HIV&AIDS legal clinic ONTARIO

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M v H: What the Supreme Court Says About Same-Sex Couples

Many people have probably seen news reports about the Supreme Court of Canada's decision in *M v. H*. In it, the Supreme Court declared that the definition of "spouse" in some parts of Ontario's *Family Law Act* was unconstitutional because the definition only covered opposite sex common law couples and excluded same sex common law couples. It therefore discriminated against gay people on the grounds of sexual orientation which is contrary to section 15(1) of the *Charter of Rights and Freedoms*.

In understanding the implications of *M v. H* it's important to understand that the definition of "spouse" it talks about is only the definition contained in part of the legislation. The *Family Law Act* gives rights to couples when their relationship breaks down. Most of those rights are about division of property and spousal support; some of them are about custody of children. Those sections of the Act which are about the division of matrimonial property only apply

to legally married couples. Therefore, *M v. H* does not mean that gay couples who break up have to divide up their property the way married straight couples do when they divorce. Those sections of the Act are strictly limited to married couples. (So opposite sex common law spouses aren't covered either.)

M v. H was a challenge to the definition of "spouse" in Part III of the Act. That is the part which extended obligations to provide spousal support upon relationship breakdown to common law spouses (couples who have lived together for at least three years or who have children together). So the basic ruling in *M v. H* is that it is contrary to the *Charter* that opposite sex common law couples can use the *Family Law Act* to apply for spousal support when their relationships break down, but same sex couples cannot.

However, the Court did not say that the remedy was that same sex couples should simply be taken to be included in the definition of common law spouse like opposite sex couples. That is a remedy called "reading in". If the court had read in same sex spouses in the definition of "spouse" in Part III of the Act then same sex couples could have sued one another for spousal support when their relationships break down like straight people can. But the Court didn't do that. Instead, it said that the section should simply be declared unconstitutional and the province given six months to fix it. If the province doesn't fix it within six months, that part of the legislation essentially will have no force and effect for either same sex or opposite sex couples. It would probably surprise most people to know that the Ontario provincial government did not argue that the definition of "spouse" did not discriminate against same sex couples. It actually agreed that it did, but argued that the discrimination could be justified as reasonable under section 1 of the *Charter*. So, on a practical level, *M v. H* doesn't have much impact right away. But it will have as it will force the province to change Part III of the *Family Law Act* within the next six months to include same sex spouses for the purposes of spousal support. More importantly, it is already having ripple effects in other legal disputes where gay people are arguing they are being discriminated against because laws don't recognize their unions as spousal relationships. Recently, the *Globe and Mail* reported that the federal government had backed down in two cases involving the denial of CPP spousal benefits to two gay men in Nova Scotia whose same sex partners had both died. Although that decision on the part of the federal government only effects those two men, it is a signal that all those people who have lost partners to AIDS, applied for CPP spousal benefits, been denied and appealed, may one day actually get the benefits they should be entitled to!

If you have internet access you can read *M v. H* for yourself (warning: it's hundreds of pages long) on the Supreme Court of Canada's web site at: www.droit.umontreal.ca/doc/csc-scc/en/index.html.

Correction

Although we truly hate to admit it, there were a couple of errors in the last issue of halco news.

- The issue number for the Spring/Summer 1999 issue should be Vol. 4, No.1

- In the article about appealing ODSP decisions, under "Where do I send my request for Internal Review?", the second sentence of the 1st paragraph should read: If the decision has to do with whether or not you are medically eligible for benefits, your request should go to the **DAU**.

- A reference made to Chuck Shepard's website on page three should refer to **News of the Weird**.

We apologize for any confusion this may have caused.

You Asked Us

This is another in a series of frequently asked questions which we get here at the legal clinic.

