Background Paper

Sexual Orientation and Legal Rights

Publication No. 08-49-E
Revised 24 February 2010

Mary C. Hurley

Social Affairs Division
Parliamentary Information and Research Service

Library of Parliament Bibliothèque du Parlement

Sexual Orientation and Legal Rights

(Background Paper)

HTML and PDF versions of this publication are available on Intraparl (the parliamentary intranet) and on the Parliament of Canada website.

In the electronic versions, a number of the endnote entries contain hyperlinks to referenced resources.

Ce document est également publié en français.

Library of Parliament ***Background Papers*** present and analyze various aspects of current issues in an objective, impartial manner. They are prepared by the Parliamentary Information and Research Service, which carries out research for and provides information and analysis to parliamentarians and Senate and House of Commons committees and parliamentary associations.

Publication No. 08-49-E
Ottawa, Canada, Library of Parliament (2010)

CONTENTS

SEXUAL ORIENTATION AND LEGAL RIGHTS

1 INTRODUCTION

Over recent decades, the legal rights of lesbians and gay men in Canada have been the subject of considerable judicial, political and legislative activity. During this period, judicial and tribunal rulings dealing with legal challenges against allegedly discriminatory laws and in assertion of legal rights 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 also featured increasing calls, gradually sanctioned by the courts in a majority of jurisdictions and now, authoritatively, by the adoption of federal legislation, for the extension of the institution of civil marriage to same-sex couples on the basis of constitutional equality rights.

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 in prescribed areas; and
- the recognition of same-sex relationships, and the extension to homosexual partners of the benefits and rights that are accorded to heterosexual partners.

This paper reviews issues and developments that have determined the legal rights of lesbians and gay men at the federal level as well as in areas of provincial jurisdiction. The paper does not discuss other socio-cultural or moral issues that have been raised in relation to homosexuality.

2 BACKGROUND AND ANALYSIS

2.1 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, the characteristics originally targeted in legislation typically 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* (Charter) 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 the Charter's 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 accepted that section 15 is to be interpreted broadly, and that "analogous" grounds, i.e., personal characteristics other than those listed, may also form the basis for discrimination against a group or an individual. (*Andrews* v. *Law Society of British Columbia*). 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, which specifies that the rights set out in the Charter are "subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." 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 across the country.

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

In 1992, the Charter's impact on human rights legislation was affirmed when the Ontario Court of Appeal ruled that the absence of sexual orientation from the list of proscribed grounds of discrimination in the CHRA violated section 15 of the Charter (*Haig* v. *Canada*). The Court determined that 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 the Canadian Human Rights Commission began accepting complaints of discrimination based on sexual orientation. In 1996, Parliament's enactment of Bill C-33 codified the law as stated in the *Haig* decision, amending the CHRA to explicitly include sexual orientation as a ground of discrimination. The amendment to the CHRA 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. In 2009, Alberta became the last province to do so. Now human rights Acts and Codes in all jurisdictions explicitly prohibit discrimination based on sexual orientation. The legislation enacted in the Northwest Territories is the first human rights statute in Canada to also prohibit discrimination based on "gender identity."

Despite the absence of explicit legislation until 2009, sexual orientation had been considered a prohibited ground of discrimination in Alberta since 1998. In a ruling analogous to the earlier *Haig* decision, the Supreme Court of Canada found that its omission from the province's human rights statute signified that lesbian and gay individuals were denied both substantive equality and 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 (*Vriend* v. *Alberta*).

A now substantial body of human rights decisions involve the alleged denial of services or accommodation on the basis of sexual orientation, and related lesbian and gay issues (e.g., *Waterman* v. *National Life Assurance Co. of Canada*, 1993: loss of employment; *Crozier* v. *Asselstine*, 1994 and *DeGuerre* v. *Pony's Holdings Ltd.*, 1999: harassment in employment; *Grace* v. *Mercedes Homes Inc.*, 1995 and *Québec (Comm. des droits de la personne et des droits de la jeunesse)* c. *Michaud*, 1998: housing; *Geller* v. *Reimer*, 1994, *Hughson* v. *Kelowna (City)*, 2000: Gay Pride proclamation/permit; *Moffatt* v. *Kinark Child and Family Services*, 1998: work environment; *McAleer* v. *Canada (Human Rights Commission)*, 1999: promotion of hatred; *Trinity Western University* v. *British Columbia College of Teachers*, 2001: teacher training program; *Brockie* v. *Brillinger (No. 2)*, 2002: printing services; *Jubran* v. *North Vancouver School District (No. 44)*, *School District No. 44 (North Vancouver)* v. *Jubran*, 2005: harassment in school; *Kempling* v. *The British Columbia College of Teachers*, 2005: publication of anti-homosexual material; *Owens* v. *Saskatchewan (Human Rights Commission)*, 2006: exposure to hatred; *Commission des droits de la personne et des droits de la jeunesse* v. *Périard*, 2007: verbal and physical harassment; *Darren Lund* v. *Stephen Boissoin and the Concerned Christian Coalition*, 2007: exposure to hatred; *Holt* v. *Surfside Recovery House*, 2007: rehabilitation services; *Heintz* v. *Christian Horizons*, 2008: loss of employment; *Boissoin* v. *Lund*, 2009: exposure to hatred; *Bro and Scott* v. *Moody (No. 2)*, 2010: tenancy).

