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Losing the Feminist Voice? Debates on the Legal Recognition of Same Sex Partnerships in Canada

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Article

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LOSING THE FEMINIST VOICE? DEBATES ON THE LEGAL RECOGNITION OF SAME SEX PARTNERSHIPS IN CANADA

ABSTRACT. Over the last decade, legal recognition of same-sex relationships in Canada has accelerated. By and large, same-sex cohabitants are now recognised in the same manner as opposite-sex cohabitants, and same-sex marriage was legalised in 2005. Without diminishing the struggle that lesbians and gay men have endured to secure this somewhat revolutionary legal recognition, this article troubles its narrative of progress. In particular, we investigate the terms on which recent legal struggles have advanced, as well as the ways in which resistance to the legal recognition has been expressed and dealt with. We argue that to the extent that feminist critiques of marriage, familial ideology, and the privatisation of economic responsibility are marginalised, conservative and heteronormative discourses on marriage and family are reinforced. Our case studies include two pivotal moments in the quest for legislative recognition of same-sex relationships: the Hearings of the Canadian House of Commons Standing Committee on

Justice and Human Rights on Bill C-23, The Modernization of Benefits and Obligations Act, in 2000 and the hearings on Same-Sex Marriage in 2003. We find that the debates operated within a narrow paradigm that bolstered many existing hierarchies and exacerbated conditions for those who are economically disadvantaged.

KEY WORDS: cohabitation, marginalisation of feminist critique, marriage, privatisation, same-sex relationships

Canada has for some time granted legal recognition to unmarried opposite-sex cohabitants, treating them as virtually the same as married couples for many, though not all, purposes. Since the early 1990s, Canada has been challenged to extend this legal recognition to same-sex partners. The ensuing changes can be termed an incredible success story for the lesbian and gay social movements and a challenge to legal heteronormativity. Same-sex cohabitants increasingly, though unevenly across provinces and territories, are now treated like opposite-sex cohabitants. Furthermore, the opposite-sex requirement for legal marriage was challenged and in July 2005 the federal government legalised civil same-sex marriage across Canada. Both opposite-sex and same-sex partners can now choose whether to marry or not. Even if they do not, they may still be ascribed spousal status for various purposes, based on a period of cohabitation.

The extent of these changes to normative ideas about family would have been difficult to foresee even a decade ago, let alone in the 1980s when the lesbian and gay

social movement began to use the legal system as a site of struggle (Herman 1994; Smith 1999; Lahey 1999). Same-sex relationship recognition disturbs the assumption that marriage and kinship rest on naturalistic and biologistic notions of reproduction and family. As a result, familial ideology – long critiqued by feminists (e.g. Barrett & McIntosh 1982; Gavigan 1993) – is uprooted from its traditions. The threat that same-sex marriage brings to socially conservative assumptions about family, society and nation cannot be underestimated, nor can resistance to it (Mello 2004). Many lesbians and gays from other countries have looked to Canada as a model for their own jurisdictions, while others have come to Canada to marry (Kitzinger & Wilkinson 2004). The calls by social conservatives for legal protection of the opposite-sex definition of marriage have exposed the fragility of marriage as an historically specific social institution, as opposed to a naturalised, timeless one. As well, essentialist assumptions about the natural complementarity of female and male roles, and their importance in relation to the socialisation of children, have been interrupted.

Without diminishing the struggle that lesbians and gay men have endured to secure legal recognition of their relationships, we wish to trouble the evolutionary narrative of progress in this field by investigating the terms on which recent legal struggles have advanced. Judith Butler (2002) has pointed out that the political context surrounding the same-sex marriage debates has led to a dichotomous framing of the 'debate' and a perceived demand that a stand be taken either for or against marriage, without problematising marriage as a social and economic institution. Taking up Butler's call to resist this imposed binary, we suggest that the story of the legal recognition of same-sex relationships is less than fully positive, in the sense that it has proceeded in a

way that has rendered invisible important feminist critiques of marriage, familial ideology and the domestication of lesbian and gay relationships (Robson 1994, p. 976). In particular, a diminishing space appears to exist for feminist voices on various issues related to the family and economic security. We will argue that to the extent that feminist voices are marginalised, conservative and heteronormative discourses on marriage and family are reinforced, even as same-sex relationships are recognised.

We first briefly trace the events of the last decade that have challenged the heterosexual definition of spouse in Canadian law. We then discuss concerns about marriage and familial ideology that have been raised by feminists: does allowing lesbians and gay men to marry actually challenge the hierarchical nature of marriage? Does extending spousal status to lesbians and gay men reinforce the neo-liberal privatisation of economic responsibility by placing it on family members, rather than the state? Finally, to what extent do the recent struggles embrace these questions or challenge heterosexism at any fundamental level?

Our case studies are based on two pivotal moments in the quest by Canadian lesbians and gay men for legislative recognition of their relationships: the Hearings of the Canadian House of Commons Standing Committee on Justice and Human Rights on Bill C-23, The Modernization of Benefits and Obligations Act, in 2000, and on Same-Sex Marriage in 2003. We are interested not only in the arguments made by those who resisted legal recognition of same-sex relationships, but also those made by its supporters. Did their arguments invoke the feminist critiques of marriage and familial ideology, or did they take a formal equality stance that failed to challenge the essence of these institutions? Was there discursive space for more radical arguments and if so, how were

these represented and received? Our analysis draws on the briefs presented to the Standing Committee and the transcripts of the hearings.

THE SUCCESS STORY: TRANSFORMING THE LEGAL DEFINITION OF SPOUSE

The enactment of the Canadian Charter of Rights and Freedoms (the *Charter query why use of italic?*)[1] in 1982 and the coming into force of its equality section in 1985 provided a tremendous impetus for court challenges to heterosexist statutory definitions of spouse. Although sexual orientation was not explicitly listed as a prohibited ground of discrimination, in 1995, the Supreme Court of Canada in *Egan v. The Queen*[2] confirmed that it was an analogous ground. Two other groundbreaking cases deserve comment. In 1998, the Ontario Court of Appeal held in *Rosenberg v. Canada (Attorney General)*[3] that the words "or same-sex" should be read into the definition of "spouse" in the Income Tax Act,[4] for the purposes of registration of pension plans (see Young 1998). This ruling effectively extended entitlement to survivor benefits under occupational pension plans to the partners of lesbians and gay men. Then, in 1999, the Supreme Court of Canada rendered the most important judicial decision to date on same sex spousal recognition in *M. v. H.*,[5] striking down as unconstitutional an opposite-sex definition of "spouse" in a family law

[1] Part 1 of the Constitution Act 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11.

