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SEXUAL ORIENTATION AND LEGAL RIGHTS

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SEXUAL ORIENTATION AND LEGAL RIGHTS*

ISSUE DEFINITION

Over the past 20 years, the legal rights of lesbians and gay men in Canada have been the subject of considerable judicial, political and legislative activity. All Canadian jurisdictions prohibit discriminatory treatment based on sexual orientation, and the introduction of the *Canadian Charter of Rights and Freedoms* significantly altered the legal framework in matters of equality rights for lesbians and gay men.

Generally speaking, legal issues relating to sexual orientation have arisen in two contexts:

- the prohibition of discrimination, primarily to ensure that individual lesbians and gay men are not discriminated against; and
- the recognition of same-sex relationships, and the extension to homosexual partners of the benefits and rights that are accorded to unmarried heterosexual partners.

Numerous judicial rulings dealing with legal challenges against allegedly discriminatory laws and in assertion of legal rights have clarified the legal position of lesbians and gay men, served as a focus for the ongoing political debate about homosexuality and, in several instances, provided a framework for legislative reforms of varying scope. Recent years have also featured increasing calls, gradually sanctioned by the courts in a majority of jurisdictions and now, authoritatively, by the adoption of national government legislation, for extending the institution of civil marriage to same-sex couples on the basis of constitutional equality rights.

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* The original version of this Current Issue Review was published in October 1992; the paper has been regularly updated since that time.

This paper reviews issues and developments affecting the legal rights of lesbians and gay men at the federal level as well as in areas of provincial jurisdiction. The paper is concerned only with legal matters. It does not discuss other socio-cultural or moral issues considered to be raised by homosexuality, or policy issues and choices affecting lesbian and gay rights.

BACKGROUND AND ANALYSIS

A. Discrimination on the Basis of Sexual Orientation

Human rights legislation establishes that society considers unequal treatment of certain groups to be unacceptable by setting out a list of characteristics against which discrimination is prohibited, customarily in employment, accommodation and services. In Canada, these characteristics have traditionally included race, colour, national or ethnic origin, religion or creed, age, sex, family and/or marital status, and mental or physical disability.

Prior to the 1980s, there were few legal rights or provisions that could be invoked by lesbians and gay men. The legal situation in Canada changed considerably with the coming into effect of the equality rights provision in section 15 of the *Canadian Charter of Rights and Freedoms* in 1985. Although it had been decided not to include sexual orientation explicitly as a prohibited ground of discrimination, subsection 15(1) was worded to ensure that its guarantee of equality was open-ended:

> Every individual is equal before and under the law and has the right to equal protection and benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

The courts have accepted that section 15 is to be interpreted broadly, and that "analogous" grounds, i.e., personal characteristics other than those listed, may also form the basis for discrimination against a group or an individual (*Andrews* v. *Law Society of B.C.*). In 1995, the view that sexual orientation is such an "analogous" ground, and therefore a prohibited ground of discrimination under the Charter, was confirmed by the Supreme Court of Canada in the *Egan* decision discussed below under the heading "Same-Sex Spouses."

Relying on the Charter as the sole vehicle for the validation of equality rights may not provide a remedy in all cases. Even if discrimination on the ground of sexual orientation is recognized as a *prima facie* section 15 violation, a court may uphold the law as justifiable under section 1 of the Charter. Furthermore, the Charter's constitutional guarantees apply only to governmental action, not private acts; and, in most instances, Charter remedies must be pursued through costly, prolonged and adversarial court proceedings. In contrast, human rights statutes establish relatively inexpensive and, in theory, at least, expeditious administrative mechanisms to deal with complaints of discrimination in both public and private spheres. Human rights advocates thus stressed the importance of including sexual orientation as a prohibited ground of discrimination in human rights laws.

The Canadian Human Rights Commission first recommended that sexual orientation be made a prohibited ground of discrimination under the *Canadian Human Rights Act* in 1979. In 1985, a parliamentary committee report entitled *Equality for All* made the same recommendation. The federal government's 1986 response expressed the belief that sexual orientation was encompassed by section 15 guarantees, and made a commitment to "take whatever measures are necessary to ensure that sexual orientation is a prohibited ground of discrimination in relation to all areas of federal jurisdiction."

In August 1992, the Charter's impact on human rights legislation was affirmed when the Ontario Court of Appeal, in *Haig* v. *Canada*, ruled that the absence of sexual orientation from the list of proscribed grounds of discrimination in section 3 of the *Canadian Human Rights Act* violated section 15 of the Charter. The Court determined that section 3 of the Act should be read and applied as if sexual orientation were listed, i.e., sexual orientation should be "read in" to the Act. The federal government decided not to appeal the *Haig* decision and indicated that it would be applied throughout Canada. Accordingly, the Canadian Human Rights Commission has been accepting complaints of discrimination based on sexual orientation since 1992.

In June 1996, Parliament enacted Bill C-33, *An Act to amend the Canadian Human Rights Act*, to include sexual orientation among the Act's prohibited grounds of discrimination. Bill C-33 had the effect of codifying the law as stated in the Ontario Court of Appeal's *Haig* decision and since practised by the Canadian Human Rights Commission and Canadian Human Rights Tribunal(s). This development is more fully reviewed under the heading "Parliamentary Action."

The amendment to the *Canadian Human Rights Act* also brought the federal Act into line with existing provincial and territorial laws. Quebec was the first Canadian jurisdiction to include sexual orientation as a prohibited ground of discrimination when the province's *Charte des droits et libertés de la personne* was amended in 1977. Now human rights Acts and Codes explicitly prohibit discrimination based on sexual orientation in all jurisdictions except Alberta. The new N.W.T. legislation, which took effect in July 2004, is the first human rights statute in Canada to also prohibit discrimination based on "gender identity."

Canadian courts have ruled that sexual orientation is also a prohibited ground of discrimination in Alberta. In a ruling analogous to the earlier *Haig* decision, the Supreme Court of Canada found, in 1998, that the omission from the province's human rights statute of the ground of discrimination of greatest significance to lesbian and gay individuals signified that they were denied substantive equality and denied access to the legislation's remedial scheme. The Court concluded that the most appropriate remedy for the section 15 violation was to "read in" sexual orientation as a prohibited ground of discrimination in the Alberta legislation (*Vriend* v. *Alberta*).

A now numerous body of human rights decisions involve the alleged denial of services or accommodation on the basis of sexual orientation, or related lesbian and gay issues (e.g., *Waterman* v. *National Life Assurance Co. of Canada*, 1993: loss of employment; *Crozier* v. *Asselstine*, 1994 and *DeGuerre* v. *Pony's Holdings Ltd.*, 1999: harassment in employment; *Grace* v. *Mercedes Homes Inc.*, 1995 and *Québec (Comm. des droits de la personne et des droits de la jeunesse)* c. *Michaud*, 1998: housing; *Geller* v. *Reimer*, 1994, *Hughson* v. *Kelowna (City)*, 2000: Gay Pride proclamation/permit; *Moffatt* v. *Kinark Child and Family Services*, 1998: work environment; *L. (C.)* v. *Badyal*, 1998: pub services; *McAleer* v. *Canada (Human Rights Commission)*, 1999: promotion of hatred; *Trinity Western University* v. *British Columbia College of Teachers*, 2001: teacher training program; *Owens* v. *Saskatchewan (Human Rights Commission)*, 2002: exposure to hatred; *Brockie* v. *Brillinger (No. 2)*, 2002: printing services; *Jubran* v. *North Vancouver School District (No. 44), School District No. 44 (North Vancouver)* v. *Jubran*, 2005: harassment in school; *Kempling* v. *The British Columbia College of Teachers*, 2005: publication of anti-homosexual material; *Komar, Taylor, Hamre, Wallace* v. *Whatcott*, 2005: exposure to hatred).

Prohibition of discrimination based on sexual orientation in human rights legislation point out that such inclusion does not entail endorsement of homosexuality, but does accord an element of legal protection from job loss or the denial of accommodation or services.

Although some have expressed concern that the term "sexual orientation" itself is broad enough to include pedophilia and other sexual proclivities that are not intended to be covered, prohibiting discrimination on the basis of sexual orientation does not affect *Criminal Code* prohibitions of certain sexual activities, for instance, those between adults and minors. The Federal Court of Appeal has held that "the expression ["sexual orientation"] has been clarified in many decisions of the courts and is now well-established as to its particular meaning" (*McAleer* v. *Canada (Human Rights Commission)*).

B. Same-Sex Spouses

The situation of gay and lesbian couples has raised distinct issues related to discrimination based on sexual orientation. In the main, such issues arose because statutes have traditionally used the concept of "spouse," explicitly or implicitly defined in heterosexual terms, as the basis for allocating rights, powers, benefits and responsibilities to partners. Beginning in the early to mid-1990s, legislative initiatives recognizing cohabitation of same-sex partners as conjugal in nature have increased markedly in both number and scope, particularly following the pivotal 1999 Supreme Court of Canada decision in *M.* v. *H.* Previous court rulings discussed under the following heading should be considered in light of that judgment, also reviewed below, and of contemporaneous or subsequent legislative reforms in the area of same-sex spousal benefits, **in particular, the enactment of federal Bill C-38, the Civil Marriage Act, in July 2005.**

1. Selected Case Law

Court challenges under human rights legislation and/or the *Canadian Charter of Rights and Freedoms* have turned on the question of whether the term "spouse" applies to same-sex partners, often in the context of interpreting collective agreements or wording in specific statutes or regulations. There is now a considerable body of jurisprudence has evolved in this area.

a. Early Decisions

One of the earliest cases was *Andrews* v. *Ontario (Ministry of Health)*, a section 15 Charter case in which a woman sought to have her lesbian partner provided with OHIP dependant's coverage under the *Ontario Health Act*. The court rejected the application on the basis that "spouse," which was undefined in the legislation, always refers to a person of the

opposite sex. An opposite conclusion was reached in *Knodel* v. *British Columbia (Medical Services Commission)*, in which the B.C. Supreme Court concluded that the opposite-sex definition of "spouse" in regulations under the *Medical Service Act* was an unjustified infringement of subsection 15(1) of the Charter.