Prohibitions of discrimination based on sexual orientation in human rights legislation 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" is broad enough to include pedophilia and other sexual proclivities that are not intended to be covered, barring discrimination on the basis of sexual orientation does not affect *Criminal Code* prohibitions of certain sexual activities, such as those between adults and minors.

2.2 SAME-SEX SPOUSES

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

2.2.1 SELECTED CASE LAW

Court challenges under human rights legislation and/or the Charter turned on the question of whether the term "spouse" applies to same-sex partners, often in the context of interpreting collective agreements or wording in specific statutes or regulations. A considerable body of jurisprudence evolved in this area.

2.2.1.1 EARLY DECISIONS

One of the earliest cases was a 1988 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 (*Andrews* v. *Ontario (Ministry of Health)*). An opposite conclusion was reached in 1991 by a B.C. court, which 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 (*Knodel* v. *British Columbia (Medical Services Commission*.

In a third case, 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 (*Veysey* v. *Canada (Correctional Service)*).

2.2.1.2 EMPLOYMENT-RELATED DECISIONS

Many of the decisions concerning same-sex benefits arose in the employment sphere. In one early case, a gay federal public service worker who had been denied bereavement leave to attend the funeral of his partner's father argued that he had been discriminated against on the basis of "family status" under the CHRA. The Supreme Court of Canada's 1993 majority decision ruled 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 (*Canada (Attorney General)* v. *Mossop*).

Other employment-related decisions in the federal sphere 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, for the most part, allowed grievances alleging discrimination based on sexual orientation under the CHRA 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 was set aside by the courts on jurisdictional grounds (*Canada (Attorney General)* v. *Boutilier*).

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

2.2.1.3 *EGAN* AND SUBSEQUENT DECISIONS

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

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

This 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. In 1997, an adjudicator found that no bona fide and reasonable cause for the discrimination 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 1996, the Canadian Human Rights Tribunal found that the denial of same-sex benefits to federal government employees based on opposite-sex definitions of "spouse" violated both the Charter and the CHRA. In 1997, the Tribunal also rejected the government's addition of a definition of "same-sex partner" to the existing definition of "spouse," 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 (*Moore* v. *Canada (Treasury Board)*).
- 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 two applicants, who became 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)*).
- In 1999, following a Quebec Superior Court ruling that the existing spousal definition in the province's pension legislation violated the province's human rights charter, amendments to the statute extended spousal status explicitly to same-sex couples. In 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)*).

2.2.1.4 *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 a section of the province's *Family Law Act* that prevented same-sex partners from applying for spousal support upon relationship breakdown. In confirming that the definition infringed section 15, the Court summarized its views, in part, as follows:

> [The] definition … draws a distinction between individuals in conjugal, opposite-sex relationships of a specific degree of duration and individuals in conjugal, same-sex relationships of a specific degree of duration. …
>
> The crux of the issue is that this differential treatment discriminates in a substantive sense by violating the human dignity of individuals in same-sex relationships. … 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 Court stressed that the appeal before it did not challenge traditional conceptions of marriage. As a remedy, it ordered that the definitional section be "severed" (cut) from the legislation and suspended the remedy for six months to enable the Ontario legislature to amend the spousal support scheme in conformity with section 15. The Court commented that its ruling "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."

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

2.2.2 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.

2.2.2.1 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 legislation in British Columbia amended the definition of "spouse" in numerous statutes to include persons of the same sex living in "marriage-like" relationships. These laws related to a variety of topics, including medical services, family maintenance, family relations, public sector pensions, pension benefit standards, adult guardianship, representation, and health care consent. In addition, the adoption legislation in effect in British Columbia since 1996 enabled same-sex couples to make joint applications for adoption not as a result of a spousal definition, but by virtue of gender-neutral references to joint adoption by "two adults."

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

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

In 1998 and 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 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* then in effect, 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.

At the federal level, in 1999 the government introduced a bill containing important reforms of the major public service pension statutes, including the extension of survivor benefits to same-sex couples.

2.2.2.2 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 calling for enactment of a Domestic Partnership Act and a Family Status Recognition Act were not implemented. The report stressed the importance of consistent definitions of spousal status and standardization of domestic relationships in all provincial legislation.

2.2.2.3 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, territorial and municipal governments extended at least some health-related or other benefits to their same-sex employees. In the area of pension benefits, the Nova Scotia government agreed in 1998 to extend survivor benefits of 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.

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. This policy had no substantive effect on either the scope of available benefits, or the opposite-sex definition of "spouse" in federal legislation.

Finally, 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.

