



## CONFERENCE PROGRAM

**FRIDAY, APRIL 27**

7:00 p.m. - 9:00 p.m.

Opening Reception / Registration

**SATURDAY, APRIL 28**

8:00 a.m. - 9:00 a.m.

Registration / Continental Breakfast

9:00 a.m. - 11:00 a.m.

Concurrent Workshops - Session One

**SESSION 1A**

**CRIMINAL LAW and SEXUALITY**

**SOCIAL LOUNGE**

Chair: Margot Young - UBC Faculty of Law - Vancouver, BC

### **Can prosecution protect and prevent? Public health and human rights impact of criminalization of HIV transmission and exposure**

**Alana Klein** - Canadian HIV/AIDS Legal Network - Toronto, ON

An increasing number of cases are being reported in Canada in which people living with HIV have been criminally charged for a variety of acts that transmit HIV or risk HIV transmission. Judges frequently justify convictions in these kinds of cases based on deterrence and preventing the spread of HIV/AIDS, but little is known about whether and how criminalization affects HIV testing and sexual behaviour. This paper reviews the existing research on seeking HIV testing and on risk behaviour. It points out where gaps in knowledge have prevented judges from making legally coherent decisions about whether to assign criminal responsibility for consensual sexual activity that may carry the risk of HIV transmission. It also proposes standards for when sexual behaviour should be criminalized in the absence of such knowledge, drawing on criminal law, human rights and public health policy analyses.

### **Sex Work and Law Reform**

**Elin Sigurdson** - Pivot Legal Society - Vancouver, BC

The sale of sexual services between consenting adults is legal under Canadian Law. However, the Canadian



government uses the criminal law to control specific aspects of sex work. The result is that many workers face criminal consequences for engaging in what is otherwise a legal activity.

Conditions for sex workers are affected, if not defined, by the criminal laws. These laws marginalize an already disadvantaged group, and worsen the already harmful conditions under which sex workers live.

The criminal laws affecting the sex trade were the focus of Pivot Legal Society's report "Voices for Dignity". Pivot obtained statements from 91 sex workers in Vancouver who attested to their experiences working in the criminalized sex trade and, considering this evidence, argued that the current legal framework is in breach of sex workers' fundamental human rights under the *Charter*. This argument formed part of a submission to a Parliamentary Subcommittee that had undertaken to review the criminal laws, and provided a background for Pivot's report on the effects of decriminalization titled "Beyond Decriminalization".

The Subcommittee's final report, titled "The Challenge of Change", was published in December 2006. It failed to make any concrete recommendations to alleviate the human rights issues faced by sex workers. Their findings demonstrate that law reform on this issue will not be achieved through education and advocacy alone. It is Pivot's view that law reform will only be initiated through strategic litigation in the Canadian court system.

### **Do Hate Crime Laws matter? A Preliminary Comparison of Non-Governmental Groups that Monitor Homophobic and Trans-phobic Hate Crimes in Canada and the United States**

**Bernard P. Haggerty** - *University of British Columbia, Faculty of Law - Vancouver, BC*

A field of hate crime law has developed among police, prosecutors, judges, and government officials in communities throughout Canada and the United States. Hate crime laws and official government policies regulate our knowledge about homophobic and trans-phobic violence.

But official governmental agents do not control all knowledge. "Others" participate in criminal prosecutions, and "Other" inquiries transgress the boundaries of the official hate crime field. In both Canada and the United States, non-governmental groups contend both inside and outside the traditional hate crime field to establish knowledge about homophobic and trans-phobic violence.

This paper compares the inquiry practices of non-governmental groups that monitor homophobic and trans-phobic violence in four cities in Western Canada and the United States. Correlations between the practices of the groups and the hate crime laws and policies at each site suggest several preliminary conclusions.

Hate-related events are among the most common reasons for the formation and mobilization of groups that monitor homo-phobic and trans-phobic violence. The most active and innovative non-governmental hate crime inquiries appear where no existing law or policy requires police to gather hate crime statistics. Generally, either the absence of violence or the successful "entrenchment" of a systematic, official hate crime inquiry can operate to "contain" or de-mobilize anti-violence groups. On the other hand, where laws authorize a particularized, local "entrenchment" of equality rights, the successful "entrenchment" of a hate crime inquiry system can contribute to mobilization that



“transgresses” the hate crime field.