In *Veysey* v. *Canada (Correctional Service)*, a prison inmate and his homosexual partner were denied participation in the Private Family Visiting Program. The Trial Division of the Federal Court quashed that denial on the basis that it violated subsection 15(1) of the Charter. In dismissing an appeal of this ruling, the Federal Court of Appeal specifically refrained from deciding whether common-law partners of the same sex are common-law "spouses" under the Charter.

b. Employment-related Decisions

Many of the decisions concerning same-sex benefits have arisen in the employment sphere. In *Canada (Attorney General)* v. *Mossop*, a gay federal public service worker who had been denied bereavement leave under the collective agreement to attend the funeral of his partner's father argued that he had been discriminated against on the basis of "family status" under the *Canadian Human Rights Act*. The Supreme Court of Canada's 1993 majority decision upheld the Federal Court of Appeal's ruling that Parliament had not intended that sexual orientation should be encompassed by the term "family status," and did not deal with the question of whether the absence of sexual orientation in the federal human rights statute violated the Charter. The Court subsequently addressed this matter in the provincial context in the 1998 *Vriend* decision discussed above.

Other employment-related decisions in the federal sphere have typically concerned grievances lodged under the *Public Service Staff Relations Act* or the *Canada Labour Code* to contest employers' denial to same-sex couples of various "spousal" benefits. Since the *Haig* ruling, grievance adjudicators and arbitrators have, for the most part, allowed grievances alleging discrimination based on sexual orientation under the *Canadian Human Rights Act* and anti-discrimination provisions of the applicable public service collective agreements (*Hewens* v. *Treasury Board*; *Lorenzen* v. *Treasury Board*; *Canada Post Corporation* v. *Public Service Alliance of Canada* (Guévremont grievance); *Canadian Telephone Employees' Association (C.T.E.A.)* v. *Bell Canada*; *Canadian Broadcasting Corporation* v. *Canadian Media Guild*; *Yarrow* v. *Treasury Board*). On at least one occasion, a tribunal ruling favouring the grievor has been set aside by the courts on jurisdictional grounds (*Canada (Attorney General)* v. *Boutilier*).

At the provincial level, an important 1992 ruling of an Ontario Board of Inquiry found that the province's denial of benefits to same-sex partners of government employees violated section 15 of the Charter. The Board ordered that the heterosexual definition of marital status in the Ontario *Human Rights Code* be "read down" by omitting the words "of the opposite sex" (*Leshner* v. *Ontario (Ministry of the Attorney General)*).

c. *Egan* and Subsequent Decisions

The case of *Egan* v. *Canada*, a challenge to the spousal allowance provisions then in the federal *Old Age Security Act* provided the Supreme Court of Canada with its first direct opportunity to consider a sexual orientation Charter case. The allowance in question was available to opposite-sex couples meeting the statute's age requirements who had cohabited for a year or more, but was never available to same-sex couples. A gay couple (Egan and Nesbit), together for more than 45 years but denied the spousal allowance, launched a section 15 Charter challenge to the legislation in 1989.

In 1995, the Supreme Court of Canada dismissed their challenge by a final margin of 5-4. The Court was unanimous in ruling that sexual orientation is an analogous ground that triggers section 15 protection, thus settling that question authoritatively. A 5-4 majority of the Court also found that the spousal definition at issue discriminated on the basis of sexual orientation, infringing section 15 of the Charter. However, in the determinative finding, a different 5-4 majority found the discrimination justified under section 1 of the Charter.

This Supreme Court of Canada decision exerted considerable influence on subsequent same-sex spousal benefit cases at federal and provincial levels:

- In 1995, the Manitoba Court of Appeal allowed the appeal of a gay Manitoba government employee on the same-sex benefits issue and ordered that an adjudicator determine whether the Manitoba *Human Rights Code* provision that may permit discrimination for *bona fide* and reasonable cause applied in the case. In 1997, the adjudicator found that no such cause had been shown for non-pension benefits, and ordered the government to extend these benefits to their employees' same-sex partners (*Vogel* v. *Manitoba*).

- In its 1996 decision in *Moore* v. *Canada (Treasury Board)*, the Canadian Human Rights Tribunal found that the denial of same-sex benefits to federal government employees based on opposite-sex definitions of "spouse" "offends the Charter and the *Canadian Human Rights Act* and constitutes discrimination prohibited on both." In 1997, the Tribunal also rejected the government's addition of a definition of "same-sex partner" to the existing definition of "spouse" in the relevant documents, and ordered that the term "spouse" be interpreted without reference to gender, rather than on the basis of a new classification. In 1998, a Federal Court judge declined to set aside this order, ruling that the definition proposed by the government would establish an unacceptable "separate but equal" regime for same-sex couples.

- In 1997, challenges to the opposite-sex definition of "spouse" in the *Canada Pension Plan* met with mixed responses, primarily owing to differing conclusions as to whether the admitted section 15 violation was justified under section 1 of the Charter. In 1999, the federal government agreed to settle with the applicants in question, making them the first gay men in Canada to receive *Canada Pension Plan* survivor benefits (*Wilson Hodder*; *Paul Boulais*). A "test case" judicial review application involving a CPP same-sex claim was decided in the claimant's favour in 1999 (*Donald Fisk*).

- In 1998, the Ontario Court of Appeal ruled that the discriminatory opposite-sex definition of "spouse" in the federal *Income Tax Act* that prevented the registration of pension plans with survivor benefits for same-sex spouses did not meet the section 1 justification "test." The Court ordered that the definition of "spouse" be enlarged to include same-sex spousal relationships, through the reading-in remedy, for purposes of pension plan registration. The federal government did not appeal this decision (*Rosenberg* v. *Canada (Attorney General)*).

- Subsequent to a 1998 Quebec Superior Court ruling that the existing spousal definition in the province's pension legislation violated the province's *Charte des droits et libertés de la personne* on the basis of sexual orientation, 1999 amendments to the statute extended spousal status explicitly to same-sex couples. In March 2002, the Quebec Court of Appeal reversed the lower court decision, on the basis that the definition of "surviving spouse" in the pre-1999 legislation had also extended to otherwise entitled same-sex partners (*Bleau et Québec (Commission des droits de la personne et des droits de la jeunesse)* c. *Québec (Procureur général)*).

d. *M.* v. *H.*

In May 1999, a landmark 8-1 decision of the Supreme Court of Canada affirmed the Ontario Court of Appeal ruling in the case of *M.* v. *H.* The Ontario decision had allowed a Charter challenge to the opposite-sex definition of "spouse" in section 29 of the province's *Family Law Act* (FLA) that prevented same-sex partners from applying for spousal support upon relationship breakdown. In confirming that the definition infringed section 15, the Court summarized its views, in part, as follows:

> [The] definition … draws a distinction between individuals in conjugal, opposite-sex relationships of a specific degree of duration and individuals in conjugal, same-sex relationships of a specific degree of duration. …
>
> The crux of the issue is that this differential treatment discriminates in a substantive sense by violating the human dignity of individuals in same-sex relationships. … [T]he nature of the interest affected is fundamental, namely the ability to meet basic financial needs following the breakdown of a relationship characterized by intimacy and economic dependence. The exclusion of same-sex partners from the benefits of the spousal support scheme implies that they are judged to be incapable of forming intimate relationships of economic interdependence, without regard to their actual circumstances …

> [The] infringement is not justified under s.1 of the *Charter* because there is no rational connection between the objectives of the spousal support provisions and the means chosen to further this objective. … [T]hese objectives [are not] furthered by the exclusion of individuals in same-sex couples from the spousal support regime. If anything, these goals are undermined by this exclusion.

The Court stressed that the appeal before it did not challenge traditional conceptions of marriage, and that the Court did not need to consider whether same-sex couples can marry, or whether they must always be treated in the same way as unmarried opposite-sex couples. As a remedy, the Court ordered that the definitional section be "severed" [cut] from the legislation and suspended the remedy for six months to enable the Ontario legislature to devise its own approach to ensuring that the spousal support scheme conforms to section 15. In closing, the Court commented that "declaring s. 29 of the FLA to be of no force or effect may well affect numerous other statutes that rely upon a similar definition of the term 'spouse.' The legislature may wish to address the validity of these statutes in light of the unconstitutionality of s. 29 of the FLA."

Although the Court's decision was concerned only with Ontario legislation, its effects became apparent in virtually every jurisdiction, as outlined below under the heading "Developments following *M.* v. *H.*"

2. Reform Prior to *M.* v. *H.*

Advocates of same-sex benefits expressed the view that systematic reform by legislators would obviate the need to undertake costly court contests statute by statute. Opponents of reform criticized "judicial activism" for supplanting the legislative role in deciding whether or when to recognize same-sex spouses.

a. Legislation

Prior to *M.* v. *H.*, some legislative recognition of same-sex spouses had occurred at the provincial level, most notably in British Columbia and Quebec. From 1992 through 1999, groundbreaking B.C. legislation amended the definition of "spouse" in numerous statutes to include persons of the same sex living in "marriage-like" relationships. These laws related to a variety of topics, including medical services, family maintenance, family relations, public sector pensions, pension benefit standards, adult guardianship, representation, and health care consent. and admission. In addition, the adoption legislation in effect in British Columbia since 1996

enabled same-sex couples to make joint applications for adoption not as a result of a spousal definition, but by virtue of gender-neutral references to joint adoption by "two adults."