[2] [1995] 2 S.C.R. 513.

[3] (1998), 38 O.R. (3d) 577.

[4] R.S.C. 1985, c. 1 (5th Supp.).

[5] [1999] 2 S.C.R. 3.

statute. This case generated many legislative changes to extend spousal or equivalent status to same-sex cohabitants, including Bill C-23, discussed below.[6]

In the early 21st century, a renewed struggle for same-sex marriage emerged, having been put on hold in Canada in the mid-1990s in favour of seeking the rights available to unmarried opposite-sex cohabitants. Several successful *Charter* challenges were raised to the common law rule that defined marriage as between one man and one woman,[7] so that same-sex couples acquired, with startling rapidity, the right to marry in several provinces and one territory. In October 2004, the federal government sought the opinion of the Supreme Court of Canada on whether same-sex marriage for civil purposes was consistent with the *Charter* and on December 9, 2004, the Supreme Court of Canada held that it was.[8] On July 20, 2005, Bill C-38, the Civil Marriage Act received Royal Assent and was proclaimed, legalising civil same-sex marriage across Canada. Civil marriage is now defined as "the lawful union of two persons to the exclusion of all others."[9]

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[6] Modernization of Benefits and Obligations Act, S.C. 2000, c. 12. See also, e.g., the Definition of Spouse Amendment Act, S.B.C. 1999, c. 29 and the Definition of Spouse Amendment Act, S.B.C. 2000, c. 24; An Act to Amend Certain Statutes because of the Supreme Court of Canada's Decision in *M. v. H.*, S.O. 1999, c. 6.

[7] E.g., in Ontario, *Halpern v. Canada (Attorney General)* (2003) 169 O.A.C. 172 (C.A.); in British Columbia, *E.G.A.L.E. Canada Inc. v. Canada (Attorney General)* (2003) 228 B.C.C.A. 406.

[8] *Reference re Same-Sex Marriage* [2004] 3 S.C.R. 698.

[9] Civil Marriage Act, S.C. 2005, c. 33.

PROBLEMATISING SUCCESS: FEMINIST CRITIQUES OF MARRIAGE AND MARRIAGE-LIKE DYADS

This rapid reversal of state-sanctioned homophobia in the Canadian legal system, and the creative work by many lesbians and gay men and others to achieve this change, is extraordinary. Nevertheless, we want to explore the terms on which the success occurred. We will argue that the more radical perspectives on the institution of marriage, the exclusivity of the nuclear family and familial ideology have been marginalised as the legal embracing of same-sex relationships has progressed.

This dynamic is not entirely surprising. Those participating in the debates about same-sex relationships are a product of their society, which includes still powerful ideologies of the exclusive, nuclear family. Many lesbians and gay men are not inclined to challenge the role that marriage has played in reinforcing unequal relations in society. Indeed, some major proponents of same-sex marriage seek admission to that institution precisely by invoking some of its oppressive features (e.g. Sullivan 1997; Sullivan 1989, p. 22). A Canadian editorial called "Gays in the 'hood'" (2005) recalled the bourgeois comforts of marriage:

> By embracing marriage, homosexuals remind others that it is, or should be, the norm for committed couples. It is the best place to experience love, sex and companionship together. It is the best place to raise children. Marriage's 'till death do us part' pledge of permanence gives people the security they need to give themselves fully to the other. It is one of the ironies of the same-sex marriage debate that conservatives who once condemned the hedonistic, selfish and licentious 'gay lifestyle' would now deny homosexuals the right to opt into the bourgeois comfort of marriage.

This approach is geared towards capturing the approval of 'middle America' for same-sex relationships, and so endorses key elements of familial ideology. Equally, it raises the possibility that recognition of lesbian/gay relationships in family law may not challenge male economic privilege or the sexual division of labour within the privatised family that has been the subject of feminist critique (see Jacobs 1997, pp. 65-184). The continued exploitation of women's unpaid work coupled with the assigning of responsibility for the costs of social reproduction to the family constitutes an intrinsic component of the capitalist mode of production (Hennessy 2000, p. 64; Picchio 1992). From a feminist and left perspective, failing to challenge at a fundamental level the roles that marriage and family play in social inequality, is problematic.[10] Yet this is precisely what has occurred in the debates over same-sex relationship recognition: the familial sphere has been recoded to place less emphasis on the gender-based normative structure of the family and more on its support functions. The family remains the natural site for social reproduction, although new sexual citizens can now participate in it (Cossman 2002a).

This issue raises a broader range of questions about family and gender than marriage alone. However, the lengthy history of resistance to marriage as one of the key institutions of patriarchy and conveyors of familial ideology is instructive (Astell 1696; Auchmuty 2004, p. 105). Modern feminist legal scholars also question the legal institution of marriage. Carol Smart has argued that marriage was problematic as a legal category: as an ideological "enclosure" it prioritised coupledom and heterosexuality, and made them the norms against

[10] But see Calhoun (2000), who argues that this position displaces the specificity of lesbian existence and arguments in favour of a focus on the concerns of heterosexual women.

which all other relationships were measured. Marriage was thus "as significant to the unmarried as to the married and to the homosexual as to the heterosexual" (Smart 1984, p. 143). In addition, Smart noted that marriage became the privileged context for the reproduction of children. As many have pointed out, despite social changes such as the increased participation of married women in the labour force, marriage remains an inherently patriarchal institution, with men viewed primarily as breadwinners and women carrying complementary responsibility for childcare and work in the home. Despite changes to family law, many fought for by feminists, economic remedies available on marriage breakdown have not been especially successful in addressing the inequalities stemming from women's continuing provision of the reproductive labour needed to sustain families, the economy and labour power.[11] Individuals may well within their own marriages challenge traditional norms such as the sexual division of labour, but the socio-legal institution of marriage at a larger level still embodies patriarchal and heterosexual norms. Although the concept of coverture inherent within marriage has been challenged, "its (hetero)sexual performatives remain a key trope in marriage and (to a lesser extent) marriage-like relationships" (Brook 2000, p. 133).

