

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. Most Canadian jurisdictions have legislated against discriminatory treatment based on sexual orientation, and the introduction of the *Canadian Charter of Rights and Freedoms* 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, now sanctioned by the courts, for extending the institution of marriage to same-sex couples on the basis of constitutional equality rights.**

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.

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

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 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 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. Currently, human rights Acts and Codes explicitly prohibit discrimination based on sexual orientation in all jurisdictions except the Northwest Territories, **where legislation has been adopted but has yet to be proclaimed in force, Nunavut, where legislation has been introduced, and Alberta.**

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*).

An increasing number 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. Town of Oliver*, 2000: Gay Pride proclamation/permit; *Moffatt v. Kinark Child and Family Services*, 1998: work environment; *L. (C.) v. Badyal*, 1998: pub services; *McAlee v. Canada (Human Rights Commission)*, 1999: promotion of hatred; *Trinity Western University v. British Columbia College of Teachers*, 2001: teacher training program; *Hellquist v. Owens*, 2001: exposure to hatred; ***Brockie v. Brillinger (No. 2)*, 2002: printing services; *Jubran v. North Vancouver School District (No. 44)*, 2002: harassment in school).**

Advocates for the prohibition of discrimination based on sexual orientation in human rights legislation point out that such inclusion does not entail endorsement of lesbian or gay lifestyles, 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" (*McAlee v. Canada (Human Rights Commission)*).

B. Same-Sex Spouses

The situation of gay and lesbian couples has highlighted distinct issues related to discrimination based on sexual orientation. Many such issues have arisen 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.

Many hold the view that the majority of Canadians now endorse extension of spousal rights to same-sex couples. Legislative initiatives recognizing cohabitation between same-sex couples as conjugal in nature have increased markedly in both number and scope, particularly since the pivotal 1999 Supreme Court of Canada decision in *M. v. H.* Previous court rulings 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.

1. Selected Case Law

Numerous court challenges have been mounted under human rights legislation and/or the *Canadian Charter of Rights and Freedoms* on the question of whether the term “spouse” applies to same-sex partners. Several challenges have turned on the interpretation of collective agreements or wording in specific statutes or regulations. A now 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 technical 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 1991 and 1993, the trial and appeal divisions of the Federal Court of Canada rejected their claim.

In 1995, the Supreme Court of Canada dismissed the appeal of *Egan* and *Nesbit* 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. One member of the majority noted that the prohibition of discrimination against gays and lesbians was "of recent origin" and was "generally regarded as a novel concept," thus appearing to suggest that the outcome might not be the same in future cases.

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)* whereby same-sex partners were precluded 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. ... Same-sex relationships are capable of being both conjugal and lengthy, but individuals in such relationships are nonetheless denied access to the court-enforced system of support provided by the *FLA* ...

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. The objectives [are to provide for] the equitable resolution of economic disputes when intimate relationships between financially interdependent individuals break down, and [to alleviate] the burden on the public purse to provide for dependent spouses. Neither of these objectives is 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 are 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. In January 1999, the perceived lack of legislative action prompted the Foundation for Equal Families to undertake an omnibus Charter challenge of 58 federal laws in which the terms “spouse” and “dependant” were claimed to discriminate against same-sex couples. The case was later stayed in light of federal reforms, discussed below under the heading “Parliamentary Action.”

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 relate to 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 enables 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 May 1999, Bill 32, *Loi modifiant diverses dispositions législatives concernant les conjoints de fait*, was introduced in Quebec’s *Assemblée nationale*. 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. Bill 32 was adopted unanimously and came into effect in June 1999.

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.

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 provides 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

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. The bulk of both the 1999 and 2000 legislation took effect in either July or November 2000.

Other significant legislative packages respecting same-sex couples' status enacted or introduced over the 1999-2003 period to date include the following:

- In October 1999, the Ontario Legislative Assembly adopted the *Amendments Because of the Supreme Court of Canada Decision in M. v. H. Act, 1999*, which came into effect in March 2000. 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.” Bill 5 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 has 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” are eligible to register their partnership by means of a declaration, provided neither person is a minor, married or in a prior domestic partnership, and both are ordinarily resident or property owners in Nova Scotia. Upon registration, each domestic partner immediately assumes 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 it enacted Bill 25, the *Justice Administration Amendment (2001) Act*. The benefits of registration as domestic partners are available only within Nova Scotia.