### **Drawing the Line: A Close Study of Age of Consent Legislation in Canada**

**Mary Shearman** - Simon Fraser University, Women Studies' Dept - Burnaby, BC

**Rebecca Haskell** - Simon Fraser University, School of Criminology - Burnaby, BC

The past few decades have ushered in growing bodies of discourse critiquing the legal regulation of sexuality, both in Canada and internationally. Parliamentarians and legislators, however, have tended to respond to these discussions in ways that sustain the nuclear family, promote reproductive sex, and discourage other expressions of sexuality that can be engaged in (and enjoyed) by citizens of any sexual identity. For example, while the age of consent for most forms of sexual behaviour in Canada is set at fourteen, section 159 of the Criminal Code states that anal intercourse is a criminal offence until the age of eighteen unless it takes place between husband and wife.

In this close study we will discuss how the discrepancy between the age of consent for anal intercourse and other forms of sexual behaviour constitutes a form of symbolic violence that (re) produces conceptions of youth, and non hetero-sexualities. By exploring variations in legislation at the provincial level and in the Criminal Code and discussing how distinctions between public and private spheres further limit sexual freedoms, we will demonstrate that setting a higher age of consent for anal sex than is required for other sexual acts signifies a form of systemic heterosexism that can be read as a violation of human rights. Finally we will discuss the underlying values preserving the unequal age of consent, movements to challenge the legislation they inform, and potential means of reforming both public conceptions and legislation regarding anal intercourse.

### **Bound By Law: How Canada's Protectionist Public Policies in the Areas of Both Rape and Prostitution**

#### **Limit Women's Choices, Agency and Activities**

**Nora Currie and Kara Gillies** - Toronto, ON

This research examines Canadian sex work and sexual assault policies that are designed to protect women but which in practice limit their options, activities and sense of agency. These policy arenas were selected based on the observation that the sexual nature of the work (in the case of prostitution) and the violence (in the case of sexual assault) elicits an exceptionally paternalistic state response and casts the women involved as damaged and defiled. Research findings indicate that police warning policies, the Sexual Assault Evidence Kit and the procuring law all have multiple, negative impacts on women.

**SESSION 1B**

**TRANS ADVOCACY (Part I)**

**SEMINAR ROOM**

#### **Lobbying for Change - SRS and Beyond**

**Martine Stonehouse and Susan Gapka** - Trans Health Lobby Group, Rainbow Health Network Toronto, ON

On November 28, 2006, an Ontario Human Rights Tribunal ruled that public funding for Sex Reassignment Surgery (SRS) should be provided to only the three complainants who had been assessed at the Gender Identity Clinic when the procedure was de-listed. The fourth complainant's quest for coverage was dismissed because he was not a client of the Gender Identity Clinic when the service was de-listed on October 1, 1998.

Martine will demonstrate how she launched this landmark case to gain healthcare access for transsexual people in



Ontario. Susan will describe how the Trans Health Lobby Group educated the public and media about trans health care access and created partnerships to put pressure on the government to gain health care access with an emphasis on SRS coverage. The presentation will be highlighted through a viewing of television news coverage of the Lobby Group's political actions.

Audience participants will learn about trans organising in Southern Ontario and the principles necessary to bring a diverse group of trans activists together for a common cause. Delegates will also be exposed to the utter necessity for stronger legal protection for transsexual and transgender people in Canada. They will be called to embark upon this struggle as the next frontier in equality rights in Canada.

11:15 a.m. - 12:00 p.m.

**SAME SEX PARTNERSHIPS**

**SOCIAL LOUNGE**

**Losing the Feminist Voice? Debates on the Legal Recognition of Same Sex Partnerships in Canada**  
*Susan Boyd & Claire Young - University of British Columbia, Faculty of Law - Vancouver, BC*

Since the mid-1990s, legal recognition of same-sex relationships in Canada has accelerated and the legal terrain has changed enormously. 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, or the ongoing resistance to it in some quarters, we want to trouble 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: (1) 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 (2) the hearings on Same-Sex Marriage in 2003. We suggest that the debates operated within a narrow paradigm that bolstered many existing hierarchies and exacerbated conditions for those who are economically disadvantaged.

