

Some Notes on the Experience of Working in Community with the Gay and Lesbian
Communities of Ontario

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For: Panel on Marginalized Communities: Moving Forward by Learning From Our Past

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Introduction

It is with some trepidation that I make this contribution to the scholarly efforts of my colleagues and predecessors at these Colloquia, which have been so generously and appropriately sponsored by our Chief Justices in Ontario, as well as the many other professional bodies listed in the program materials. So let me begin by freely and fairly admitting: I am no scholar.

I am first and foremost in this context, a practitioner of law, and as well, a member of a variety of communities. The intertwining and synergistic nature of these identities, as well as my own personal and idiosyncratic character traits and flaws, are what I bring to the table for today's discussion. I hope my comments will be of some use, or at least, some interest, for those seeking to use the law as a vehicle for realizing progressive social goals.

The lessons which can be learned from marginalized communities' interaction with the law and the legal profession are legion. Of necessity, I will limit my comments to two major areas which are germane to this 11th Colloquium on the Legal Profession: Professionalism and Serving Communities. They are: issues of professionalism as they

¹ I would like to acknowledge the invaluable assistance of Piper Henderson, Student-at-Law with Green and Chervover, 2008-09 in producing this paper. I also would like to thank my community for entrusting me with the work of litigating and lobbying for equality over the years. It is a privilege and an honour to be of service. As always, any errors or omissions are my own.

emerge in working with the lesbian and gay communities in Ontario on legal issues, and some lessons learned.

A Note on the Use of the Word “Marginal”

I am not a fan of the word “marginal” to describe communities which are “other” than the predominant communities. I am not even convinced that so-called “predominant” communities are always predominant in numbers, although they may yet remain predominant in influence. For a while, I preferred the concept, at least for gay and lesbian communities, that we were “interstitial” not marginal. That is, our communities were *of* the fabric of the broader community, inseparable from it and necessary to it- but largely invisible until one looked in the interstices for evidence of our presence, which was then obvious in abundance. Marginal implies thrust out of, not part of, and not necessary to. I do not believe that describes my community. However, marginal does describe the view the predominant takes of the other, and in recognition of this fact, I have used the words “marginal” and “marginalized” in this paper.

Issues of Professionalism as They Emerged in Litigating Relationship Recognition

I would like to turn first to one aspect of “moving forward by learning from our past” and that is some issues of professionalism as they emerged for me in litigating and generally pursuing the issue of legal recognition of and protection for the spousal relationships of gay men and lesbians. What I would like to bring to this discussion is a sense of some of the thinking that informed the litigation at the time, whether in hindsight that thinking was useful and the role of lawyers as professionals within the community in

informing and in many ways shaping that strategy in consultation with and on behalf of the community.

I have picked a starting point of the late 1980's for several reasons. The first is that my perspective is informed by being a lawyer in Ontario, and it was in 1986 that the Ontario *Human Rights Code* was amended to include sexual orientation as a prohibited ground of discrimination. While there had been notable attempts prior to that time to establish a right to equality under the law for lesbians and gay men², Attorney General Ian Scott's amendment to the *Code* provided an indisputable basis for those demands for equality. As well, the repatriation of the *Charter of Rights and Freedoms* in 1982 and the bringing into force of section 15 in 1985 also presented new and unprecedented opportunities to argue for equality and non-discrimination for gay men and lesbians.

These legal developments were inextricably bound up with social changes in the recognition and status of gay men and lesbians, brought about by a complex constellation of historic events, including the crest of the so-called second wave of feminism of the twentieth century, the burgeoning politics of the "Queer Nation", the identification of and battle against HIV/AIDS as one of the most virulent scourges of our times, and the presence, in the political spectrum of a still viable language of progressive politics. It was possible to identify and name oppression without invoking ironic or disparaging responses, and more importantly, it was possible to conceive of and articulate alternative perspectives and engage in public debate on those alternative views. It was a time of compelling change.

² See: Donald G. Casswell, *Lesbians, Gay Men, and the Canadian Law*, (Toronto: Montgomery, 1996).

One of the things I have come to realize about the effort to achieve equal rights for gay men and lesbians in the 1980's and 1990's is that it was an intensely legalistic approach to the advancement of these communities. Perhaps that seems painfully self evident now. But despite there being many ways in which to take a community forward (education, activism and community development in all its facets being some of them) in the last twenty or so years, my community chose a rights based strategy to advance equality. One could argue that the presence of so many young lawyers in the community and wanting to serve the community, at a time when both legal and social discourse focussed on social, civil, political and human rights, was in fact the impetus for such a strategy. And in part that would be true. However, my observation is that the movement for equality for lesbians and gay men, as it was expressed in those decades and into the twenty-first century, was tremendously informed by the rights based struggles of others. The experiences of racialized persons and women were among the strongest influences that I observed; the experiences of these communities in moving towards, into and sometimes past a rights based strategy were drawn upon and learned from as we struggled to formulate our own strategies. Perspectives about these rights based legal strategies were available to our communities in significant part because lawyers worked in community to develop those strategies.

It is also arguable that recognition and protection of the law through the removal of constraints (such as criminal sanctions) and the presence of protection (like human rights) is a necessary precursor to equality in a practical sense. Certainly it was our argument at the time that without, for example, protective and fair employment policies first, no one would come out at work and assert a right to equality. Law and rules of fairness and equity would in fact create an environment conducive to living openly as a

complete person fully expressing one's identity as gay or lesbian. I believe there is merit in this view, although experience tells me the process of advancing equality is far more entangled with many social, political and legal factors than this linear analysis would suggest.

I should also note that I offer my observations as a litigator and community member who worked in community on several but not all aspects of the issues facing gay men and lesbians in those years. My involvement stems from acting as a lawyer on some of the cases, working on the Campaign for Equal Families in 1994, founding and working with the Foundation for Equal Families and in that capacity acting as "the client" on some cases where the Foundation intervened, and as the lawyer on others. I cannot speak to the strategic considerations of all the litigation which has occurred since the late 1980's, but where I can offer some insight, I will do my best.

The first case I would like to discuss is *Andrews et al. v. Ontario (Minister of Health) et al.* 49 D.L.R. (4th) 584 (H.C.). In that case, the applicants (including Karen Andrews, now a lawyer in Ontario) made application alleging that the *Health Insurance Act* discriminated against same-sex couples and their families in the manner in which it provided Ontario Health Insurance Plan benefits. At that time, OHIP benefits were paid for through individual premiums calculated on the basis of single or family coverage. While the *Act* extended family coverage to the dependents of those in opposite sex relationships (both married and common law) the *Act* failed to extend OHIP coverage to the dependents of a person in a same-sex relationship. The applicants argued that the definition of "spouse" should extend to same-sex couples living in domestic partnerships, and that the denial of this benefit constituted an infringement of their *Charter* rights. The

court dismissed the application on the basis that the definition of spouse had been defined consistently in Ontario statutes by reference to a partner of the opposite sex. The court concluded that the differential treatment between same and opposite-sex couples was not discriminatory, as same-sex couples were being treated similarly to all unmarried people in the province. The court determined the *Charter* claim was without merit.

