THE CANADIAN EARTHQUAKE: SAME-SEX MARRIAGE IN CANADA

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I. INTRODUCTION

Canadians are used to being ignored by Americans. So, it was a source of national delight when they learned that the Ontario Court of Appeal ruling on same-sex marriage was attracting enormous attention south of the border.[1] Some called it the "Canadian earthquake." *The Economist* magazine, a British publication, recently went so far as to suggest that Canada might even be "cool."[2]

For those who had not been following the issue, it was a shock that those nice, boring Canadians were suddenly embracing same-sex marriage. For international experts who had been aware that this development was imminent, it still came as a surprise to learn that Canada was the first country in the world to offer same-sex marriage to people who were neither residents nor citizens.[3]

As a result of the Ontario Court of Appeal's ruling, a same-sex wedding performed at the Metropolitan Community Church of Toronto (MCC

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1. Halpern v. Canada, [2002] 60 O.R.3d 321 (Ont. Div. Ct.), *aff'd*, [2003] 65 O.R.3d 161. The author acted as lead counsel on behalf of the Metropolitan Community Church of Toronto. As a result, this article reflects this perspective. This article was the basis of the speech given by the author at the *New England Law Review* Symposium but has been updated as of December 2003.

2. *Canada's New Spirit*, THE ECONOMIST (London), Sept.-Oct. 2003, at 13.

3. Canadian marriage law does not have a citizenship or residency requirement in order to get married in Canada. However, one year residency is required in order to divorce. *See* Marriage Act, R.S.O., 1990, ch. M-3, § 5 (1990) (Ont.). The Netherlands does not have a citizenship requirement, but it does have a residency requirement for one partner in the couple.

Toronto or MCCT) on January 14, 2001 is now the first legal same-sex marriage in the world.[4] The wedding of Kevin Bourassa and Joe Varnell, and of Elaine and Anne Vautour, preceded the weddings in Amsterdam by several months. The Netherlands still deserves credit, of course, as the first government in the world to legalize same-sex marriages.[5] The legality of the weddings at MCC Toronto, in contrast, was not immediately recognized by Canadian officials. A lawsuit was necessary in order to confirm their validity.

It may seem strange that the first, legal same-sex wedding in the world took place in a Christian Church, especially to those who have witnessed what Justice Scalia has described as a "culture war" between Christians and gay and lesbian equality advocates.[6] For many lesbians and gays, Christian tradition has been an impediment to equality at best, and a menace to life and limb at worst. In modern times, it often appears that Christian groups have been devoted exclusively to resistance to equality. However, in Canada, a Christian Church has been in the forefront of the struggle for equal marriage.[7]

How did it happen? And why was a Christian Church involved in seeking, rather than opposing, equal rights for gays and lesbians? In order to answer these questions, some background is required. First, we will consider the issue of homosexuality, Christianity and the law. Second, we will examine the question of Christianity, marriage and the law. Third, we will analyze Canada's *Charter* jurisprudence that preceded this landmark ruling. Finally, we will examine the marriage rulings and their significance for Canada and internationally.

4. The Court of Appeal ordered the Registrar General of the Province of Ontario "to accept for registration the marriage certificates of Kevin Bourassa and Joe Varnell and of Elaine and Anne Vautour," who were married in the Metropolitan Community Church on January 14, 2001. *Halpern*, 65 O.R.3d at 200.

5. On April 1, 2001, the Dutch law allowing same-sex couples to marry came into force, together with a new law allowing same-sex couples to adopt children. *Act Opening Up of Marriage*, Dec. 21, 2000, Stb. 2001, 9.

6. Lawrence v. Texas, 123 S. Ct. 2472, 2497 (2003) (Scalia, J., dissenting). Justice Scalia also quite characteristically, but incorrectly, cited *Halpern* as a case of the courts "imposing" same-sex marriage on Canada. The new common law definition was no more "imposed" than was the old common law definition that it replaced, a fact Justice Scalia overlooked or chose to ignore. The Courts have a duty to reformulate unconstitutional common law rules, as was done by the Massachusetts Supreme Judicial Court later. *See generally* Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941 (Mass. 2003).

7. For more information about these couples' weddings and their struggle for legal recognition, see generally KEVIN BOURASSA & JOE VARNELL, JUST MARRIED: GAY MARRIAGE AND THE EXPANSION OF HUMAN RIGHTS (2002). The author acknowledges that there were earlier attempts at same-sex marriage in Canada, however, the fact remains that the MCCT performed the first legally recognized same-sex marriage in Canada.

II. CHRISTIANITY, HOMOSEXUALITY AND THE LAW IN CANADA

In Canada, as elsewhere in North America, homosexuality was widely tolerated for millennia prior to the arrival of Europeans. Same-sex marriage was traditional among many native communities until Europeans came with a mission to convert the "heathen savages" to Christianity.[8]

With the advent of European settlement, Christianity would become by far the predominate religion in Canada. It had been assumed until recently by many that the Christian Bible, and its Jewish antecedents, had unequivocally established a religious position hostile to homosexual acts at an early date. Modern scholars have cast doubt on that position, as will be discussed below. However, it is generally accepted by most scholars that for at least two centuries before Columbus, Christianity had condemned homosexuality as sinful. History records that the first gay man was burned at the stake in 1292.[9] European states endorsed ecclesiastical proscriptions and matched them with criminal law sanctions. Ultimately, Canada came to be governed by English criminal law. Buggery, which had been under the jurisdiction of the ecclesiastical courts, became a felony for the first time under Henry VIII in 1533. After a brief restoration of jurisdiction over the issue to the Church, buggery was once more proscribed by Elizabeth I. Thereafter, policing same-sex relations remained firmly in the hands of the state, first under English law, and later under Canadian criminal law.[10]

There can be no doubt that this alliance of the law and the Church in persecuting homosexuals was well developed at the time of Europeans' conquest of the Americas. European political and monetary ambitions were often allied with an evangelizing fervor that many Europeans saw as their

8. In Canada, the First Nations had no religious or other proscriptions of homosexual acts. Most First Nations recognized that some of their members were what we would call "gay" or "lesbian." First Nations believed that such persons were "two-spirited," that is, that they had both a male and a female spirit, and that they were special or magical persons as a result. Many native cultures conceived of such persons as being of a third gender, and had a special name for them, such as the Lakota word *winkte*. Two-spirited persons often occupied a special place in their nations, and had enduring relationships with others of the same sex that could reasonably be called marriages. *See, e.g.*, WALTER L. WILLIAMS, THE SPIRIT AND THE FLESH: SEXUAL DIVERSITY IN AMERICAN INDIAN CULTURE (1992); Le Duigou, *A Historical Overview of Two Spirited People: A Context for Social Work and HIV/AIDS Services in the Aboriginal Community* 3:1 NATIVE SOC. WORK J. 195, 195-97 (2000); GARY KINSMAN, THE REGULATION OF DESIRE: HOMO AND HETERO SEXUALITIES 92-93 (2d ed. 1996).

9. *See* BYRNE FONE, HOMOPHOBIA: A HISTORY 144, plate at 176 (2000). Fone discusses the development of the Christian concept of sodomy and the relationship between its prosecution by ecclesiastical and secular authorities. *See id.* at 111-75; *see also* DAVID F. GREENBERG, THE CONSTRUCTION OF HOMOSEXUALITY 274 (1988).

10. For a history of the persecution of homosexuals by the Church and State in Canada, see KINSMAN, *supra* note 8.

Christian duty. In North America, Christian explorers evangelized or exterminated the natives when they discovered that these natives had tolerant attitudes toward homosexual acts. For example, Balboa had his dogs kill, then eat, a tribe he had found to be rife with "sodomites." The massacre was proudly reported as "a fine action of an honorable and Catholic Spaniard."[11]

The view that homosexual acts are sinful and therefore deserving of criminal sanction was questioned as early as the eighteenth century. The anticlerical forces that arose during the French Revolution resulted in the repeal of France's criminal sodomy laws as part of secularization.[12] Despite the close connections between France and the newly founded United States of America, and the new Republic's commitment to a separation of Church and state, this is one idea that Americans did not embrace. Also, around this time in England, Jeremy Bentham, the father of utilitarian philosophy, also questioned the social justification for sodomy laws. He noted wryly that Christ had been remarkably silent on the entire question of sexual irregularity.[13]

French law reform had no impact on Canada, however. Although large parts of Canada had once been under French rule, Canada was entirely in British hands by the time of the French Revolution. Canada was still part of "Christendom," but had passed from rule by an officially Catholic sovereign to rule by an officially Protestant state in which the rights of Catholics were limited. However, unlike in other parts of the British Empire, the Quebec Act of 1774 protected the pre-existing rights of Canadian Catholics.[14]

Many parts of Europe adopted aspects of the French law reform on sodomy as Napoleon's armies marched through Europe. Perhaps because of suspicion or even outright hostility to all things French, and certainly because they were largely untouched by the anticlericalism, there was no movement to repeal sodomy laws in England or North America during the nineteenth century. Eighteenth century debates about sodomy laws were fruitless; the idea of equality in France was linked to a distinct mistrust of the role of the Catholic Church in state affairs. In the United States, in contrast, while there was to be an official separation of Church and State, few doubted that there was any incompatibility between Christianity and

11. WILLIAMS, *supra* note 8, at 137 & plate 5.

12. *See* KINSMAN, *supra* note 8.