Moreover, the legal institution of marriage has been implicated in racist practices. In Canada, marriage provided a mechanism for the imposition of colonialist and patriarchal norms on Aboriginal communities, with negative consequences for indigenous women (McIvor 2004). Within the American legacy of slavery, the "racialized engendering of marriage had very different consequences for white and black women" (Hennessy 2000, p.

[11] On women's role in relation to reproductive labour and its significance to labour power, see Hennessy (2000, p. 64). On the inefficacy of legal remedies, see Mossman (1994); and Boyd & Young (2004).

65). Slaves were forbidden to marry and the ideologies of womanhood that prevailed for women in white, bourgeois families were not engendered in the same way for African American women, indeed quite the contrary (Carby 1997; Davis 1983; Roberts 1997). Moreover, miscegenation statutes in the United States prohibiting interracial marriage in some states, were not declared unconstitutional until surprisingly recently (*Loving v. Virginia* (1967) 388 U.S. 1).

Given these critiques of marriage as an institution that rests – perhaps irretrievably – on profoundly hierarchical social and economic relations, struggles to achieve legal recognition of same-sex relationships may require a normalisation of lesbian and gay intimate relationships to appear as marriage-like as possible, in turn leaving intact the hierarchies that are ideologically embedded within marriage.[12] Furthermore, the invocation of the equality rights section of the Canadian *Charter* [query italic] has exacerbated this trend, requiring that litigants demonstrate that they have been discriminated against on the basis of sexual orientation. As a result, litigants must compare themselves to others in a relevant category, in a way that tends to suppress differences and emphasise similarities (Iyer 1993, p. 183).

The *Charter* [query italic] challenges in Canada have indeed tended to rest on evidence that same-sex couples are virtually the same as heterosexual couples and should, therefore, be given equal legal treatment. The affidavits in the same-sex marriage cases emphasised factors such as joint finances, reciprocal wills, monogamy and the desire to be 'just like' other couples, which they would be but for their sexuality. The equality rights

[12] The expanded definition of spouse in s. 1 of the British Columbia Family Relations Act, R.S.B.C. 1996, c. 128, actually requires same-sex cohabitants to show that they lived in a "marriage-like relationship".

framework, which requires a comparison between the advantaged group and the disadvantaged group, tends to force rights claimants in a formal equality direction that is often essentialist as well (Gotell 1995; Lessard 2004). The diversity that exists in lesbian and gay relationships, as well as in heterosexual relationships, tends to be diminished or rendered invisible. Successful inclusion in the institution on these terms may well result in the marginalisation of those who 'deviate' from the relationship pattern that has been 'normalised', thus creating a new hierarchy of acceptable and non-acceptable gays and lesbians. As we shall see, submissions to the Canadian House of Commons Standing Committee show it was almost impossible for lesbians and gay men to raise a critique of the institution of marriage in an effective manner.

This dynamic of normalising same-sex relationships through comparison to a heterosexual norm may also help to explain why same-sex relationship recognition has proceeded relatively quickly: "the threatening possibility of a gender-less sexual desire" is contained by this process and "by a new paradigm of sexual identity that articulated it in a heterogendered frame" (Hennessy 2000, p. 101). Rosemary Hennessy points out that capitalism may not particularly require heteronormative families or even a gendered division of labour, but it does require an unequal division of labour (2000, pp. 105, 63). As a result, if gays and lesbians are willing to shore up that unequal division in their relationships – for example by adopting a division of labour that involves one partner taking greater responsibility for childcare, while the other is a fiscally responsible breadwinner – then a same-sex family can appear quite acceptable. As long as the economics work well, "neo-liberalism is generally agnostic in relation to same-sex challenges to spousal definitions, insofar as it is not wedded to any particular family form" (Cossman 2002, p. 182). The

extent to which the complex social relations of inequality can be challenged under this formal equality rights model inherent within liberal legalism and neo-liberalism is limited. Moreover, the heteronormative model that underpins such legal changes may reinforce distinctions between 'good' gays and lesbians, who look as much as possible like the traditional nuclear couple, and 'bad' gays and lesbians, whose relationships violate familial norms. The neo-liberal state is quite happy to accommodate new sexual citizens so long as they adhere to a privatised, familiarised heteronormativity (Cossman 2002a, p. 484).

In addition to these normalising, assimilating trends, expanding spousal recognition to unmarried and same-sex partners has particularly problematic economic implications for already disadvantaged persons, related to neo-liberal policies of privatised economic responsibility. Rhetoric in favour of the legal recognition of same-sex partners often ignores the economic disadvantages, as opposed to advantages, that spousal recognition can bring. Class and gender are relevant here: spousal recognition can benefit wealthier couples or couples whose relationships are premised on the economic dependency of one partner, but cause disadvantage to lower income couples. For instance, spouses often lose entitlement to state benefits because their income is aggregated for the purpose of computing entitlement, resulting in a loss of the benefit because the spouses are no longer treated as individuals (Young 1994; Boyd & Young 2003). Entitlement to social assistance is often lost because the state assumes that spouses will take financial responsibility for the economic well being of each other (Gavigan 1993). Indeed, a key rationale for extension of spousal recognition in the Supreme Court of Canada decision in *M. v. H.* was that a main purpose of spousal support law was to alleviate the burden on the public purse by shifting the obligation to provide support for needy persons to family members (*M. v. H.*, paras. 4, 53, 106). As

feminists have noted, this assumption that individuals should rely on their families for support is especially problematic for women, who tend to have less income and wealth. Women often fall through the cracks between the social welfare and the family law systems (Mossman & MacLean 1999; Cossman 2002). Lesbian couples may well be more susceptible to this risk than gay male couples.