One might ask, as the court impliedly did in this case, why the applicants had not used the provisions of the just amended *Human Rights Code* to advance their claims. It has to be remembered at this time that the Code amendments extended only to protection against discrimination on the basis of sexual orientation; the amendments did not include changes to the definition of “marital status” or “spouse”- which continued to reflect the so-called traditional opposite sex definitions of spouse, be it in the context of marriage or common law relationships.

This choice to include sexual orientation, but not amend other definitions was a considered political and policy choice by the government of the day. Some argue it made inclusion of sexual orientation in the Code possible, others that it shaped the litigation for the next decade and a half. What seemed clear at the time was that this disjuncture in the basic law against discrimination caused the community to focus on relationship recognition as a key component of advancing the rights of lesbians and gay men in Ontario. The disjuncture created a split in the protection offered by the law- a distinction between “being and doing”. In other words, it was now “ok” to be a lesbian or gay man and you could not be discriminated against on the simple basis of your identity in the social areas protected by the Code. But if you ventured outside that protected space, and actually acted upon your identity by forming relationships, those relationships were not protected and could be differentially and discriminatorily treated.

This disjuncture generated considerable debate and discourse in the gay and lesbian communities across Ontario and indeed Canada. It is not the purpose of this paper to explore that debate in any great detail. However, it became clear that there were significant pressures inside the communities in Ontario to address the disjuncture, through litigation, legislation or both. Efforts by organizations such as the Coalition for Lesbian and Gay Rights in Ontario or CLGRO, focussed significantly on lobbying for so-called “spousal recognition” later renamed “relationship recognition” in some form, in legislation.³

It was primarily in respect of those efforts by CLGRO that I first became involved in the issue. I worked on the relationship recognition issue within this community based organization in really a dual role: as a member of the affected community and as a lawyer. It was in this dual capacity that I first began to experience those professional and personal challenges that almost inevitably inform working in community. While as a lawyer I could offer a legal analysis of the existing situation, the possible solutions and the probable outcome, I also had to earn my credibility within the community by being prepared to stay with the work on the issue over time, to make myself available to the community as a resource, to act as a spokesperson when required and to respect the fact that there are times that the job of spokesperson is for someone else. And perhaps most fundamentally, I had to learn to work within consensus.

As advocates, we do like to argue a position. But in working in community, it is first necessary to establish a broad enough consensus on the position that one can convincingly speak as a “community voice”. Working through to consensus, as fragile as

³ Coalition for Lesbian and Gay Rights in Ontario, *Happy Families: The Recognition of Same-Sex Spousal Relationships - A Brief on the Recognition of Same-Sex Spousal Relationships* (Toronto: CLGRO, 1992).

it was at times, was one of the primary jobs of those in the community who chose to work on relationship recognition, including the lawyers.

And consensus was not immediate or complete. At this time in the late 1980's and early 1990's debate inside the community began increasingly to focus on the viability of a challenge to the traditional definition or category of "marriage", in the absence of clear human rights protection and the absence of a clear statement (at least in the late 1980's and early 1990's) that "sexual orientation" was an analogous ground under the *Charter of Rights and Freedoms*, section 15. An alternate strategy, focussing on extending the concept of protection on the basis of sexual orientation from merely individual protection to encompassing recognition and protection of relationships became a dominant theme in both formal and informal discussions around strategy. The idea that the common law definition of spouse, based as it was primarily on cohabitation, could afford a vehicle for sidestepping the politically contentious issue of a direct challenge to marriage law, and could afford a logically coherent, precedent⁴ based method for recognizing our relationships began to gain currency.

Yet even that apparent consensus was fraught with issues from the profoundly basic question "why should we seek to be participants in social constructs which are heterosexual in origin and not necessarily reflective of our experience" to strategic questions like "what should we call that status we are seeking?"

Students of this subject would note that the terminology evolved. At first it was referred to as spousal recognition, then same-sex spousal recognition, then relationship recognition. The evolution was no accident; it stemmed from discussions within the

⁴ Viewed from the standpoint of modern law in Canada (and not a broader historic viewpoint) a common law spousal definition was in fact a judicial construct in more modern usage at least from the case of *Pettkus v. Becker*, [1980] 2 SCR 834, 117 D.L.R. (3d) 257.

community about how to honestly communicate our goal within alienating the audience. This language choice was deliberate and strategic and acknowledged the barriers we faced in speaking to the broader society, including judges. Should we have made this choice? There is no doubt that it was informed by considerations of legal advocacy. Was the right balance struck between communication and a proper expression of the community's aspirations? This kind of choice was one in which the challenges of being a legal professional were illustrated: do we opt for language that frankly seems to respond to retrograde attitudes about the use of the term "spouse" or do we find a way to reach decision makers that allowed us to advance the cause? A choice was made, it is obvious, but these questions linger.

The question next became: in what legal context should we attempt to advance relationship recognition? I do not mean to suggest that this was a linear, logical, step by step analysis. Far from it, litigation about a variety of issues bubbled up in a multitude of legal contexts. Individual discrimination in employment, family law issues of custody and care of dependents and ill partners⁵, the recognition of relationships in acute care medical settings, the cost and allocation of benefits in income maintenance and other insurance schemes both governmental and private, were occurring as the individual litigants saw the need to challenge the laws and rules that they believed discriminated against them. To suggest, as some detractors did, that there was a "Gay Agenda" to "subvert" the law would be to attribute far more organization to the litigation and other efforts than in fact existed. By the same token, in communities as closely knit and at the same time ubiquitous as the lesbian and gay communities, it would also be impossible to

⁵ On this issue, it is to be noted that Ontario introduced legislation earlier than most other Canadian jurisdictions with the *Substitute Decisions Act*, 1992, S.O. 1992, c. 30, ss. 1(2), 17(1), giving a "partner" the rights extended to spouses under this statute.

deny that there were shared experiences and there was a dialogue going on about these things that informed people's thinking about the issues.

But there was a tension, for those who saw a possibility to advance the issue through litigation, between the natural occurrence of litigation as individuals saw fit, and the desire for a coherent overall strategy. As lawyers we both had to accept the fact of individual choice in litigation and work with it. Professionalism, with its imperatives to show integrity, leadership and be of service, compelled lawyers in the community, including myself, to offer our thoughts, advice and services when needed, but also to express when we thought a piece of litigation, or a particular strategy or fact situation, would not advance the issue. This is not always a comfortable role to have in a community.