13. JEREMY BENTHAM, OFFENSES AGAINST ONESELF (Louis Crompton, ed., 1978), *reprinted in* 3 J. OF HOMOSEXUALITY No. 4 (1978).

14. David M. Brown, *Freedom from or Freedom for?: Religion as a Case Study in Defining the Content of Charter Rights*, 33 U. BRIT. COLUM. L. REV. 551, 554 n.4 (2000) (discussing protections offered to Catholics).

equality. A leading thinker on this subject, John Adams stated that "[t]he doctrine of human equality is founded entirely in the Christian doctrine that we are all children of the same Father, all accountable to Him for our conduct to one another, all equally bound to respect each other's self love."[15]

The emergence of the medical model of homosexuality in the nineteenth century challenged the prevailing view in Canada, and elsewhere in "Christendom," of "sodomy" as a sinful act. This theory asserted that there was a group of human beings who had a natural orientation toward their own sex that was either innate or ingrained. The term "homosexual" was invented in the second half of the century.[16] However, although this new model to explain same-sex behavior reinforced the arguments of those advocating the repeal of sodomy laws, it did not trigger any serious examination and review of the origins of Christian teaching about homosexuality. This would not begin to occur in earnest until after the Second World War.

In 1867, four colonies of British North America united to form a new federal "dominion" of Canada. Legislative powers were divided between the central government in Ottawa and the provincial governments. Special constitutional rights protected the Protestant minority in Quebec, and the Catholic minority in Ontario.[17] The central government implemented and enforced the criminal laws, and criminal proscription of buggery continued to be based on the English model. When England broadened the range of proscribed acts in the notorious LaBouchere Amendments of the late nineteenth century, Canada was not bound by English law. However, anxious to emulate Mother England, Canada quickly enacted its own similar criminal laws. Little would change until after the Second World War.[18]

Canada did not fail to notice the challenging scientific work being done by Dr. Kinsey and Dr. Hooker in the post war era. However, Canada still very much looked to England for leadership at the time. The winds of change in the law were to come to Canada across the Atlantic again, this time pushing Canada in a different direction. In response to a number of scandals and in the tense paranoid social atmosphere of the Cold War in the 1950's, Sir John Wolfenden was asked to examine and report on England's

15. DAVID MCCULLOUGH, JOHN ADAMS 619 (2001).

16. *See* GREENBERG, *supra* note 9, at 407, 409. The invention of the modern word "homosexuality" is attributed to the Vienna-born writer Karl Maria Benkert, also known by the Hungarian form he adopted for his name, Kertbeny.

17. *See generally* Constitution Act, 1867, 30 & 31 Vic., ch. 3 (U.K.).

18. *See* KINSMAN, *supra* note 8, at 128-34.

sodomy laws.[19] This was to launch a revitalized modern movement for law reform aimed at more humane treatment of homosexuals.

The Wolfenden Inquiry sparked a debate about the role of Christianity in English law. In particular, Lord Devlin argued that Christian moral teachings were the foundation of English criminal law. Opponents suggested that the law should avoid reflecting any particular religious doctrine, given the theocratic excesses of the past. Contemporaneous with the legal debate, the Church of England (known as the Episcopalian Church in the United States) set out to examine Christian teachings on the subject. This would lead, in 1955, to the publication of the first major book arguing for a revision of the traditional Christian view of "sodomy," Dr. Derrick Sherwin Bailey's *Homosexuality and the Western Christian Tradition*.[20]

Dr. Bailey outlined how the Christian Church viewed homosexual acts as sinful. He noted how this had influenced the legal proscriptions on homosexuality. For example, Justinian's Law recited the danger to public safety evidenced by the Sodom story, and Elizabeth's Statute declared homosexuality offensive in the eyes of "Almighty God." Bailey also argued that the degree of persecution and the Church's role in it had been exaggerated by at least one early gay author, a debate that continues to this day. Bailey questioned whether the scriptures had been interpreted correctly in asserting condemnation of homosexual acts. Moreover, he argued that, our modern scientific understanding of sexual orientation was unknown to the ancients. According to Bailey, this ignorance had informed religious views both in Biblical times and by the medieval doctors of the Church. It was no longer sensible, in his view, to interpret all homosexual acts as being the willful misbehavior of sinful heterosexuals. As a result, Bailey was adamant that Christian teaching could not continue to be used as a justification for continuing criminal law sanctions.[21]

Despite the arguments of Bailey and others about the Christian Church's degree of persecution of homosexuals, there can be no doubt that there has been a mutual social reinforcement between traditional Christianity and the criminal laws that has served to justify persecution of gays and lesbians for centuries. This has created a modern social myth of a pervasive and

19. During the 1950s, the British government asked Sir John Wolfenden to study law reform around sexuality. His landmark report decried British laws prohibiting male homosexuality as "the Blackmailer's Charter." He urged decriminalization of male homosexual acts between consenting adults in private. However, it would take over ten years before Parliament would act on this recommendation in England. *See* THE WOLFENDEN REPORT, REP. OF THE COMM. ON HOMOSEXUAL OFFENCES & PROSTITUTION (Stein & Day, 1957).

20. DERRICK SHERWIN BAILEY, HOMOSEXUALITY AND THE WESTERN CHRISTIAN TRADITION (Archon Books 1975) (1955).

21. *See id.* at 73-79.

unchanging social reality, as is clearly reflected in the majority reasoning in *Bowers v. Hardwick*.[22] This unholy alliance between Church and state has made legal and theological reform difficult throughout the common law world, including Canada.

As we know, Lord Devlin and his allies lost the debate in England about the importance of linking Christian teaching and criminality. Almost ten years after his plea for reform, England lifted the criminal prohibition on private homosexual acts between adults. In 1969, Canada agreed that "the state had no place in the bedrooms of the nation," in the famous phrase used by then Prime Minister Pierre Elliott Trudeau.[23] Canada would no longer enforce the traditional Christian ban on sodomy as part of its criminal law. Of course, legalization did not automatically change the views of Christians in Canada about the morality of homosexuality.

Since the legalization of homosexual acts in Canada, there has been a long, arduous struggle to secure acceptance under the law for gays and lesbians. Some Christians have been prominent in opposing the movement for equality for gays and lesbians. In the late 1970s, Ontario preacher Ken Campbell brought to Canada Anita Bryant's "Save our Children Campaign." The Catholic Bishops of Canada have opposed every effort of extending legal protection to gays and lesbians, including inclusion of sexual orientation in human rights laws, common law relationship recognition, and same-sex marriage. The Evangelical Fellowship of Canada, a conservative Protestant group, has frequently intervened in Supreme Court cases dealing with lesbian and gay equality, always in support of continuing legal discrimination.[24] At the extreme fringe of Christianity, there are those who advocate violence.

Even the Pope has been the victim of Christian homophobia! The Reverend Fred Phelps is known for tasteless picketing at gay funerals, and his notorious website, www.godhatesfags.com. If you visit this remarkable website, you will see that Phelps condemns the Catholic Church as "evil" and a "fag church" because it permits homosexuals as members and even dares to ordain celibate homosexuals.

Despite the presence of some of the worst extremists in the Protestant denominations, Protestant churches have been the center of efforts to reform Christian teaching on this topic. This is not surprising given the hierarchical nature of the Catholic Church and the conservative outlook and intolerant orthodoxy of the current Pope.[25] However, it is also in keeping

22. Bowers v. Hardwick, 478 U.S. 186 (1986).

23. On May 15, 1969, the House of Commons voted to decriminalize private same-sex acts between consenting adults in Canada. The law became effective in August.