This policy of privatisation of economic responsibilities has accelerated in the neo-liberal climate of the past decade. It rests on an assumption that responsibility to redress economic need or dependency should reside in the private sphere of family or charities, rather than be shared with or reside with the collectivity (Boyd 1999; Cossman 2002; Fineman 2000). The policy is also based on an assumption that spouses pool their income and capital, yet pooling does not occur in all relationships by any means (e.g. Phipps & Burton 1995; Vogler & Pahl 1994). Given the weaknesses of privatised economic remedies, various authors have instead suggested that benefits such as social assistance should be extended on an individual basis, rather than focusing on adult, sexually intimate relationships as a marker of economic responsibilities (Ettelbrick 1992; Gavigan 1993).

Critiques such as these have led some feminist authors to argue that privileging a sexually intimate adult relationship in laws and social policies is mistaken and that marriage as a legal category should be abolished (Fineman 1995 & 2000). For instance, Nancy Polikoff (2000) has argued that marriage as a legal institution fails to envision a truly transformatory model of family for all people and is problematically embedded in liberal notions of equality and choice. In the next section, we examine the Canadian House of Commons Standing Committee Hearings on Bill C-23 in 2000 and on Same-Sex Marriage in 2003, to determine the extent to which such critical analyses appeared.

CANADIAN COMMITTEE HEARINGS ON BILL C-23

On June 29, 2000 the Modernization of Benefits and Obligations Act (Bill C-23) received Royal Assent, amending 68 pieces of federal legislation in Canada to extend various rights and responsibilities to 'common law partners', defined to include same-sex partners. This legislation was pivotal in the progress towards equality for lesbians and gay men, yet it simply added same-sex cohabitants to the list of those who obtain certain rights and responsibilities once legally recognised. It did not challenge the terms on which those rights and responsibilities are accorded and, thus it reinforced the *status quo*: government policies underlying the attachment of responsibilities to spousal status were now also imposed on lesbian and gay cohabitants, with the attendant problems canvassed above. One prime example is the placing of economic responsibility for those in need on those who are legally defined as their spouses, rather than on the state. For example, when Bill C-23 extended common law status to same-sex partners for the purposes of various tax credits, student loans and social assistance, it extended the neo-liberal policy of privatising economic security to lesbian and gay couples. In each case, the couple's income is aggregated to determine entitlement, meaning less access to state funding for low income couples, while more responsibility is placed on the private sector (here, the family) to bear the financial burden (Boyd & Young 2003, p. 757).

Prior to enactment of Bill C-23, the Canadian House of Commons Standing Committee on Justice Human Rights held hearings in March 2000. The briefs and the

testimony provide a fascinating insight into the respective positions of those who supported the legislation (16 organisations and one individual) and those who opposed it (8 organisations and one individual). Four significant issues emerge. First, many who supported the legislation did so without reservation, adopting a formal equality approach typically criticised by feminists. Second, a few witnesses, although encouraging the government to enact the legislation, ventured to offer a critique of its formal equality model. Third, even though Bill C-23 did not refer to marriage, opponents put the issue of marriage front and centre in their submissions, portraying marriage as a vulnerable institution under threat. Fourth, a few witnesses suggested that Bill C-23 should be altered to include non-sexually intimate interdependency relationships.

Adopting Formal Equality

E.G.A.L.E. (Equality for Gays and Lesbians Everywhere), a Canadian organisation "committed to advancing equality and justice for lesbians, gays and bisexuals", has been a key proponent of same-sex marriage. It took a purely formal equality approach in its submissions to the Standing Committee and also affirmed the power of law to effect social change (E.G.A.L.E. 2000, p. 2; Smart 1989). Its brief stated: "It is a basic principle of human rights that all citizens be treated equally before the law. Currently lesbians, gays and bisexuals are denied equality through the refusal to recognize our relationships" (E.G.A.L.E. 2000, p. 11).

E.G.A.L.E.'s written and oral submissions did not raise concerns about the potentially gendered impact of the Bill on lesbians, or its resulting privatisation of economic

security for lesbians and gay men. It accepted the Bill as drafted and made no suggestions for change. E.G.A.L.E.'s choice to de-emphasise some of the political issues concerning Bill C-23 meant that it actively participated in a project that normalised some lesbians and gay men while othering many others. By its actions, E.G.A.L.E. also embraced the privatisation of economic responsibility and its negative impact on those with lower incomes. Arguably, E.G.A.L.E. distanced itself from more fundamental critiques offered by feminists.

The 'Gendered and Radical' Voice

Very few witnesses challenged the limited vision of equality offered by E.G.A.L.E.. But the National Association of Women and the Law (N.A.W.L.) directly challenged the formal equality of Bill C-23, expressing concern that it would negatively affect the substantive equality rights of lesbians. For example, inclusion of lesbians as common law partners under the Canadian Income Tax Act[13] would result in many lesbians paying more tax because they would lose their entitlement to the tax credits (N.A.W.L. 2000, p. 2). As well, the privatisation of economic responsibility inherent in the proposed legislation would "thrust lesbians into a system where they will have to start suing each other for support and compensation. What interests do lesbians have in relinquishing their claim against the state and relying primarily on their spouse and their families?" (N.A.W.L. 2000, p. 2). N.A.W.L.'s brief called for an opting-out provision allowing lesbians to choose whether or not the legislation would apply to them, and for a full review of the Bill's impact within five years.

[13] R.S.C. 1985, c. 1 (5th Supp.).

The Focus on Marriage

Generally speaking, those who supported Bill C-23 did not raise same-sex marriage, except in response to questions from committee members. In contrast, those who opposed the Bill – which was silent on marriage – were very concerned that it was merely a precursor to the legalisation of same-sex marriage. Ironically, this focus on marriage seems to have diluted the arguments against Bill C-23 by deflecting the debate to a different issue not under direct consideration by the committee. As a result of their concerns, however, the government amended the Bill to clarify that "[f]or greater certainty, the amendments made by this Act do not affect the meaning of the word 'marriage', that is, the lawful union of one man and one woman to the exclusion of all others" (s. 1.1).