**NOTE:** *barbara findlay's presentation on "Asking the Hardest Questions about Gender" has been cancelled due to illness.*

12:00 p.m. - 1:30 p.m.

**Catered Lunch**

**SOCIAL LOUNGE**



1:30 pm. - 2:30 p.m.	CONFERENCE KEYNOTE	SOCIAL LOUNGE
----------------------	--------------------	---------------

**Sexual Freedoms in Global Perspective**

**Ruthann Robson** - CUNY School of Law - Flushing, NY

What is sexual freedom and who decides? For those of us trained in the discipline of law, we understandably look at legal schemes and institutions when confronted with such a question. Yet doubts about whether the law can be a vehicle for real change persist. Further, there are serious debates about which legal institutions and instruments can address issues of sexual freedom: should sexual freedom be voted upon or protected by judges or constitutionalized or subject to international norms? By examining these issues in a comparative perspective, we can begin to appreciate the specific cultural conditions that construct our own views and the practices in our particular jurisdictions. And while global sexual freedom might seem like a dream, it also seems as if many of us continue to struggle for it, in and outside the law.

2:45 p.m. - 4:00 p.m.	Concurrent Workshops - Session Two
-----------------------	------------------------------------

SESSION 2A	TRANS IDENTITY & THE LAW	SOCIAL LOUNGE
------------	--------------------------	---------------

**Chair: Susan Boyd** - UBC Faculty of Law - Vancouver, BC

**Unprincipled Exclusions: Feminist Theory, Transgender Jurisprudence & Kimberly Nixon**

**Dr. Lori Chambers** - Lakehead University, Dept of Women's Studies - Thunder Bay, ON

In 1995, Kimberly Nixon initiated a human rights complaint against Vancouver Rape Relief Society (VRRS), a non-profit organization providing services to women who are victims of male violence. Kimberly Nixon identifies herself as a woman. She was born a biological male and underwent surgery and hormone treatments in order to complete sex-reassignment. VRRS maintains a women-only hiring policy under s.41 (formerly s.22) of the *British Columbia Human Rights Code*. Nixon was denied the opportunity to serve as a volunteer peer rape counselor on the basis that she had lived part of her life as a man. It was Nixon's self-definition as a woman that was first upheld by the Human Rights Tribunal in 2002, then overturned by the Supreme Court of British Columbia in 2003, and which was again under dispute before the British Columbia Court of Appeal in 2005. Who, it had to be determined, is a 'real' woman with the right to enter women-only spaces?

I begin by exploring the complexities of defining sex, gender, and transgender identity. I place *Nixon* in historical context by examining all Canadian transgender jurisprudence that preceded the case. I then explore the details of the *Nixon* case at all levels of proceedings. Feminist responses to the case are surveyed. Finally, the legal reasoning employed by VRRS and accepted (in part) by the Court of Appeal is challenged. The implications of the



*Nixon* decision are also explored by reviewing *Johnston v. St. James Community Service Society*. I conclude that self-identification must be sufficient for inclusion and that policing bodies is unethical and unnecessary.

### **Bodies That Matter: Notes on Trans Politics in Canada**

**Ajnesh Prasad** - York University, School of Organizational Behaviour - Toronto, ON

In this paper, I use the Kimberly Nixon case to consider the impact transsexuals have on law and the conventional socio-sexual paradigm. Nixon was prohibited from working at the Vancouver Rape Relief Centre—a woman's only organization—after it was made known that she is a male-to-female trans woman. As a result, there was a complaint lodged with the British Columbia Human Rights Tribunal (BCHRT), and two judicial cases were taken before the provincial court. Central to each of these proceedings was the question of the corporeal ontology of MTF transsexuals. Using Nixon as a case study, this paper seeks to discern the problematic ways in which sexual difference is reified in legal systems through the bodies of transsexuals. This analysis is primarily rooted in understanding that 'sex' and 'sex differences' have been intricately constructed through science and other cultural discourses. I provide a critical account of how sex differences have been construed since the Enlightenment. Thereafter, I use the Nixon case to elucidate the fallaciousness of the nature/culture and male/female binaries and rethink the culturally-marked, scientifically prescribed ideology of sexual difference. I conclude with some consideration of how this sexual difference is manifested in legal discourse.