24. Vriend v. Alberta, [1998] 1 S.C.R. 493 (Can.); M. v. H., [1999] 2 S.C.R. 3 (Can.).

25. *See* VATICAN, CONGREGATION FOR THE DOCTRINE OF THE FAITH, CONSIDERATIONS

with Protestant tradition. Protestant churches are based less on dogma and more on a tradition of the importance of individual conscience, questioning of dogma, the importance of Biblical authority and "protest." This is not to say, however, that there have been no important Catholic thinkers on the subject. One of the most important advocates of reform was the late Professor John Boswell, a Catholic who clearly disagreed with the current teaching of the Vatican on this subject.[26]

The two largest Protestant denominations in Canada are the United Church of Canada and the Anglican Church of Canada (Episcopalian). While both have made contributions to equality for gays and lesbians, both denominations have had significant internal debate about the issue of same-sex relationships. A much smaller denomination, the United Fellowship of Metropolitan Community Churches (MCCs), would lead the way on marriage.

Established in Los Angeles by Reverend Elder Troy Perry in 1969, the MCCSs represent, in some ways, the culmination of the process of reconsidering the issue of homosexuality and Christianity. Perry was convinced that homosexuality and Christianity could be reconciled. His denomination has spread around the world. In Canada, the largest Church in this denomination is the Metropolitan Community Church of Toronto (MCCT). From humble beginnings, it has grown to be a substantial congregation that is well known in Canada's largest city and, indeed, across the nation. Its senior pastor, the Reverend Dr. Brent Hawkes, is one of Canada's best known gay activists.[27]

III. CHRISTIANITY, MARRIAGE AND THE LAW

A. England

Marriage is a human institution that is older than Christianity. However, given the important role of Western European, and especially English, culture in shaping Canadian culture and law, it is important to understand the historical links between Christianity and marriage and its impact on Canadian law.

Marriage has always been important to Christians. Jesus Christ is believed by Christians to have performed his first wedding ceremony at

REGARDING PROPOSALS TO GIVE LEGAL RECOGNITION TO UNIONS BETWEEN HOMOSEXUAL PERSONS, *at* http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_ doc_ 20030731_ homosexual-unions_en.html (last visited Mar. 17, 2004).

26. *See, e.g.*, JOHN BOSWELL, CHRISTIANITY, SOCIAL TOLERANCE AND HOMOSEXUALITY (1981) [hereinafter BOSWELL, CHRISTIANITY]; JOHN BOSWELL, SAME-SEX UNIONS IN PREMODERN EUROPE (1994).

27. For more on MCCT, visit its website at www.mcctoronto.com.

Cana.[28] However, for centuries, the Christian Church did not attempt to regulate marriages. Christianity would develop significantly different ideas about marriage than its Jewish and Roman antecedents. Two Christian principles are the most distinctive.

First, Christians developed the belief that virginity, or celibacy, was the most desirable conditions for a Christian. Sexual intercourse was permitted within marriage, but only for the purposes of procreation. Married persons who had vaginal intercourse for purposes other than procreation were sinners. Based on these principles, St. Augustine of Hippo was able to identify his three "goods" of marriage: *proles* (procreation), *fides* (monogamy) and *sacramentum* (a permanent and sacred bond).[29]

The third good identified by Augustine highlights the second salient distinguishing feature of Christian marriage. Unlike Jewish and Roman marriages, Christian marriage was believed to be permanent. In the famous words of the King James translation, Jesus said "What God has joined together, let no man put asunder."[30] These words have been repeated at millions of Christian weddings for centuries. Augustine's teachings still inform Roman Catholic doctrine.

It should be noted, however, that these concepts of Christian marriage and its sacramental nature took over one thousand years to develop and to become codified in canon law. During the first thousand years of Christianity, marriage had been seen as a private matter between couples, or in the case of the wealthy and powerful, a contractual matter between families or nations. The Church did not involve itself, and there were no "standard operating procedures." However, in some cases, the couple would have the priest bless them at their home or at the door of the Church. Boswell has argued that similar Christian blessings were offered for same-sex relationships in keeping with earlier Roman practice. However, even Boswell and his school would concede that there is no evidence of any such Christian ceremonies since at least the late Middle Ages until the twentieth century.[31]

The medieval period was a time when marriages were private, and even secret. It was an age without consistent central public records, and no mass media. The Church was concerned about respect for its moral rules about bigamy and incest. In 1215, as part of a codification of canon law that was intended to ensure consistent rules about sexual and other matters, the

28. Though there may be some debate as to whether Jesus was an officiator or merely a guest, he was nevertheless "invited to the wedding." John 2:2 (Oxford New Revised Standard Version).

29. *See* BOSWELL, CHRISTIANITY, *supra* note 26, at 113.

30. *See id.* at 108-09.

31. *See id.*

practice of "bans" of marriage was endorsed as part of Church procedures.[32]

"Bans" is derived from an expression meaning an announcement. The concept was that the priest announced the intention of the couple to marry in an audible voice in the Church that they regularly attended. If there were no objections, traditionally after three readings on three consecutive Sundays, the couple could then be married in a public ceremony in the Church. This effort by the Catholic Church to exercise control over all marriages sometimes ran afoul of the politically powerful, most famously in the case of Henry VIII. Henry broke with the Pope, after the Pope refused to annul his allegedly incestuous marriage to his brother's widow, Catharine of Aragon.

Henry asserted the primacy of the Crown over the Church in all matters, including both homosexual acts and marriage. While his daughter Mary I briefly restored the power of the Church, the state emerged as the ultimate arbiter of marriage under Elizabeth I. It has reserved that power ever since in England, and later in Canada. However, there was no real effort by the state to regulate marriages until almost two centuries after Elizabeth. Protestant faiths such as the new Church of England departed from the doctrinal consensus within Christianity on marriage which had only existed for a relatively short time in Church history. For many, the concept of marriage as a sacrament was rejected and in some Protestant faiths divorce was permitted.[33]

In the late eighteenth century, concerns emerged in England about shady marriages known as "Fleet Street marriages" being performed by dubious clerics. The result was Lord Hardwicke's Act of 1759. This Act was the first effort in England to exert state control over the religious marriages of the King's subjects.[34] Given the long and bloody history of religious intolerance in Europe, it is perhaps not surprising that Protestant England did not extend recognition to the marriages of all faiths. Naturally, the marriages performed in the Church of England under the authority of bans were legally recognized. Quaker marriages were also recognized, reflecting Quaker influence in Parliament. It also expanded the legal concept of marriage by recognizing that sect's radically different view of marriage. There is no presiding cleric at a Quaker wedding. In the Quaker tradition, the priest does not marry the couple, it is the couple who marry each other

32. As a Christian ritual it was formally adopted and codified by the Twelfth Ecumenical Council: Lateran IV 1215. *See* H. J. SCHROEDER, DISCIPLINARY DECREES OF THE GENERAL COUNCILS: TEXT, TRANSLATION AND COMMENTARY 236-96 (1937).

33. An ironical historical note is that despite Henry's actions, his track record, divorce remained prohibited by the Church of England.

34. An Act for the Better Preventing of Clandestine Marriages, 1759, 26 Geo. II, c. 33 (U.K.).

in the eyes of God, all others being merely witnesses. A similar exception was also created in the law for Jewish marriages. No other Christian marriages were given any legal recognition. Catholic marriages were conspicuous by their absence. Purely civil marriages were inconceivable.[35]

B. Ontario

Canada is made up of ten provinces and three territories, each with their own somewhat unique history of marriage. This discussion will focus on one province, Ontario.

Native Americans, or as they are known in Canada, First Nations, had a concept of marriage prior to contact with Europeans. Their marriage traditions were radically different from those in England or France at the time. Polygamy was commonplace. Divorce was also frequently permitted. Same-sex marriages were also common among many First Nations, though not all. The formalities associated with Church and state regulation of marriage, such as bans, were entirely absent.[36]

With European contact, parts of Ontario in the far North came under English rule, but the bulk of the province was notionally part of New France and under French law. As the Supreme Court of Canada later observed, while England at that time was treating Catholic marriages as nullities, Protestant marriages were similarly unknown to French law. Pursuant to royal edicts, in addition to Catholic marriages, Jewish marriages were also legally recognized. There is some irony to the notion that the most persecuted religious minority in Europe, the Jews, were the only group to have their marriages legally recognized by both great Christian powers. In fact, it was a feature of life in early Ontario that European men would take an aboriginal woman as a "country wife," sometimes abandoning her and her children by returning to the cities of North America or Europe to take a Christian European wife.[37]

Lord Hardwicke's Act, the English statute regulating marriage, expressly did not apply to the English colonies in North America. At about that time, the French were forced to cede New France to England and all of Ontario came under English law. As a result, Protestant marriages, at least the Church of England Episcopalian denomination, immediately became lawful for the first time.[38] The entire colony, including both present Ontario

35. *See* J.J. Talman, *The Position of the Church of England in Upper Canada 1791-1840*, 25 CAN. HIST. R. 361, 361 (1934).

36. *Connolly v. Woolrich,* [1867] 17 R.J.R.Q. 75 (S.C.), *aff'd*, [1869] 17 R.J.R.Q. 266 (Q.B.).