Opposition to the Bill was apparently rooted not in the legal ramifications of the proposed legislation, but rather something deeper – the symbolic importance of marriage. All witnesses who opposed the introduction of Bill C-23 discussed marriage at some point. A common theme was that the heterosexual family was threatened, and marriage as an institution was under attack and needed protection. For example, The Toronto District Muslim Education Assembly argued that "we should be developing policies and statues [sic] to strengthen and promote the sacred institution of marriage and the sanctity of family in society, not weaken or undermine them" (Toronto District 2000, p. 5). R.E.A.L. Women of Canada (Realistic, Equal, Active, for Life) put it this way:

Our concern is that Bill C-23 destroys the unique position of marriage. The purpose of marriage, to give it a unique position, is to encourage people to enter into marriage and obtain benefits because they're married.

> What Bill C-23 does is simply eliminate all differences between homosexual, same-sex, and heterosexual common law and marriage, yet it has always been the social policy to make marriage unique to encourage people to enter into it. (*Minutes* 2000, 36, 21 March, p. 2).

This concern about the elision of the differences between common law relationships and marriage runs through many submissions by opponents of Bill C-23. While Canada has been a leader among nations in terms of extending a variety of rights and responsibilities accorded to married couples to heterosexual common law couples, based on a period of cohabitation, a firm legal and social distinction had always been drawn between the two relationships. Marriage in Canada historically gave couples more legal rights and responsibilities than common law status and also carried with it enhanced social recognition and affirmation of the relationship. The opponents of Bill C-23 clearly viewed marriage as a very different relationship than common law status: marriage is to be aspired to and valued, and is the cornerstone of any civilised society; it plays a fundamental role in the social fabric of the nation, a role that common law status can never play. Hence these opponents were obsessed with making sure that whatever Bill C-23 did, it would not lead to same-sex marriage. As we shall see, these views were merely a glimpse of much more vitriolic and homophobic submissions to come.

Moving Beyond Adult Sexually Intimate Relationships?

Finally, several witnesses argued that Bill C-23 should be expanded to include relationships other than those of a sexual nature. This stance echoes – albeit from a different political perspective – the work of the Law Commission of Canada. The Commission has questioned

whether the law should move away from the granting of rights and responsibilities on the basis of marriage or spousal status, suggesting some other marker such as "emotional and economic dependence" (Law Commission of Canada 2001). Drawing on the formal equality that already underlay Bill C-23 in equating same-sex and opposite-sex cohabitants, these witnesses took the position that it was unfair to add only same-sex cohabitants and not "other relationships that are as strong and interdependent as those which have a sexual aspect" (Conference of Catholic Bishops 2000, p. 3; *Minutes* 2000, 32, 15 March, p. 13).

Although progressive and feminist voices have suggested moving away from prioritising relationships with a sexual tie and making relationships of 'inevitable dependency' the core unit for law and social policy (Fineman 2000; Polikoff 2000), a conservative position arguably motivated the argument in the context of the Bill C-23 debates, in an attempt to 'desex' and render invisible lesbian and gay relationships by conflating relationships based on sexual intimacy with other non-sexual familial relationships (LaViolette 2002, pp. 148-152).

Bill C-23 was passed into law in 2000. The Bill arguably reflected the extension of privatised relations of responsibility and dependence to intimate partnerships regardless of their gender, which in turn reflects the agnostic view of neo-liberalism towards the gendered composition of the family. At the same time, the reassertion of the opposite-sex definition of marriage was a gesture towards the neo-conservative desire to use state and law to shore up traditional family values. The Canadian House of Commons debates on Bill C-23 revealed a similar split to the committee presentations, with formal equality discourse predominant in relation to support for the Bill, while neo-conservative language on the family and society informed most of the opponents' positions.

CANADIAN COMMITTEE HEARINGS ON SAME-SEX MARRIAGE (2003)

As we have seen, even though it was not officially on the agenda of the Standing Committee, same-sex marriage dominated the committee hearings on Bill C-23. It is therefore not surprising that when the committee held hearings on same-sex marriage in 2003, based on a Department of Justice (Canada) discussion paper (2002), interest was intense. No fewer than 362 briefs were presented and 444 witnesses appeared, more than 20 times the number of witnesses at the Bill C-23 hearings. Of those witnesses, 265 supported same-sex marriage, 163 opposed it, and 16 took no position. The discussion paper actually offered three options – retaining the opposite-sex definition of marriage, expanding legal marriage to same-sex partners, and abolishing marriage as a legal (though not religious) category, instead introducing a registration system. Most witnesses at the hearings focused on the first two options, retaining the status quo or eliminating marriage's opposite-sex definition.

Once again, the briefs and testimony presented to the committee by supporters of same-sex marriage were based on formal equality: lesbians and gay men should be allowed to marry partners of the same sex because to deny them the same marriage rights as heterosexual persons is discriminatory and contravenes the *Charter [query italic]*. The rationale was that same-sex couples should be given the same choice to marry as heterosexual couples because their relationships are similar. Some witnesses also emphasised that allowing same-sex couples to marry would strengthen marriage and the

family. All of these arguments are based on liberal legalism, looking to law to remedy a discriminatory situation whereby likes are treated in an unlike manner. They draw on liberal notions of 'formal equality' and 'choice' – an attractive concept in neo-liberal times and one that is ascendant in family law (Boyd & Young 2004). They also reinforce the normative status quo, in this case, the primacy of the exclusive, nuclear family. Although a few witnesses raised feminist concerns about marriage, most did so after endorsing the formal equality approach.

Arguments for Same-Sex Marriage

It's the Law: It's the Law" was the phrase used by E.G.A.L.E. throughout the same-sex marriage debates, building on its argument in 2000 (E.G.A.L.E. 2003). E.G.A.L.E.'s Director of Advocacy stated that "[w]e have a constitution that requires that all Canadians be treated equally under the law. Opposite-sex couples can get married. Same-sex couples can't. That's not equality. It's discrimination, and it's prohibited by the Charter of Rights" (*Minutes* 2003, 13, 4 February, p. 6). Obviously the *Charter* [query italic] has provided enormous support for the equality arguments of Canadian lesbians and gay men, but as discussed above, equality rights discourse is based on comparisons. To the extent that it is invoked in legislative hearings, the pull towards formal equality may be almost as powerful as in the litigation framework and has similar constraints in terms of challenging the status quo. Arguing that same-sex couples are the same as heterosexual couples, and thus should be entitled to legally marry, leaves virtually no room for critical analysis of the institutions of marriage and family, and their relationship to the political economy and social relations of

inequality. This constrained level of debate can produce problematic practical consequences for already disadvantaged groups and reinforce existing disadvantage.