When the *Leshner v. Ontario Ministry of the Attorney General (No. 2)* (1992), 16 C.H.R.R. D/184 (Ont. Bd. of Inquiry) decision was rendered, it seemed in some ways a logical outcome of this ongoing discussion and a resolution of sorts of this tension by establishing a "template" for relationship recognition in the law in Ontario on terms which offered the possibility of further development.

The applicant, a Crown Attorney with the Ontario Government and a community activist, made a complaint under the Ontario *Human Rights Code* of discrimination on the basis of sexual orientation. He claimed the Ontario government pension legislation discriminated against him by denying his spouse coverage under the pension benefits plan. Coverage had been denied on the basis that the pension legislation limited eligibility of the benefits to common-law spouses only of the opposite-sex. Further, the applicant argued that the *Human Rights Code* provisions which restricted the definitions of "spouse" and "marital status" to persons of the opposite sex infringed s.15 of the *Charter*.

The Board of Inquiry decided in favour of the complainant, on the basis that the *Human Rights Code* must extend equal protection to same-sex couples as to opposite-sex couples in common-law relationships, and to do otherwise would be to condone discriminatory treatment. The Commission found the *Code* was in breach of the *Charter*, not saved under s.1. This included a finding that that words “of the opposite sex” were to be removed from the definition of “marital status” in the *Code*; that s. 25(2) was deemed inoperative to the extent that it restricted survivor benefits to opposite-sex conjugal relationships; finally, provisions within the *Employment Standards Act*, the *Public Superannuation Act*, the *Public Service Pension Act* were held similarly inoperative to the extent they mirrored definitions of the *Code* that contravened s. 15 of the *Charter*. Amendments to the Ontario *Income Tax Act* were also required, or, alternatively, the Government could create a separate registered pension plan for equivalent survivor benefits and eligibility to persons living in same-sex conjugal relationships. This decision was not appealed by the Government.

My own involvement with this case was as an activist in the community supporting Michael Leshner’s efforts in this case. While I brought my legal experience and training to that effort, it was in the capacity of building support for and understanding of the case, not directing the strategy. One could say that it was an example of collegiality and service- two hallmarks of professionalism, and it offers another example of how lawyers can work in community.

But what made the *Leshner* challenge so successful when only a few years before, a similar challenge in the *Andrews* case had failed? It was not the mere passage of time,

although that, coupled with increasing media attention in the main stream to the issue of same sex relationship recognition, had brought the issue into more public focus.

If I could hazard a guess, it was because of several factors: it was explicitly not a challenge to marriage, and it explicitly was a bid to extend the civil (as opposed to religiously based) concept of common law spousal status to gay men and lesbians. The case was also expressly based on an argument of fairness- Leshner paid into the pension plan at the same rate as his colleagues who were in opposite sex relationships, and yet he and his partner could not draw out of that plan at the same rate or extent as his colleagues, no matter how long they lived together, because the opposite sex definition of spouse as it appeared in the various laws implicated in the transactions.

It also must be noted that in constructing its argument, the Government made several key concessions, notably that if the discriminatory definition of “marital status” in the *Code*, combined with the relevant employment benefits legislation was found to “trump” the Leshner’s right to be free from discrimination, then those provisions were an infringement of his section 15 *Charter* rights to equality and could only be saved under section 1. These concessions did two things: they avoided the need to judicially find that sexual orientation was an analogous ground under the *Charter*, and they moved the debate into the arena of “reasonable limitations”. This allowed Leshner to make the argument that whatever the historic significance, in the context of pension benefits, of protective legislative provisions for female spouses, these historic rationales no longer held true in a modern society and could not justify the restriction. This in turn opened the discussion in the case to an examination of modern concepts of conjugal relationships and their meaning.

These choices about how to frame the issue in the context of litigating the case were strategic legal choices, and they had significant repercussions, both good and bad, for how the community advanced the issue, how it was viewed by the general public and the discussions it engendered both within and without the community.

In seeking to analogize gay and lesbian relationships to heterosexual relationships we simultaneously opened doors to possible recognition, and embroiled ourselves and our community in what appeared to some to be an effort to appear “more hetero than thou”. Objections to this monolithic and heterocentric conceptualization of our relationships were legitimate, well founded and real. Professionalism compelled us as lawyers and activists to acknowledge these facts, and simultaneously to offer rationales for accepting the strategic choices even with their limitations. I wrote and spoke about this issue in the community in Toronto and Ontario, and professionalism again compelled me to not necessarily voice my own personal thoughts on these issues, but to offer a lawyer’s perspective on the consequences, legally, of the various strategic choices facing our community. In being of service, at times, it was necessary to forgo personal expression in favour of professional “objectivity”. This was not always easy to do, and I make no claim to having been completely successful at it.

It would be a mistake to think though that the litigation around same sex spousal recognition and benefits was limited to individuals within the community. In an important move based on coalition, the trade union movement began to litigate these issues as well, through their collective agreement provisions on benefits and on non-discrimination⁶. In fact, this coalition between community members and trade unions

⁶ See: Donald J.M. Brown & David M. Beatty, *Canadian Labour Arbitration*, looseleaf, 4th ed. (Aurora, Ontario: Canada Law Book, 2008) at para. 8:3320, n. 51, and see also Volume 2 for Historical Case References at para. 8:3320, n. 51.

helped to develop, refine, coalesce and move forward these developments so that they became more and more a part of mainstream discourse on benefits, entitlement and non-discrimination. This was an important, and I would posit an essential step in bringing lesbian and gay issues from the interstices to the centre and demonstrated a synergistic and progressive relationship between education, politics, litigation and communities. And while the basis of the strategy was legal action, the milieu in which this occurred was in fact both a social movement and a significant sector of society being unionized workers across private and public employers.

And yet, the progress in relationship recognition litigation was hardly uniform⁷. At virtually the same time as the *Leshner* case was being decided, another case about relationship recognition was working its way to the Supreme Court of Canada. In *Canada (Attorney General) v. Mossop* [1993] 1 S.C.R. 554 (4-3), affirming [1991] 1 F.C. 18 (F.C.A.), reversing (1989), 10 C.H.R.R. D/6064 (C.H.R.T.) the Canadian Human Rights Commission appealed to the Supreme Court of Canada. The Canadian Human Rights Tribunal had determined that the complainant had been denied his right to bereavement leave under the collective agreement between the Federal Treasury Board and his Union. The Tribunal held that this denial was in violation of the *Canadian Human Rights Act* on the grounds of “family status”.