In June 1999, the Quebec Assemblée nationale unanimously adopted the *Loi modifiant diverses dispositions législatives concernant les conjoints de fait* (Bill 32). This omnibus statute amended the definition of *de facto* spouse [conjoint de fait] in 28 laws and 11 regulations to include same-sex couples, thus giving them the same status, rights and obligations as unmarried heterosexual couples under the affected legislation. Amended laws included those relating to workers' compensation, occupational health and safety, labour standards, insurance, tax, trust and savings companies, pension benefits, public-sector retirement plans, social assistance and other subjects. The legislation did not amend the *Code civil du Québec*, which governed family-related matters such as spousal support and adoption and which restricted spousal status to married couples.

In other jurisdictions, legislative initiatives were fewer and narrower in scope. In Ontario, for example, the 1992 *Substitute Decisions Act* defined "partners" in gender-neutral terms, thus entitling same-sex spouses to make decisions for incapacitated partners. In 1994, the broad reform proposed by the former NDP government in Bill 167 to remove disparities in treatment between same-sex and heterosexual couples in Ontario laws was defeated.

In 1998 and early 1999, the Yukon Legislative Assembly introduced gender-neutral definitions, of "spouse" in territorial laws governing family support and maintenance enforcement, and of "common-law spouse" in estate administration and legislative assembly retirement allowance statutes. To date, only the latter appear to have come into force**.**

In May 1999, the Alberta government acted on an undertaking to enable some private adoptions by same-sex couples by enacting amendments to the *Child Welfare Act* under which the gender-neutral term "step-parent" was substituted for the term "spouse" in the relevant sections of the Act. The change was not intended to affect public adoptions. In November 1999, a judge of the Alberta Court of Queen's Bench gave the first approval of petitions for adoption under this legislation by same-sex partners (*A (Re)*).

At the federal level, in April 1999 the government introduced a bill containing important reforms of the major public service pension legislation. Among other things, Bill C-78 provided for the extension of survivor benefits under that legislation to same-sex couples. This development is reviewed below under the heading "Parliamentary Action."

b. Law Reform Proposals

Legislative reforms in the area of same-sex spousal recognition recommended by the Ontario Law Reform Commission in 1993, and by the Ontario Human Rights Commission and the Nova Scotia Law Reform Commission in 1997, were not acted upon.

Similarly, recommendations of the 1998 *Report on Recognition of Spousal and Family Status* of the British Columbia Law Institute (BCLI) calling for enactment of a Domestic Partnership Act and a Family Status Recognition Act were not implemented. Under the former, domestic partnership status would not be restricted to persons in a marriage-like relationship; under the latter, "spouse" would be defined as a person who was married, a domestic partner, and a person "living with another person, who may be of the same or opposite sex, in a marriage-like relationship." The Report stressed the importance of consistent definitions of spousal status and standardization of domestic relationships in all provincial legislation.

c. Other Developments

A number of additional developments in the area of same-sex benefits or recognition of spousal status occurred in the pre-*M.* v. *H.* period, most commonly in the employment sphere. A steadily increasing number of private employers, including many major corporations, as well as some federally regulated employers, provided health care benefits to same-sex couples. In addition to British Columbia, a number of provincial and territorial governments adopted policies extending health-related and other employment benefits to same-sex couples; these included Nova Scotia, New Brunswick, Ontario, Manitoba, Saskatchewan, Yukon and the Northwest Territories. Major municipalities providing at least some same-sex benefits to their employees included Halifax, Montréal, Kingston, Ottawa, Kitchener-Waterloo, Hamilton, London, Toronto, Winnipeg, Calgary, Edmonton, Regina, Prince Rupert, Vancouver and Victoria.

With regard to pension benefits, in addition to Ontario's 1994 "offside" plan, the Nova Scotia government agreed in 1998 to extend survivor benefits provided for in the province's public service pension statute to the surviving partners of same-sex relationships (*Wilson Hodder*; *Paul Boulais*); the New Brunswick government followed suit.

At the federal level, in 1996, Revenue Canada modified its interpretation of the *Income Tax Act*'s definition of "private health services plan" to enable same-sex couples to obtain employer-paid medical and dental benefits on a tax-free basis. As a result of the 1998 *Rosenberg* decision, Revenue Canada also began registering pension plans providing for same-sex survivor benefits.

In the federal employment sphere, beginning in 1995, federal Treasury Board policy gradually extended employment-related benefits to same-sex couples, with the Board of Internal Economy of the House of Commons generally following suit. Compliance with the *Moore* ruling led to the extension of medical and dental benefits, and later to a policy of gender-neutral interpretation of the definition of common-law spouse in federal civil service collective agreements, policies and plans. This policy had no substantive effect on either the scope of available benefits, or the opposite-sex definition of "spouse" in federal legislation.

3. Developments Following *M.* v. *H.*

a. Legislation

Significant legislative packages respecting same-sex couples' status enacted or introduced over the 1999-2004 period to date include the following:

- In 1999, the British Columbia Legislative Assembly adopted the *Definition of Spouse Amendment Act, 1999*. The legislation extended the spousal definition to same-sex couples cohabiting in marriage-like relationships in a number of acts governing the rights of surviving spouses, such as the *Estates Administration Act* and the *Wills Act*. In July 2000, British Columbia legislators further enacted the *Definition of Spouse Amendment Act, 2000*, which extended the spousal definition to same-sex couples in about 20 additional provincial statutes covering a broad range of subject matters, and standardized that definition in these and previously amended laws.

- In October 1999, the Ontario Legislative Assembly adopted the *Act to amend certain statutes because of the Supreme Court of Canada Decision in M. v. H.* This omnibus amending legislation provided same-sex couples with the same statutory rights and responsibilities as applied to opposite-sex common-law spouses under 67 provincial laws. It did so by introducing the term "same-sex partner" in the affected statutes, while preserving the existing opposite-sex definition of "spouse." The legislation also made implicit allowance for joint and step-parent adoption applications by same-sex partners, a right recognized by the common law in Ontario since 1995 (*K. (Re)*). Some considered the Ontario approach inconsistent with *M.* v. *H.* and potentially open to constitutional challenge to the degree that it established a "separate but equal" scheme. In May 2000, the Supreme Court of Canada dismissed an application for rehearing in *M.* v. *H.*

- In June 2000, the federal Parliament adopted the omnibus Bill C-23 extending benefits and obligations in federal statutes to same-sex couples. The legislation is more fully reviewed below under the heading "Parliamentary Action."

- In November 2000, the Nova Scotia Legislative Assembly enacted the *Law Reform (2000) Act*. The legislation added a gender-neutral definition of "common-law partner" to a number of laws, including those governing maintenance and custody, health, insurance and pension benefits; the measure had the apparent effect of restricting the term "spouse" in the affected statutes to married individuals. Critics argued the reform should have been broader in scope

in light of the number of provincial laws dealing with spousal status. In relation to one such law for which no statutory reform had been proposed to date, a June 2001 Charter decision of the Nova Scotia Supreme Court (Family Division) struck down the provincial ban on same-sex adoption (*Nova Scotia Birth Registration No. 1999-02-004200 (Re)*).

The *Law Reform (2000) Act* also amended the provincial *Vital Statistics Act* to establish the first registered domestic partnership scheme in Canada. Under this initiative, "two individuals [of the same or opposite sex] who are cohabiting or intend to cohabit in a conjugal relationship" became eligible to register their partnership by means of a declaration, provided neither person was a minor, married or in a prior domestic partnership, and both were ordinarily resident or property owners in Nova Scotia. Upon registration, each domestic partner immediately assumed the rights and obligations of a [married] spouse under 12 provincial statutes. In June 2001, Nova Scotia legislators added 5 statutes to this number when they enacted Bill 25, the Justice Administration Amendment (2001) Act.

- In December 2000, the Legislative Assembly of New Brunswick enacted *An Act to amend the Family Services Act*. It extended the New Brunswick statute's spousal support obligation to two unmarried persons who had cohabited for at least three years "in a family relationship in which one person has been substantially dependent upon the other for support." The combined cohabitation and support criteria distinguished this measure from those of other provincial statutes adopted in the wake of *M.* v. *H.*

- In December 2000, the Newfoundland *Family Law Act* was modified by a gender-neutral definition of "partner" in the statute's family support and domestic contract provisions. In November 2001, the province's House of Assembly also adopted the *Same Sex Amendment Act*, which amended 11 statutes to enable opposite-sex and same-sex "cohabiting partners" to acquire rights and obligations in relation to public-sector pension benefits, workplace compensation survivor benefits, and other matters. In December 2002, Newfoundland and Labrador legislators adopted legislation enabling same-sex adoption.

- In June 2001, the Manitoba Legislature passed *An Act to Comply with the Supreme Court of Canada Decision in M. v. H.* The bill introduced a gender-neutral definition of "common-law partner" in 10 provincial statutes relating to support rights and obligations as well as pension and death benefits. Under the definition, one or three years of cohabitation were required in order to acquire status as a common-law partner. In a second round of reform, in August 2002 the Manitoba Legislature adopted the *Charter Compliance Act*. The legislation amended over 50 provincial laws covering a broad range of subject-matters to further recognize statutory rights and responsibilities of same-sex couples, including joint and step-parent adoption rights. Further legislation dealing with the rights of common-law partners to division of property on death or separation was adopted by the Manitoba Legislature the same month. The *Common-Law Partners' Property and Related Amendments Act* took effect in June 2004. It also provided for "registration of common-law relationships" under the province's *Vital Statistics Act*, with relevant amendments to statutes containing a definition of common-law partners. Under the legislation, opposite-sex or same-sex common-law couples might, irrespective of the duration of their cohabitation, register their relationships and immediately become entitled to the benefits and subject to the obligations for which non-registered couples were required to satisfy varying prior cohabitation requirements.