- In December 2000, the Legislative Assembly of New Brunswick enacted *An Act to amend the Family Services Act*. It extends the New Brunswick statute’s spousal support obligation to two persons who have cohabited: (1) for at least three years “in a family relationship in which one person has been substantially dependent upon the other for support,” or (2) in a family relationship of some permanence where they are the natural parents of a child. The legislation’s combined cohabitation and support criteria distinguish 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 amends 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 are 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* also provides 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 may, 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 must 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 include pension and insurance schemes, family maintenance, matrimonial and other categories of property, dependant relief, intestate succession, and step-parent same-sex 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 introduces 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 does not expand the spousal definition. **Bill 30-2, the *Adult Interdependent Relationships Act*, adopted in November 2002, amends 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” refers 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 defines “relationship of interdependence” as one outside marriage in which two persons of the same or of the opposite sex, including non-minor relatives, share their lives, are emotionally committed and function as an economic and domestic unit. Criteria for determining whether the last component is satisfied are also set out. Bill 30-2 prompted controversy, among other reasons, because it was perceived as potentially creating involuntary interdependency. The legislation came into effect on 1 June 2003.

- In June 2002, following several months of consultation, Quebec’s Assemblée nationale unanimously adopted Bill 84, *Loi instituant l’union civile et établissant de nouvelles règles de filiation*. Bill 84 amends the *Code civil* to entrench the conjugal status of same-sex and unmarried opposite-sex couples, and create a new optional institution for them. The Code now authorizes 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 may 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* clarify the joint parental rights of same-sex spouses in civil and *de facto* unions and delete 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 does 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.
- **Legislation to prohibit discrimination based on sexual orientation is awaiting proclamation in the Northwest Territories, having been adopted in October 2002. When the new Human Rights Act is proclaimed in force, it will become the first human rights legislation in Canada to prohibit discrimination on the basis of gender identity.** Notwithstanding this legislative gap, in June 2002, the Northwest Territories Legislative Assembly enacted *An Act to Amend the Adoption Act and the Family Law Act*. The legislation extends 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.

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 Conjuality: 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. The current federal Minister of Justice indicated he would consider the report's proposals.

c. Other Developments

In January 2002, the Alberta government responded to a legal challenge to its existing policies by approving survivor pension benefits for the same-sex partners of senior government employees. In May 2002, faced with a further lawsuit on this issue, the province extended benefits under a number of other public-sector pension plans. The relevant regulations were amended to include a "pension partner," meaning a person who has cohabited with the pensioner for at least three years. The term "spouse" remains reserved for married partners.

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 December 2002, the Ontario Superior Court of Justice granted certification of 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 representative plaintiffs maintain that entitlement to benefits should be retroactive to April 1985, when section 15 of the Charter came into force. The trial is scheduled for September 2003 (*Hislop et al. v. Attorney General of Canada*). A similar class action proceeding is pending in Quebec, which has a separate pension plan that parallels the CPP.

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 et al. v. Treasury Board et al.*).

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 had 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*).

Both the *M. v. H.* decision and federal Bill C-23 were followed by marriage-related developments. In the former case, a June 1999 opposition motion aimed at preserving marriage as an exclusively heterosexual institution (reviewed below under the heading “Parliamentary Action”) was adopted by a large majority in the House of Commons. In the latter case, the Alberta Legislative Assembly, in March 2000, adopted a private member’s bill amending the provincial *Marriage Act* to define marriage as exclusively heterosexual and to insert a notwithstanding clause for purposes of overriding the *Canadian Charter of Rights and Freedoms*. The amendments were described as having little legal effect owing to federal jurisdiction over marriage capacity.

In other developments, advocates for extending the marriage option mounted constitutional challenges, in Quebec, Ontario, and British Columbia, to existing common law and statutory restrictions against same-sex marriage.

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. Pitfield J. 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 even if section 15 did apply, any 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 (*EGALE Canada Inc. et al. v. Attorney General of Canada et al.*).

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. In it, LaForme J. rejected the B.C. Court's conclusion that the 1867 Constitution prevented Parliament from legislating a modified legal meaning of "marriage," as well as the federal government's position that granting equivalent entitlements to same-sex couples under a term other than "marriage" precluded a finding of discrimination. In his view, this would amount to "the 'separate but equal' argument that has long been rejected as a justification" for discrimination: equivalency of benefits *via* other means would prove inadequate, as "such alternative methods do not have the same meaning or significance as access to them by right of entry to a basic social and cultural institution." Arguments that procreation represents the fundamental objective of marriage were also rejected as justification for prohibiting same-sex marriage.