2.2.3 Developments Following *M.* v. *H.*

2.2.3.1 Legislation

Significant legislative packages respecting same-sex couples' status over the ensuing period include the following:

- In 1999 and 2000, the British Columbia Legislative Assembly adopted the *Definition of Spouse Amendment Act, 1999* and the *Definition of Spouse Amendment Act, 2000*. The first extended the spousal definition to same-sex couples in acts governing the rights of surviving spouses; the second extended that definition to additional statutes covering a range of subject matters, and standardized that definition in these and previously amended laws.
- In 1999, the Ontario Legislative Assembly adopted omnibus amending legislation entitled *Act to amend certain statutes because of the Supreme Court of Canada decision in M.* v. *H.* It provided same-sex couples with the same statutory rights and responsibilities as applied to opposite-sex common-law spouses by introducing the term "same-sex partner" in the affected statutes, while preserving the existing opposite-sex definition of "spouse." The legislation also made implicit allowance for joint and step-parent same-sex adoption applications, a right recognized by the common law in Ontario since 1995 (*K. (Re)*). Some considered the Ontario approach inconsistent with *M.* v. *H.* to the degree that it established a "separate but equal" scheme.
- In 2000, the federal Parliament adopted the omnibus Bill C-23, thus extending benefits and obligations in federal statutes to same-sex couples.
- In 2000, the Nova Scotia Legislative Assembly enacted the *Law Reform (2000) Act*, which added a gender-neutral definition of "common-law partner" to a number of laws, with the apparent effect of restricting the term "spouse" in the affected statutes to married individuals. A 2001 Charter decision further struck down the provincial ban on same-sex adoption (*Nova Scotia Birth Registration No. 1999-02-004200 (Re)*). In 2007, *Birth Registration Regulations* under the Nova Scotia *Vital Statistics Act* authorized same-sex partners/spouses to be registered on birth certificates as "other parent," thereby precluding the need to undertake costly adoption proceedings to attain legal parental status.

The *Law Reform (2000) Act* also amended the provincial *Vital Statistics Act* to establish the first registered domestic partnership scheme in Canada. Under this initiative, "two individuals [of the same or opposite sex] who are cohabiting or intend to cohabit in a conjugal relationship" became eligible to register their partnership by means of a declaration, provided neither person was a minor, married or in a prior domestic partnership, and both were ordinarily resident or property owners in Nova Scotia. Upon registration, each domestic partner immediately assumes the rights and obligations of a [married] spouse under 21 provincial statutes.

- In New Brunswick, the 2000 *Act to amend the Family Services Act* extended the statute's spousal support obligation to two unmarried persons who had cohabited for at least three years "in a family relationship in which one person has been substantially dependent upon the other for support." The combined cohabitation and support criteria distinguished this measure from those of other provincial statutes adopted in the wake of *M.* v. *H.* In 2007, further amendments to the *Family Services Act* made provision for joint adoption by gender-neutral "common-law partners." In 2008, amendments to the province's *Pension Benefits Act* governing private employer benefit schemes repealed the heterosexual definition of "spouse" to provide for entitlement of gender neutral married spouses and unmarried common-law partners. In late 2008, the omnibus *Modernization of Benefits and Obligations Act* extended the application of the remaining provincial statutes involving spousal status to same-sex common-law couples.

- In 2000, the Newfoundland *Family Law Act* was modified by a gender-neutral definition of "partner" and, in 2001, the *Same Sex Amendment Act* amended additional statutes to enable opposite-sex and same-sex "cohabiting partners" to acquire rights and obligations in relation to employment-related and other matters. In 2002, Newfoundland and Labrador legislation authorized same-sex adoption.

- In 2001 and 2002, the Manitoba Legislature passed *An Act to Comply with the Supreme Court of Canada Decision in M.* v. *H*. and the *Charter Compliance Act*, which amended dozens of laws to recognize statutory rights and responsibilities of same-sex couples, including joint and step-parent adoption rights. The *Common-Law Partners' Property and Related Amendments Act*, which took effect in 2004, provided for "registration of common-law relationships" under the province's *Vital Statistics Act*. Under the legislation, opposite-sex or same-sex common-law couples might, irrespective of the duration of their cohabitation, register their relationships and immediately become entitled to the benefits and subject to the obligations for which non-registered couples were required to satisfy varying prior cohabitation requirements.

- In Saskatchewan, the *Miscellaneous Statutes (Domestic Relations) Amendment Act, 2001* and the *Miscellaneous Statutes (Domestic Relations) Amendment Act, 2001 (No. 2)* expanded 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. The bills covered a broad range of subjects, including same-sex step-parent adoption (in Saskatchewan, same-sex couples were already entitled to make joint adoption applications).

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

- In Quebec, the 2002 *Loi instituant l'union civile et établissant de nouvelles règles de filiation* (Bill 84) amended the *Code civil* to entrench the conjugal status of same-sex and unmarried opposite-sex couples, and create a new optional institution for them. The amended Code authorized unrelated adult partners to enter into a formal "civil union" contract (*union civile*), governed by the same rules as apply to solemnization of marriage, entailing the rights and obligations of marriage and subject to formal dissolution rules. Bill 84 also amended the *Loi d'interprétation* to ensure that, under Quebec law, "spouse" means "a married or civil union spouse" and "includes a de facto spouse." 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. Other amendments to the *Code civil* clarified the joint parental rights of same-sex spouses in civil and de facto unions. Finally, Bill 84 amended provincial statutes to incorporate the civil union regime and make related consequential changes.

- In 2002, the Northwest Territories *Act to Amend the Adoption Act and the Family Law Act* extended the definition of "spouse" in the affected statutes to include same-sex partners. In 2005, the *Modernization of Benefits and Obligations Act* amended a number of territorial laws, including the generally applicable *Interpretation Act*, to define "spouse" in gender-neutral terms for both marital and non-marital/conjugal relationships.