- In July 2001, the Legislative Assembly of Saskatchewan enacted the *Miscellaneous Statutes (Domestic Relations) Amendment Act, 2001* and the *Miscellaneous Statutes (Domestic Relations) Amendment Act, 2001 (No. 2)*. The bills amended 24 provincial laws, expanding the definition of "spouse" either to include same-sex partners in programs thus far restricted to married and unmarried opposite-sex couples, or to extend to same-sex and unmarried opposite-sex partners benefits and obligations that had been available only to married couples. Areas covered by the bills included pension and insurance schemes, family maintenance, matrimonial and other categories of property, dependant relief, intestate succession, and same-sex step-parent adoption (in Saskatchewan, same-sex couples were already entitled to make joint adoption applications).

- In Alberta, the *Intestate Succession Amendment Act, 2002* was enacted in May 2002 in response to a 2001 judicial decision finding the definition of spouse in the succession statute then in effect in violation of the Charter (*Johnson* v. *Sand*). The legislation introduced the concept of "adult interdependent partner," meaning "a person […] who lived with the intestate in a conjugal relationship outside marriage" for a prescribed period immediately preceding the death. It did not expand the spousal definition. Bill 30-2, the *Adult Interdependent Relationships Act*, adopted in November 2002, amended several family-related provincial statutes to establish the rights and obligations of persons in a variety of non-married but not necessarily conjugal relationships involving interdependency. Under the legislation, the term "spouse" referred exclusively to married partners. while a person is an "adult interdependent partner" of another if the two have lived in a relationship of interdependence for prescribed periods, or have entered into an adult interdependent partner agreement. The legislation defined "relationship of interdependence" as one outside marriage in which two persons of the same or of the opposite sex, including non-minor relatives, shared their lives, were emotionally committed and functioned as an economic and domestic unit. Bill 30-2 prompted controversy, among other reasons, because it was perceived as potentially creating involuntary interdependency.

- In June 2002, following several months of consultation, Quebec's Assemblée nationale unanimously adopted the *Loi instituant l'union civile et établissant de nouvelles règles de filiation* (Bill 84). The legislation's amendments to the *Code civil* entrenched the conjugal status of same-sex and unmarried opposite-sex couples, and created a new optional institution for them. The Code now authorized unrelated adult partners to enter into a formal "civil union" contract ["union civile"], governed by the same rules as apply to solemnization of marriage, entailing the rights and obligations of marriage and subject to formal dissolution rules. Bill 84 also amended the *Loi d'interprétation* to ensure that under Quebec law, "spouse" means "a married or civil union spouse" and "includes a *de facto* spouse unless the context indicates otherwise." That is, same-sex or unmarried heterosexual partners might remain *de facto* spouses ["conjoints de fait"] under the less structured regime put in place in 1999 by Bill 32, described above, as modified by Bill 84. Other noteworthy modifications to the *Code civil* clarified the joint parental rights of same-sex spouses in civil and *de facto* unions and deleted the stipulation that marriage must be between a man and woman. The provision was believed to be without legal force under the Constitution; its deletion did not have the effect of authorizing same-sex marriage. Finally, Bill 84 amended over 50 additional provincial statutes to incorporate the civil union regime and make related consequential changes.

- In June 2002, the Northwest Territories Legislative Assembly enacted *An Act to Amend the Adoption Act and the Family Law Act*. The legislation extended the definition of "spouse" in the affected statutes to include same-sex partners, thus enabling joint and step-parent same-sex adoption, and entitling same-sex spouses to support, division of property and orders respecting the family home.

- In December 2002, the Legislative Assembly of Prince Edward Island amended the *Family Law Act* to extend support obligations to gender-neutral common-law partners.

b. Law Reform Activities

In December 2001, following a lengthy consultation process, the Law Commission of Canada released an exhaustive report on the subject of close personal relationships entitled *Beyond Conjugality: Recognizing and Supporting Close Personal Adult Relationships*. The report concluded, among other things, that a modified approach to government regulation is necessary in order to reflect the full range of close adult relationships in Canada. While marriage has served as the primary vehicle of public commitment, it is no longer an adequate model in light of the variety of such relationships. Under a proposed new methodology for addressing the regulation issue, the state would retain a role in defining the legal framework for the voluntary undertaking of mutual rights and obligations, and should widen the range of relationships it supports by creating a registration scheme open to conjugal and non-conjugal couples and legalizing same-sex marriage.

c. Other Developments

In December 2002, the first Alberta Human Rights Panel decision involving sexual orientation found that the denial of family coverage to same-sex couples and their children owing to the opposite-sex definition of "common law spouse" in the relevant regulations violated the provincial human rights legislation (*Anderson et al.* v. *Alberta Health and Wellness*).

In June 2003, in compliance with a May Order of the Canadian Human Rights Tribunal on consent of the parties, the Treasury Board instructed all government departments to grant employees in same-sex relationships up to five days' leave, the equivalent of marriage leave, for purposes of participation in their public same-sex commitment ceremony (*Boutilier* v. *Canada (Natural Resources)*).

In December 2003, the Ontario Superior Court of Justice allowed a national class-action challenge, not including Quebec, to the 1 January 1998 cut-off date for retroactive same-sex survivor benefits under Bill C-23 amendments to the *Canada Pension Plan*. The Court found that denial of CPP benefits to otherwise eligible same-sex partners of deceased contributors between April 1985, when section 15 of the Charter came into force, and 1998, represented an unjustified violation of Charter equality rights. In November 2004, the Ontario Court of Appeal upheld the trial court's finding of invalidity. (*Hislop et al.* v. *Attorney General of Canada*). **In June 2005, the Supreme Court of Canada granted leave to appeal this ruling; pending a final determination, the federal government has agreed to pay some retroactive survivor benefits (*Hislop et al.* v. *Attorney General of Canada*).**

In August 2004, the New Brunswick government acceded to a human rights ruling holding that the legislative prohibition against same-sex step-parent adoption violated the province's *Human Rights Act.*

4. Same-Sex Marriage Issues

Under the *Constitution Act, 1867*, capacity to marry falls under federal jurisdiction, while the solemnization of marriage is a provincial responsibility. Although no federal legislation explicitly prohibits the practice, marriage between two individuals of the same sex has traditionally not been permitted under Canadian common law. On that basis, a majority of the Ontario Divisional Court, in March 1993, dismissed a Charter challenge by two men who had been denied a marriage licence by the province (*Layland and Beaulne* v. *Ontario*).

In the wake of the 1999 *M.* v. *H.* ruling and enactment of federal Bill C-23 in 2000, advocates for extending the marriage option to same-sex couples undertook renewed equality rights constitutional challenges in most jurisdictions. As the following overview illustrates, in each affected jurisdiction they resulted in the invalidation of the traditional opposite sex requirement for a legal marriage, its replacement in most instances with a gender-neutral redefinition, and effective legalization of same-sex marriage. Appellate decisions in Ontario and British Columbia prompted the federal government to refer the same-sex marriage question to the Supreme Court of Canada.

a. Lower Court Rulings

- In October 2001, the British Columbia Supreme Court dismissed the challenge brought against the federal and provincial governments by several gay and lesbian couples and the national organization EGALE. The judge reasoned, in part, that changes to the common law should be made in "incremental steps"; that Parliament was without authority to enact legislation that would redefine marriage – which had a distinct meaning at Confederation – to include same-sex couples; that the constitutional meaning of "marriage" was not open to Charter scrutiny, since one constitutional provision may not amend another; and that even if section 15 did apply, any potential violation of the petitioners' equality rights was justified under section 1 of the Charter owing, in part, to the importance of the "opposite-sex core" of marriage. The plaintiffs appealed this decision (*EGALE Canada Inc.* v. *Canada (Attorney General)*).

- In July 2002, three judges of the Ontario Superior Court of Justice (Divisional Court) dealing with a similar challenge found unanimously that the existing common-law rule defining marriage in opposite-sex terms represented an unjustified infringement of section 15 of the Charter. The ruling was unprecedented in Canada. It rejected the B.C. Court's conclusion that the 1867 Constitution prevented Parliament from legislating a modified legal meaning of "marriage." The view that granting equivalent entitlements to same-sex couples under a term other than "marriage" precluded a finding of discrimination was also dismissed, on the basis that this would amount to "the 'separate but equal' argument that has long been rejected as a justification" for discrimination.

  The Court suspended its invalidation of the common-law rule for 24 months to enable Parliament (and the provinces, where applicable) to remedy the law of marriage, failing which the common-law rule would be reformulated by replacing the words "one man and one woman" with "two persons." The federal government appealed this ruling (*Halpern* v. *Canada (Attorney General)*).

- The Quebec case involved a constitutional challenge to the *Code civil* section explicitly limiting marriage to opposite-sex couples and to any federal statute or common-law rule prohibiting same-sex marriage. In September 2002 the Cour supérieure du Québec found, in part, that section 5 of the 2001 *Federal Law-Civil Law Harmonization Act, No. 1 (FLCLHA)* – the operative provision applicable in Quebec – under which "[m]arriage requires the free and enlightened consent of a man and a woman to be the spouse of the other" effected an unjustified section 15 violation, and that providing equivalent benefits would not remedy the inequity of denying gay and lesbian couples access to marriage. Thus, the province's new civil union regime, although recognizing the legitimacy of same-sex conjugal relationships, was not equivalent to marriage.

  The Quebec Court extended its declaration of constitutional invalidity to the interpretive provision in federal Bill C-23 and to the *Code civil* provisions that also characterized marriage as a heterosexual institution, suspending this remedy for 24 months. This decision, too, was appealed by the federal government (*Hendricks* c. *Québec (Procureur général)*).