The Ontario Court suspended its declaration invalidating the common-law rule for 24 months to enable Parliament (and the provinces, where applicable) to remedy the law of marriage in accordance with constitutional values, failing which the common-law rule would be reformulated by replacing the words "one man and one woman" with "two persons" (*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 became the second Canadian court to allow a same-sex marriage application. Lemelin J. found that the terms of section 5 of the 2001 *Federal Law-Civil Law Harmonization Act, No. 1 (FLCLHA)* – the operative provision applicable in Québec – 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. Like the Ontario Court, she concluded that the 1867 Constitution did not prevent a new legislated definition of marriage, 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. Lemelin J. also concluded that procreation could no longer be considered the sole defining characteristic of marriage.

The Quebec Court suspended its declaration of constitutional invalidity for 24 months to enable Parliament to remedy the discrimination in section 5 of the *FLCLHA*, presenting no substitute definition to take effect in the absence of Parliamentary action. The finding of invalidity was extended to the interpretive provision in federal Bill C-23, which also characterizes marriage as a heterosexual institution (*Hendricks c. Québec (Procureur général)*).

Each of the above decisions was appealed, that of the B.C. Court by the plaintiff couples and EGALE, that of the Ontario and Quebec courts by the federal government.

On 1 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. In the ruling's principal set of reasons, Prowse J.A.:

- **concurred with the Ontario and Quebec lower courts' finding that Parliament has the constitutional authority to legislate a modified definition of marriage;**
- **adopted the view, set out in the Ontario ruling, that the opposite-sex common law definition effects substantive discrimination in that marriage "represents society's highest acceptance of ... a couple's relationship, and, thus, touches their sense of human dignity at its core";**
- **noted that La Forest J.'s comments on traditional marriage in the 1995 Supreme Court of Canada *Egan* decision were written for the minority in the section 15 portion of that ruling, and 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";**
- **agreed with the Ontario and Quebec courts that the section 15 infringement resulting from the opposite-sex common law definition of marriage was not justified under section 1 of the Charter, in part, because procreation no longer represents a sufficiently pressing objective to justify restricting marriage to opposite-sex couples; and in the absence of evidence that allowing same-sex marriage would reduce heterosexual procreation, the restriction is not rationally connected to that objective.**

In the result, 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 12 July 2004, the expiration of the suspension in the *Halpern* decision. However, this suspension was subsequently lifted (*Barbeau v. British Columbia (Attorney General)*).

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. In *per curiam* reasons, the Court explicitly endorsed much of the reasoning and conclusions of prior decisions to that effect described above, while dismissing in turn arguments of federal lawyers seeking to refute the finding of unconstitutionality. The reasons assert, in part:

- “Marriage” in subsection 91(26) has the “constitutional flexibility to meet ... changing realities” without a constitutional amendment;
- Canadian governments have given various forms of legal recognition to opposite-sex marriage, while same-sex couples are denied access to all such regimes, resulting in a formal distinction. 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;
- Further to the historical disadvantage suffered by same-sex couples that favours a finding of discrimination, the common law rule requiring opposite-sex marriage also denies same-sex couples a fundamental choice;
- The prohibition of same-sex marriage does not accord with the needs and capacities of same-sex couples in relation to a number of reasons for which couples marry – including child-rearing, intimacy, economic benefits – and perpetuates the view of inferior capabilities and worth;
- 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, of particular broader significance, exclusion from the fundamental institution of marriage and its corresponding benefits, whether economic or non-economic;
- None of the purposes of marriage advanced by federal lawyers – uniting the opposite sexes, encouraging the birth and raising of children, and companionship – is a pressing objective of maintaining marriage as an exclusive heterosexual institution, nor is the common law rule excluding same-sex marriage rationally connected to those objectives;
- The opposite-sex requirement does not represent minimal impairment of the rights of same-sex couples, who should have access to the same “stabilizing institution” as opposite-sex couples:

Allowing same-sex couples to choose their partners and to celebrate their unions is not an adequate substitute for legal recognition. This is not a case of the government balancing the interests of competing groups. 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, in that its invalidation of the existing common law definition of marriage and reformulation to refer to the "voluntary union for life of two persons" were made effective immediately. The Court also ordered the Clerk of the City of Toronto to issue marriage licences to participating and, by necessary implication, other otherwise qualified same-sex couples.