The Attorney General appealed the decision to the Federal Court of Appeal, and was successful in having the decision overturned. The Commission then appealed this decision to the SCC, and the majority of the Court held that the FCA was correct in its

⁷ See for example: *Ontario Blue Cross v. Ontario (Human Rights Comm.)* 21 C.H.R.R. D/342 (Ont. Ct. (Gen. Div.), Div. Ct.) reversing (1993), 18 C.H.R.R. D/377 (Ont. Bd. of Inquiry) The Ontario Divisional Court reversed the decision of the Board of Inquiry. The court found that a denial of employment-related family benefits to same-sex partners did not violate the Ontario *Human Rights Code* on the basis of sexual orientation.

standard of review with regard to the Commission's decision. The majority also confirmed that the Commission had made an error of law when it interpreted the definition of "family status" to include same-sex families. In dissent, McLachlin, Cory, and L'Heureux-Dubé JJ, did not find the Commission's interpretation of "family status" to be incorrect, namely, that same-sex couples appropriately fell within the definition.

While I was not involved with the case, I like many others in the community followed it closely for the insight it provided to judicial perspectives at the time, and because, had it been successful, it would have represented an important development in establishing our existence and our rights in the mainstream. *Mossop* was as clearly an expression of the aspirations of the community as any of the other pieces of litigation at the time. It represented another kind of legal strategy, carried out through litigation, in an effort to interject back into the jurisprudence a sense of the lived experience of gay men and lesbians, not as some version of common law spouses, but as family in a quintessential but uniquely gay sense. One could argue that it was Mossop's and Popert's determination and their counsel's professionalism which ensured that this strand of thinking about our relationships remained part of the jurisprudential discussion.

How is it that within one year of each other, one decision could determine that the opposite sex definition of "spouse" was discriminatory, and another could say that same sex relationships did not fall within the rubric of "family status". At the time, and in hindsight today, I believe that the strategy in the *Mossop* case, to push more into the category of "family" as it was then understood was simply "a bridge too far". While it was possible to articulate a vision of same sex relationships between two adults which paralleled our common law heterosexual notions of relationship, it was simply too much and too fast for the court to compass the idea that these constructs might be *families* too.

Such limitations in judicial analysis can and should be critiqued for unexpressed homophobia and internalized heterosexism, but it nevertheless offers a way in which these two decisions can be understood.

As if to mark the fact that too much was happening too fast, the *Layland and Beaulne v. Minister of Consumer & Commercial Relations* (1993), 14 O.R. (3d) 658 (Ont. Div. Ct.) also came out in this time period.

In *Layland*, the applicants, who were both male and who were cohabiting in a conjugal relationship, applied under s. 8(4) of the *Marriage Act*, R.S.O. 1990, c. M.3, for judicial review of the refusal to issue a marriage licence to them. They argued that the limitation which prevents persons of the same sex from marrying violated their equality rights under s. 15(1) of the *Canadian Charter of Rights and Freedoms*. Their application was dismissed by a majority of the court, which found that under the common law of Canada applicable to Ontario, a valid marriage can take place only between a man and a woman, and persons of the same sex do not have the capacity to marry one another. The majority found that “professed homosexuals” do make up a discrete and insular minority, and sexual orientation is an analogous ground of discrimination under s. 15 of the *Charter*. However, the majority stated that that characteristic raises a question of capacity, which is not irrelevant to the common law restriction of marriage to unions of persons of opposite sex. One of the principal purposes of the institution of marriage, the majority found, is to encourage procreation, and that purpose cannot be achieved in a homosexual union.

The majority went on to state that the law does not prohibit marriage by homosexuals, provided it takes place between persons of the opposite sex. The fact that

many homosexuals do not choose to marry because they do not want unions with persons of the opposite sex is the result of their own preferences, not a requirement of the law. Unions of persons of the same sex are not "marriages", because of the definition of marriage. The majority found that the applicants were, in effect, seeking to use s. 15 of the *Charter* to bring about a change in the definition of marriage. The *Charter* does not have that effect. The common law limitation of marriage to persons of opposite sex does not discriminate against the applicants contrary to s. 15 of the *Charter*.

The minority found that restricting marriage to heterosexual couples infringed the applicants' s. 15(1) *Charter* rights. "Choice" is a benefit of the law and the applicants were denied their right to choose whom they wished to marry. The right to choose is a fundamental right and applies to the context of marriage in our society. The applicants were denied equality on an analogous ground under s. 15(1) of the *Charter* in that they were denied equality on the basis of their sexual orientation. Denying a marriage licence has a discriminatory impact on the applicants.

The minority further found that the denial of the applicants' s. 15(1) rights was not saved by s. 1 of the *Charter*. It is in the interest of the state to foster all family relationships, be they heterosexual or same-sex relationships. To say that the state must preserve only traditional heterosexual families is discriminatory. A rule with a discriminatory purpose may not be justified under s. 1. Furthermore, there is no rational connection between supporting heterosexual families and denying homosexuals the right to marry. There is no common law prohibition against same-sex marriages in Canada.

For the lesbian and gay communities of Ontario, the state of the law was becoming increasingly confused and confusing. Along with the general uncertainty about

whether our relationships were or were not recognized, and if recognized, in which contexts, there were ancillary questions being raised by the cases which did accord relationship recognition and consequent benefits: tax issues, implicating Federal and provincial tax law, began to arise, as the Ontario Government and other larger employers, began to extend benefit coverage (both health and pension) to same sex spouses or partners of employees.⁸

At several critical junctures along the way, lesbian and gay communities across Canada, in Ontario, and nationally, began to take stock of the situation, and realize that certain key goals needed to be attained in order to clarify rights and solidify gains. In part, this may have been because of the availability of the category of common law spouse or partner in Canadian law, a category which proved more amenable to discussion and to eventual expansion to include gay men and lesbians. But in part, it was as a result of key decisions being taken by advocacy groups and individuals within the gay and lesbian communities at the time, to pursue the goal of same sex relationship recognition within the common law category first, to consolidate that gain, and then to move ahead on other issues. Those decisions were taken in formal and informal discussions within the communities in Ontario and were made an explicit part of the strategy employed by CLGRO in lobbying the Ontario Government and the opposition parties for support for comprehensive same sex relationship recognition throughout Ontario statutes. While the availability of marriage for same sex couples remained an important issue in the early to

⁸ This was ultimately resolved in Ontario in the case of *Rosenberg v. Canada*, Ont. CA, reversing (1995) D.L.R. (4th) 738, 25 O.R. (3d) 612 (Ont. Ct. (Gen. Div.)) The *Income Tax Act* denied registration of a private pension plan with Revenue Canada if the plan extended eligibility of survivor benefits to same-sex spouses. Rosenberg challenged the constitutionality of this exclusion. The court below dismissed the application, on the grounds that it was indistinguishable from Egan. It upheld the legislation as constitutionally valid. Effectively, this denied same-sex couples the tax benefits available through the private pension registration plan. On an appeal by Rosenberg, the Attorney General accepted that there was discriminatory treatment in violation of s.15, but that it was saved by s.1. The Ontario Court of Appeal did not agree, and reversed the lower court decision, as it found the discriminatory provisions could not be deemed as a reasonable limit, as there was no pressing or substantial objective achieved from the exclusion of same-sex couples from the private pension registration system. The sexual orientation of the recipient of the survivor's benefits had no meaningful connection to the objective of the legislation, namely, the protection from economic insecurity in old age.

mid-1990's, it did not become the pervasive and all encompassing goal that it has been, for example, in the United States for almost two decades now, for better or worse.