### **Trans-phobia and the Relational Production of Gender**

**Elaine Craig** - Dalhousie University, Faculty of Law - Halifax, NS

This paper posits that gender identity is in large measure produced relationally through a series of interpretive devices and that due to the interpretive, relational nature of gender production many experience gender transgression in others as disruptive to their own sense of identity; it suggests that this results in much of the legal discrimination and oppression faced by individuals whose gender presentation does not conform with dominant gender norms. The paper suggests that because gender identity is produced through these relational, contextually influenced, interpretative processes, in societies which strongly embrace static, binary conceptions of gender, and in which legal, social, familial, occupational, and sexual interactions are heavily influenced by gendered social scripts, gender expressions which are ambiguous, or which have changed since a prior interaction, or which are strongly incongruent with normative understandings of the correlation between gender and biology, are often experienced by others as uncomfortable, if not disruptive. The paper then argues that the degree of trans-phobia prevalent in our society will be reduced by reducing the cognitive dissonance people experience in the face of gender transgression and that this cognitive dissonance will be reduced by adopting a more nuanced conceptualization of gender; an understanding which recognizes its fluidity, and relational nature. The paper concludes by arguing that Canadian legal approaches which will assist in instigating such a re-conceptualization include the elimination of unnecessary gender designations on legal documents such as birth certificates and the adoption of litigation strategies which critically challenge the necessity of gender designations in particular contexts rather than simply asserting individual gender identity claims.



**SESSION 2B**

**LABOUR & QUEER RIGHTS**

**SEMINAR ROOM**

**Working Out: Labour's Role in pursuing Queer Rights in Canada**

**Craig Bavis and Marjorie Brown** - Victory Square Law Office - Vancouver, BC

Perhaps more so than other social movements, significant struggles for gay and lesbian rights have occurred within the legal sphere, most notably the expansion of rights under section 15 of the *Charter of Rights and Freedoms* to include sexual orientation as a prohibited ground of discrimination. In particular, litigation of human rights and discrimination claims arising in the workplace have led to significant legal victories including the recognition of same sex benefits for spouses, the rights of teachers to use materials referring to same sex relationships in the classrooms, and the condemnation of discrimination and harassment based on sexual orientation.

This discussion will examine the role that litigation of employment claims has played in contributing to the development of gay and lesbian rights in Canada and will, in particular, focus on the role that trade unions have played in litigating legal issues of concern to gays and lesbians. In an often unrecognized or undervalued role, trade unions have made a substantial contribution to the development of human rights generally through challenging discriminatory policies and laws in both courts and labour arbitrations, although, not all unions have embraced the queer rights cause with the same degree of enthusiasm. Trade unions continue to play a vital role in advancing the interests of their members in the 21st century. As legally sophisticated organizations with sufficient financial resources to engage in strategic litigation and a statutory duty to fairly represent their members, trade unions are ideally situated to advance equality claims in the legal sphere. While the workplace is only one forum in which equality struggles occur, its significance can often be overlooked. Strategies to advance queer and other sexual rights should engage the organized labour movement as a valuable and powerful ally.

**4:30 p.m. - 6:30 p.m.**

**SOGIC Reception**

**SOCIAL LOUNGE**

SOGIC (the Sexual Orientation and Gender Identity Conference of the Canadian Bar Association) will be hosting a reception in the Social Lounge at St. John's College on Saturday April 28th, 2007 from 4:30 p.m. to 6:30. p.m.

Conference participants and members of the British Columbia legal community are invited to join us for this networking event. This is a great opportunity to meet other practitioners in a relaxed atmosphere, to discover what's happening in BC and to learn about SOGIC's recent initiatives in the areas of law reform and advocacy on behalf of the GLBTTQ community.



SUNDAY, APRIL 29

8:00 a.m. - 9:00 a.m.