37. *See, e.g.*, *Connolly*, 17 R.J.R.Q. at 90-92.

38. Under the eighteenth century French law, only Catholic and Jewish marriages were legally valid**.** Judge Idington held the following with respect to the definition of

and Quebec, was originally known as Quebec. In an unprecedented step reflecting emerging notions of religious freedom and tolerance, the Catholic majority in the new colony were guaranteed freedom of religion.[39]

Shortly thereafter, England lost the American Revolutionary War. Refugee Tories headed north to what is now Ontario, a largely unsettled region of the colony. They arrived in such numbers, and were so distinct from the older French Catholic portion of the colony, that England separated the colony into two, creating Upper Canada with its capital at York (now Toronto).

One of the earliest Acts of the fledgling colony of Upper Canada was an Act to regulate marriage. This Act reflected the homogenous Tory Loyalist nature of the colony, and Governor Simcoe's dream of creating a "Little England." The statute was more religiously intolerant than the British statute, in that only Church of England marriages performed in Upper Canada were to be given legal recognition. There was no exception for Jews or Quakers.[40]

In the space of less than forty years, Ontario had moved from recognizing only Catholic and Jewish marriages, to recognizing Episcopalian, Catholic and Jewish marriages, to recognizing *only* Episcopalian marriages. The tension between the new, predominately Protestant colony of Upper Canada with the neighboring predominately Catholic colony of Lower Canada is easy to imagine.

As what would become Ontario grew in size and diversity, the original intolerant marriage law grew gradually more tolerant. However, suspicion continued for a prolonged period about Methodists, who were mainly recent American immigrants and suspected of harboring republican sympathies. As a result, there was, for a time, a requirement that a couple marrying elsewhere than an Episcopalian Church swear an oath of loyalty

marriage in section 91 of the Constitution:

> The word "marriage" is not, as I conceive its use in this Act, to be interpreted as only such form of marriage as the laws of England had deemed marriage, or part of this country at the time of Confederation had deemed such.
>
> It is to be taken for the measuring of the *power*, in the widest sense that the word can have a meaning in any civilized country, including, for example, the widest sense in which any one of the court engaged in resolving the case of *The Queen* v. *Millis*, 10 Cl. & F. 534, would have held it to mean; or, for example, in the sense that so long prevailed over Western Europe and up to recent years in Scotland; in short, consensual marriage of any kind.

In Reference Re: Marriage Act, [1912] 46 S.C.R. 132 (Can.).

39. *See, e.g.*, Brown, *supra* note 14; Talman, *supra* note 35.

40. An Act to Confirm and Make Valid Certain Marriages Now Comprised Within the Province of Upper Canada, and to Provide for Future Solemnization of Marriage Within the Same, 1793, 33 Geo. III, c. 5 (U.K.).

to the Crown. Hostility to Catholics meant that Catholic marriages were not recognized under the law of Ontario until 1847.[41] Although Jewish marriages had enjoyed privileged recognition under English law, such marriages had no legal validity in Ontario until 1857.[42]

In 1866, a case came before the courts of England that was to have great significance for Canadian marriage law. A careful reading of the decision reveals the influence of the canon law of the official state Church of England. The case of *Hyde v. Hyde and Woodmansee* was actually concerned with the legal validity of an American marriage.[43] The petitioner sought to dissolve his Mormon marriage to a woman in Utah, a marriage formed at a time when Utah permitted polygamy. The English court ruled that this heterosexual union was no marriage at all and could not be dissolved by the English courts. Reviewing the English law that had considered the validity of various non-Christian forms of marriage in the far-flung British Empire, the Court made this famous statement about the universal and unchanging fundamentals of marriage which would come to be cited as the legal definition of marriage in Canada: "I conceive that, for this purpose, marriage in Christendom is understood to be the lawful union of one man and woman for life to the exclusion of all others."[44]

Since the debates that have raged about the roles of the courts, the Church, and the legislature in regulating marriage, it is important to stress that this definition was neither created by God, nor by a Parliamentarian, but by a judge. It was this judicial edict by an English judge that was used to deny access to legal marriage to same-sex couples a century later, not any Act of Parliament.

By 1867, any form of bona fide religious marriage could suffice to ensure that a couple was legally wed in Ontario. Ontario became a province in the new Dominion of Canada on July 1, 1867.[45] Under the country's new federal constitution, power over marriage and divorce was principally given to the central federal government to be established at Ottawa.[46] This caused considerable anxiety among the Catholic population in Quebec, which was concerned about preserving the traditional control of the Catholic Church over marriages. In particular, it was concerned that the obnoxious continental notion of purely civil marriage might be

41. An Act to Extend the Provisions of the Marriage Act of Upper Canada to Ministers of All Denominations of Christians, 1847, 10 & 11 Vict., c. 18 (S. Prov. C.).

42. An Act to Amend the Laws Relating to the Solemnization of Matrimony in Upper Canada, 1857, 20 Vict., c. 66 (U.K.).

43. [1866] L.R. 1 P. & D. 130 (ct. Div. & Matr.).

44. *Id.* at 133.

45. *See* Constitution Act, *supra* note 17.

46. *See* Constitution Act, *supra* note 17, at § 91(26).

recognized.[47] As a result, an exception was created giving power over the ceremonial or formalities of marriage to the provinces.[48]

Religious marriage was the only way to be married in Ontario, although efforts to enforce official Christianity in marriage were rejected by the Ontario Courts as long ago as the nineteenth century.[49] For agnostics or atheists, however, there was no secular option until 1950. Beginning in that year, the law permitted judges and others to preside over purely civil marriages for the first time in Ontario.[50] Throughout these changes in the law, the original recognition of the ancient right of Christian churches to marry couples under the authority of the publication of bans was preserved. It is now contained in section 5 of the Ontario Marriage Act.[51]

The eventual recognition of purely civil marriage was not the only departure Canadian law would make from traditional Christian teaching about marriage. The Courts had to contend with the forms of marriage of Native Americans that did not meet the fundamental *Hyde* criteria, not to mention the formalities of bans or licenses. Here, the common law doctrine that developed made some nice distinctions. The lack of formalities and divorce "at will" could be excused. The validity of such marriages was upheld despite this failure to meet the "*for life*" requirement from *Hyde.*[52] However, other native traditions, such as polygamy, were found to be *mala in se* and invalid because they were fundamentally obnoxious to the Christian notion of marriage enshrined in the common law in *Hyde*.[53]

In the late nineteenth century, debate raged in Canada about changing the laws prohibiting a man from marrying his dead wife's sister. For Episcopalians, unlike Catholics, this was incest and the laws of Canada reflected the Episcopalian rules. Although the debate seems bizarre to us a

47. In fact, Quebec was the last Canadian province to permit purely civil marriage in 1970.

48. *See* Constitution Act, *supra* note 17.

49. Chief Justice Armour concluded his brief reasons in support of quashing the conviction of a Mormon minister for illegally performing a marriage with these words in respect of the *Marriage Act* then in effect:

> The statute should receive a wide construction. It does not say "Christian" but "religious". If it said "Christian" it would exclude Jews. The fundamental law of the Province makes no distinction between churches or denominations. Every person is at liberty to worship his Maker in the way he pleases. We have, or ought to have, in this country, perfect freedom of speech and perfect freedom of worship.

Regina v. Dickout, [1893] 24 O.R. 250, 254 (Ont. C.A.).

50. *See* Marriage Act, S.O., ch. 42, § 25 (1950) (Ont.).

51. *See* Marriage Act, R.S.O., ch. M-3, § 5 (1990) (Ont.).

52. Connolly v. Woolrich, [1867] 17 R.J.R.Q. 75.

53. *See generally* R. v. Bear's Shin Bone, [1899] 3 C.C.C. 329.

century later, the arguments made have a familiar ring—the state had no right to interfere with natural law and with God's will; centuries of Christian tradition were at stake; incest was about to be legalized by the state, an affront to all right-thinking people; the very foundation of civilization, marriage, was under attack with unforeseeably dire consequences; Episcopalian religious freedom was being infringed, and their clergy might face jail for refusing to follow the new rules. The Attorney General of Canada defended the reform as necessary in a society that respected religious freedom and diversity. The reform was passed, and none of the predictions of doom came to pass.