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

2.2.3.2 Law Reform Activities

In 2001, the Law Commission of Canada released an exhaustive report on the subject of close personal relationships entitled *Beyond Conjugality: Recognizing and Supporting Close Personal Adult Relationships*. The report concluded that, among other things, a modified approach to government regulation was necessary in order to reflect the full range of close adult relationships in Canada. Under a proposed new methodology, 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. Only the last of these proposals has since been implemented.

2.2.3.3 Other Developments

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

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

In a national class-action challenge, the Ontario Court of Appeal ruled, in 2005, that statutory distinctions restricting same-sex spouses' eligibility for and access to arrears of survivor benefits under Bill C-23 amendments to the Canada Pension Plan represented unjustified violations of section 15. In 2007, the Supreme Court of Canada denied the federal government's appeal of this decision, while also denying the claimants' cross-appeal seeking broader retroactive benefits (*Canada (Attorney General)* v. *Hislop*).

2.2.4 Same-Sex Marriage Issues

Under subsection 91(26) of 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 was traditionally not sanctioned by Canadian common law. On that basis, in 1993, the Ontario Divisional Court, dismissed a Charter challenge by two men who had been denied a marriage licence by the province (*Layland and Beaulne* v. *Ontario*).

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

2.2.4.1 LOWER COURT RULINGS

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

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

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

- A 2002 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 Quebec Superior Court found, in part, that the provision of the 2001 *Federal Law–Civil Law Harmonization Act, No. 1* under which "[m]arriage requires the free and enlightened consent of a man and a woman" effected an unjustified section 15 violation, and that providing equivalent benefits would not remedy the inequity of denying gay and lesbian couples access to marriage. Thus, the province's new civil union regime, although recognizing the legitimacy of same-sex conjugal relationships, was not equivalent to marriage.

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

- In May 2003, a unanimous decision of the British Columbia Court of Appeal reversed the Supreme Court judgment that had upheld the common-law rule barring same-sex marriage. The ruling affirmed that Parliament has the constitutional authority to legislate a modified definition of marriage; adopted the

view that the opposite-sex common-law definition effected substantive discrimination; and endorsed the position that procreation no longer represented a sufficiently pressing objective to justify restricting marriage to opposite-sex couples.

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

- In June 2003, the Ontario Court of Appeal unanimously upheld the Divisional Court's decision finding the common-law definition of marriage an unjustified violation of section 15 of the Charter. The Court explicitly endorsed much of the reasoning and conclusions of prior decisions to that effect described above, asserting, in part:
  - "Marriage" in subsection 91(26) has the "constitutional flexibility to meet … changing realities" without a constitutional amendment;
  - When compared with married couples, same-sex couples are not afforded equal treatment in matters of benefits and obligations owing, for example, to specific cohabitation requirements or the unevenness of benefits under provincial legislation and exclusion from benefits of the fundamental institution of marriage;
  - Uniting the opposite sexes, encouraging the birth and raising of children, and companionship are not pressing objectives of maintaining marriage as an exclusive heterosexual institution, nor does the opposite-sex requirement represent minimal impairment of the rights of same-sex couples:
    - This is not a case "of balancing the rights of same-sex couples against the rights of religious groups who oppose same-sex marriage. Freedom of religion … ensures that religious groups have the option of refusing to solemnize same-sex marriages. The equality guarantee, however, ensures that the beliefs and practices of various religious groups are not imposed on persons who do not share those views."

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

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

- In July 2004, the Yukon Supreme Court found the common-law definition of marriage unconstitutional and modified it to a gender-neutral one. The judge rejected the federal government's request to adjourn the case pending the

Supreme Court reference, reviewed below, on the basis that delay would perpetuate a "legally unacceptable result" (*Dunbar and Edge* v. *Yukon (Government of) and Canada (A.-G.)*).

- In September 2004, the Manitoba Court of Queen's Bench declared the opposite-sex definition of marriage unconstitutional and reformulated it as a voluntary union of two persons. The federal government did not oppose the judge's Order, which was consented to by the provincial Attorney General (*Vogel et al.* v. *Attorney General of Canada et al.*).
- In September 2004, the Nova Scotia Supreme Court followed suit, ordering that the common-law definition of marriage in the province be altered to "the lawful union of two persons" and further finding that same-sex marriages performed in Ontario were valid in Nova Scotia. The federal government did not intervene in the application (*Boutilier* v. *Nova Scotia (Attorney General)*).
- In November 2004, the Saskatchewan Court of Queen's Bench also allowed a Charter application seeking the reformulation of the common-law definition of marriage and issued an order authorizing same-sex marriage in the province. Neither the provincial nor the federal Attorney General opposed the application (*W. (N.)* v. *Canada (Attorney General)*).
- In December 2004, the Supreme Court of Newfoundland and Labrador ordered that the common-law definition of civil marriage in the province be stated in gender-neutral terms (*Pottle et al.* v. *Attorney General of Canada et al.*).
- In June 2005, New Brunswick became the eighth province and ninth jurisdiction to legalize same-sex marriage when a Court of Queen's Bench Charter ruling redefined civil marriage in the province in gender-neutral terms (*Harrison* v. *Canada (Attorney General)).*

2.2.4.2 Supreme Court of Canada Reference and Bill C-38

In June 2003, then Prime Minister Chrétien announced that the federal government would not appeal Ontario and British Columbia appellate decisions and would discontinue its appeal in the Quebec case.