Choice: The rhetoric of choice so often associated with liberalism also played a significant role in the written and oral submissions of supporters of same-sex marriage. For the Canadian Union of Public Employees (C.U.P.E.), marriage was "about equality, choice and ending the discrimination we know all too well" (2003, p. 5), while the New Democratic Youth of Canada stated, in a rare allusion to the fact that not all lesbians and gay men embrace the institution of marriage, that "while some same-sex couples may not hold marriage as an option for them personally, the general consensus of the LGBT communities is that people should at least be allowed the choice" (2003, p. 1).

Arguments based on the freedom to choose, located as they are in the liberal paradigm, are attractive and easy to make. The choice to marry is typically viewed as the exercise of an individual right, isolated from broader social structures that favour certain social relationships and determine how they should be regulated. Yet the individual "choice" to marry is actually shaped by the powerful familial ideologies encouraging dyadic adult commitments within nuclear family settings, and is therefore not completely free or unfettered, nor innocent of being implicated in social relations of power and hierarchy. Familial ideology renders 'normal' and desirable the choice to enter a dyadic relationship and bolsters these choices via the ideal liberal contract – the contract of marriage (Phelan 2001, p. 74). The marriage contract in turn is more than a simple contract because, when two individuals contract marriage, they enter a highly regulated "private welfare system" (Halley 2001, p. 100) with differing consequences depending on gender and income level.

Sameness: Images of sameness and assimilation permeated many of the pro-same-sex marriage submissions in Canada, often invoking traditional norms of family. Again and again, the point was made that lesbian and gay relationships mirror those of heterosexual couples. Many individuals who testified talked about their own relationships in this way. For example, Dawn Barbeau focused on financial similarities: "Our finances have gradually become more and more intertwined … we have joint accounts; we own property or a house together; our car is our joint property" (*Minutes* 2003, 29, 1 April, p. 76). Other witnesses focused on how traditional their relationship was, for example in relation to childcare:

> I come to you as a traditional lesbian, who's been together for 19 years and has children. My partner is quitting work in a couple of weeks so she can stay home with our children. We need to be recognized for our equality with other couples who make choices (*Minutes* 2003, 29, 1 April, p. 50 (Martha Dow)).

E.G.A.L.E.'s brief (2003) contained a series of "portraits" of lesbian and gay couples, again focusing on how similar to heterosexual couples they were in relation to attributes such as monogamy, love, fidelity, sharing of property, being viewed by others as a couple, and longevity of relationship.

It is not especially surprising that these images were put forward. As we know, (formal) equality discourse lends itself to arguments based on comparisons and demonstrating sameness while at the same time obscuring diversity. In this context the obvious comparator for lesbian and gay couples is heterosexual couples. But the results can be problematic. First, even the concept of the typical heterosexual couple as monogamous and in a long-term relationship in which virtually all property is shared is somewhat

artificial, and certainly an idealised norm rather than a representation of reality. Second, the research on the dynamics of same-sex partnerships remains at an early stage (Ambert 2003) and it is unclear what similarities and differences exist. At the same time, using the idealised heterosexual model as the comparator serves to 'other' those who do not fit the mould. Those individuals – whether heterosexual or not – who do not fit within the dyadic marriage model will be left out in the cold. For instance, those who rely on the collective for support in fields such as health, poverty, transport, and migration will suffer unless wider discussion ensues about the broader redistribution of responsibilities rather than a simple fetishising of romantic coupledom (Cooper 2001, p. 96).

Marriage and Family Strengthened: While many who opposed same-sex marriage argued that permitting lesbians and gay men to marry would weaken the institution, many proponents argued the exact opposite. Under both approaches, the significance of dyadic marriage and the nuclear family was bolstered. Speaking for the Foundation for Equal Families, Michelle Douglas said that "[t]he foundation believes that equal marriage will in fact strengthen the institution of marriage by expanding the range of loving couples who subscribe to its tenets" (*Minutes* 2003, 15, 11 February, p. 2). Another witness alluded to the benefits of marriage to the family when she said "[t]here are also clear advantages for the children." But she continued in a broader vein, stating that "[b]enefits to Canada, to the state, include the promotion of intra-family solidarity, the empowerment and solidarity of couples and families and certainly a reduced social burden for the state" (*Minutes* 2003, 14, 6 February, p. 3 (Marie-France Bureau)). Bureau was the only witness to comment explicitly on the 'benefits' that would accrue from the privatisation of economic

responsibility within the family, reinforcing the tendency to look inwards to the family for support under the neo-liberal approach of privatised self-reliance.

Marriage as the Gold Standard: One option presented in the Canadian Department of Justice Discussion Paper on Same-Sex Marriage was to permit lesbians and gay men to enter civil unions or registered domestic partnerships (R.D.P.s) instead of the right to legally marry (Department of Justice 2002, p. 21). One might have thought that these options would attract support, since they avoid the ideological trappings of marriage. However, those who supported same-sex marriage either rejected civil unions or R.D.P.s outright, or in some cases, rejected them unless same-sex marriage was also legalised. For example, E.G.A.L.E. stated that "[g]iven the social imprimatur of marriage and the stigma still attached to homosexuality, registered domestic partnerships could only be interpreted as official, government sponsored, second class status" (E.G.A.L.E. 2003, p. 9). A similar critique was expressed by René LeBoeuf, a litigant in the Québec case that found that the opposite-sex definition of marriage contravened the *Charter [query italic]*.[14] Following that decision, Québec amended its Civil Code to allow civil unions, thus giving same-sex couples the opportunity to enter a new conjugal regime. Mr. LeBoeuf described civil unions as "light marriage"; while acknowledging that civil unions were a "good first step", he urged the committee not to stop there because "we continue to believe that a civil *marriage* is the gold standard of conjugal relationships" (*Minutes* 2003, 15, 11 February, p. 3, emphasis added). For most supporters of same-sex marriage, there appeared no interest in accepting anything other than marriage. The symbolic importance of marriage was thus reinforced, even as arguments were made for challenging its heterosexual premises.

