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Sexual Orientation and Canadian Law: An Assessment of the Law Affecting Lesbian and Gay Persons

John A. Yogis, Randall R. Duplak & J. Royden Trainor

Toronto: Emond Montgomery Publications Ltd., 1996, 153 pp.

Reviewed by Michael Beggs[†]

Sexual orientation is one of the most fascinating battlegrounds on which equality rights under Canadian law are currently being fought. While legal issues surrounding sexual orientation are by no means a new subject, as Sopinka J. in *Egan v. Canada*¹ would lead us to believe, there are today an unprecedented number of cases before the courts that deal with the rights of gays and lesbians. Thus, Yogis, Duplak, and Trainor provide a timely and valuable contribution to the already burgeoning literature on the subject. Overall, the authors provide a solid work backed by thorough research and written with admirable clarity.

But first, a caveat or two. This book is not by any means a scholarly text. The authors explicitly disavow an academic approach to the subject, instead aiming for a more practical work for a broader audience of non-lawyers. In this manner, the book fills a void in the literature; the work would be a valuable addition to the collection of any practitioner or organization, or for those having an interest in human rights. However, serious scholars of sexual orientation and the law will find little, if any, new material or analysis.

An exception to the observation that little new material is presented occurs in the chapter on estate planning. Estate planning for homosexuals is an area of discussion which has suffered from neglect in standard texts on wills and estates and the authors make some effort to remedy this oversight. In the appendices, examples

[†] B.A. (Hons.) (Wilfred Laurier), LL.B. anticipated 1997 (Dalhousie).

¹ (1995), 2 S.C.R. 513 [hereinafter *Egan*].

of wills, codicils, living wills, and documents regarding powers of attorney are provided. These materials and the accompanying text provide a solid understanding of the general issues involved.

The explicit goal of the book is to provide a "significant Canadian publication that attempted an analysis of the federal, provincial, and territorial laws affecting the equality rights of lesbians and gay men, as well as persons who have AIDS or are HIV-positive."² An ambitious goal, but one towards which the authors have made a laudable effort.

The chapters are arranged by issues (family, human rights, immigration, etc.) and, as a result, constitutional provisions and human rights legislation are peppered throughout the text. It makes the work necessarily repetitive but, as with most legal texts, the book is clearly meant as a reference work.

An obvious drawback of writing about such a contemporary issue is that the law is still in motion. To some extent, the work is already dated. For example, it lacks the recent appellate decisions that are the result of the fallout from *Egan*,³ the *Canadian Human Rights Act* has been amended to include sexual orientation as a prohibited ground, and the Canadian Human Rights Commission has reviewed its guidelines dealing with AIDS discrimination. None of this detracts from the value of the work, but practitioners must be aware that they cannot treat this text as definitive.

The authors adopt a writing style that reflects their ambition to reach a wider audience. Cases are explained in a conversational manner; to the extent that the principal parties are addressed by their first names, one hopes that the reader will forgive this over-familiarity. While this may further understanding of the issues for non-lawyers, others may find this style frustrating.

The level and detail of information and analysis varies from chapter to chapter. In some cases, such as the chapter on parenting, detailed suggestions are provided as to how to maximize one's chances in a custody or adoption situation. Conversely, the chapter

² J. A. Yogis, R. R. Duplak & J. R. Trainor, *Sexual Orientation and Canadian Law: An Assessment of the Law Affecting Lesbian and Gay Persons* (Toronto: Emond Montgomery Publications Ltd., 1996) at xiii.

³ See generally *Vriend v. Alberta* (1996), 132 D.L.R.(4th) 595 (Alta. C.A.); *M. v. H.* (1996), 132 D.L.R.(4th) 538 (Ont. C.A.).

on criminal law simply describes the relevant criminal offences, such as sexual offences and offences relating to public morals.

The initial chapters on human rights and same-sex spousal status present information that will be familiar to most readers. The division of these subjects into two chapters is apt, given the differential treatment that courts have imposed on sexual orientation as a human rights issue and the redefinition of the family through recognition of same-sex spouses. The latter, of course, remains remarkably poor. The authors provide a thorough examination of the issue of family status, one that is key for establishing the foundation for many of the later chapters, such as parenting and pensions benefits.

The chapter dealing with custody, access, and adoption of children is also particularly thorough and helpful. The keen analysis presented in this chapter provides an excellent guide to the varying options including a realistic assessment of the available alternatives.

In a later chapter, the authors provide a basic review of immigration law and its particular impacts on gays and lesbians. Two specific areas are examined: the sponsorship of same-sex spouses, and homosexuals as convention refugees. The authors have done an excellent job of condensing and clarifying the complex and conflicting legal questions in this area.

Especially useful is the analysis of legal issues surrounding HIV/AIDS. As an area of increasing importance, it is appropriate in a work of this nature given the popular perception of a connection between AIDS and sexual orientation. The authors briefly discuss the overlap of sexual orientation and AIDS discrimination, perhaps to the detriment of a broader examination of the latter. While they do discuss the classification of AIDS as a disability under human rights legislation, they perhaps do not treat this subject as thoroughly as it deserves, given that this is the principal ground upon which human rights commissions found claims of AIDS discrimination. For example, the discussion of *bona fide* occupational requirement might benefit from an examination of the policies established by some human rights commissions for health care workers.

The authors also wade into the debate surrounding the criminalization of HIV/AIDS transmission. After reviewing various criminal cases and examining American legislation, they make few suggestions for reform to the *Criminal Code*. This chapter is unlike the rest in that it seems to have little practical application, instead

constituting a policy discussion. Nonetheless, it does provide a useful summary of the state of this area of the law in Canada.

In presenting an information source on the state of the law today, the authors provide useful suggestions on how gays and lesbians can work within the legal system to protect their rights. In dealing plainly with the realities presenting gays and lesbians, it appears at times that the authors are advocating dwelling within the status quo; for example, the observation that "custody is awarded to discreet, non-militant homosexual parents who do not flaunt their sexual orientation."⁴ However, the authors do not hesitate to criticize such prejudices and call for reform where appropriate.

It is worthy of note that, while they adopt an optimistic outlook towards recent developments and reform in the law, the authors do provide a stern reminder that while particular legal developments may be exciting, general practice remains all too disappointing.

⁴*Supra* note 2 at 57.