It is understood that the federal government is currently considering the introduction of omnibus legislation to treat those in same-sex relationships equally, and to bring its laws into conformity with the Charter of Rights. But this has not happened yet, and the period of time it will take for homosexuals to gain equality status, is unknown. Same-sex relationships are committed and worthy of recognition, just as heterosexual relationships are given the same stature. It is clear that the current structure of marriage laws still continues to discriminate in a direct manner by excluding gay men and lesbians from a legal and social institution open to heterosexuals

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