Q. I am a tenant and there is another tenant living in my building who is driving me crazy. He is up at all hours of the night making noise which is preventing me from sleeping. He has guests at all hours of the day and night who are very noisy and disruptive. He also has a Rottweiler dog which he lets off its leash in the hall so it can run up and down the hall for exercise. Quite frankly, when I get off the elevator and see that dog running towards me it scares the heck out of me. The landlord says the guy is allowed to have a dog and is allowed to have guests and that there's nothing he can do. What can I do?

A. Although it is true that the other tenant has the right to have guests and to have a dog, it is not true that the landlord can do nothing about it. When you pay rent in exchange for your unit, you're

buying more than access to the space. You're also buying something called "quiet enjoyment". Quiet enjoyment is not silence or even quiet. What it means is that you have the right to enjoy your premises for all usual purposes without being unreasonably or unduly disturbed by the landlord or by other tenants. So if the noise is so bad, or the guests so disruptive, that you can't sleep during normal night time sleeping hours, and if the dog is scaring the heck out of you regularly, then you're being denied the right of quiet enjoyment at night and when you step out of the elevator and the dog is there. If the landlord refuses to take the appropriate steps to deal with the situation then you have a right to make application to the Ontario Rental Housing Tribunal for an abatement of rent. When you complain to the landlord, he should issue warning notices to the offending tenant. If the behaviour doesn't stop, the landlord can evict your obnoxious neighbour. If the landlord won't do these things then you should write to the landlord outlining the problems and explaining to him that if the problem isn't fixed in a certain time period (pick a period like ten days), then you'll exercise your legal options. You should keep a copy of this letter so you can prove to the Tribunal that you asked the landlord to fix the problem. If that doesn't work you should proceed to make an application to the Tribunal. HALCO can help you with the forms and explain how to make such an application. You can also do it yourself as most tenants do. The forms and instructions on how to apply to the Tribunal can be found at the Tribunal's web site at: www.orht.gov.on.ca. An application such as this is called "An Application About Tenant's Rights" and is free at the Tribunal.

Appeals of Decision About Home Care Eligibility Now Possible

by George T. Monticone

A recent decision of the Health Services Appeal Board (now called the "Health Services Appeal and Review Board") is good news for those unhappy about being denied home care services. In the January 6, 1999 decision of Strathern v. Community Care Access Centre Niagara et al., the Board decided that it could hear an appeal from a decision of Community Care Access Centre Niagara denying services to Ian Strathern. Prior to the Strathern decision, it was not clear whether there was a right to appeal decisions made by a community care access centre (CCAC). This was an issue because the Long Term Care Act, which gives applicants for home care a right of appeal, limits that right to appeals from decisions of "approved agencies". The issue in Strathern was whether

Community Care Access Centre Niagara was an "approved agency".

CCACs have operated throughout Ontario for some time now. The Ontario government has provided CCAC's with millions of dollars so that the CCACs in turn can provide home care services to the citizens of Ontario.

Individual CCACs receive funding upon signing an annual funding and service agreement with the Ministry of Health. That agreement says that CCACs must comply with the policies,procedures, and guidelines set out in a Planning, Funding and Accountability Manual. The Manual speaks of "approved agencies" which since 1995/96 have received funding to provide services and which must sign annual service agreements. Despite the service agreements, the Manual and the on-going practice of relying upon the CCACs to carry out the difficult job of arranging for home care for Ontarians, the provincial government's position has been that the CCACs are not formally approved agencies. This has previously stood in the way of anyone wanting to appeal a CCAC decision to the Health Services Appeal Board.

The Board in Strathern found that Section 5 of the Long Term Care Act defines what counts as an approved agency, and that Community Care Access Centre Niagara satisfied all the requirements. There are four elements in the definition:

1. the body being approved must be an agency;

2. the Minister must be satisfied that with financial assistance, the agency will be financially capable of providing the service;

3. the Minister must be satisfied that the agency will be operated in accordance with the Bill of Rights as set out in the Long Term Care Act; and

4. the Minister must be satisfied that the agency will be operated with competence, honesty, integrity and concern for the health, safety and well-being of the persons receiving the service.