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

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

- The provision in the draft bill authorizing same-sex marriage was within Parliament's exclusive legislative authority over legal capacity for civil marriage.
- The provision was consistent with the Charter and, in the circumstances giving rise to the draft bill, flowed from it.
- The declaratory clause relating to those who perform marriages, and therefore within the provincial constitutional authority over solemnization of marriage, was ultra vires Parliament.
- The religious freedom guarantee in subsection 2(*a*) of the Charter is sufficiently broad to protect religious officials from state compulsion to perform same-sex marriages against their religious beliefs.

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

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

2.2.4.3 Same-Sex Marriage and Provincial Jurisdiction

Same-sex marriage advocates in Ontario were critical of the provincial government's failure to immediately amend the province's legislation to reflect the appellate court's ruling in the *Halpern* case. In 2005, this matter was addressed when the Ontario Legislature adopted Bill 171, An Act to amend various statutes in respect of spousal relationships. The bill removed the term "same-sex partner" and language recognizing exclusively opposite-sex spousal status from Ontario statutes. With the passage of Bill C-38, it was anticipated that other provinces and territories would undertake a short-term review of existing statutes providing for exclusively heterosexual spousal or marital status and proceed with equivalent measures. The only other provinces that appear to have done so to date are Prince Edward Island and Newfoundland and Labrador. In PEI, the omnibus *Domestic Relations Act* enacted in 2008 and proclaimed in December 2009 aimed to ensure all provincial statutes treat spousal and parental status consistently in gender-neutral terms. The *Definition of Spouse Act* adopted by Newfoundland and Labrador legislators in December 2009 also amended provincial laws to provide for gender-neutral language related to spousal status.

Notwithstanding the Charter guarantee of freedom of conscience and religion, the advent of same-sex civil marriage prompted critics to raise concerns about the need for provincial and territorial governments to ensure explicit legislative protection for religious officials for whom same-sex religious marriage conflicts with their religious beliefs. In some provinces, public officials appointed to perform civil marriages on a fee basis resigned, citing religious grounds, rather than comply with government directives that they provide their services to same-sex couples. Some argued that the provinces should also protect and have a duty to accommodate the religious beliefs of these officials.

In this context, provincial human rights complaints were lodged by marriage commissioners in Saskatchewan and Manitoba, alleging religious discrimination, and by a Saskatchewan same-sex couple against a marriage commissioner, raising discrimination based on sexual orientation. In March 2006, the Saskatchewan Human Rights Commission dismissed the complaints of three marriage commissioners, finding, in part, that the purpose of the province's marriage legislation "does not relate to marriage commissioners, but to addressing the needs of those wishing to marry. Marriage commissioners are public officials providing a service; they are not beneficiaries of that service." The ruling was upheld by the Saskatchewan Human Rights Tribunal in October 2006 (*Orville Nichols* v. *Department of Justice, Government of Saskatchewan*). An application for judicial review of a similar dismissal of the Manitoba complaint by the province's Court of Queen's Bench remains pending despite the absence of activity in the file since mid-2006. In 2008, the Saskatchewan Human Rights Tribunal found that a marriage commissioner's refusal to marry a same-sex couple on the ground of his religious belief represented a discriminatory denial of service based on the couple's sexual orientation. The respondent was ordered to pay the complainants $2,500, and to cease denying the service. In July 2009, the Queen's Bench for Saskatchewan dismissed the marriage commissioner's appeal of that ruling (*Nichols* v. *M.J.*).

Sources consulted differ as to which provinces and territories, in addition to Manitoba and Saskatchewan, currently have policies in place requiring marriage commissioners to perform same-sex marriage ceremonies, irrespective of their religious beliefs. To date, few jurisdictions appear to have legislated to address the matter. Quebec's Code civil has, since 1991, included a section under which "[n]o minister of religion may be compelled to solemnize a marriage to which there is any impediment according to his religion and to the discipline of the religious society to which he belongs." Initiatives to date in the post-Bill C-38 context include the following:

- Amendments in Bill 171 to the Ontario *Human Rights Code* and *Marriage Act* provide that registered religious officials for whom same-sex marriage is contrary to their religious beliefs are not required to solemnize such marriages.
- In 2005, amendments to Prince Edward Island's *Marriage Act* included a broad provision under which any person authorized to perform marriages in the province, whether religious or civil, "may refuse to solemnize a marriage that is not in accordance with that person's religious beliefs."
- In June 2009, the Saskatchewan Cabinet asked the provincial appellate court for an advisory opinion as to whether two versions of draft amendments to the *Marriage Act* are consistent with the Charter. Under the first, no marriage commissioners would be required to perform marriages inconsistent with their religious beliefs; under the second, only those who were commissioners in November 2004, when same-sex marriage became legal in the province, would be exempted. The Court will hear submissions on the matter in May 2010; it has granted intervener status to 18 groups and individuals in support of and opposed to both proposals.