On 17 June 2003, Prime Minister Chrétien announced that the federal government would not appeal the Ontario Court of Appeal decision, and would prepare legislation to recognize same-sex marriage. It was also decided not to appeal the British Columbia appellate ruling, and to discontinue the federal appeal in the Quebec case. The federal response is outlined further under the heading "Parliamentary Action."

Although the federal Justice minister has urged authorities in other provinces to allow same-sex marriages immediately, to date the Ontario appellate decision does not appear to have been given effect outside the province. However, on 8 July 2003, the British Columbia Court of Appeal lifted the suspension of remedies it had initially imposed, immediately reformulating the common law definition of marriage in B.C. as "the lawful union of two persons to the exclusion of all others."

Although some of the remaining provinces have indicated either support for or willingness to abide by same-sex marriage legislation, the Premier and Attorney General of Alberta have voiced an intention to invoke the Charter's notwithstanding clause, if necessary, to prevent same-sex couples from marrying in Alberta through exercise of the province's constitutional jurisdiction over solemnization of marriage, including licensing and registration. Court action in other provinces seeking to give effect to the Ontario ruling has been reported.

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 exemplified by the fact that the majority of provincial and territorial jurisdictions have initiated or enacted legislation sanctioning same-sex adoption, and, most notably, **by federal government recognition of same-sex marriage.**

Opponents of these reforms continue to argue that extending same-sex rights undermines 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 judgement agreed to by the parties described the military's previous policy governing the service of homosexuals as contrary to the *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 continue 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 1998, judicial review of this decision was granted, on the ground that the decision was “contrary to the [*School Act*] requirement that schools be ‘conducted on strictly secular [...] principles.’” In 2000, the British Columbia Court of Appeal set aside this ruling, finding that the resolution was within the board’s jurisdiction.

In December 2002, the Supreme Court of Canada allowed an appeal of the Court of Appeal’s decision. It found the Board decision 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, including grammar and spelling mistakes, 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. On 10 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 (*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 have 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. The federal and provincial governments have been considering expanding grounds protected by *Criminal Code* hate propaganda provisions to include sexual orientation. **A Private Member’s bill on this matter currently before Parliament is 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 recent years have considered whether the circumstances of individual homosexuals warrant the granting of refugee status (*Muzychka v. Canada (Minister of Citizenship and Immigration)*; *Serrano 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."

D. Conclusions

Over the past decade, sexual orientation and same-sex jurisprudence has, in the main, affirmed the legal rights of lesbians and gay men. In this regard, the equality rights provision at section 15 of the *Canadian Charter of Rights and Freedoms*, together with prohibitions against discrimination on the basis of sexual orientation in human rights legislation, have had an enormous impact on the process of reform. Although many observers believe it

would have been preferable for changes to have been initiated through governmental actions, legislation and policy decisions, rather than through the courts, until recently most politicians appear to have viewed such changes as politically risky.

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, then Justice Minister Allan Rock 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 to 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. The bill defined a “survivor” as a person who “establishes that he or she was cohabiting in a relationship of a conjugal nature with the contributor for at least one year” preceding the latter’s death. 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 February 2001, Bill C-11, An Act respecting immigration to Canada and the granting of refugee protection to persons who are displaced, persecuted, or in danger, received first reading in the House of Commons. Its comprehensive reform to the immigration statute included a measure to recognize a “common-law partner,” as defined in the eventual regulations, among members of the family class eligible for sponsorship. Bill C-11 was adopted by the House of Commons and the Senate in June and October 2001, respectively, effective 28 June 2002. The new *Immigration and Refugee Protection Regulations*, which also took effect on 28 June, set out the gender-neutral definition of “common-law partner” first enacted in Bill C-23, with its one year co-habitation requirement. In recognition of practical difficulties associated with that criterion in the immigration context, a second gender-neutral category for “conjugal partner[s]” has also been created for purposes of family class regulations. A “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 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. From November 2002 through May 2003, the Committee held approximately three months of hearings on this issue both in Ottawa and across the country. It was in the process of

preparing its report to the House when, on 3 June, the Ontario Court of Appeal released its ruling giving immediate effect to same-sex marriage in Ontario.

On 12 June 2003, by a vote of 9 to 8, the Committee 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.”