The influence of traditional Christian views about sex, sexuality and marriage on Canadians continued to erode over the following years. To the horror of disciples of St. Augustine, contraception was legalized and women's rights were strengthened. Eventually, a married woman would not only be a separate person in the law, she would even have the right to refuse to have sex with her husband. Homosexual acts in private were no longer criminal as of 1969. Divorce, condemned equally by both the Catholic and Anglican churches, became more freely available under the law. Abortion was permitted.[54]

Canada began to extend some legal recognition to so-called "common law" heterosexual couples as early as 1966 in our Canada Pension Plan (similar to Social Security in the United States). In the late 1970s, the law began to widely recognize the rights and obligations of so-called "common law" heterosexual couples. These were unmarried heterosexual couples who were previously referred to as living "without benefit of clergy," or "living in sin."[55] Despite the fact that such relationships are officially sinful according to the official dogma of many Christian churches, there seems to be widespread support in Canada for this recognition. There has been no great outcry of opposition to legal recognition of heterosexual common law couples from those who accuse our community of undermining marriage.

IV. THE MOVEMENT FOR LESBIAN AND GAY EQUALITY IN CANADA

A. The Pre-Charter Era

In the period prior to the reform of the criminal law, there was considerable danger associated with being identified as a gay rights activist in Canada. Jim Egan, who would rise to national fame in the Charter era, was a lonely voice in the Toronto of the 1950s, urging lawmakers to consider the Wolfenden reforms and the psychological findings of Dr.

54. *See* Divorce Act, S.C., ch. 24 (1967-68), *amended by* R.S.C., ch. D-8 (1970). For more on abortion in Canada, see Morgentaler v. Regina, [1988] 1 S.C.R. 30 (Can.).

55. *See* Family Law Reform Act, S.O., ch. 2 (1978).

Evelyn Hooker about the normalcy of homosexuals. In British Columbia, the first gay rights organization was established. Like its American counterpart, the Mattachine Society, the group chose a non-threatening name: Association for Social Knowledge.[56]

Criminal law reform and the mood of modernization introduced by Pierre Elliott Trudeau spurred the formation of Ontario's first gay rights group, the University of Toronto Homophile Association. This soon spawned a city-wide organization, the Community Homophile Organization of Toronto in which George Hislop played a key role. Gays and lesbians demonstrated on Parliament Hill in Ottawa in 1971 with a variety of demands, including legal recognition of same-sex couples. The City of Toronto passed an anti-discrimination ordinance in 1973, the first in Canada. Quebec was the first province to introduce such a measure in 1977. At the same time, both the federal and Ontario human rights commissions urged similar changes under Ontario and Canadian law.

There were also setbacks. Chris Vogel, one of Manitoba's most famous activists, had his efforts to marry his same-sex partner rejected by the courts of his province.[57] Montreal's bars and bathhouses were raided in an effort to "clean up" the city in advance of the 1976 Olympics. In Ontario, John Damien became embroiled in a very public battle over his firing as a racing steward for being gay. The American crusade against gay rights that featured Anita Bryant was imported into Canada. The sadistic murder of Emanuel Jacques, a young shoeshine boy, sparked a huge backlash in Toronto that included raids on gay bathhouses, and prosecutions of the leading gay newspaper and bookstore.[58]

B. The Charter Era

Pierre Elliott Trudeau, who had been educated at Harvard and in France, was an admirer of the notion of a constitutional entrenched Bill of Rights. He was determined that Canada would have an equality guarantee modeled on such precedents as John Adams' Article One from the Massachusetts Declaration of Rights of 1780. Canada's section 15 featured a list of prohibited grounds of discrimination, similar to the familiar anti-discrimination statutes in existence throughout the country. Efforts by George Hislop and others to persuade governments to add sexual orientation to the list of grounds failed. However, in a compromise advocated by Svend Robinson, M.P., section 15(1) was left open-ended,

56. *See, e.g.*, KINSMAN, *supra* note 8.

57. *See* North v. Matheson, [1974] 52 D.L.R.3d 280, 285 (Man. Co. Ct.).

58. *See* CBC News Online, *Child Murders* (June 26, 2003), *at* http://www.cbc.ca/news/indepth/background.child_murder_timeline.htm.

creating the possibility of "analogous grounds" to the listed grounds.[59]

Section 15(1) reads:

> Every individual is equal before and under the law and has the right to the equal protection and equal 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.[60]

The rights created under section 15(1) did not come into effect until April 17, 1985, by virtue of section 32(2). A simple statute can override section 15 guarantees by using section 33. The rights are, in any event, subject to the limits set out in section 1, which reads as follows: "The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."[61]

It is a telling comment on the conservative nature of Canadians that, whereas John Adams placed equality as the first article in his *Declaration of Rights*, Canadians put the limits on equality first and equality was well down the list at 15. There was natural concern among gay and lesbian Canadians that the *Charter* would not fulfill its promise.

Those doubts were soon erased. The House of Commons committee, known as the Boyer Committee, charged with examining Canada's laws for compliance with section 15(1), found that sexual orientation was an analogous ground.[62] The Attorney General of Canada agreed, and pledged to end discrimination on the basis of sexual orientation at the federal level.[63] Sadly, the government failed to honor that commitment and discrimination continued, while Parliament engaged in years of empty promises, foot-dragging and debates larded with homophobic comments.

Despite their traditional role in enforcing the criminal law against gays and lesbians, and the lack of any legal tradition of restraint on parliamentary supremacy, the courts proved to be more reliable guardians of equality. Legal recognition has been increasingly extended to homosexual common law relationships, first through court decisions beginning with *Veysey v. Canada.*[64] The Courts ventured where legislatures

59. CAN. CONST. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms), § 15(1) [hereinafter Charter of Rights and Freedom].

60. *Id.*

61. *Id.* § 1.

62. *See* J.P. BOYER, EQUALITY FOR ALL: REPORT OF THE PARLIAMENTARY COMMITTEE ON EQUALITY RIGHTS (CANADA) (1985).

63. *See* TOWARD EQUALITY: THE RESPONSE TO THE REPORT OF THE PARLIAMENTARY COMMITTEE ON EQUALITY RIGHTS (CANADA) 13 (1986).

64. [1990] 1 F.C. 321, 322 (T.D.), *aff'd* on other grounds by the Court of Appeal on

were fearful to tread, for example, ordering an end to the ban on gays in the military.[65] Three cases were to create a firm foundation for Canadian jurisprudence in this area at the Supreme Court level.

Jim Egan and his partner Jack Nesbitt lost their case under section 1, but they advanced the jurisprudence. *Egan v. The Queen* confirmed that sexual orientation was an analogous ground under section 15(1). The Court also ruled that discrimination against same-sex couples was an infringement of section 15 that governments would have to try to justify under section 1.[66]

Delwin Vriend was fired from a conservative Christian college in Canada's most conservative province because he was gay. Alberta did not provide anti-discrimination protection for gays and lesbians at the time. He took his case to the Supreme Court and won, the first clear victory of its kind at that level. Justice Sopinka, the swing vote in *Egan,* heard argument in the case but died before the decision was rendered.[67] The eight judges ruling were unanimous on all issues except remedy, where one judge advocated a different approach. Several of the judges changed their positions from the earlier ruling in *Egan,* notably the Chief Justice of Canada. *Vriend v. Alberta* established that gays and lesbians had a right to protection from discrimination, and that the Courts would step in where government failed to act.

Finally, the question of equality with heterosexual common law couples reached the Supreme Court in *M. v. H*.[68] This important decision found that it was constitutionally imperative under the Canadian Charter for laws to provide equal treatment of same-sex common law couples and opposite sex common law couples.

In all of these cases, conservative Christian groups intervened in opposition to lesbian and gay equality. Despite the fact that unmarried heterosexual relationships are also supposedly sinful and are clearly far more common than same-sex relationships, these self-declared proponents of traditional marriage and the family have been remarkable by their absence from court cases involving legal recognition of unmarried heterosexual relationships. Apparently, some sins are hated more than others. The recent move to legally recognize same-sex marriage has attracted the most aggressive traditional Christian opposition to any equality measure to date.

May 31, 1990, Court File A-557-89.

65. *See* Haig v. Canada, [1992] 9 O.R.3d 495, 497.

66. *See* Egan v. Canada, [1995] 2 S.C.R. 513, 522 (Can.).

67. *See* Vriend v. Alberta, [1998] S.C.R. 493, 580 (Can.).

68. M. v. H., [1999] 2 S.C.R. 3 (Can.).

V. SAME-SEX MARRIAGE IN CANADA

There was a challenge to assert entitlement to same-sex marriage under the common law launched in Canada prior to the Charter in the 1970's. This was, not surprisingly, unsuccessful.[69] The introduction of the Canadian Charter of Rights and Freedoms in 1982 changed everything.[70] Once again, it was Prime Minister Trudeau who was responsible for transforming the law from an instrument of our oppression into the vehicle for our liberation. Sexual orientation was recognized as an "analogous ground" of protection under section 15(1) of the *Charter* from the outset. However, the fate of future legal challenges in Canada's traditionally conservative courts was not certain.