Unsurprisingly, the strategy chosen, which could be described as one of incremental development of the law, was not immediately successful. But that is the nature of such a strategy: it does not succeed or fail in one fell swoop; instead it builds both on successes and failures, using both to advance arguments in favour of the ultimate goal of non-discrimination.

For example, by 1993-94, *precisely because* of the confusion in the case law about relationship, it was possible to argue, as CLGRO did in its lobbying efforts with the Ontario Government, that the confusion could only properly and fairly be addressed through comprehensive statutory reform of the definition of common law spouse to include same sex spouses. And it seemed, with the election of the Bob Rae NDP Government in Ontario, that such an argument might actually succeed. That possibility of success seemed manifestly more real when in 1994, the Rae Government introduced Bill 167 "*An Act to Amend Ontario Statutes to Provide for the Equal Treatment of Persons in Spousal Relationships*". The lobbying effort for that Bill was an Ontario wide effort, and 'The Campaign for Equal Families' emerged almost spontaneously out of the groundwork of CLGRO on this issue.⁹

The demise of that Bill in June 1994 lead directly to a reinvigoration of efforts on the litigation front, and those efforts began to increasingly meet with success, *because it was now possible to argue that elected legislatures were not going to take action to*

⁹ I have written an examination of the Bill, the Campaign and the issues which lead to the demise of the Bill elsewhere. See: "Bill 167 and Full Human Rights" in *Lesbian Parenting: Living with Pride and Prejudice*, ed. by Katherine Arnup (Charlottetown: Gynergy Books, 1995)

address discrimination and relationship recognition. In other words, there was a dynamic set in motion by the failure of legislators to act. Of course, it could have been possible that neither the judicial nor the legislative branches of government would respond to the demand for equality. Certainly, that has been the experience in many other jurisdictions over the years. But this is not what happened in the case of relationship recognition in Ontario, and ultimately at the Federal level.

As a direct result of the defeat of Bill 167, the Foundation for Equal Families was created in 1994. This was an Ontario based organization which was made up of community activists and lawyers. Its mission was to achieve recognition and equality for same-sex relationships and associated family rights through legal action and education. The Foundation acted as an intervener in same-sex relationship court cases including *Rosenberg*,¹⁰ as well as *Vriend*,¹¹ and *M v. H*¹² at the Supreme Court level. It worked in conjunction with other community organizations such as the nationally based EGALE (Equality for Gays and Lesbians Everywhere) to advance a litigation (as opposed to legislative) based strategy for relationship recognition.

My involvement in the Campaign for Equal Families and the Foundation for Equal Families is illustrative of the intersection of roles for a lawyer working in service to her community. As Lobby Coordinator for the Campaign, I helped organize the lobby effort of Queen's Park MPP's and in this capacity drew on my experiences both as an organizer and as a lawyer. As a founding director of the Foundation, I again drew on my experience as a lawyer to help establish the Foundation and to help develop its litigation

¹⁰ *Supra*, note 8.

¹¹ *Vriend v. Alberta*, [1998] 1 S.C.R. 493, 156 D.L.R. (4th) 385.

¹² [1999] 2 S.C.R. 3, 171 D.L.R. (4th) 577.

strategy. These are still more ways in which lawyers can exhibit the characteristics of professionalism in service to community.

In 1995, the Supreme Court of Canada rendered its first decision about our rights under the *Charter*. *Egan v. Canada*, [1995] 2 S.C.R. 513, affirming result in [1993] 3 F.C. 401, 15 C.R.R. (2d) 310 (F.C.A.), [1992] 1 F.C. 687 (T.D.) was an appeal from a Federal Court decision which held that the *Old Age Security Act* did not violate s.15 of the *Charter*. The issue related to the eligibility of a spousal allowance only for pensioners who were married or in opposite-sex common law relationships. Nesbit, the partner of Egan, had applied for the allowance when he turned 60, but was denied on the basis that he was not in a relationship which was covered by the *Act*.

The Supreme Court held, unanimously, that sexual orientation was an analogous ground protected under s.15. Further, it was clear that the legislation had created a distinction in treatment based on this prohibited ground, and denied the complainant a benefit. However, the SCC was considerably split with respect to whether this distinction in treatment was relevant, and if a violation of s.15 had occurred, whether it was saved under s.1

For the majority, Lamer, La Forest, Gonthier and Major JJ, held that s.2 within the *Old Age Security Act* was constitutional, and the appeal was dismissed.

Sopinka J was the so-called “swing vote” in this decision, as he held that s.2 of the *Act* was in violation of s.15 of the *Charter*, but that it was saved under s.1. He justified this analysis by relying (ironically, some might say) on a theory of incrementalism, finding that while there was a violation of section 15, Parliament needed more time to deal with the implications of such a finding because scarce governmental resources (also known as tax dollars) were in issue, because the courts should not lightly interfere with or second guess

legislative allocation of those resources and because the recognition of same sex relationships was still “generally regarded as a novel concept”.

For the minority, Cory, Iacobucci, McLachlin, and L’Heureux-Dubé all found s.2 to be unconstitutional and not saved by s.1. Note that Justice L’Heureux- Dubé wrote her own dissenting opinion, and within it she proposes an effects-based emphasis to the s.15 analysis, as opposed to a grounds-based approach. This approach, specifically with regard to the role of human dignity within the s.15 analysis, was later adopted in subsequent Supreme Court decisions.

My involvement in the *Egan* case was as co-counsel representing the intervenor Metropolitan Community Church of Toronto, or MCCT. MCCT is a church which serves specifically the gay and lesbian community in Toronto. The Church intervened in support of Mr. Egan and Mr. Nesbitt. Litigating this case was one of my formative experiences of working in community on this issue. It offered an opportunity to develop the arguments in favour of *Charter* protection against discrimination on the basis of sexual orientation and in support of relationship recognition from the perspective of a defined community within the community- the MCCT congregation. It provided me with invaluable insight into the need, as a professional, to convey authentically, the experiences, convictions and aspirations of one’s client. It also, memorably, gave me a lasting hesitation about drafting facta in committee, although professionalism compels me to admit of the necessity of doing same when working in community.