On 17 June, Prime Minister Chrétien announced that the federal government would not appeal Ontario and B.C. appellate decisions supporting the lifting of restrictions against same-sex marriage. Under the government’s phased approach to legalizing same-sex marriage across the country, on 17 July draft legislation both 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 was referred to the Supreme Court of Canada in a constitutional reference. The government has requested that the Court consider whether: the bill’s extension of the capacity to marry to persons of the same sex is 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. Following the Court’s non-binding opinion, the government’s stated intention is to subject the draft marriage legislation to a free vote in the House of Commons.

It would appear the reference has been tentatively scheduled for April 2004. As of 29 August 2003, Alberta, B.C. and Quebec are the only provinces to have indicated they plan to participate in the hearing.

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, introduced in 1992 and 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 of Sen. Noel Kinsella died on the *Order Paper* when Parliament dissolved in fall 1993, was reintroduced as Bill S-2 and adopted by the Senate in

April 1996. Both Bill S-2 and Bill C-265, its identical counterpart in the House of Commons sponsored by MP Svend Robinson, 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 and 37th Parliaments

Many of the numerous Private Members' bills tabled over the period October 1997 through June 2003 were introduced on more than one occasion. Unless otherwise indicated, none has been given second reading:

- 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, 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). 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 and February 2001, MP Jim Pankiw tabled Bills C-460 and C-266, An Act to amend the Marriage (Prohibited Degrees) Act, to protect the legal definition of marriage by invoking section 33 of the *Canadian Charter of Rights and Freedoms*;

- In January 2001, Sen. Anne Cools introduced Bill S-9, An Act to remove certain doubts regarding the meaning of marriage. The bill would amend the *Marriage (Prohibited Degrees) Act* and the *Interpretation Act* to codify the current common-law definition of marriage as a heterosexual institution. Bill S-9 was debated at second reading in the Senate from 24 April 2001 through 13 June 2002 **but died on the Order Paper when Parliament was prorogued in September 2002. The bill was reintroduced as Bill S-15 in February 2003;**
- In November 2001, MP Svend Robinson tabled Bill C-415, An Act to amend the Criminal Code (hate propaganda), which sought to expand the definition of “identifiable group” in the Code’s hate propaganda provisions to include persons distinguished by sexual orientation. **Having died on the Order Paper following second reading and referral to the House of Commons Justice Committee, the bill was reintroduced at that stage in October 2002 as Bill C-250. Conflicting views on the bill’s merits were voiced in Justice Committee hearings in February and May 2003, and in report stage debate on 11 and 13 June 2003. Proposed amendments to Bill C-250 at report stage are aimed at excluding good faith opinions based on religious convictions or texts from the definition of hate propaganda.**

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*).
 - The Canadian Armed Forces announced an end to restrictions on enlistment and promotion on the basis of sexual orientation.

- 1993 - In *Canada (Attorney General) v. Mossop*, the Supreme Court of Canada ruled that the term “family status” in the *Canadian Human Rights Act* does not include sexual orientation.
- 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 at second reading by a vote of 68-59.
- 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 passed in May and came into force in June.
 - The Canadian Human Rights Tribunal upheld a complaint of discrimination based on sexual orientation under the *Canadian Human Rights Act* arising from the denial of same-sex benefits to federal public-sector workers (*Moore v. Canada (Treasury Board)*).
- 1997 - The federal Treasury Board was ordered to interpret the term “spouse” in existing collective agreements, policies and plans relating to federal public-sector workers without reference to gender, rather than adding a new classification of “same-sex partner.”
- 1998 - In February, the British Columbia *Family Relations Amendment Act* became law. The legislation was the first to extend the benefits and obligations relating to child support, custody and access to same-sex couples.
- In April, 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.
 - In April, the Ontario Court of Appeal found, in *Rosenberg v. Canada*, that the discriminatory opposite-sex definition of “spouse” in the federal *Income Tax Act* was not justified under section 1 of the Charter. The Court ordered that the definition be enlarged to include same-sex spouses through the reading-in

remedy for purposes of pension plan registration. The federal government did not appeal this decision.