There was disappointment when all recommendations by a Parliamentary Committee about ending discrimination against gays and lesbians were given lip service, and then promptly shelved. The lesbian and gay community was not in much of a position to fight back. Although a Canadian lesbian and gay political movement had existed for some years, it had no national voice until EGALE was formed in 1986.[71] Even then, this organization was under-resourced and struggled for years to establish its legitimacy with politicians and the lesbian and gay community. The pace of reform was initially slowed as Canada's gay community was ravaged by the AIDS epidemic. Responding to the social and legal concerns arising out of this crisis both galvanized and drained the limited resources of the community.

Individual gays and lesbians began to test their rights in the courts. From the beginning, there were cases seeking relationship recognition. The early cases failed, with the Courts relying on section one of the new Charter, the section that allows government to impose limits on rights that are "demonstrably justified in a free and democratic society." Strangely enough, one of the first successful cases involved equal conjugal visits for federal prisoners![72]

A second marriage challenge was mounted in the early 1990's. It was also unsuccessful at the lower court level.[73] Many leaders in the gay community at the time thought it was premature. For many years, Canada had extended some legal recognition to opposite sex common law couples. Many thought it was important to establish equality with common law

69. *See* North v. Matheson, [1974] 52 D.L.R. (3d) 280 (Man. Co. Ct.).

70. *See* Charter, *supra* note 59.

71. *See* Egale website, *at* http://www.egale.ca (last visited Feb. 24, 2004).

72. *See* Veysey v. Canada, [1990] 1 F.C. 321, 322 (T.D.), *aff'd* on other grounds by the Court of Appeal on May 31, 1990, Court File A-557-89.

73. Layland v. Ontario (Minister of Consumer & Commercial Relations), [1993] 14 O.R. (3d) 658 (Div. Ct.).

couples before tackling marriage, with its religious connotations. Pressure was brought to bear, and the case advanced no further.

As has been discussed, the jurisprudence began to consistently favor equal treatment of same-sex couples. Finally, in 1999 came the body blow to discrimination, the Supreme Court's ruling in *M. v H*. In a near unanimous ruling, the Court found that a law that included common law opposite sex couples but excluded same-sex couples was discriminatory. It called upon the lawmakers of Canada to rectify all Canadian laws, rather than force gays and lesbians to resort to the Courts. Although the Court expressly declined to comment on marriage, since the issue was not before them, the stage was set for the next great battle in the struggle for full equality.[74]

Canada's Supreme Court released *M. v. H.* in May 1999. The following June, Professor Robert Wintemute hosted a landmark international conference at King's College that brought together experts on the subject of legal recognition of same-sex relationships. While the conference energetically discussed the Canadian decision, the debate about which country would be the first to recognize same-sex marriage was a binary one between the United States and the Netherlands. Canada was not on the radar screen.[75]

Martha McCarthy and I attended the conference and talked to international colleagues about the appropriateness and timing of a Canadian challenge. That fall, a further conference was held at Queen's University in Kingston, Ontario. Some of the same international experts attended, including Evan Wolfson. Martha and I arranged to take the train back to Toronto with Evan, and the plans for the Canadian marriage challenge began to unfold.

A key concern was which lawyers and organizations would move first, and where and when they would begin the challenges. Martha and I had enjoyed working together on *M. v. H.* and wanted to be involved in the next move. We decided that I would seek to represent the MCCT. Martha and I were convinced that it was important to have a progressive religious voice in court to balance the inevitable chorus of woe from the religious right.

Professor Kathy Lahey of Queen's University subsequently suggested that I consider the use of the bans as a means of having a couple who could actually get married to present to the court, rather than simply seeking a

74. M. v. H., [1999] 2 S.C.R. 3 (Can.).

75. *See generally* Robert Wintemute, *The Massachusetts Same-Sex Marriage Case: Could Decisions From Canada, Europe, and South Africa Help the SJC?*, 38 NEW ENG. L. REV. 505 (2004). By the time of the conference, Michael Hendricks and René Leboeuf had already begun their struggle. Ironically, although they were the first to attempt to achieve equal marriage, they were the last to obtain a ruling.

marriage license. As someone who was raised in the Episcopalian Church, I was familiar with the process. Moreover, I had to then explain to Rev. Dr. Hawkes. His response was memorable: "It can't be this easy." I assured him it would not be easy.

Efforts were made by Canada's only national gay and lesbian rights organization, Equality for Gays and Lesbians Everywhere (EGALE), to develop a national response. EGALE had some cooperation, but faced the usual problems. Quebec had tried for some time to get its case moving, and the Hendricks-Leboeuf couple involved had eaten into their own personal financial resources to accomplish this task. Ontario based-groups felt that they had strong lawyers and progressive courts. Activists in British Columbia pointed out that the government in power would support our efforts. EGALE and an allied group of couples decide to proceed in B.C. with the initial support of the provincial government.[76]

In the summer of 2000, Martha's clients unexpectedly went to the media in Toronto with their plans—the case was thrust into the public eye. Interestingly, the Clerk of the City of Toronto decided not to refuse a license to Martha's clients, but sought the guidance of the court. Martha launched her case, and MCC of Toronto joined in as an intervener (amicus curiae).

Later that year, on International Human Rights Day, Rev. Dr. Hawkes announced our plans to use the bans to legally marry two same-sex couples the following month, on January 14, 2001. It was a tense and exciting time under intense media scrutiny. We had to endure the pain of our religious foes standing up in the Church, as is their right under the law, to protest the bans. The weddings proceeded despite these protests. The positive impact on public opinion was immense, however, the Ontario government refused to register the marriages that had been performed, a technicality under the Vital Statistics Act.[77] This gave us a basis for a legal challenge, which was promptly launched. Our application was ordered by the court to be joined with the case already before the court for Martha's clients, and came to be known as the "Applicant Couples." The matters were heard by the Divisional Court, a Court composed of trial judges of the Superior Court able to address judicial review of administrative action. Legal challenges were now under way in British Columbia, Quebec and Ontario challenging the exclusion of same-sex couples from marriage.[78]

76. After a new conservative regime came to power following an election, the B.C. government withdrew its proactive support and adopted a neutral stance. Interestingly, a similar political change happened during the course of the *M. v. H.* litigation in Ontario.

77. Vital Statistics Act, R.S.O., ch. V.4 § 19(1) (1990).

78. For a comprehensive listing and description of these cases and surrounding circumstances, see http://www.samesexmarriage.ca.

The most negative Canadian Court ruling in recent memory was the first ruling to be released, the British Columbia trial level marriage decision of Justice Pitfield.[79] Justice Pitfield held that the restriction on same-sex marriage was discriminatory under section 15(1) of the Charter, but justified under the reasonable limits exemption of section 1 of the Charter. Remarkably, the Court also held that same-sex marriage was legally impossible in Canada in the absence of a constitutional amendment. Fortunately, an appeal from that decision was later granted and this regressive decision has been overturned.

In a strongly worded and unanimous decision issued in 2003 prior to the Ontario Court of Appeal's decision in *Halpern*, the British Columbia Court of Appeal found the exclusion of a same-sex couple from marriage violated the equality guarantee and found that there was no constitutionally valid alternative to marriage. Legislatures were given until July 12, 2004 to amend incidental legislation and give effect to this ruling.[80] The Canadian Government had until June 30, 2003 to seek leave to appeal this decision. A similar result was achieved at the lower court level in Quebec.[81]

The Divisional Court, the court of first instance in Ontario, also unanimously found the bar to same-sex marriage unconstitutional. The Divisional Court ruling, which preceded both the BC Court of Appeal ruling and the Quebec decision, was the first ruling in favour of same sex marriage in Canada. However, two of the three judges opined that there might be constitutional alternatives. The majority would have given the Canadian Government until July 12, 2004 to resolve the problem, failing which same-sex marriage would become a legal reality.[82] The federal government appealed that decision, and we cross appealed on remedy. The Ontario Court of Appeal, the province's highest court, heard argument in April of 2003.

The Ontario Court of Appeal released its unanimous ruling remarkably quickly, on June 10, 2003.[83] In a unanimous decision, it accepted the lower Court's decision that had rejected the analysis of Justice Pitfield on the "frozen" meaning of marriage. They confirmed that the bar to same-sex marriage did not engage religious freedom under either section 2(a) or section 15(1) of the Charter. It supported the Divisional Court's findings that there had been a common law bar to same-sex marriage, which violated section 15(1) of the Charter on ground of sexual orientation. Like

79. *See* EGALE Canada Inc. v. Canada, [2001] B.C.J. No. 1995, *rev'd*, [2003] B.C.C.A. No. 251.