The Feminist or Progressive Voice: None of the Canadian briefs and submissions discussed so far included critiques of marriage, and perhaps understandably: it is very difficult to argue for inclusion in an institution while at the same time raising problems inherent within it. However, a few witnesses tried to walk that fine line. For example, while endorsing same-sex marriage, Lise Gotell also raised concerns with the terms on which the debate was framed. She was careful to point out that allowing same-sex marriage would simply result in formal equality for lesbians and gay men and would not lead to substantive equality. It would not, for example, eliminate homophobia, just as ending racial segregation in the United States had not eliminated racism (*Minutes* 2003, 30, 2 April, p. 23). No committee member engaged with Gotell's concerns about the incompleteness of marriage as a tool by which to achieve equality.

West Coast L.E.A.F. (Legal Education and Action Fund), a group seeking equality for women, attempted to break free from the formal equality model and introduce a more nuanced feminist analysis, raising the larger issue of the role that marriage has played in "enforcing women's economic inequality, allowing women's victimization by domestic violence, and devaluing the important work of caregiving" (*Minutes* 2003, 29, 1 April, p. 61). Only one committee member engaged with these gender issues and then not in a spirit that accorded with the group's recommendation. Vic Toews (Canadian Alliance) used the concerns expressed by West Coast L.E.A.F. to suggest that marriage not be extended to same-sex couples. He asked "are we certain enough about what we're doing with this particular institution, given the history we've had with divorce and the impact of divorce

[14] *Hendricks v. Québec* [2002] R.J.Q. 2506.

and the ‘feminization” of poverty’, as one witness put it here? Don’t we have to worry about those kinds of things?” (*Minutes* 2003, 29, 1 April, p. 64).

The transcripts reveal how little room existed for any position other than absolute opposition to same-sex marriage or complete support for it. The questions and comments by the committee members clearly demonstrated that they were not prepared to engage in a more nuanced debate. Just as litigation often forces parties and intervenors into positions more stark than they would prefer (Boyd 1999, pp. 379-382), debating the merits of possible legislation in an area as contested as same-sex marriage also appears to limit the opportunity to do more than simply accept the proposal that same-sex marriage be legalised. Any more nuanced an approach might be taken as evidence by opponents that the concept of same-sex marriage is indeed flawed and should not go forward. Most lesbians and gay men and feminists were unwilling to take that risk. Even N.A.W.L., which in 2000 offered a feminist analysis of Bill C-23 that challenged the privatising impact of the Bill, toned down its critique considerably in 2003.

The most radical analysis was offered by Gary Kinsman, who called for the abolition of state sanctioned marriage. He addressed the patriarchal nature of marriage, noting that marriage is the most privileged of social relations and that state institutionalised recognition of marriage is itself a state practice of discrimination against other forms of social and sexual relationships, such as single-parent-headed households. He suggested that there should be recognition of and support for individuals “on the basic principles of social justice, on the basis of democracy, autonomy, equality, consent, choice and the redistribution of wealth to those living in poverty and hardship” (*Minutes* 2003, 35, 9 April, p. 4, 5). Members of the committee appeared confused by Kinsman’s testimony, which did

not fall easily into an argument for or against same-sex marriage. No committee member addressed his position directly or challenged him on its implications. Instead he was questioned about his views on civil unions, the symbolism of marriage, and marriage as a uniquely heterosexual institution. Indeed Liberal member of the committee, John McKay described Kinsman's recommendation as a "curious idea" and a "curious position" (*Minutes* 2003, 35, 9 April, 11). Ideas about the abolition of marriage and regulating social relationships by use of other markers seemed to be outside the imagination of the committee, and indeed, most witnesses.

Arguments against Legalising Same-Sex Marriage: Heterosexual Anxiety

Most of those who opposed same-sex marriage tried to cast same-sex couples as the antithesis of heterosexual couples in terms of their relationships and lifestyle, often in clearly homophobic terms. Underpinning their opposition to same-sex marriage was a neo-conservative view of marriage and the family as inherently patriarchal and hierarchical institutions. For them, the imperviousness of marriage and the family to the critique of feminists and others was crucial to the health of society and the nation. These interventions represented a "performance of heterosexuality", revealing the anxiety of many men (and women) in society about the fact that "being straight" is an increasingly contested status, as is masculinity (Collier 1996).

The main opposition to same-sex marriage was based on a belief that allowing lesbians and gay men to marry would lead to the demise of marriage, the family and society. Somewhat like those feminists who have speculated that allowing lesbians and gay men to

marry might transform the relationship in such a way that it becomes less hierarchical and more egalitarian (e.g. Cox 1997), those who opposed same-sex marriage took the view that it was more than a possibility that such a change in marriage would occur. Allowing lesbians and gay men to marry would strike at the most abiding and important aspects of marriage in their eyes, that is, the hierarchical nature of the relationship in which women and men have clearly defined gender-based roles based on the male breadwinner and the stay at home wife and mother. As Gwen Landolt of R.E.A.L. Women of Canada commented, "[m]arriage is not a mere social construct, because social constructs change, but the nature of marriage has not changed through thousands of years of recorded history and through a variety of cultures" (*Minutes* 2003, 16, 12 February, p. 7).

Opponents of same-sex marriage first went to great lengths to argue that lesbian and gay relationships were the antithesis of heterosexual relationships in every way. Their vision of the nature of the heterosexual married couple's relationship was highly idealised: marriage is a monogamous union of two people who have children and remain together until death. In their attempt to preserve marriage as a heterosexual institution, opponents made extremely homophobic statements that clearly disturbed some committee members. For example, Réal Ménard (Bloc Québecois) responded to the submissions by members of the Cosmas and Damian Society by saying "I am a bit surprised by your presentation, because it gives the impression that homosexuals are full of unchecked desires, who do nothing but have sex and who are entirely incapable of being parents. I am all the more surprised by the basis of your presentation since you are presenting yourselves as professionals" (*Minutes* 2003, 27, 25 March, p. 11). The attack by opponents 'othered' same-sex relationships in terms that reinforced the values and essentialist gender roles

underlying traditional views of heterosexual marriage. Ménard's response in turn normalised same-sex relationships.