- In May 2003, a unanimous decision of the British Columbia Court of Appeal reversed the Supreme Court judgment that had upheld the common-law rule barring same-sex marriage. The ruling affirmed that Parliament has the constitutional authority to legislate a modified definition of marriage; adopted the view that the opposite-sex common-law definition effected substantive discrimination; noted that La Forest J.'s comments on traditional marriage in the 1995 Supreme Court of Canada *Egan* decision did not preclude Parliament from changing the existing definition of marriage: "[i]t is not disputed that heterosexual marriages represent the tradition; the question is whether that tradition must be re-evaluated and altered in light of the Charter"; and endorsed the view that procreation no longer represented a sufficiently pressing objective to justify restricting marriage to opposite-sex couples.

  The Court declared the common-law bar against same-sex marriage of no force and effect, reformulated the common-law definition to mean the "lawful union of two persons," and suspended both forms of relief until expiration of the suspension in the Ontario decision. In July 2003, in light of subsequent developments and with the federal Attorney General's consent, the Court lifted this suspension, making its gender-neutral definition of marriage effective in British Columbia immediately.

- On 10 June 2003, the Ontario Court of Appeal unanimously upheld the Divisional Court's decision finding the common-law definition of marriage an unjustified violation of section 15 of the Charter. The Court explicitly endorsed much of the reasoning and conclusions of prior decisions to that effect described above, asserting, in part:

  - "Marriage" in subsection 91(26) has the "constitutional flexibility to meet … changing realities" without a constitutional amendment;

  - It is not enough to say marriage "just is" heterosexual. It is the opposite-sex component that requires scrutiny, in order to determine whether its impact on same-sex couples is discriminatory;

  - When compared to married couples, same-sex couples are not afforded equal treatment in matters of benefits and obligations owing, for example, to specific cohabitation requirements or the unevenness of benefits under provincial legislation and exclusion from benefits of the fundamental institution of marriage;

  - Neither uniting the opposite sexes, encouraging the birth and raising of children, or companionship is a pressing objective of maintaining marriage as an exclusive heterosexual institution, nor does the opposite-sex requirement represent minimal impairment of the rights of same-sex couples:

    - Allowing same-sex couples to choose their partners and to celebrate their unions is not an adequate substitute for legal recognition. . . . Allowing same-sex couples to marry does not result in a corresponding deprivation to opposite-sex couples.

    - Nor is this a case of balancing the rights of same-sex couples against the rights of religious groups who oppose same-sex marriage. Freedom of religion … ensures that religious groups have the option of refusing to solemnize same-sex marriages. The equality guarantee, however, ensures that the beliefs and practices of various religious groups are not imposed on persons who do not share those views.

The Court modified the Divisional Court's remedy, making invalidation of the existing common-law definition of marriage and reformulation to refer to the "voluntary union for life of two persons" effective in Ontario immediately.

- In March 2004, the Quebec Court of Appeal ruled unanimously that a religious organization that had intervened before the Cour supérieure to argue against same-sex marriage lacked standing to appeal that Court's decision. The Court allowed an application to reject the appeal and, in doing so, declined to exercise its discretion to render judgment on its merits. With the acquiescence of the federal Attorney General, the Court lifted the suspension of remedy imposed by the lower court, thus enabling same-sex couples to marry legally in the province with immediate effect (*Ligue catholique pour les droits de l'homme* c. *Hendricks*).

- On 14 July 2004, the Yukon Supreme Court found that the common-law definition of marriage is unconstitutional and modified it to a gender-neutral one. The judge rejected the federal government's request to adjourn the case pending the Supreme Court reference, reviewed below, on the basis that delay would perpetuate a "legally unacceptable result" (*Dunbar and Edge* v. *Yukon (Government of) and Canada (A.-G.)*).

- On 16 September 2004, the Manitoba Court of Queen's Bench declared the opposite-sex definition of marriage unconstitutional and reformulated it as a voluntary union of two persons. The federal government did not oppose the judge's Order, which was consented to by the provincial Attorney General (*Vogel et al.* v. *Attorney General of Canada et al.*).

- On 24 September 2004, the Nova Scotia Supreme Court followed suit, ordering that the common-law definition of marriage in the province be altered to "the lawful union of two persons" and further finding that same-sex marriages performed in Ontario are valid in Nova Scotia. The federal government did not intervene in the application (*Boutilier* v. *Nova Scotia (Attorney General)*).

- On 5 November 2004, the Saskatchewan Court of Queen's Bench also allowed a Charter application seeking the reformulation of the common-law definition of marriage and issued an order authorizing same-sex marriage in the province. Neither the provincial nor the federal Attorney General opposed the application (*W. (N.)* v. *Canada (Attorney General)*).

- On 21 December 2004, the Supreme Court of Newfoundland and Labrador ordered that the common-law definition of civil marriage in the province be stated in gender-neutral terms (*Pottle et al.* v. *Attorney General of Canada et al.*).

- **On 23 June 2005, New Brunswick became the eighth province and ninth jurisdiction to legalize same-sex marriage when a Court of Queen's Bench Charter ruling redefined civil marriage in the province in gender-neutral terms (*Harrison* v. *Canada (Attorney General)*).**

b. Supreme Court of Canada Reference and Bill C-38

On 17 June 2003, then Prime Minister Chrétien announced that the federal government would not appeal Ontario and B.C. appellate decisions and would discontinue its appeal in the Quebec case.

On 17 July, the government referred draft legislation recognizing same-sex marriage for civil purposes and acknowledging religious organizations' authority to continue to solemnize marriage in accordance with the precepts of their faith to the Supreme Court of Canada in a constitutional reference. The reference asked that the Court consider whether: the draft bill fell within Parliament's exclusive legislative authority; the bill's extension of the capacity to marry to persons of the same sex was consistent with the Charter; the Charter's freedom of religion guarantee shields religious officials from being forced to perform same-sex marriages contrary to their religious beliefs. A fourth question added in January 2004 asked whether the existing opposite-sex requirement for civil marriage was consistent with the Canadian Charter.

In the midst of judicial developments across the country, the reference was heard on 6 and 7 October 2004. The Court issued its ruling on 9 December, finding that:

- The provision in the draft bill authorizing same-sex marriage was within Parliament's exclusive legislative authority over legal capacity for civil marriage under subsection 91(26) of the *Constitution Act, 1867*.

- The provision was consistent with the *Canadian Charter of Rights and Freedoms* and, in the circumstances giving rise to the draft bill, flowed from it.

- The declaratory clause relating to those who perform marriages, and therefore within the provincial constitutional authority over solemnization of marriage, was *ultra vires* Parliament;

- The religious freedom guarantee in subsection 2(*a*) of the Charter is sufficiently broad to protect religious officials from state compulsion to perform same-sex marriages against their religious beliefs.

The Court declined to answer the fourth question. It found, in part, that the federal government intended to proceed with legislation irrespective of the Court's opinion, and that married same-sex couples relying on the finality of judicial decisions in jurisdictions authorizing such marriages had acquired rights that deserved protection.

On 1 February 2005, Bill C-38, the Civil Marriage Act legalizing same-sex marriage across the country, was introduced in the House of Commons; the legislation was adopted on 19 July. It is discussed under the heading "Parliamentary Action."

c. Same-Sex Marriage and Provincial Jurisdiction

For the jurisdictions in which same-sex marriage had not been legalized by the courts – Alberta, Prince Edward Island, Nunavut and the Northwest Territories – passage of Bill C-38 necessitates minor adaptations of provincial marriage application and registration forms to provide for same-sex spouses.

Same-sex marriage advocates in Ontario were critical of the provincial government's failure to immediately amend the province's legislation to reflect the appellate court's ruling in the *Halpern* case. On 24 February 2005, this matter was addressed when the Ontario Legislature adopted Bill 171, An Act to amend various statutes in respect of spousal relationships. The bill removes the term "same-sex partner" and language recognizing exclusively opposite-sex spousal status from Ontario statutes. It is anticipated that, with the passage of Bill C-38, other provinces and territories – including jurisdictions in which same-sex marriage had not been legalized by the courts – will also undertake review of existing statutes providing for exclusively heterosexual spousal or marital status and proceed with equivalent measures.

Notwithstanding the Charter guarantee of freedom of conscience and religion, the advent of same-sex civil marriage prompted critics to raise concerns about the need for provincial and territorial governments to ensure explicit legislative protection for religious officials for whom same-sex religious marriage conflicts with their religious beliefs. In some provinces, public officials appointed to perform civil marriages on a for-fee basis have resigned, citing religious grounds, rather than comply with government directives that they provide their services to same-sex couples. Some have argued that the provinces should also protect and have a duty to accommodate the religious beliefs of these officials. Provincial human rights complaints by one or more marriage commissioners, raising religious discrimination, and at least one same-sex couple against a marriage commissioner, raising discrimination based on sexual orientation, are pending.

To date, few jurisdictions appear to have legislated in these matters. Québec's *Code civil* has, since 1991, included a section under which "[n]o minister of

religion may be compelled to solemnize a marriage to which there is any impediment according to his religion and to the discipline of the religious society to which he belongs." In the current context, Bill 171 amendments to the Ontario *Human Rights Code* and *Marriage Act* do provide that registered religious officials for whom same-sex marriage is contrary to their religious beliefs are not required to solemnize such marriages. Under New Brunswick Bill 76, introduced on 28 June 2005, "a person who is authorized to solemnize marriage under this Act may refuse to solemnize a marriage that is not in accordance with that person's religious beliefs." The right of refusal would extend to public and religious officials.

The Alberta government has announced that legislation to be introduced at the legislature's next sitting will "shield religious officials and marriage commissioners from potential human rights complaints if they choose to abstain from conducting same-sex marriage ceremonies because of religious beliefs." The Attorney General has indicated the Charter's notwithstanding clause could be used, if necessary.

5. Conclusion

Judicial and legislative reforms over the past decade, particularly since the *M.* v. *H.* decision in 1999, have effected a significant shift in Canadian society with respect to recognition of the legal status and claims of same-sex conjugal couples. The watershed nature of this shift is illustrated, most notably, by federal legislation sanctioning same-sex marriage.