80. *See generally* EGALE Canada Inc. v. Canada, [2003] B.C.C.A. No. 251.

81. *See generally* Hendricks v. Québec, [2002] R.J.Q. No. 3816 (C.S.).

82. *See* Halpern v. Canada, [2002] 60 O.R.3d 321 (Ont. Div. Ct.).

83. *See generally* Halpern v. Canada, [2003] 65 O.R.3d 161 (Ont. Div. Ct.).

the Divisional Court, the Court of Appeal rejected all of the arguments under section 1 to justify this discrimination, including procreation and religious considerations.

The real surprise was on remedy. The Court of Appeal unanimously ordered a much more dramatic remedy than the Divisional Court, which had been deeply divided over remedy. The definition of marriage was immediately changed. The authorities were ordered to begin licensing and registering same-sex marriages. No delay was to be permitted, sending governments scrambling to respond. Perhaps most importantly, the Court ruled that the two same-sex marriages that had taken place at the Metropolitan Community Church of Toronto on January 14, 2001 were valid, making them the first legal same-sex marriages in the world.

Canada became the first jurisdiction in the world to offer same-sex marriage to non-resident couples. Many American couples began to take advantage of the ruling, including Rev. Tory Perry, the founder of Metropolitan Community Churches worldwide.

The Quebec Court of Appeal was scheduled to hear an appeal in September of 2003, but that date has been moved to spring 2004. The Federal Government has abandoned their appeal, but the religious conservative interveners are carrying on with the case as permitted under Quebec's laws.

While the appeals had been winding their way through the Courts, a Parliamentary Committee had been holding many days of hearings in response to the Ontario Divisional Court ruling. Most witnesses before the Committee favored same-sex marriage, even in western Canada and smaller centers. The only exception was the predominately Mennonite community of Steinbach, Manitoba. However, many witnesses expressed concern about protecting religious freedom. There was vocal and significant opposition from a minority of witnesses, some of them making vile links between homosexuality and the molesting of children and even infants.

By the time of the ruling in *Halpern,* the Committee had not yet issued a report. On June 12, 2003, two days after the Court of Appeal ruling, the Committee took a vote on how to respond. It was a tie, and the Chairman voted to break the tie by recommending to the government that there be no appeal.[84]

The Federal Government announced that it would not appeal the Ontario decision, although some interveners from the case have subsequently attempted to do so. A draft Bill confirming the new definition of marriage would be referred from the legislature to the Canadian Supreme Court for

84. The vote was taken on June 12, 2003 and was carried in favour of the motion with a 9-8 margin.

an advisory opinion. Three questions will be posed that aim to ensure the constitutional validity of the new definition of marriage and the legal protection of clergy who object to marrying same-sex couples.[85] The Bill will then be submitted to Parliament for a free vote. However, as the opposition has noted, the legal definition of marriage has already changed, so the Bill is somewhat superfluous.

The only real hope for those opposing equality lies with the invocation of section 33 of the Canadian Constitution, which allows Parliament to exempt laws from the equality guarantee. However, this constitutional "weapon of mass destruction" has never been invoked by the Federal Parliament in the history of the *Charter*.

VI. RECENT DEVELOPMENTS

Since the release of the Ontario Court of Appeal's ruling in *Halpern*, there have been a dizzying series of activities. Their significance is not fully appreciated in Canada itself, so it is hardly surprising that those living outside her borders may be somewhat puzzled. Since the Court of Appeal ordered an immediate end to the old discriminatory definition of marriage, same-sex couples have started marrying in large numbers. It soon became widely known in the United States, and indeed throughout the world, that Canada was the first country in the world to offer same-sex marriage to persons who were neither citizens nor residents of the country. Same-sex couples have flocked to Toronto to marry. The most recent statistics from the City of Toronto disclose that there were 757 licenses issued to same-sex couples in the period from June 10 to September 30, 2003, including 265 to couples from other countries.[86]

The government had originally hoped to have the Reference held in the fall of 2003, but it has been scheduled for April 16, 2004. Even though the Supreme Court has rejected all of the procedural suggestions made by the government, the government still appears committed to the process; it recently announced that Canada's preeminent constitutional scholar, Professor Peter Hogg, will argue the case on its behalf.

The Reference process is unique to Canada, so far as this author is aware. It allows the federal government and the federal government alone, to publicly seek the public opinion of the Supreme Court of Canada on a theoretical question. In this case, the Attorney General suggested that the Supreme Court would be asked three questions about the draft bill. First, is

85. *See* discussion *infra* Part VI.

86. The total number of licenses issued to same-sex couples where both partners were from the United States is 247. Toronto Marriage License Statistics, Equal Marriage for Same-Sex Couples, *at* http://www.samesexmarriage.ca/legal/toronto_marriage_stat.htm (last visited Mar. 23, 2004).

the Bill within the power of the federal government? It will be recalled that the lower court in British Columbia had agreed with argument presented by the interveners in that case that the federal government lacked the power to legally recognize same-sex marriage. This question is also aimed at foreclosing arguments by Alberta that it can "opt out" of the new definition. Second, does the new law comply with the Charter? This question is designed to prevent future Charter challenges, as is the third question: Will religious freedom be infringed by the new definition?[87] It will be seen that the reference questions are aimed at dealing with all of the opposition concerns, but do not ask for the court's view of the fundamental question of whether marriage is a constitutional imperative.

Some in Canada have suggested that this approach is somehow dishonest or deceitful, or even undemocratic. This is absolute nonsense. There is no requirement that the federal government fight a constitutional case to the Supreme Court of Canada in every case. It has not done so in the past on such topics as the end of the ban on gays in the military.

The Courts of three provinces have spoken in the clearest possible terms. The added burden and delay of appealing to the Supreme Court cannot be easily justified, especially when those who are demanding a Supreme Court ruling are the very ones who have claimed all along that this decision should be made by Parliament and not the Courts. It is clearly a matter for the discretion of the executive branch of government whether to continue litigation against the government or settle it. Whether same-sex marriage is required by the Charter or not becomes irrelevant if Parliament decides that it is going to pass an act requiring it.[88] At that juncture, the only issue is the constitutional validity of the law, not its constitutional necessity. The Reference will deal with the question of the validity of the law.

The current approach to same-sex marriage is in-line with the presentation of the majority of groups who had appeared before the Standing Committee, supporting same-sex marriage but expressing concern about the need to protect religious freedom. In front of the Committee, the Attorney General expressed his wish for other provinces to begin permitting same-sex couples to marry immediately and not work for the Bill. However, they have failed to act on his suggestion.

The winning couples in the British Columbia case sought a variation of the British Columbia ruling which was to take effect on July 12, 2004. The province's Court of Appeal ruled, in light of *Halpern,* that justice required

87. The text of the *Reference to the Supreme Court of Canada* is available on the Department of Justice website at http://canada.justice.gc.ca/en/ews/nr/2003/doc_30946.html.

88. The Charter represents the floor of rights in Canada; therefore, what is required by the Charter is inconsequential if Parliament decides to extend the right.

that the new definition of marriage apply immediately in British Columbia given the fact that the federal government no longer sought any delay and since British Columbia couples could travel to Ontario to marry. Thus, same-sex couples are now permitted to marry in two of the three most populous provinces of Canada.[89]

Canadian activists had been warned to expect a backlash. However, it is fair to say that after a brief interval of calm, it came with a ferocity that was surprising. The interveners (amici) in the Ontario Court announced that they would appeal the Ontario decision. The Vatican itself weighed in on the debate with a blistering missive from the Congregation for the Doctrine of the Faith, formerly know as the Inquisition. Since the document is largely a synthesis of earlier directives, it is clear to most observers that the timing of the release of this document was intended to impact on the debate in Canada.[90]

This document is worth reading. It calls on Catholic politicians to vote in accordance with Catholic teaching, rather than in conformity with the laws of their country. At least one Catholic bishop has publicly stated that the Canadian Prime Minister risks "eternal damnation" for his actions. Other Catholic bishops have tried to sugar-coat the Vatican's demands, asserting that it just wants to be heard, respects gays and lesbians, and that it only wants to protect marriage. Despite these assurances, the document itself asserts that allowing gays and lesbians to parent amounts to doing "violence" to children; it also characterizes the legal recognition of same-sex couples (not just same-sex marriage) as moving from tolerance to the "legalization of evil."