- In New Brunswick, private member's Bill 76, introduced in 2005, would have extended the right of refusal to celebrate same-sex marriages to public as well as religious officials. The bill died on the *Order Paper*. Bill 37, an identical bill introduced in 2007, did not proceed beyond first reading.
- In Alberta, private member's Bill 208, introduced in 2006, proposed amending the province's *Marriage Act* to ensure that a member of the clergy and a marriage commissioner might refuse to solemnize same-sex marriages on the basis of "religious beliefs or moral values," and to prevent legal action against those exercising the right of refusal. The bill also proposed amending the Alberta human rights statute to prohibit sanctions against anyone exercising freedom of religion with respect to same-sex marriage. Bill 208 died on the *Order Paper* and has not been re-introduced.

2.2.4.4 Other Developments

In 2005, the British Columbia Human Rights Tribunal ruled that, although a Knights of Columbus chapter had been entitled to refuse its rental facility to a same-sex couple for their wedding reception, the manner in which it did so was discriminatory. The Tribunal ordered remedial monetary damages (*Smith and Chymyshyn* v. *Knights of Columbus and others*).

In 2005 and 2006 respectively, British Columbia and New Brunswick superior courts allowed divorce petitions based on "same-sex adultery" (*P.(S.E.)* v. *P.(D.D.)*; *Thébeau* v. *Thébeau*).

In 2007, the then Minister of Citizenship and Immigration announced that same-sex marriages, lawfully performed in Canada or in a country where they are also legal, would be recognized for all immigration purposes. As a result, a Canadian who marries his or her same-sex partner in one of those jurisdictions may now sponsor the partner for permanent residency as a spouse.

In 2007, a Federal Court judge found that the Canadian Human Rights Commission had not erred in dismissing the complaints of a unionized federal government employee alleging discriminatory treatment on religious grounds. The case involved the Treasury Board's denial of the employee's request to divert her union dues to a charitable institution based on her opposition to the union's support of same-sex rights and marriage. In May 2008, the Federal Court of Appeal dismissed the appeal of this ruling (*Comstock* v. *Canada (Treasury Board)*).

2.2.5 Conclusion

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

Opponents of these reforms continue to argue that the extension of same-sex rights in general, and same-sex marriage in particular, undermine the traditional family and family values. At the same time, some gay and lesbian couples (like some

heterosexual couples) do not want either the legal obligations or the benefits that flow from spousal status or marriage. As the 2002 report of the former 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.

2.3 Other Legal Issues

A variety of other legal issues have affected 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, the Canadian Armed Forces announced that enlistment and promotion in the military would no longer be restricted on the basis of sexual orientation. The Federal Court judgment agreed to by the federal government and a former lieutenant who had resigned after admitting to a lesbian relationship, described the military's previous policy governing the service of homosexuals as contrary to the Charter (*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 the age of 18. The age of consent to other forms of sexual activity is 16. 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*). Although section 159 has not been amended, it appears the provision is not actively enforced.

Despite broad policy and statutory reforms, the policies of some public bodies, notably in the education sector, continued to be specifically directed toward lesbians and gay men:

- In 1996, a local school board in British Columbia banned certain teaching materials that featured same-sex parents. In 2002, the Supreme Court of Canada found the board had been unreasonable in light of the statutory educational scheme and remanded to the board the issue of whether the books should be approved using appropriate criteria (*Chamberlain* v. *Surrey School Board No. 36*). In 2003, the board again rejected the books and announced it would seek other resources that depict same-sex family models.
- In 2006, a gay couple in British Columbia with a history of advocacy in education dropped a human rights complaint alleging systemic discrimination by the Ministry of Education owing to its failure to include information about homosexuality in school curricula. Under a negotiated settlement, the province undertook, in part, to introduce an elective course on social justice that would include sexual orientation issues and, controversially, to consult the couple as to content.

- In 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. The Superior Court of Justice granted an interlocutory injunction to enable the plaintiff's attendance at the event with his male partner. The case was discontinued in 2005 without having gone to trial (*Hall (Litigation Guardian of)* v. *Powers*).

Violence directed at lesbians and gay men is a longstanding 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" was also identified as a priority issue in other Canadian cities, including Vancouver and Toronto. Vancouver police described the 2001 murder of a gay man as a hate crime and have expressed concern that gay men and lesbians are the groups most likely to be assaulted in the city. In 2008–2009, a number of violent assaults were reported in the Toronto and Vancouver areas, most against gay men. In 2008, a study by Statistics Canada based on data from a 2004 survey found that lesbians and gay men are likely to be victims of violence, including sexual and physical assault, twice as often as heterosexual persons, while bisexual persons are over four times more likely to be victimized. In 1995, hate-motivated crime directed against homosexual people was recognized by Parliament as an important issue in sentencing. In 2004, Parliament also expanded grounds protected by *Criminal Code* hate propaganda provisions to include sexual orientation. Both matters are discussed under the heading "Parliamentary Action."