Egan is properly regarded as a watershed case in Canadian law. Despite the ostensible loss in the case, it was seen as a win in the lesbian and gay communities and beyond because it confirmed that sexual orientation was an analogous ground protected

under section 15 of the *Charter*. This aspect of the decision was seen as a necessary step in the evolution of discrimination protection because it offered Supreme Court confirmation of the arguments accepted in *Leshner* by the Board of Inquiry, namely that section 15 encompassed sexual orientation as an analogous ground and that opposite sex definitions of spouse offended that protection. The development of a common understanding that *Egan* represented a victory was initially at least, a community effort informed by both legal and political considerations. But it derived its lasting impact from the fact that the claim of victory could be legally justified on a proper reading of the case. The availability of legal resources to assist in the development of this view was a prime example of service and integrity on the part of the profession.

While the section 1 argument in *Egan* succeeded at the time, the movement of the argument from having to assert entitlement to the basic right itself, to attacking the limitations sought to be imposed on the right opened up the jurisprudential discourse on gay and lesbian rights, relationship recognition and family formation to input from a variety of disciplines like sociology, psychology and anthropology. That input in turn offered the basis for updating what were essentially 19th and early 20th century legal visions of spousal relationships and family into the social realities of the late 20th century.

In 1996, I acted as counsel for one of the complainants in *Dwyer v. Toronto (Metro)(No.3)*,(1996), 27 C.H.R.R. D/108 (Ont.Bd.Inq.). That case involved two complainants who worked for the Municipality of Metropolitan Toronto. The City had been granting uninsured benefits to same-sex couples, such as bereavement leave, on a discretionary basis, and insured benefits on an interim basis as the *Municipal Act* still retained an opposite-sex definition in terms of eligibility for said benefits. The Board distinguished the facts of *Dwyer* from those in *Egan* on the basis that the benefits sought

were employment benefits, rather than social benefits. The Board found the *Municipal Act* to be in violation of s.15 of the *Charter* and ordered that the offending provisions be “read down”.

While *Egan* was referenced in the decision, and was in part the basis for the conclusion, the Board of Inquiry distinguished the situation of employment benefits, which are presumably a form of employment compensation, from social benefits provided by the government. Strategically, this confirmed the utility of a contractually grounded set of arguments for equality in building upon and extending the opportunity afforded by *Egan*.

In *Canada (Attorney General) v. Moore (T.D.)* [1998] 4 F.C. 585 affirming [1997] C.H.R.D. No.4, and see also *Moore v. Canada (Treasury Board)* [1996] C.H.R.D. No.8, a similar result pertained. This was an application for judicial review of portions of a Canadian Human Rights Tribunal order. The Tribunal found that opposite sex definitions of "spouse" that deny employment benefits to same-sex partners are discriminatory under the *Canadian Human Rights Act*. The decision in *Moore* was distinguished from *Egan*, on the basis that *Egan* was considering the distribution of social benefits, whereas, the decision in *Moore* was based on the distribution of employment benefits.

The federal government was ordered to cease applying discriminatory provisions in collective agreements or other joint policies or plans, including health and dental care plans. In July 1996, the Treasury Board announced its intention to comply with the "cease and desist" order for purposes of medical and dental benefits. In September 1996, an interim application to stay the contested requirements of the Tribunal order was refused by the Federal Court. In April, 1997, the Tribunal further clarified its order in

relation to the contested requirements, specifically with regard to the language required to amend the discriminatory provisions. The Tribunal ordered that in order to bring the provisions into compliance with the CHRA and the *Charter*, that the words “of the opposite sex” were to be removed, rather than creating a separate classification for same-sex couples.

Then in 1999, in *M. v. H.*,¹³ the jurisprudential dam, so to speak, broke, and the Supreme Court confirmed that there was a general right to be free from discrimination against gay and lesbian relationships.

The Foundation for Equal Families was an intervenor in that case, and in my capacity as a director, I had the experience of being a client rather than a lawyer. To view the conduct of litigation from this perspective was enlightening but at the same time, as a lawyer I found it an opportunity to bring to the work of being the client the same values of honour, integrity, collegiality and service which inform our work as lawyers. This underlined an important truth for me as a lawyer working in community: we do not and should not shed our identities as lawyers when we take on different roles in community, since these are opportunities to apply our values in a new way. I mean this observation not as some gloss on a rule of professional conduct, but as an insight into how profoundly the practice of law imbues our lives. While I am not *just* a lawyer, I most certainly derive an important aspect of my ability to contribute to my community from this identity.

This case was an appeal from the Ontario Court of Appeal, affirming a declaration that s. 29 of the *Family Law Act* was in violation of s.15 of the *Charter*. M sought spousal support pursuant to s.29 of the *Act*, but was denied on the basis that eligibility for spousal support was restricted to married couples and cohabitating opposite-sex couples.

¹³ *Supra*, note 12.

The Supreme Court upheld the declaration, stating that same-sex couples were capable of being in the types of relationships for which support could be required, namely, conjugal relationships of some permanence. The *Act* provided an avenue to enforce support obligations for both men and women, with or without children. Excluding same-sex partners from the protection of the legislation had no rational connection to the objective of ensuring the protection of women and children, or reducing the burden on the public purse. While the Court dismissed the appeal, it did alter the remedy sought. Rather than reading in the words “two persons” into the offending provision, the Court preferred to sever the provision, allowing the government six months in which to amend the *Act*.

The decision in *M v. H* led in turn to Ontario Bill 5, “*An Act to Amend Certain Statutes because of the Supreme Court of Canada decision in M v. H*” in March 2000. Ironically, it was brought in by the Conservative Government of the day, many of the members of which had voted down Bill 167. This omnibus statute extended most of the provincial rights and responsibilities of married or common law couples to lesbian and gay couples. However, it did so by creating a new category of “same-sex partner” in addition to the existing definition of “spouse” for married and cohabiting heterosexual couples. This was done for the express purpose of continuing to reserve the traditional category of spouse for heterosexual couples, whether married or unmarried. Nevertheless, Bill 5 must be regarded as a highly significant strategic event for two reasons: it extended statutory law to encompass lesbian and gay relationships and thus brought some measure of relief from laws which had previously not even recognized those relationships, and at the same time, through its use of a “separate but equal”

concept, continued to confirm the reluctance of legislators to act fairly and non-discriminatorily and the consequent need for judicial oversight.

While a litigation strategy at the provincial level had lead in turn to omnibus legislation, in a unique conjoining of the legislative and litigation strategies that had separately informed the work for relationship recognition, the Foundation for Equal Families launched a *Charter* challenge to the failure to include same sex spousal recognition in Federal legislation in January 1999.¹⁴ That challenge was proceeding when the decision in *M v. H* was rendered. Just prior to the introduction of Bill 5, in February 2000, the Federal Government, also in response to the impetus of *M v. H*, introduced Bill C-23, the "*Modernization of Benefits and Obligations Act*". That *Act* amended 68 statutes relating to a wide range of issues such as pension benefits, old age security, income tax deductions, bankruptcy protection and the *Criminal Code*. In March, Justice Minister Anne McLellan announced that the bill would include a definition of marriage as "the lawful union of one man and one woman to the exclusion of all others." In the result, the opposite definitions of "marriage" and "spouse" were left untouched but the definition of "common-law relationship" was expanded to include same-sex couples. This meant that same-sex couples who lived together for more than a year would receive the same benefits and obligations as common-law couples. The Bill was passed into law in April 2000.