Opponents of these reforms continue to argue that extending same-sex rights, in general, and same-sex marriage, in particular, undermine the traditional family and family values. At the same time, some gay and lesbian couples (like some heterosexual couples) do not want either the legal obligations or the benefits that flow from spousal status or marriage. As the recent report of the Law Commission of Canada and other indicators suggest, the question of whether the matter of entitlements based on the marital or conjugal nature of a partnership should be re-examined remains open.

C. Other Legal Issues

A variety of other legal issues affect lesbians and gay men; some flow from those discussed above. They include military practices, criminal law issues, violence, customs, immigration, issues related to HIV/AIDS and medical treatment, and discriminatory application of laws. A number of these issues have come before the courts.

In 1992, following an out-of-court settlement between the federal government and a former lieutenant who had resigned after admitting to a lesbian relationship, the Canadian Armed Forces announced that enlistment and promotion in the military would no longer be restricted on the basis of sexual orientation. The Federal Court judgment agreed to by the parties described the military's previous policy governing the service of homosexuals as contrary to the *Canadian Charter of Rights and Freedoms* (*Douglas* v. *The Queen*).

Section 159 of the *Criminal Code* makes anal intercourse a criminal offence, except when it takes place between husband and wife or between consenting adults over 18. The age of consent to other forms of sexual activity is 14. Since 1995, a number of Canadian courts have found this provision discriminatory under the Charter, either on the basis of sexual orientation and age (*Halm* v. *Canada*), on the basis of age alone (*R.* v. *M.(C.)*), or on the basis of sexual orientation, age and marital status (*R.* c. *Roy*). To date, section 159 has not been amended.

Despite broad reforms in many jurisdictions, the policies of some public bodies continued to be specifically directed toward lesbians and gay men. In 1996, a local school board in British Columbia banned certain teaching materials that featured same-sex parents. In 2002, the Supreme Court of Canada overturned a British Columbia Court of Appeal ruling that the resolution had been within the Board's jurisdiction. It found the Board had been unreasonable in light of the statutory educational scheme and remanded the issue of whether the books should be approved using appropriate criteria to the Board (*Chamberlain* v. *Surrey School Board No. 36*). In June 2003, the Board again rejected the books for various reasons and announced it would seek out other resources that depict same-sex family models.

In March 2002, an Ontario Catholic School Board endorsed a member high school's denial of a gay student's request to attend his graduation dance with his boyfriend, on the basis that allowing behaviour representative of a homosexual lifestyle would be inconsistent with church teachings and Catholic school values. In May, a judge of the Superior Court of Justice granted an interlocutory injunction, pending trial, to enable the plaintiff's attendance at the event with his male partner. **The case was discontinued in June 2005 without having gone to trial** (*Hall (Litigation Guardian of)* v. *Powers*).

Violence directed at lesbians and gay men remains an issue of concern. In 1993, Quebec Human Rights Commission hearings on the matter acquired prominence as a result of the high incidence of murder of homosexual men in Montréal. "Gay-bashing" has also been identified as a priority issue in other Canadian cities, including Vancouver and Toronto.

Vancouver police described the November 2001 murder of a gay man as a hate crime and have expressed concern that gays and lesbians are the group most likely to be assaulted in the city. In 1995, hate-motivated crime directed against gays was recognized by Parliament as an important issue in sentencing. In April 2004, Parliament also expanded grounds protected by *Criminal Code* hate propaganda provisions to include sexual orientation. Both matters are discussed under the heading "Parliamentary Action."

Books and periodicals imported to gay and lesbian bookstores in Canada and subjected to intense scrutiny by Customs officials have often been seized as obscene within the *Criminal Code* definition. In 1994, provisions of the *Customs Act*, the *Customs Tariff* and its Schedule VII came under challenge. In December 2000, the Supreme Court of Canada upheld lower court findings that the Act and Tariff were constitutional. However, Customs officials' adverse treatment in applying the legislation, targeting appellants at the administrative level, was prejudicial and demeaning to their dignity. The resulting section 15 violation was not capable of section 1 justification as it was not "prescribed by law" (*Little Sisters Book and Art Emporium* v. *Canada (Minister of Justice)*).

In 1993, the Supreme Court of Canada ruled that membership in a "particular social group" as a basis of persecution under the Convention refugee definition includes groups defined by an "innate, unchangeable characteristic," such as sexual orientation (*Canada (Attorney General)* v. *Ward*). Numerous cases in the ensuing period have considered whether the circumstances of individual homosexuals warrant the granting of refugee status (*Muzychka* v. *Canada (Minister of Citizenship and Immigration)*; *Trembliuk* v. *Canada (Minister of Citizenship and Immigration)*; *Aire* v. *Canada (Minister of Citizenship and Immigration)*).

Until recent amendments, federal immigration regulations restricted spousal family class membership for immigration purposes to married couples, although this restriction did not act as a total bar to permanent residence applications by same-sex or unmarried opposite-sex partners under administrative guidelines. In January 1999, the government's proposed program for modernizing immigration policy and law acknowledged that "[t]he recognition of common-law and same-sex relationships through regulatory changes would eliminate the recourse to discretionary administrative guidelines." Bill C-11, which received Royal Assent in November 2001, initiated this process of change, and is reviewed below under the heading "Parliamentary Action."

PARLIAMENTARY ACTION

A. Government Initiatives

Parliament decriminalized homosexual activity between consenting adults in 1969, while the *Immigration Act, 1976* removed homosexuals from classes of persons prohibited from entering Canada. Until 1992, little further legislative activity at the federal level addressed legal issues related to homosexuality.

In 1992, then Minister of Justice Kim Campbell introduced Bill C-108, which would have added sexual orientation to the *Canadian Human Rights Act* as a prohibited ground of discrimination, while defining marital status in exclusively heterosexual terms. The bill died on the *Order Paper* in September 1993.

In 1995, Parliament enacted Bill C-41, *An Act to amend the Criminal Code* (sentencing). Under the bill, evidence that a crime was motivated by bias, prejudice or hate based on a number of listed personal characteristics constitutes an aggravating circumstance for which a sentence should be increased. The inclusion of sexual orientation among those personal characteristics sparked considerable opposition. Bill C-41 came into force in September 1996.

In April 1996, the then Justice Minister introduced Bill C-33, An Act to amend the Canadian Human Rights Act, in the House of Commons. It proposed to add "sexual orientation" to the prohibited grounds of discrimination in the *Canadian Human Rights Act*. The introduction of Bill C-33 intensified long-standing controversy within the public as well as among Members of Parliament over the implications of this initiative. Following intensive hearings before the then House Standing Committee on Human Rights and the Status of Persons with Disabilities, Bill C-33 was adopted in the House in a free vote by a tally of 153-76, was passed by the Senate unamended and came into force in June 1996.

In April 1999, the then President of the Treasury Board introduced Bill C-78, the Public Sector Pension Investment Board Act, in the House of Commons. The bill's major amendments to the superannuation statutes governing the pension regimes of civilian and uniformed government employees and Members of Parliament included replacing provisions entitling unmarried opposite-sex spouses to "surviving spouse" benefits with provisions recognizing gender-neutral "survivor" entitlement. Bill C-78 was the first federal legislation to provide unambiguously for same-sex benefits. Members of Parliament from the official opposition, as well as several other opposition and government Members, opposed this measure, proposing amendments to restore opposite-sex spousal status as the basis of entitlement or to

expand the class of potential beneficiaries without reference to spousal status. Bill C-78 was adopted by the House of Commons and the Senate in May and September 1999 respectively. The Standing Senate Committee on Banking, Trade and Commerce recommended that "the federal government give serious consideration to the extension of benefits in situations where economic dependence exists."

In June 1999, shortly after the Supreme Court of Canada's decision in *M.* v. *H.*, by a vote of 216-55, the House of Commons adopted an opposition motion that, in the opinion of the House, "it is necessary, in light of public debate around recent court decisions, to state that marriage is and should remain the union of one man and one woman to the exclusion of all others, and that Parliament will take all necessary steps to preserve this definition of marriage in Canada."

In February 2000, Bill C-23, an Act to modernize the Statutes of Canada in relation to benefits and obligations, was given first reading. The bill sought to amend 68 statutes to effect equal application of federal laws to unmarried heterosexual and same-sex couples, and to extend some benefits and obligations previously limited to married couples to both opposite-sex and same-sex common-law couples. The bill proposed to add the gender-neutral designation(s) "common-law partner" and/or "survivor" to statutes that previously awarded benefits exclusively to opposite-sex "spouses." Under the bill, a "common-law partner" is a person who has cohabited with an individual in a conjugal relationship for at least one year, a "survivor" includes a person's "spouse" and common-law partner, and the designation "spouse" is restricted to married persons.

Advocates for gay and lesbian equality rights welcomed Bill C-23 as a major milestone. The bill also prompted considerable opposition. It was argued, for example, that:

- the undefined phrase "conjugal relationship" was too ambiguous a criterion of entitlement to survivor pension benefits;
- verification of eligibility would entail undue government interference in private relationships; and
- mutual dependency, rather than conjugality, should determine entitlement to benefits.

Although the Minister of Justice emphasized that Bill C-23 was not about and did not affect the institution of marriage, critics argued that the bill would have a negative impact on marriage, and urged the government to resolve any ambiguity by including a definition of marriage in the bill. In March 2000, the government proposed an interpretive amendment to

Bill C-23, under which, "[f]or greater certainty, the amendments made by this Act do not affect the meaning of the word 'marriage,' that is, the lawful union of one man and one woman to the exclusion of all others." Many argued that this proposal was antithetical to the bill's equality objectives and had the effect of continuing to treat same-sex relationships as inherently inferior. Bill C-23 was adopted by the House of Commons as amended in April 2000 by a vote of 176-72, with 17 government members voting against, and by the Senate in June 2000.