Books and periodicals imported by 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 2000, the Supreme Court of Canada upheld lower court findings that the *Customs Act* and the *Customs Tariff* and its Schedule VII were constitutional. However, Customs officials' adverse treatment in applying the legislation, targeting the appellant book store at the administrative level, was in violation of section 15 and was not capable of justification under section 1 of the Charter as it was not "prescribed by law." (*Little Sisters Book and Art Emporium* v. *Canada (Minister of Justice)*). In 2007, the Supreme Court confirmed a denial of Little Sisters' application for advance costs to finance further proceedings relating to both seizure of goods and Customs' practices in its regard, on the ground that it had not met the requirement of special circumstances (*Little Sisters Book and Art Emporium* v. *Canada (Commissioner of Customs and Revenue)*).

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 over the ensuing period have considered whether the circumstances of individual homosexuals warrant the granting of refugee status (*Muzychka* v. *Canada (Minister of Citizenship and Immigration)*; *Trembliuk* v. *Canada (Minister of Citizenship and Immigration)*; *Hackman* v. *Canada (Minister of Citizenship and Immigration)*; *Dosmakova* v. *Canada (Citizenship and Immigration)*; *Odetoyinbo* v. *Canada (Citizenship and Immigration)*).

As has been mentioned, the enactment of legislation authorizing same-sex marriage in 2005 had implications for the country's immigration scheme. Previously, 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 2001, Bill C-11 initiated a process of regulatory change with respect to recognition of common-law and same-sex relationships, as outlined.

In 2007, the Ontario Court of Appeal issued a precedent-setting ruling in a family law case raising the issue of whether a child conceived by artificial insemination, raised by his biological mother and her lesbian partner, and with close ties to his biological father, could legally have two mothers in addition to a father. The Court noted that, when the decades-old *Children's Law Reform Act* (CLRA) was adopted, "[t]he possibility of legally and socially recognized same-sex unions and the implications of advances in reproductive technology were not on the radar scheme." It concluded that in light of "[advances] in our appreciation of the value of other types of relationships and in the science of reproductive technology [that] have created gaps in the CLRA's legislative scheme," it would be contrary to the child's best interests that he be deprived, not only of his father's parentage, but also "of the legal recognition of the parentage of one of his mothers." The Court declared the partner to be the boy's mother, thus entitling her to the rights and obligations of a custodial parent (*A.A.* v. *B.B.*). The Supreme Court of Canada subsequently denied the application of a family-based coalition to be added as a party to the proceedings in order to apply for leave to appeal the lower court's ruling, finding that it lacked standing for that purpose (*Alliance for Marriage and Family* v. *A.A.*).

3 PARLIAMENTARY ACTION

3.1 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 1993.

In 1995, Parliament enacted *An Act to amend the Criminal Code (sentencing)* (Bill C-41), under which evidence that a crime was motivated by bias, prejudice or hate based on a number of listed personal characteristics constituted an aggravating circumstance for which a sentence should be increased. The inclusion of sexual orientation among those characteristics sparked considerable opposition. In 1996, *An Act to amend the Canadian Human Rights Act* (Bill C-33), added "sexual

orientation" to the prohibited grounds of discrimination in the *Canadian Human Rights Act*. The initiative intensified long-standing polarization of views within the public as well as among members of Parliament.

In 1999, the *Public Sector Pension Investment Board Act* (Bill C-78) was adopted. The legislation's major amendments to statutes governing the pension regimes of civilian and uniformed government employees and members of Parliament included replacing provisions entitling unmarried opposite-sex spouses to "surviving spouse" benefits with provisions recognizing gender-neutral "survivor" entitlement. Bill C-78 was the first federal legislation to provide unambiguously for same-sex benefits. Members of Parliament from the Official Opposition, as well as several other opposition and government members, opposed this measure.

In 1999, shortly after the Supreme Court of Canada's decision in *M.* v. *H.*, the House of Commons voted 216–55 in favour of an opposition motion that, in the opinion of the House, it was 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 2000, the *Modernization of Benefits and Obligations Act* (Bill C-23) amended 68 federal laws to effect their equal application 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. It added the gender-neutral designation(s) "common-law partner" and/or "survivor" to statutes that had awarded benefits exclusively to opposite-sex "spouses," and restricted the designation "spouse" to married persons. Advocates for gay and lesbian equality rights welcomed the legislation as a major milestone, but it also prompted considerable opposition. In response to criticisms that Bill C-23 would have a negative impact on marriage, an interpretive amendment provided that, "[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.

In 2001, the *Immigration and Refugee Protection Act* (Bill C-11) included a "common-law partner" among members of the family class eligible for sponsorship. Accordingly, the new *Immigration and Refugee Protection Regulations* set out the gender-neutral definition first enacted in Bill C-23, with its one-year cohabitation requirement. In recognition of practical difficulties associated with that criterion in the context of immigration, a second gender-neutral class of "conjugal partner[s]" was also created for purposes of family class regulations. A "conjugal partner" is "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." These categories remain in place alongside the now gender-neutral "spouse" category.

From November 2002 through June 2003, the House of Commons Standing Committee on Justice and Human Rights studied 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. The committee was preparing its report to the House when the Ontario Court of Appeal released its ruling giving immediate effect to same-sex marriage in Ontario. The committee subsequently adopted a motion of support for the decision. An Opposition motion identical to that of June 1999 affirming the heterosexual definition of marriage was then defeated by a 137–132 margin.