Continental Breakfast

9:00 a.m. - 11:00 a.m.

Concurrent Workshops - Session Three

SESSION 3A

INTERNATIONAL PERSPECTIVES

SOCIAL LOUNGE

Chair: Claire Young - UBC Faculty of Law - Vancouver, BC

**The Right to Privacy in Male/Male Anal Intercourse in Hong Kong: Dehypersexualising or Disempowering?**

**Phil C. W. Chan** - University of Ottawa, Faculty of Law, Common Law Section - Ottawa, ON

In August 2005, the Hong Kong Court of First Instance concluded that four provisions of the Crimes Ordinance concerning same-sex sexual conduct arbitrarily and discriminatorily targeted gay men and were thus in violation of Hong Kong constitutional equality guarantees on grounds of sexual orientation. The decision was since upheld by the Hong Kong Court of Appeal in September 2006. Against these two decisions, my paper will provide a history of the legal developments in Hong Kong pertaining to homosexuality and then discuss whether, as has been argued by a Canadian commentator who in an article in the *Hong Kong Law Journal* also criticises the 1995 Ontario decision in *R. v. M. (C.)*, the decision ought to have been premised on an individual's right of equality when an individual's right to privacy would have sufficed for the legislative provisions to be construed as unconstitutional and to have them struck down. The commentator, which my paper attempts to rebut, further argues that neither the Hong Kong nor the Ontario decision presented an appropriate opportunity for the court to declare that sexual orientation was a prohibited ground of discrimination in Hong Kong as the case, being concerned with sex, will merely reinforce the stereotype ascribed to gay men that they are 'hypersexualised'. My presentation will show the role and value of Canadian constitutional law in assisting the protection of sexual minorities in other jurisdictions.

**Patrolling the Borders of Sexual Orientation: Bisexual Refugee Claims in Canada**

**Sean Rehaag** - CDIM, Université de Montreal - Montreal, PQ

It is possible to claim refugee status in Canada alleging a fear of persecution on account of sexual orientation.



Success rates for such claims are similar to the success rates for traditional refugee claims. However, one subset of sexual minority refugee claimants, those alleging a fear of persecution on account of bisexuality, is less successful.

This paper argues that a major cause of the difficulties faced by bisexual refugee claimants is the dominant understanding of sexual orientation as involving a binary and unchangeable personal characteristic. This view of sexual orientation underlies contemporary Canadian refugee law as well as sexual minority human rights jurisprudence. The life experiences of many bisexual asylum seekers, however, cannot be easily located within such an understanding, leading refugee adjudicators to approach accounts of such experiences with scepticism.

The author contends that it is time for adjudicators in the refugee law setting to embrace an alternative understanding of sexual orientation that can accommodate bisexual and other sexual minority life stories. Such an account can be drawn from the tradition of queer theory.

### **Same Sex Marriage and the Constitution**

**Takashi Shirouzu** - *Osaka University, Graduate School of Law and Politics - Osaka, Japan*

Same sex marriage raises important constitutional questions about constitutional rights, including equality rights. In this presentation, several same sex marriage cases in Canada and United States will be examined to identify differences in the approaches of each country's courts. Then, since same sex marriage cases have not yet reached the Japanese courts, a brief analysis will suggest how Japanese courts might consider such cases.

### **Globalism, Migration and the International Political Economy of Human-Trafficking: An Analysis of the Intersection of 'Anomie' and 'Neurotic Citizenship' within a System of 'Global Apartheid'**

**Laura Smith** - *Simon Fraser University - Burnaby, BC*

The neo-liberal meta-narrative, seeking to maximize comparative advantage by opening up borders to trade, is fundamentally flawed in practice by neglecting to also compel the opening of borders to migration. As this paper will outline, the incongruence within this meta-narrative has established conditions conducive to the international trafficking of human beings. Firstly, this paper will identify the 'anomalies', and 'logical errors' within the neo-liberal international trading regime. Secondly, it will evaluate the economic extent of human trafficking, before continuing on to elucidate key conceptual difficulties in the operationalization of 'human trafficking' itself. It will borrow from Durkheim and Merton's theories of anomie in evaluating the underlying conditions which enable human trafficking. Extending upon the foundational or contributory factors to the trafficking of humans, this paper will continue to highlight the subjugation of the 'reproductive' realm within the International Political Economy, a consequence of which is the mass 'feminization' of migration, flexibilization and poverty. After establishing the key source of anomie in international criminal law, this paper will outline Isin's theory of the 'neurotic citizen' to explain the mass reticence to extend citizenship to individuals who have been subject to trafficking. It will conclude with a comparative analysis of UK, Canadian and American immigration policies with respect to 'reverse trafficking', in notable contrast to the progressive stance adopted by Italy.