In June and October 2001, respectively, the House of Commons and the Senate adopted *An Act respecting immigration to Canada and the granting of refugee protection to persons who are displaced, persecuted, or in danger* (Bill C-11), effective 28 June 2002. Its comprehensive reform to the immigration statute included a measure to recognize a "common-law partner," to be defined in the regulations, among members of the family class eligible for sponsorship. The new *Immigration and Refugee Protection Regulations* set out the gender-neutral definition first enacted in Bill C-23, with its one year cohabitation requirement. In recognition of practical difficulties associated with that criterion in the immigration context, a second gender-neutral category for "conjugal partner[s]" was also created for purposes of family class regulations. Under the regulations, "conjugal partner" "means, in relation to a sponsor, a foreign national residing outside Canada who is in a conjugal relationship with the sponsor and has been in that relationship for a period of at least one year."

In November 2002, the then Minister of Justice asked the House of Commons Standing Committee on Justice and Human Rights to study the question of whether, in the context of Canada's constitutional framework and the traditional definition of marriage, Parliament should take steps to recognize same-sex unions, and if so, how. Following approximately three months of hearings on this issue, the Committee was in the process of preparing its report to the House when, on 10 June 2003, the Ontario Court of Appeal released its ruling giving immediate effect to same-sex marriage in Ontario. The Committee subsequently adopted a motion to support "the recent Ontario Court of Appeal decision which redefines the common-law definition of 'marriage' as 'the voluntary union for life of two persons, to the exclusion of all others', while fully respecting freedom of religion, as guaranteed under the Charter of Rights."

In September 2003, an Opposition motion identical to that of June 1999 affirming the heterosexual definition of marriage and the need for Parliament to preserve it was defeated by a 137-132 margin.

In April 2004, Bill C-250, a private Member's bill introduced by MP Svend Robinson, amended *Criminal Code* hate propaganda provisions, expanding the definition of "identifiable group" to include any section of the public distinguished by sexual orientation. Like Bill C-41 in 1995, Bill C-250 proved highly controversial during parliamentary committee hearings. In response to concerns of some religious organizations that the measure would criminalize religious expression, the legislation was amended to add good faith expression of opinion based on belief in a religious text as a defence against a charge of willful promotion of hatred.

On 1 February 2005, Bill C-38, An Act respecting certain aspects of legal capacity for marriage for civil purposes, or the Civil Marriage Act, was introduced in the House of Commons. The legislation codifies a definition of marriage for the first time in Canada, expanding on the traditional common-law understanding of marriage as an exclusively heterosexual institution to include "the lawful union of two persons to the exclusion of all others." It also recognizes that religious officials may refuse to perform marriages that conflict with their religious beliefs.

Throughout the legislative process in both the House of Commons and the Senate from 14 February through 19 July 2005, MPs, Senators and witnesses representing a broad range of opponents and supporters of Bill C-38 expressed deeply divided views on the merits and implications of the legislation. To some degree, these opinions reflected those raised in earlier debates on legislation extending the scope of benefits to same-sex conjugal couples. Perceived threats to the freedom of religion and expression of those opposed to same-sex marriage were of particular concern for Bill C-38 critics. Some were of the view that, notwithstanding provincial jurisdiction over solemnization of marriage, the bill could and should, at a minimum, enhance their protection in areas of federal jurisdiction. In response, the House and Senate adopted:

- **A government amendment stipulating that no benefit will be denied or sanction imposed under any federal law solely because a person or organization exercises freedom of conscience and religion guaranteed by the Charter in respect of same-sex marriage, or expresses their belief in respect of heterosexual marriage based on that freedom;**

- **An opposition amendment to the *Income Tax Act* providing that registered charities with religious purposes will not have their status revoked solely because they or their members exercise freedom of conscience and religion guaranteed by the Charter in respect of same-sex marriage.**

By way of "necessary implication" consequential amendments, Bill C-38 replaces the opposite-sex definition of "spouse" in the *Divorce Act* with a gender-neutral reference to "two persons" who are married, as well as opposite-sex language in section 5 of the *Federal Law and Civil Law of the Province of Quebec Act* concerning consent to marry. It also repeals the interpretive provision in the *Modernization of Benefits and Obligations Act* referring to the former opposite-sex common-law definition of marriage.

Bill C-38 was adopted by the House of Commons and the Senate on 28 June and 19 July 2005 respectively and came into effect with Royal Assent on 20 July as Chapter 33 of the Statutes of Canada for 2005. With its enactment, Canada became the fourth country to legislate same-sex marriage, the others being the Netherlands (2001), Belgium (2003) and Spain (2005).

B. Private Members' Bills

1. 1980-1996

Between 1980 and 1992, none of the numerous private Members' bills introduced in the House of Commons to prohibit discrimination based on sexual orientation proceeded beyond first reading. Bill S-15, adopted by the Senate in 1993, would have added "sexual orientation" to the prohibited grounds of discrimination in the *Canadian Human Rights Act*. This initiative, reintroduced as Bill S-2 and adopted by the Senate in April 1996, and Bill C-265, its identical counterpart in the House of Commons, were superseded by government Bill C-33, which became law in June 1996.

In September 1995, MP Réal Ménard's private Member's motion that the House should move to recognize same-sex spouses was defeated by a large margin. His May 1996 Bill C-282, An Act providing for equal treatment for persons cohabiting in a relationship similar to a conjugal relationship, would have required interpreting the term "spouse" in federal legislation so as to provide same-sex couples with the rights available to unmarried heterosexual couples. The bill did not proceed beyond first reading.

2. 36th–38th Parliaments

Many of the numerous private Members' bills tabled over the period October 1997 through November 2004 were introduced on more than one occasion. Unless otherwise indicated, none received second reading. All have died on the *Order Paper*.

- The terms of MP Réal Ménard's Bills C-309 and C-481, tabled in February 1998 and March 1999 respectively, were identical to those of Bill C-282 as described above;

- Introduced in October 1997 and given second reading in October 1998, MP Tom Wappel's Bill C-225, An Act to amend the Marriage (Prohibited Degrees) Act and the Interpretation Act, would have stipulated that a marriage "is void unless it is a legal union of one man and one woman as husband and wife," and defined "marriage" accordingly in the interpretation statute. In March 2000, MP Steve Mahoney introduced identical legislation as Bill C-463;

- In March 1998, March and October 2000 and February 2001, MP Svend Robinson introduced Bills C-385, C-463, C-501 and C-264, An Act to amend the marriage (Prohibited Degrees) Act (marriage between persons of the same sex). Only the last of these was given second reading in October 2001. The bill sought to change the title of the marriage statute to the Marriage Capacity Act, and add a provision to the effect that "marriage between two persons is not invalid by reason only that they are of the same sex." Bill C-392, introduced in February 2003, would have amended the marriage statute in identical fashion, and would also have amended the interpretive provision in the *Modernization of Benefits and Obligations Act* describing marriage in opposite-sex terms to include couples of the same sex;
- MP Svend Robinson tabled Bill C-386, An Act to amend the Income Tax Act and the Canada Pension Plan (definition of spouse), in March 1998. The bill would have included same-sex couples within those statutes' definition of spouse;

- In March 2000, February 2001 and September 2003, MP Jim Pankiw tabled Bills C-460, C-266 and C-450, An Act to amend the Marriage (Prohibited Degrees) Act in order to protect the legal definition of marriage by invoking section 33 of the *Canadian Charter of Rights and Freedoms*. Bill C-450 received second reading in April 2004;

- In January 2001, Senator Anne Cools introduced Bill S-9, An Act to remove certain doubts regarding the meaning of marriage. The bill would have amended the *Marriage (Prohibited Degrees) Act* and the *Interpretation Act* to codify the common-law definition of marriage as a heterosexual institution. Bill S-9 was debated at second reading in the Senate from April 2001 through June 2002. The bill was reintroduced as Bill S-15 in February 2003, and given second reading in March 2003. In February 2004, Senator Cools introduced Bill S-10, An Act to amend the Marriage (Prohibited Degrees) Act and the Interpretation Act in order to affirm the meaning of marriage. It, too, would have defined marriage as an exclusively heterosexual institution. Bill S-10 received second reading in April 2004. An identical bill was introduced by Senator Cools as Bill S-4 in October 2004.

- In September 2003, MP Grant Hill introduced Bill C-447, An Act to protect the institution of marriage, which was debated at second reading in October 2003. The bill was intended to codify the traditional common-law definition of marriage. MP Dave Chatters introduced an identical bill in October 2004 as Bill C-213.

- In November 2004, MP Rob Moore introduced Bill C-268, An Act to confirm the definition of marriage and to preserve ceremonial rights. It, too, sought to legislate the common-law definition of marriage "[d]espite any other Act of Parliament."

- In November 2004, MP Bill Siksay introduced Bill C-300, An Act to amend the Divorce Act, the Marriage (Prohibited Degrees) Act and the Modernization of Benefits and Obligations Act. This bill was intended to modify provisions in the listed statutes to incorporate same-sex marriage.

CHRONOLOGY

1977 - Quebec became the first jurisdiction to prohibit discrimination on the basis of sexual orientation.

1979 - The Canadian Human Rights Commission recommended that the *Canadian Human Rights Act* be amended to include sexual orientation. This recommendation was made in successive annual reports up to and including 1995.

1982 - The *Canadian Charter of Rights and Freedoms* became part of the Constitution of Canada.

1985 - Section 15 of the Charter (the equality rights provision) came into force.

- *Equality for All*, the report of the House of Commons Sub-committee on Equality Rights, called for prohibition of discrimination on the basis of sexual orientation in the *Canadian Human Rights Act*.

1992 - The Ontario Court of Appeal decided that a prohibition against discrimination on the basis of sexual orientation should be "read in" to the *Canadian Human Rights Act* (*Haig* v. *Canada*).