The Board rejected the government's argument that the approval had to be in writing. The Board found on the basis of the practices of the government and the four elements above that the Niagara agency is an approved agency. For the same reasons, it may be that all CCACs across Ontario are "approved" agencies.

A person applying to an approved agency for home care services may make a complaint to the agency about any of the following:

1. a decision that the person is not eligible for a service;

2. a decision to exclude a service from the person's plan of service;

3. a decision respecting the amount of a service to be included in the person's plan of service;

4. a decision to terminate a particular service;

5. the quality of a service to be provided to the person;

6. An alleged violation of the person's rights as set out in the Bill of Rights (section 3).

A response to the complaint must be made within 60 days. If after an internal review of complaints falling under categories 1 - 4, the complainant is not satisfied, the Strathern decision now makes it clear that the complainant has the right to appeal to the Health Services Appeal Board. Brian Simpson of Crossingham, Brady in St. Catharines was Counsel for Ian Strathern. The Board decision number is LC.6149.

This article has been reprinted with permission from the Advocacy Centre for the Elderly. The article originally appeared in the ACE Newsletter, Spring 1999, Vol. 2, No. 7. The Advocacy Centre for the Elderly is a Legal Clinic serving low-income Seniors.

Three Family Law Offices Now Open in Ontario

In early June, Legal Aid Ontario announced the opening of three Family Law Offices in Ontario. The offices are located in Toronto, Thunder Bay and Ottawa. These offices have lawyers on staff who have the ability to represent clients in matters related to Family Law. Examples of issues related to family law include:

- Getting or changing custody of your children
- getting a restraining order against your partner
- Setting up or changing support payments for you and

your children

- Setting up or changing access to your children, including situations where your partner has denied you access to the children

- property issues, including RRSPs and pensions

The Family Law offices operate differently than Community Legal Clinics like HALCO and local Community Legal Clinics across the province. In order to access the services of a lawyer at one of the Family Law offices, you must first get a legal aid certificate through the legal aid office which serves your community. The Family Law offices were established to address the problem of individuals who were eligible for and received a certificate for family law issues but who were not able to find a lawyer to accept the certificate and take on their case. The Offices were designed to help make it easier for people to find lawyers who will take family law certificates.

If you have a family law issue, contact your nearest legal aid office. They can usually be found in the phone book under "Legal Aid" or in the Government of Ontario section of the Blue Pages of your phone book under the Ministry of the Attorney General heading.

The Family Law offices are located at:

393 University Avenue, Suite 420
Toronto, ON M5G 1E6
(416) 348-0001

85 Albert Street, Suite 200
Ottawa, ON K1P 6A4
(613) 569-7448
1-800-348-0006

30B St. Paul Street
Thunder Bay, ON P7A 4S5
(807) 346-2203
1-800-393-8140

So Long, Farewell...

Sadly, we have come to the end of the term for our articling student, Lavinia Inbar. As many of you will know, Lavinia has worked extremely hard over the last year sharpening her legal skills while

helping HALCO's many clients. Lavinia started her articling term at the beginning of July, 1998, when she took over from HALCO's previous articling student Adwowa Rouse. During her time here at the clinic, we have experienced our highest volume of demand for services in the history of the clinic. This has meant Lavinia has been essential to our ability to meet the needs of as many clients as we have.

Lavinia will begin her Bar Admissions course in September of 1999. We wish her all the best in her future career. She will be sorely missed here at HALCO. Thank you for all your hard work and good humour, Lavinia...

Unfortunately, HALCO is no longer in the position of being able to host an articling student. The special funds which have been used to pay a student working here over the last two years have been exhausted. Beginning July 1st, 1999 we will once again be reduced to a staff of one lawyer, one community legal worker and one administrative staff person serving the entire province of Ontario. Rest assured that we are doing all we can to meet all requests for services, and to attempt to secure more staff to help with an ever-growing demand for legal services directed to PHAs in the province of Ontario.

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