- In May and June respectively, the Nova Scotia and New Brunswick governments adopted policies extending provincial public service pension legislation to the surviving partners of same-sex relationships. In July, British Columbia became the first Canadian jurisdiction to legislate pension benefits for the same-sex partners of the province's public-sector employees.
- 1999 -
- In May, 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.
 - In May and September respectively, the House of Commons and the Senate adopted Bill C-78. This major pension reform legislation replaced existing 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 for same-sex benefits.
 - In June, 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 in numerous laws and regulations.
 - In October, the Ontario Legislative Assembly adopted Bill 5, the *Amendments Because of the Supreme Court of Canada Decision in M. v. H. Act, 1999*. 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 -
- In April and June, the House of Commons and the Senate adopted Bill C-23, an *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. A subsequent 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."
 - In November, 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, while apparently restricting the term "spouse" to married individuals. It also established the first registered domestic partnership scheme in Canada for opposite-sex or same-sex

cohabiting conjugal couples that satisfy prescribed criteria. Upon registration, each domestic partner immediately assumes the rights and obligations of a [married] spouse under designated provincial statutes.

- 2001 - In July, 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.
- In October, 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 in light of the significance of opposite-sex marriage as a core institution in the Canadian context.
 - In November, the Newfoundland House of Assembly adopted the *Same Sex Amendment Act*, which enables opposite-sex and same-sex “cohabiting partners” to acquire rights and obligations in a number of areas.
- 2002 - In June, Quebec’s Assemblée nationale unanimously adopted Bill 84, *Loi instituant l’union civile et établissant de nouvelles règles de filiation*. The bill amends 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. Other noteworthy modifications to the *Code civil* clarify the joint parental rights of same-sex spouses in civil and *de facto* unions.
- In June, for the first time, new *Immigration and Refugee Protection Regulations* authorized family class sponsorship for same-sex couples, defining two new eligible categories in gender-neutral terms. In each case, the couple’s conjugal relationship must be of at least one year’s duration.
 - In July, 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 in light of constitutional values requiring equal access to the rights and benefits associated with marriage by right of entry to the institution.
 - In August, the Manitoba Legislature adopted the *Charter Compliance Act*, which will amend over 50 laws covering a broad range of subject-matters to extend the statutory rights and responsibilities of same-sex couples, and the *Common-Law Partners’ Property and Related Amendments Act*. The latter

deals with the rights of common-law partners to division of property, and provides for “registration of common-law relationships” under the province’s *Vital Statistics Act*, resulting in immediate entitlement to the benefits and imposition of the obligations for which non-registered couples must satisfy prior cohabitation requirements.

- In September, 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, also represents an unjustified violation of Charter equality rights. The judge also concluded that the province’s new civil union regime was not equivalent to the institution of marriage.

2003 - In May, 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 existing common law definition effects substantive discrimination under section 15 in that marriage “represents society’s highest acceptance of ... a couple’s relationship, and, thus, touches their sense of human dignity at its core.” The Court found the Charter infringement unjustified, in part, because procreation as an objective no longer justifies restricting marriage to opposite-sex couples and, without evidence that allowing same-sex marriage would reduce heterosexual procreation, the restriction is not rationally linked to that objective. Like the Ontario and Quebec rulings, the decision of invalidity was suspended to enable a legislative response.

- In June, 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 found the violation unwarranted, in part, because the opposite-sex requirement for marriage does not represent minimal impairment of the rights of same-sex couples, who are entitled to access to the same institution that opposite-sex couples enjoy. Allowing same-sex marriage does not result in a corresponding deprivation to opposite-sex couples nor, since the Charter ensures that religious groups may opt to refuse to solemnize same-sex marriages, does the matter require balancing the rights of same-sex couples against the rights of religious groups who oppose same-sex marriage. The Court invalidated the existing common law definition of marriage and reformulated it to refer to the “voluntary union for life of two persons,” effective immediately.
- On 17 June, 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, involving (1) draft legislation to recognize same-sex marriage and acknowledge religious organizations’ authority to abide by the

precepts of their faith in relation to marriage, (2) an immediate reference of the draft legislation to the Supreme Court of Canada for a non-binding opinion as to its constitutionality and (3) a free vote in the House of Commons.

- On 8 July, the British Columbia Court of Appeal lifted the suspension of remedies it had initially imposed, immediately reformulating the common law definition of marriage as “the lawful union of two persons to the exclusion of all others.”
- On 17 July, draft legislation recognizing same-sex marriage for civil purposes was referred to the Supreme Court of Canada for its consideration. The hearing is reportedly tentatively scheduled for April 2004. Alberta, B.C. and Quebec have each indicated an intention to take part in the reference.

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