**SESSION 3B**

**TRANS ADVOCACY (PART II)**

**Seminar Room**

**Chair:** Caily DiPuma – UBC Faculty of Law - Vancouver, BC

### **Intersexuality and the Law in Canada**

**Nadia Guidotto** - York University, Dept of Political Science - Toronto, ON

For an unborn intersex child, the situation is particularly precarious. Before birth, modern medicine has established tests to determine the child's chromosomal makeup *in utero*, and as a result, many parents have chosen to abort "abnormal" fetuses. For those who survive, the post-birth treatment presents additional hazards and trauma. On a daily basis, doctors mutilate intersex children in order to make their genitals more like the "norm." In the process, non-consenting infants are subjected to extreme violence and degradation at the hands of trusted authorities. Unfortunately, in North America, intersex people have no legal protection against such treatments. In fact, when considering how constitutions and rights discourses are framed, that is, in binary gender terms, it appears that the legal system is complicit in these medical practices and vice versa. Both legal and medical discourses reproduce and reinforce a particular order, one that is predicated on a highly gendered and heteronormative framework. To bring this relationship to the fore, I will explore theories of "intelligibility" and "abjection" (Butler 1990, 1993; Kristeva 1982; Edenheim 2005) alongside theories of "the border" (Douglas 1978; Agamben 1998; McClintock 1995) to show how intersex people are positioned in relation to the dominant order, and how their bodies are medically and legally managed and/or excluded as a result.

### **Delisting Sex Reassignment Surgery in Ontario: A Justified Limit or a Limited Justification?**

**Samara Polansky** - University of Toronto, Faculty of Law - Toronto, ON

The decision in *Hogan v. Ontario (Minister of Health and Long-Term Care)* allows the Ontario government to continue to omit sex reassignment surgery (SRS) from the list of publicly funded health services in Ontario. This paper argues that justifiably delisting services necessitates a contextual approach to health and human dignity which considers the social construction of disability and gender, the historical basis of assumptions about medical care, and the expressive ability of the law. A refusal to publicly fund SRS in Ontario perpetuates the stigma associated with transsexualism through the maintenance and promotion of misconceptions and stereotypes; the expressive ability of the law ought to be considered when making delisting decisions. Moreover, the traditional judicial deferential stance to governmental decisions is unwarranted as it inadequately considers *Charter* and human rights. Procedural modifications are suggested, including a principled approach to delisting recommendations, written reasons for decisions, public consultation, and an effective review mechanism.

**11:15 a.m. - 12:00 p.m.**

**QUEERS IN CANADA/2007**

**SOCIAL LOUNGE**

### **Queers in Canada / 2007: Are We Really Equal Now?**

**Kathleen Lahey** - Queen's University Faculty of Law - Kingston, ON

Before the federal government enacted the *M. v. H. Act* in 2001 and then same-sex marriage first became available in Ontario and B.C. in 2003, it was obvious that lesbian, gay, bisexual, transsexual, and transgender people were far from equal in Canadian law. Any short tour through human rights decisions, family law statutes, immigration or criminal law, etc., confirmed that rampant discrimination on the basis of sexuality remained the norm, not the



exception.

Especially since 2003, when marriage was so dramatically extended to same-sex couples [that's code for queer, by the way!] first in Ontario in June and then in B.C. in July, however, many people seem to assume that queers became instantaneously equal throughout Canada. Leaving aside the obvious fact that marriage did not become fully available across the country until mid-2005, this paper focuses on whether this belief is accurate, and, if it is not, what the risks to queers might be of the belief that discrimination on the basis of sexuality is now a thing of the past.