1994 - Bill 167, the NDP government bill aimed at enlarging the definition of spousal relationships in Ontario statutes to include same-sex couples, was defeated.

1995 - The Supreme Court of Canada issued its first section 15 Charter decision dealing with sexual orientation and same-sex benefits issues. In *Egan* v. *Canada*, all nine members of the Court found sexual orientation to be an analogous ground for section 15 purposes, and a majority ruled that the opposite-sex definition of spouse in the *Old Age Security Act* violated section 15. However, a majority also found the violation justified under section 1 of the Charter.

1996 - Bill C-41 came into force. The legislation amended the *Criminal Code* to ensure stricter penalties for crimes motivated by bias, prejudice or hate based on a number of personal characteristics, including sexual orientation.

- Bill C-33, An Act to amend the Canadian Human Rights Act, which added "sexual orientation" to the *Canadian Human Rights Act*'s prohibited grounds of discrimination, was enacted.

1998 - The British Columbia *Family Relations Amendment Act* became law. The legislation was the first in Canada to extend the benefits and obligations relating to child support, custody and access to same-sex couples. British Columbia also became the first Canadian jurisdiction to legislate pension benefits for the same-sex partners of the province's public-sector employees.

- The Supreme Court of Canada's unanimous decision in *Vriend* v. *Alberta* found that the deliberate omission of sexual orientation from Alberta's *Individual Rights Protection Act* violated section 15 of the Charter and was not justified under section 1. As a remedy, the Court ordered that sexual orientation be "read in" to the legislation.

1999 - The Supreme Court of Canada, in *M.* v. *H.*, ruled 8-1 that the opposite-sex definition of "spouse" in Part III of Ontario's *Family Law Act* relating to spousal support infringed section 15 of the Charter and was not justified under section 1. The Court ordered that the provision be severed from the Act, but suspended the remedy for six months to enable Ontario legislators to correct the Charter violation.

- Parliament adopted Bill C-78, the first federal legislation to provide for same-sex benefits. This major pension reform legislation replaced existing provisions entitling unmarried opposite-sex spouses to "surviving spouse" benefits with provisions recognizing gender-neutral "survivor" entitlement.

- Quebec's Assemblée nationale unanimously adopted the *Loi modifiant diverses dispositions législatives concernant les conjoints de fait*, giving same-sex couples the same status, rights and obligations as unmarried heterosexual couples in numerous laws and regulations.

- The Ontario Legislative Assembly adopted the *Act to amend certain statutes because of the Supreme Court of Canada Decision in M. v. H.* The legislation entitled same-sex couples to the same statutory rights and responsibilities as applied to opposite-sex common-law spouses, introducing the term "same-sex partner" in dozens of affected statutes and preserving the existing opposite-sex definition of "spouse."

2000 - Parliament adopted the *Act to modernize the Statutes of Canada in relation to benefits and obligations*. The bill amended 68 federal statutes to effect their equal application to unmarried heterosexual and same-sex couples, by adding the gender-neutral designation(s) "common-law partner" and/or "survivor" to those statutes, and restricting the term "spouse" to married couples. An interpretive government amendment provided that the bill does not affect marriage, "that is, the lawful union of one man and one woman to the exclusion of all others."

- The Nova Scotia Legislative Assembly enacted the *Law Reform (2000) Act*. The legislation added a gender-neutral definition of "common-law partner" to a number of statutes, and established the first registered domestic partnership scheme in Canada for opposite-sex or same-sex cohabiting conjugal couples that satisfy prescribed criteria.

2001 - The Saskatchewan Legislative Assembly adopted legislation amending provincial laws covering a range of subjects either to expand the definition of "spouse" to include same-sex partners in programs thus far restricted to married and unmarried opposite-sex couples, or to extend to same-sex and unmarried opposite-sex partners benefits and obligations that had been available only to married couples.

- The British Columbia Supreme Court dismissed a challenge to the province's refusal to issue marriage licences to same-sex couples. The judge ruled that, although the legal restriction of marriage to heterosexual partners might infringe section 15 of the Charter, any violation was justified under section 1.

- The Newfoundland House of Assembly adopted the *Same Sex Amendment Act*, which enabled opposite-sex and same-sex "cohabiting partners" to acquire rights and obligations in a number of areas.

2002 - Quebec's Assemblée nationale unanimously adopted the *Loi instituant l'union civile et établissant de nouvelles règles de filiation.* The bill amended the *Code civil* to entrench the conjugal status of same-sex and unmarried opposite-sex couples and create a new optional institution for them, in which unrelated adult partners may enter into a formal "civil union" contract ["union civile"] that entails the rights and obligations of marriage.

- New *Immigration and Refugee Protection Regulations* authorized family class sponsorship for same-sex couples, defining two new eligible categories in gender-neutral terms.

- The Ontario Superior Court of Justice (Divisional Court) issued an unprecedented decision that the common-law rule defining marriage as the union of one man and one woman represented an unjustifiable infringement of section 15 of the Charter. The Court found that a "separate but equal" regime offering equivalency of benefits is not an equitable solution for same-sex couples deprived of equal access to the rights and benefits associated with marriage.

- The Manitoba Legislature adopted the *Charter Compliance Act*, which amended over 50 laws covering a broad range of subject-matters to expand the statutory rights and responsibilities of same-sex couples. It also enacted the *Common-Law Partners' Property and Related Amendments Act*, which provides for "registration of common-law relationships" under the province's *Vital Statistics Act*.

- The Cour supérieure of Quebec ruled that the characterization of marriage as a heterosexual institution in section 5 of the federal *Federal Law-Civil Law Harmonization Act, No. 1*, which applies only in Quebec, represented an unjustified violation of Charter equality rights, concluding that the province's new civil union regime was not equivalent to the institution of marriage.

2003 - The British Columbia Court of Appeal unanimously reversed the lower court judgment upholding the common-law rule barring same-sex marriage. It found that the rule effected substantive discrimination under section 15 of the Charter that is unjustified, in part, because procreation as an objective no longer justified restricting marriage to opposite-sex couples. Like the Ontario and Quebec rulings, the decision of invalidity was suspended to enable a legislative response.

- The Ontario Court of Appeal unanimously upheld the Divisional Court's 2002 decision finding the common-law definition of marriage an unjustified violation of section 15 of the Charter. The Court found the violation unwarranted, in part, because the opposite-sex requirement for marriage did not represent minimal impairment of the rights of same-sex couples. In its view, allowing same-sex marriage did not result in a corresponding deprivation to opposite-sex couples. The Court invalidated the common-law definition of marriage and reformulated it to refer to the "voluntary union for life of two persons" with immediate effect in Ontario.

- On 17 June, then Prime Minister Chrétien announced the federal government would not appeal the B.C. and Ontario Courts of Appeal decisions, but would take a phased approach to legalizing same-sex marriage across the country. On 17 July, the government referred draft legislation recognizing same-sex marriage for civil purposes and acknowledging religious organizations' authority to abide by the precepts of their faith in relation to marriage, to the Supreme Court of Canada for its consideration.

- The British Columbia Court of Appeal lifted the suspension of remedies it had initially imposed, immediately reformulating the common-law definition of marriage in British Columbia as "the lawful union of two persons to the exclusion of all others."

2004 - In March, the unanimous ruling of the Quebec Court of Appeal ruled unanimously that a religious organization that had argued against same-sex marriage before the Cour supérieure lacked standing to appeal that Court's 2002 Charter decision. The Court lifted the suspension of remedy imposed by the lower court, thus enabling same-sex couples to marry legally in the province with immediate effect.

- In April, Bill C-250 amended *Criminal Code* hate propaganda provisions, expanding the definition of "identifiable group" to include any section of the public distinguished by sexual orientation.

- From July to December, courts in Yukon, Manitoba, Nova Scotia, Saskatchewan, and Newfoundland and Labrador legalized same-sex marriage in their respective jurisdictions on constitutional equality rights grounds.

- In December, the Supreme Court of Canada issued its ruling on the same-sex reference, finding the draft provision authorizing same-sex marriage to be within Parliament's exclusive legislative authority and consistent with the Charter. The Court also found that the religious freedom guarantee in subsection 2(*a*) of the Charter is sufficiently broad to protect religious officials from state compulsion to perform same-sex marriages against their religious beliefs. It declined to answer the fourth question concerning whether the opposite-sex requirement for marriage is consistent with the Charter.

2005 - **On 1 February, Bill C-38, the Civil Marriage Act, received first reading in the House of Commons. The controversial legislation codifies a gender-neutral definition of marriage for the first time in Canada. Its gender-neutral definition of marriage as "the lawful union of two persons to the exclusion of all others," expanding on the former common-law understanding of civil marriage as a heterosexual institution. The bill also recognizes that religious officials may refuse to perform marriages that conflict with their religious beliefs, while providing that no benefit will be denied or sanction imposed under federal law solely owing to the exercise of freedom of conscience and religion guaranteed by the Charter in respect of same-sex marriage. Bill C-38 was passed by the House of Commons on 28 June, by the Senate on 19 July, and took effect on 20 July.**

- **In February, the Ontario Legislature adopted Bill 171, An Act to amend various statutes in respect of spousal relationships. Reflecting the *Halpern* same-sex marriage ruling of the Ontario Court of Appeal, the bill removes the term "same-sex partner" and language recognizing exclusively opposite-sex spousal status from Ontario statutes. Its amendments to the Ontario *Human Rights Code* and *Marriage Act* provide that registered religious officials for whom same-sex marriage is contrary to their religious beliefs are not required to solemnize such marriages.**

- **In June, a New Brunswick Court of Queen's Bench Charter ruling redefined civil marriage in the province in gender-neutral terms, making New Brunswick the eighth province and ninth jurisdiction to have legalized same-sex marriage prior to enactment of Bill C-38.**

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