While it was becoming obvious that a combined litigation and legislative strategy was yielding results, two problems had emerged. The first was the reluctance of the legislators to come to grips with the essentially discriminatory nature of their "solutions". Separate but equal categories had long been dismissed as apartheid like gestures and

¹⁴ See <http://egale.ca/index.asp?lang=E&menu=31&item=62>

dangerous in themselves, yet despite political opprobrium from some quarters, and clear language in cases such as *Moore* that these categories were suspect and unacceptable, legislatures continued to utilize them. The second problem was that marriage had yet to be dealt with.

In the late 1990's and early 2000's, the national community organization EGALE, and its offshoot, Canadians for Equal Marriage in particular, began to focus upon the issue of marriage with renewed interest. It is beyond the capacity of this paper to thoroughly outline the legislative lobbying and litigation efforts, as well as the public education initiatives undertaken by these two organizations in pursuit of the issue of marriage. For an excellent history, I can do no better than to suggest a review of their efforts as set out on EGALE's website at www.egale.ca.

It is at the juncture that I must acknowledge that there is another aspect to professionalism when working in community and that is to recognize when it is time to stand back a little, to allow others to continue on and to offer support in different ways. So it was with the litigation around marriage, at least for me. One factor informing my decision to move back from the front lines was the need to apply what are really scarce legal resources in our communities to other issues. Another was that I thought that fresh voices needed to be heard, space needed to be made for others to come forward. Professionalism requires us to know too when to stand back.

But it is only fair to offer some concluding information about the efforts to achieve relationship recognition by describing the culmination of those efforts. Ultimately, in *Halpern v Canada (Attorney General)*, [2003] 65 O.R. (3rd) 161 (Ont. CA) the issue was brought before the Ontario Court of Appeal. The appeal before the court was in response to a

decision of the lower court in which it was held that the common law definition of marriage as between “one man and one woman” infringed the applicants’ s.15 equality rights. The court had found the common-law definition of marriage was in violation of s.15, and the federal parliament was given two years to amend the common law rule, after which time the judgement would take effect.

The applicants appealed on the issue of remedy. The Metropolitan Community Church of Toronto appealed the dismissal of its claim, namely, that the opposite-sex definition violated its freedom of equality and religion. Finally, the Attorney General of Canada appealed the decision on both the remedy and on the issue of equality. The Court upheld the lower Court decision on all grounds except that of remedy, and held that the lower court decision would take effect immediately, as a constitutional amendment was not required to change the common-law definition of marriage.

The Federal Government responded by drafting legislation which would extend the right to marry to same sex couples and made that draft legislation the subject of a constitutional reference to the Supreme Court of Canada. In December 2004, the Supreme Court rendered its decision¹⁵: the legislation was consistent with the requirements of the *Charter*. Parliament then proceeded to pass the law on June 28, 2005, followed by the Senate on July 19. Equal marriage received royal assent on July 20, 2005.

While this was occurring at the Federal level, the Ontario Government finally moved to correct the arguably discriminatory use of the term “same sex partnership”

¹⁵ Reference re Same Sex Marriage, [2004] 3 S.C.R. 698; 2004 SCC 79.

from its legislation. In Bill 171 – the *Spousal Relationships Statute Law Amendment Act*, the Government removed the offensive definition from statutes and substituted for it a simple modification of the various definitions of “spouse” in the statutes- it removed the words “of the opposite sex”. This Bill came into law on March 9, 2005.

Professionalism and Working in Community: Some Lessons Learned

When considering professionalism and serving communities, there are a variety of perspectives one can take. The first and perhaps most obvious, is the perspective of being a lawyer and providing services to communities generally. But there is a less obvious perspective, although no less valid, and that is the perspective of being “of a marginal community” in the practice of law. There are elements of service in both roles and perspectives, and both draw on those qualities of professionalism which we are exhorted to exhibit: scholarship, integrity, honour, leadership, independence, pride, spirit, collegiality, service, balanced commercialism.

Let me first address the concept of being a lawyer and providing service to a community- and I will focus even more closely on the idea of being a lawyer and providing service to *one’s own marginalized community*, for this idea of being of service is what I believe attracts many young people from these communities to the practice of law in the first place.

I use the term “working *in* community” to express a particular dynamic that comes about from working with others in your own community. While it could easily be said that you are working *for* the community, in that you are providing legal service to a

group, it is undeniable that you are also working *in* community with them when you are also *of* them.

Working *for* a community implies a degree of distance, of “otherness” and separation from the community. This distance is in fact is one of the hallmarks of our professional relationships with our clients, and through the Rules of Professional Conduct, the degree of proximity to one’s clients’ personal and/or legal interests is closely regulated. In fact we have built our trade upon the concept that a lawyer is a more objective, if partisan, spokesperson for her client’s cause and is therefore a more reliable source of facts and arguments in favour of that cause.

While working for one’s own community also necessarily involves working for that community, it also of necessity involves working *in* community. In using this concept, I mean to reference those experiences of social and political organizers down the decades who have not just attempted to act upon or for communities by bringing change from the outside, but who have sought to understand by being *of* the communities they seek to serve- the better to know and be respectful of the community’s own view of the issues, goals, means and methods¹⁶. And perhaps, from my own experience, it was not so much a question of seeking to be of the community, but of always remembering that I am, by virtue of identity and character, undeniably and inseparably part of my community, and that it is from it that I derive my identity, support and strength. Without it, I would, of course, be a community of one, which is no community at all.

¹⁶ Saul Alinsky, *Rules for Radicals*, (Vintage Books, 1989).

At first blush, it would seem a simple matter to be of service to one's own community, and certainly I embarked upon that effort with the happy rose-tinted view that I could contribute something worthwhile to the effort. But working in community with others has a special meaning when it is your own community. There are obligations and expectations, responsibilities that go beyond those of the profession, and connections which must be acknowledged. Particularly when one is engaged in providing legal services in support of a broader agenda of progressive social change, and most especially when one's professional status means you may be perceived both within and outside the community as a leader or spokesperson, the requirements of professionalism and service may take on new dimensions.

Working in community requires at the outset, that you recognize you are working from within a community. Though this may seem self-evident, this was a lesson I learned the hard way, by being regularly, publicly and spectacularly challenged by other members of my community about my assumptions of status, and the consequent respect due to me and my legally informed perspectives.