Some of the answers to this question are very surprising, others not. The discussion focuses on issues in immigration, criminal, family, parentage, social benefits, medical services, conflicts, education, and human rights law that remain unresolved in 2007, and concludes with a brief comparison with how queers are doing in other countries where they can now marry.

12:00 p.m. - 1:00 p.m.

Catered Lunch

**SOCIAL LOUNGE**

1:00 p.m. - 3:00 p.m.

**QUEER CRITICAL THEORY**

**SOCIAL LOUNGE**

**Chair:** Emma Cunliffe - *UBC Faculty of Law - Vancouver, BC*

**Prejudice, Confusion, or Affirmation? The Importance of Preconceptions of Sexual Orientation in Litigating Gay Rights**

**Michael Kotrly** - *Ogilvy Renault LLP - Toronto, ON*

The meaning of sexuality and the history and nature of gay oppression can certainly find themselves central to the political discussion of gay rights. Such considerations enter the legal realm as well. This paper argues that gay rights cases centre around a judge's conception of homosexuality above all other considerations. This will be demonstrated through a survey of gay rights cases (sodomy and spousal rights cases, in particular) decided under differing constitutional regimes in Canada, the United States, Germany, Israel, South Africa, the EU and the United Kingdom. The cases explored in this paper demonstrate that no matter what legal regime by which the courts are bound, gay rights cases are decided on how judges understand homosexuality. One limitation of this analysis is that courts adjudicating more generous equality frameworks often feature more progressive judges who are typically sensitive to the histories and experiences of lesbians and gay men; this problem is minimized where we are able to compare majority opinions with their dissents.

**Bringing International Human Rights Law Home: An Evaluation of Canada's Family Law Treatment of Polygamy**

**Lisa Kelly** - *Department of Justice - Ottawa, ON*



This presentation is based on a forthcoming article in the *University of Toronto Faculty of Law Review*. For the purposes of the “Standard Margins” conference, the presentation will focus on the legal complexities involved in respecting parties’ autonomy interests to enter into multiple-partner arrangements while ensuring and protecting women’s right to equality in marriage and family life. The following abstract covers the full article.

Following the re-definition of marriage in Canada to include same-sex couples, there have been renewed questions about the continued legal relevance of other elements in the definition of marriage, including monogamy. As family law moves away from a religious-moral paradigm, it is essential that legislators, policymakers, and courts articulate coherent principles for the treatment of marriage in a pluralist society. This paper examines one facet of these issues – Canada’s family law treatment of polygamy – and in doing so, argues for the broader application of Canada’s international human rights commitments in its domestic family law policy.

Although polygamy remains a criminal offence in Canada, its regulation has been left largely to other areas of the law, particularly immigration and family law. This paper examines Canada’s family law treatment of polygamy because of the significant role that family law plays in family formation and dissolution. The article begins by discussing the prevalence and nature of multiple-partner unions in Canada, with a specific focus on polygyny (a husband with multiple wives) – the predominant form of multiple-partner unions in Canada. Polygyny is distinguished from other multiple-partner unions, including polyandry and polyamory, through an analysis of its gender-discriminatory and patriarchal foundations. These gender inequalities implicate Canada’s international human rights obligations to ensure women’s right to equality in marriage and family life. After showing why international human rights law can and should inform domestic family law, the article posits a dualistic framework for the Canadian family law treatment of polygyny. This framework would withhold formal marriage recognition at the point of family formation to discourage a gender-discriminatory family practice. However, even where formal recognition is withheld, a rights-based analysis must still account for the rights and interests of those in existing unions. Therefore, the framework also requires that polygynous spouses have access to relief at relationship breakdown, including child support, spousal support and matrimonial property division. The article concludes by analysing polygynous spouses’ ability to access such relief within the present legal system and proposes appropriate reforms where access remains limited.