The Vatican's position has generally been met with dismay by Canadians. Canadian law has permitted adoption by gays and lesbians for some time, and there has been a lesbian baby boom in Canada as a result of alternate insemination. There is no scientific evidence that any Canadian children, or any children, have suffered harm while under the care of their gay or lesbian parents. However, sadly, there is ample evidence of harm to children while under the care of some Catholic priests and brothers in Canada and elsewhere, and evidence that the Catholic hierarchy covered up such abuses. The Vatican appears to fail to recognize abuse of children where it exists, and sees abuse of children where none exists. Even some Catholic priests in Canada have publicly expressed the view that the Vatican lacks the authority to lecture others on this legal issue.[91]

89. Supplementary reasons were released on July 8, 2003. *See* EGALE Canada Inc. v. British Columbia (Att'y Gen.) [2003] B.C.C.A. 406.

90. VATICAN, *supra* note 25.

91. *See generally* Leslie Scrivener, *Toronto Priest Backs Same-Sex Marriage*, TORONTO STAR, Feb. 5, 2004, at A17. Other clippings are on file with the author.

As to the "legalization of evil," most Canadian bishops would prefer to ignore this portion of the Vatican directive. In fact, Canadians have legally recognized same-sex relationships in Canada for some time—it is a constitutional imperative. The Vatican position is clearly inconsistent with Canadian values, even though Catholics make up the majority of Canada's religious followers. Logic dictates that most Canadian Catholics are not following the Vatican's guidelines on this issue.

Evangelical Christians have also mobilized in opposition to same-sex marriage, and have flooded Parliament with emails. The sizeable Evangelical Christian Chinese population has been very visible in their opposition through demonstrations. It must be remembered, however, that in Canada Evangelical Christians are something less than half the concentration that they are in the USA. They have considerably less influence on Canada's politics. The former leader of the opposition complained that he was publicly ridiculed for his evangelical beliefs, beliefs that in the USA would be necessary qualifications to reach the White House.

This vocal opposition did appear to cause some small setback in the public opinion polls in support of same-sex marriage, although they had no discernable impact in BC and Quebec. They did cause considerable anxiety among elected officials, and the opposition smelled blood.

It is important to understand the nature of the Canadian political situation federally to understand how this issue is unfolding. Canada is a constitutional monarchy, and the Prime Minister is the leader of the party that elects the most members to the House of Commons. For most of modern history, Canada has been dominated by the Liberal Party, which currently holds the majority. We do not have fixed times for elections, but elections are expected next year. The traditional rival for the Liberals has been the Progressive Conservative party, which has recently joined two rival political parties. It is important to understand that this newly reunited political right has little chance of forming the next government.

Canada's Prime Minister throughout this period of change has been Jean Chrétien. He announced some time ago that he would retire. His party has chosen a new leader, Paul Martin, the former finance minister. He will become Prime Minister on December 12, 2003.

The long delay in handing over power from one Prime Minister to another is unprecedented in Canadian history and the opposition is using the opportunity to expose divisions in the governing party's ranks between supports of the old regime and those supporting the new regime. There is a kind of "fifth column" of pro-life social conservatives in the Liberal caucus known as the "God Squad." The closest equivalent in the US system would be the old "Dixiecrats." The "God Squad" was isolated from power under the former Prime Minister. They have high hopes for greater power under

Mr. Martin.

This leaves the question of where the Liberals will stand in the future on the issue. It is widely believed that the current Attorney General, Martin Cauchon, the current champion of same-sex marriage, will not remain in cabinet under the new regime. Whoever is chosen to replace him is not likely to be as enthusiastic. However, Mr. Martin has made two things very clear. First, he publicly has stated that while his private religious beliefs (he is also a Catholic) are against same-sex marriage, he supports the current Liberal policy as a matter of human rights. Second, while he has indicated a willingness to consider other options, he has laid down three conditions for implementation of any alternative. First, there must be no use of the notwithstanding clause. Second, the new solution must comply with the *Charter*. Finally, religious freedom must be protected. Given the comments from the Courts about the unconstitutionality of any alternate regimes, Mr. Martin's firm opposition to the use of the notwithstanding clause means that the opponents of same-sex marriage are in search of an alternative that cannot meet these criteria. While appearing to be open-minded on the topic, Mr. Martin appears to have guaranteed that Canada will not change course.

The Government had hoped to have the reference and the Bill dealt with before the new regime took power. That would have suited Mr. Martin, who would prefer not to have to deal with this controversy. However, the Supreme Court will not hear the reference until April 16, 2004. By that time, Mr. Martin will be in power, and Canadians may be in the middle of an election. It is highly unlikely that we will have an answer to the questions posed on the reference before the election. Pressure has been brought on Mr. Martin to expand the questions or the reference to convert it into a *de facto* appeal of the Ontario Court of Appeal decision.

At present, it appears likely that Canada will have an election in which same-sex marriage will be an issue. However, the truth is that this issue is unlikely to have much impact on the outcome of that election. Despite the controversy, Mr. Martin has little to fear. The provincial Liberals were recently elected in Ontario with a strong majority on a platform that included support for same sex marriage. In addition to the weak opposition at the federal level, Mr. Martin is widely acknowledged to be the most popular politician in Canada. He is a fiscal conservative and social progressive who has broad appeal across the political spectrum and across the regions. A recent book about him is aptly titled *Juggernaut*. The opposition's use of the same-sex marriage issue will expose divisions within the Liberal caucus, but will only help the political right preserve seats in their traditionally supportive regions. They cannot win the election without making substantial gains in urban Ontario, where their position on same-sex marriage enjoys little support and serves to confirm their image as "rednecks."

In other recent developments, the supportive community finally rallied and launched a new national coalition in support, Canadians for Equal Marriage. Members include Canada's largest Protestant denomination, the United Church of Canada.

This supportive coalition arrived just in time to cope with the next challenge. The opposition was poised with a motion that revived a motion that passed in Parliament from 1999. The motion proposed to re-affirm the commitment of Parliament to the traditional definition of marriage and to defend that definition "by all means necessary." The Government, having committed to a "free vote" on their own marriage bill, was stuck with permitting members to vote according to their conscience. However, it was suggested by the Prime Minister that the final language of the motion would be interpreted as supporting the eventual use of the dead notwithstanding clause. Sensing the problem, the opposition first moved an amendment to delete this clause. The result was a tie vote, only the sixth since Canadian independence in 1867. The Speaker of the House voted to break the tie, voting against deleting the wording. The original motion with its dangerous language was then defeated in a close vote, with no tie.[92] Happily, the next day Parliament voted to amend Canada's hate crimes legislation to include gays and lesbians by a wider margin.[93]

The situation continues to seethe in Parliament, but it is unlikely that there will be any further dramatic votes until after the ruling on the reference. Moreover, it now seems clear to most observers that the opponents of same-sex marriage will not be able to muster the votes to pass the notwithstanding clause to overturn the court ruling. This seals its fate.

The motion by the Catholic Bishops and others to step into the shoes of the federal government and appeal the Ontario decision and our counter-motion to quash were both argued on October 6, 2003. The Supreme Court granted our motion in its decision of October 9, 2003.[94] The litigation for same-sex marriage was over. We won.

92. *See* Edited Hansard, Number 120, 37th Parliament, 2nd Session, Sept. 15, 2003, *available at* http://www.parl.gc.ca/37/2/parlbus/chambus/house/debates/120_2003-09-16/han120-1800-E.htm#PT-6 (last visited Mar. 23, 2004).

93. Bill C-250, currently awaiting a third reading by the Senate, will affect the Criminal Code, R.S.C., ch. C-46 (1985).

94. Halpern v. Canada, Ont. 29879 (2003) (unreported), *available at* http://www.samesexmarriage.ca/docs/scc/SCCdecision.pdf (last visited Mar. 3, 2004).

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VII. CONCLUSION

After a lengthy history of repression in which the law has played a key role, gays and lesbians have been moving inexorably toward equality in Canada. The end of criminal sanctions by Parliament in 1969 was important. However, it is the role of the 1982 *Charter* and Canada's independent judiciary that have been critical to most recent advances. Canada's move to legal recognition of same-sex marriages is obviously the most dramatic, although only the latest in these developments. Although there has been a potent backlash, it seems that Canada's status as the first jurisdiction to offer same-sex marriage to the world will remain intact.

John Adams will be remembered for many things, but his creation of the Massachusetts *Declaration of Rights* in 1780 is one of his great enduring legacies. In contrast, Canada operated without a constitutionally entrenched bill of rights for two centuries longer, until 1982. It is surely no mere coincidence that Pierre Elliott Trudeau, the father of the *Charter*, was educated at Harvard, like Adams.

Canada can thank Massachusetts for helping to inspire our commitment to constitutional equality rights. Imagine Canadian joy when the Massachusetts Supreme Judicial Court released its recent decision in *Goodridge*,[95] citing with approval the Ontario Court of Appeal's decision in *Halpern*. It is richly rewarding that having inspired us, we may now inspire you.

95. Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941 (Mass. 2003).