The first lesson to be learned about working in community then is this: *You are one among equals. Your status as lawyer makes you useful, but not superior.* This is a very hard lesson to learn for some lawyers, and I was one of them. I am continually being reminded of my deficits in this regard, and I must admit, it is a work in progress. In this, of course, is the humbling and yet exalting experience of being of service

Working in community also requires that you accept that the dynamics of community are always engaged. There is no monolithic gay and lesbian community, anymore than there is a monolithic straight community. Difference abounds. Practically

speaking, this means that there will, at any one time, be a variety of different, even opposed, viewpoints on the matter with which you are engaged. Practically speaking, this means that you must be clear about for whom you work and speak, and for whom you do not work or speak. It means acknowledging where appropriate that there are different viewpoints, and nevertheless fairly stating the view you have undertaken to advance through your legal work.

Your training as a lawyer will sometimes be at odds with this reality: you are after all inclined to *advocacy*, not diplomacy. But because you nevertheless are a member of the community and presumably wish to remain a member in good standing, the second lesson to be learned is this then: *You must respect diversity within your own community, while clearly and fairly advancing the case.* This lesson requires a sense of balance and proportion. Neither your professionalism, nor your place in the community, can uniquely inform your judgment and conduct; they must both be in your consideration for you to remain effective and professional, and for you to act with integrity.

The third lesson I would like to draw to your attention is one which is more a matter of internal fortitude: maintaining a professional stance in relation to issues which touch, sometimes deeply and profoundly, on one's own life. It is because of this possible intertwining of interests that our profession so often regards lawyers who advocate in their own cause with suspicion and something akin to disdain at times; at the very least, there is a thought that the person who has himself as his lawyer has a fool for a client.

And yet, it is surely an honourable undertaking to enlist one's professional abilities in service to one's own community. We do not quarrel with those who, belonging to a service club or a small town, use those skills honed in the practice of law

to better their fellows' circumstances, be it through an application for charitable status or a by-law change to allow a park to be built. These things will surely benefit the lawyer as an individual as much as the greater community. But we see that type of action as largely community minded. Why is it that our suspicious natures are more engaged by the prospect of a lawyer acting to advance the social or political interests of her community? Why is it that such work is seen as largely self interested, and tainted by self interest? I would of course argue that it is not necessarily so.

But in order to ensure that what we bring as lawyers to community work is of value, and represents the best service we can give to our community, it is necessary to remember lesson number three: *the quality and caliber of the services you offer the community must be no less than that offered to any other client and you must be vigilant to ensure such levels are maintained.* Enthusiasm, dedication and belief in a cause are of course the motivators for our work in community- but they are not a substitute for skills and professionalism. What you bring to your community is more than just enthusiasm, dedication and belief- it is the capacity to provide skilled and informed *legal* advice to your community. This means, at times, eschewing the role of cheerleader for that of the less welcome clear eyed critic. It means not being afraid of offering legal advice or information that may run contrary to the wishes and hopes and aspirations of your community. And it also means employing all the skills at your disposal to think through the legal issues, to take a longer view of the subject and to see where losses may be strategic and gains incremental, in service of a larger legal strategy. It means, in the language of professionalism, maintaining your independence in the service of your community. This balance is extraordinarily difficult to maintain at times, but on it rests your credibility, your reliability and your usefulness to the community.

There is another lesson I have learned from my work in community: despite being a member of the community, when acting on the community's behalf, you are the public representative and conduit for the expression of the hopes, aspirations, outrage, demands and dreams of a community, and not only yourself. The last lesson on these points I would draw to your attention is this: *Let those voices flow through you and reach the court or tribunal or decision maker- your power is not just in making legal arguments but in ensuring those voices are heard.* Your unique ability in this task is that you are able to reflect and communicate the message of those voices with as little distortion or loss of content as possible. In this, I believe, you bring spirit and honour to working in community, and you fulfill the role of leader and champion of a cause, in the best sense of the words.

These are certainly not the only lessons to be gleaned from working in community, but they are some of the more important ones for me. But I had said at the beginning of this section that when considering professionalism and serving communities, there is another and less obvious perspective, that of being “of a marginal community” in the practice of law.

Being an out lesbian in the practice of law is perhaps not the startling proposition that it once was, but it has its moments. Being of a marginal community in the profession carries with it certain burdens and responsibilities, but it also carries with it opportunities.

Lawyers more eloquent than I, have described the experience of being “other” in the legal profession¹⁷. What I can say, derived from my own experience, is that being out in the profession did several things simultaneously.

It was part of a process of helping make visible the up until then largely invisible presence of gay and lesbian lawyers. We were always there, we just were not seen; or if seen were not acknowledged; or if acknowledged, were marginalized and ejected.

By becoming undeniably visible (and heard), we were part of a larger social process of progress. In my estimation, by becoming visible we acted as leaders, exemplifying what the law promised: equality and non-discrimination. And in being such leaders, we took risks on behalf of ourselves, our families and our communities.

It is perhaps easy these days to become blasé, even indifferent to or dismissive of the risks taken by those who were out and proud before the protection of the *Human Rights Code*¹⁸, before the *Charter*¹⁹, before *Egan and Nesbit*²⁰. But it would be a mistake to lose sight of the achievements of those risk takers, and others like myself who hopefully built on their successes. Those risks and those achievements are a barometer by which we can measure the progressive and synergistic interaction of the law with society and social movements, by which we can assess the ability of the law to meet the needs of the society which creates it.

¹⁷ See for example: *Becoming Gentlemen: Women, Law School, and Institutional Change*, by Lani Guinier, Michelle Fine, Jane Balin (Beacon Press, 1997), and the Canadian Bar Association Task Force Report *Touchstones for Change: Equality, Diversity and Accountability* (Ottawa: Canadian Bar Association, 1993).

¹⁸ R.S.O. 1990, c. H.19

¹⁹ The Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11

²⁰ *Egan v. Canada*, [1995] 2 S.C.R. 513, 124 D.L.R. (4th) 609

Being out in the profession also helped legitimize the discourse about our rights in the eyes of the profession, and in society at large. While it is possible to disagree with someone advancing the right to equality for gay men and lesbians, it is less possible to argue against the basic legitimacy of the discussion when faced with a visible and present community articulating its needs and rights. This shift in perspective from invisibility to legitimacy is evident I think, in the evolution of the jurisprudence.

Finally, I like to hope that the presence in profession of out lesbian and gay lawyers makes some difference to the willingness and comfort of community members to consider entering the profession, by demonstrating that it is possible to have a collegial and interesting legal career *and* to be one's self, without fear. This is not to say that all challenges have been removed and acceptance is universal- that is still not so. But to be able to believe, with some basis, that the future will be better than the past- that is an achievement I hope others will build upon.