**“No Promo Homo” = More Promo Hetero: An Argument Against “Defence of Religion”  
Legislation and a Discussion of the use of Classical liberal Arguments in the  
Modern conservative Approach to Gay Legal Issues**

**Michael Noseworthy** - Dalhousie University, Faculty of Law - Halifax, NS

The term “no promo homo” is used to describe arguments which are based on a claim that the state should not be involved in the so-called “promotion” of homosexuality. In this paper I explore the use of the “no promo homo” argument against gay rights through an examination of how this argument has been implemented in legislation and government regulation and how it has been received and framed within public discourse. I undertake an analysis of the most commonly used “no promo homo” arguments and deconstruct the reasoning behind them and identify why the right wing of the political spectrum is using these types of arguments. A study of legislation both in Canada and England is a useful tool for analysing the articulation of proposed and pre-existing ideas and the public reaction to their implementation in law.



The so-called “no promo homo” argument is a way for opponents of gay rights to use the traditional arguments of the left wing of the political spectrum (the people who traditionally argue for gay rights) to oppose gay rights. This is achieved through an argument which seeks to shoot down the traditional arguments for gay rights using ideology which liberalism is in large part founded on, and the makers of the argument believe, one which liberals cannot argue against. In this paper I argue that these arguments are simply the same old traditional anti-gay point of view used by the right wing to oppose equality for gays under the law, dressed deceptively in easier to support centrist and even left wing principles. I will attempt to show that these arguments are in fact the right’s attempt to block equality for gays and lesbians by cloaking their ideology in something they think mainstream Canadian society will support.

### **Rethinking Canada’s Surrogacy Ban: A review of the commercial surrogacy ban in Canada's Assisted Human Reproduction Act (AHRA)**

**Christopher Deeble** - *University of Ottawa, Faculty of Law - Ottawa, ON*

The AHRA ban on commercial surrogacy drives commercial surrogacy underground and exacerbates the vulnerability of commercial surrogates by criminalizing access to medical and legal counselling. The ban also criminalizes married male (same-sex) couples who wish to have a genetically linked child by commercial surrogacy. Surrogacy allows people to create families, which is a social good. For many people, surrogacy is necessary if they wish to establish their own family, and surrogacy can and should be used responsibly to help those who need it.

Part I of this paper examines the right to found a family, first in theory and then in practice, by looking at case law from the European Court of Human Rights. This is followed by an investigation showing an infringement of s. 15 of the Charter can be grounded and that the infringement would not be saved under s. 1. Part II examines the context in which the 1993 Royal Commission on New Reproductive Technologies undertook its investigations and legislative recommendations. It shows that the findings were hasty and biased. Part III examines the chief arguments advanced for and against surrogacy.

Since all male couples require surrogacy to have genetically linked children, the ban on commercial surrogacy imposed by Canada’s *Assisted Human Reproduction Act* discriminates against them as a class. Regulation of surrogacy contracts under an optimal legal framework has the potential to generate mutual gains for all concerned. The Act should be amended to allow paid surrogacy under a regulatory framework.

### **Living your difference: Lesbian Mothers and the Challenge of Family Recognition**

**Fiona Kelly** – *University of British Columbia, Faculty of Law – Vancouver, British Columbia*

While lesbians and gay men have historically been understood as “exiles from family”, in twenty-first century Canada they are increasingly being welcomed into the family fold. There is no doubt that Canada’s lesbian “baby boom” has played a significant role in this process. In fact, many of the provincial same-sex marriage litigants pointed to the fact that they were parents as evidence of the urgent need for marriage rights. For some lesbian mothers, however, particularly those with a feminist critique of “the family” as an institution that rests on profoundly hierarchical social relations, entry into the family may bring with it some uneasy tensions. Put simply, some lesbian mothers do not want to be included within the traditional family. In this presentation, I will discuss the experiences

# Standard Margins

## Au delà des frontières

Contemporary Issues in Canadian Law and Sexuality Controverses Concernant la Loi Canadienne et la Sexualité

APRIL 27 TO 29, 2007  
AVRIL 27 À 29, 2007



FACULTY OF LAW | FACULTÉ DE DROIT  
Brought to you by the UBC Outlaws  
Présenté par les Outlaws de UBC

of three lesbian mothers living in Vancouver who each struggle in their own way to assert an understanding of “family” contrary to traditional norms. Despite their best efforts to live their difference, they have found that the hegemony of dominant traditions makes asserting an oppositional position an extremely complex task.