A variety of allegations about the nature of same-sex relationships were made to the committee by many of the witnesses who opposed same-sex marriage, for example, Gwen Landolt, National Vice-President of R.E.A.L. Women of Canada:

> In the same-sex union, there is sexual infidelity; the unions are of limited duration; there are differences in the financial arrangement between heterosexual and same-sex couples; their skill compatibilities are different; and their lifestyle is totally different, in particular with the prevalence of drug use. (*Minutes* 2003, 16, 12 February, p. 9).

Many witnesses also argued, ignoring the "gayby boom" (Kelly 2004, p. 134), that because lesbian and gay couples could not procreate, they should not be allowed to marry. As Dr. Franklin Pyles of the Evangelical Fellowship of Canada said, "the conjugal relationship is essentially a procreative act. Marriage encourages procreation. It is the place where procreation is to occur" (*Minutes* 2003, 17, 13 February, p. 7).

Second, many witnesses who opposed same-sex marriage gave evidence about how the 'lifestyle' of lesbians and gay men was so debauched that they should not be permitted to marry, focusing mainly on negative, stereotyped perceptions of the gay male lifestyle. Rita Curley of the St. Ignatius Martyr Council said, using the quintessential slippery slope argument, "[t]o redefine marriage to be inclusive of homosexuality is to create a new morality in which homosexuality is not merely tolerated but is normalized and would branch out into sexual activity with babies, children of both sexes, and with animals" (*Minutes*

2003, 15, 11 February, p. 16). This homophobic outburst led committee member Svend Robinson (New Democratic Party) to intervene and say to the Chair, "as a gay man, to hear a witness equating me with pedophiles, with those who would have sex with babies, with those who would engage in bestiality, is not acceptable from any witness, and I won't accept it" (*Minutes* 2003, 15, 11 February, p. 16).

A third theme was that permitting lesbians and gay men to marry would lead to the demise of society and, for some, the end of civilisation. Some witnesses argued that permitting same-sex marriage would lead to polygamy, legalisation of incest, or marriage between two sisters or brothers. Gwen Landolt said during a heated exchange with the Chair of the Committee:

> Now you say polygamy is illegal, and incest is illegal – all of those things. But marriage is an institution that has been historically there before the common law. That is the principle, and you're going to change it fundamentally and reform it. This is the whole point of what I'm getting at: Is marriage to be as it always has been, for the purposes I've already said many times today, or are you going to open it up to any kind of relationship, legal or illegal? Because in principle, you cannot open marriage up to homosexuals or lesbian couples unless you open it up in principle to all sorts of other relationships. (*Minutes* 2003, 16, 12 February, p. 31).

In June 2003, the Standing Committee voted by a margin of only one to recommend to the federal government that it not appeal the ruling by the Ontario Court of Appeal in *Halpern* v. *Canada* redefining marriage as being between "two persons". Perhaps due in part to the heated political backdrop to the same sex marriage hearings of 2003, the dichotomous framing of the debate for or against marriage (Butler 2002) was even more

deeply entrenched, than it had been in relation to Bill C-23, with those who tried to offer analysis that problematised the dichotomy barely being acknowledged.

CONCLUSION

By and large, the debates about recognising same sex relationships as spousal in Canadian law operated within a narrow paradigm. A formal equality paradigm was used by those in favour of legal recognition. Meanwhile, resistance to such legal recognition generally reflected the extent to which marriage was seen by conservative forces as the last bastion of state enforced reinforcement of the special significance of heterosexual couples. Moreover, those in favour of formal equality argued that nothing less than marriage will do, thus reinforcing marriage as the "gold standard". Virtually no critiques of marriage or familial ideology, nor links to its relationship to unequal power, domestic abuse, economic dependency and poverty were raised, nor could they be 'heard'.

At one level, Canada's legalisation of civil same-sex marriages makes perfect sense. Marriage is, in some sense, an individualistic act that fits well within the current neo-liberal climate in Canada: everyone for herself, preferably in a dyadic family unit, not relying on the community unless absolutely necessary. Other legalised dyadic relationships such as common law partnerships also marry well with neo-liberalism. Feminist critiques have long exposed this ideology of marriage and the nuclear family (Barrett & McIntosh 1982) and the difficulty of challenging this social construction from within (Hennessy 2000, p. 97). More recently, it has been pointed out that emphasising marriage as a key social struggle and goal

has implications for citizenship. On the one hand, extending marriage rights to same-sex couples will "change cultural assumptions about who may and does love whom, about the meaning of reproductivity and parenting" (Phelan 2001, p. 158). On the other hand, assumptions about the relationship between kinship and citizenship may not change as a result of extending the definition of family: "[W]e run the risk of reconsolidating the idea of the responsible citizen as economically independent – or at least married to a provider – thus removing the burden of notice and care from other citizens" (Phelan 2001, p. 158).

The struggle for the legal redefinition of marriage to include same-sex partners in Canada, in many ways so radical, has embodied this constraint; the responsible lesbian or gay citizen of the future may well be a married one. As Butler puts it, "options outside of marriage are becoming foreclosed as unthinkable" (2002, p. 18). The neo-liberal choice model that enables same-sex marriage certainly is preferable to a neo-conservative space that would continue to endorse restrictive definitions of marriage and family. Moreover, given the security of legal recognition of their relationships, lesbians and gay men may feel secure enough in their legal rights to undertake the kind of critical analysis of marriage and familial ideology that we have argued has been undermined. As others have observed, "citizenship is never wholly disciplined, but may simultaneously retain 'an unruly edge'" (Cossman 2002a, p. 487; Stychin 2001 p. 290). In order to engage this unruly edge, however, lesbians and gay men – indeed all citizens – will have to return their gaze to the 'other' – those who do not fit the mould of the responsible citizens of neo-liberalism. Given that Canada has legalised same-sex marriage for the whole country, we can study whether or not this broader gaze – arguably a feminist gaze – is achievable.

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