In 2004, private member's Bill C-250 amended *Criminal Code* hate propaganda provisions by expanding the definition of "identifiable group" to include any section of the public distinguished by sexual orientation. Like Bill C-41 in 1995, Bill C-250 proved controversial. In response to concerns of some religious organizations, the legislation was amended to add the good faith expression of opinion on a religious subject or based on belief in a religious text as a defence against a charge of wilful promotion of hatred.

In 2005, the *Civil Marriage Act* (Bill C-38) codified a definition of marriage for the first time in Canada as "the lawful union of two persons to the exclusion of all others." The law replaced the traditional common-law understanding of marriage as an exclusively heterosexual institution. It also recognized that religious officials may refuse to perform marriages that conflict with their religious beliefs.

Throughout the legislative process in both the House of Commons and the Senate, members of Parliament, senators and witnesses representing a broad range of opponents and supporters of Bill C-38 expressed deeply divided views on the merits and implications of the legislation. To some degree, these opinions reflected those raised in earlier debates on legislation extending the scope of benefits to same-sex conjugal couples. Perceived threats to the freedom of religion and expression of those opposed to same-sex marriage were of particular concern for Bill C-38 critics. Some were of the view that, notwithstanding provincial jurisdiction over solemnization of marriage, the bill could and should, at a minimum, enhance their protection in areas of federal jurisdiction. Accordingly, Parliament amended the legislation to explicitly provide that no benefit will be denied or sanction imposed under federal law solely owing to the exercise of freedom of conscience and religion guaranteed by the Charter in respect of same-sex marriage.

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

Bill C-38 was adopted by the House of Commons and the Senate in June and July 2005 respectively and came into effect with Royal Assent as Chapter 33 of the Statutes of Canada for 2005. With its enactment, Canada became the fourth country

to legislate same-sex marriage, the others being the Netherlands (2001), Belgium (2003) and Spain (2005). More recently, South Africa (2006), Norway, and Sweden (2009) have enacted same-sex marriage laws; legislation adopted in Portugal (2010) awaits presidential approval. In the United States, only Massachusetts (2003), Connecticut (2008), Iowa and Vermont (2009) and New Hampshire (2010) authorize same-sex marriage.

In December 2006, the House of Commons defeated a government motion that would have called on the government "to introduce legislation to restore the traditional definition of marriage without affecting civil unions and while respecting existing same-sex marriages."

3.2 Private Members' Bills

3.2.1 1980 to 1996

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

In 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 1996 Bill C-282, An Act providing for equal treatment for persons cohabiting in a relationship similar to a conjugal relationship, aimed to provide same-sex couples with the rights available to unmarried heterosexual couples under federal legislation. The bill did not proceed beyond first reading.

3.2.2 36th to 40th Parliaments

Many of the numerous private members' bills tabled over the period October 1997 through May 2005 were introduced on more than one occasion. Unless otherwise indicated, none received second reading. All died on the *Order Paper*.

- The terms of MP Réal Ménard's bills C-309 and C-481, tabled in 1998 and 1999 respectively, were identical to those of Bill C-282 as described above.
- Introduced in 1997 and given second reading in 1998, MP Tom Wappel's Bill C-225, An Act to amend the Marriage (Prohibited Degrees) Act and the Interpretation Act, would have stipulated that a marriage "is void unless it is a legal union of one man and one woman as husband and wife," and defined "marriage" accordingly in the interpretation statute. In 2000, MP Steve Mahoney introduced identical legislation as Bill C-463.
- In 1998, 2000 and 2001, former MP Svend Robinson introduced bills C-385, C-463, C-501 and C-264, An Act to amend the marriage (Prohibited Degrees) Act (marriage between persons of the same sex). Only the last of these was given

second reading. 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 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* that described marriage in opposite-sex terms to include couples of the same sex.

- Former MP Svend Robinson tabled Bill C-386, An Act to amend the Income Tax Act and the Canada Pension Plan (definition of spouse), in 1998. The bill would have included same-sex couples within those statutes' definition of spouse.
- In 2000, 2001 and 2003, former MP Jim Pankiw tabled bills C-460, C-266 and C-450, An Act to amend the Marriage (Prohibited Degrees) Act, in order to protect the legal definition of marriage by invoking section 33 of the Charter. Bill C-450 received second reading in 2004.
- In 2001, Senator Anne Cools introduced Bill S-9, An Act to remove certain doubts regarding the meaning of marriage. The bill would have amended the *Marriage (Prohibited Degrees) Act* and the *Interpretation Act* to codify the common-law definition of marriage as a heterosexual institution. Bill S-9 was debated at second reading in the Senate, reintroduced as Bill S-15 in 2003 and given second reading. In 2004, Senator Cools introduced Bill S-10, An Act to amend the Marriage (Prohibited Degrees) Act and the Interpretation Act in order to affirm the meaning of marriage. It, too, received second reading and would have defined marriage as an exclusively heterosexual institution, An identical bill was introduced by Senator Cools as Bill S-4 later in 2004 and as Bill S-12 in 2005.
- In 2003, former MP Grant Hill introduced Bill C-447, An Act to protect the institution of marriage, which was debated at second reading. The bill was intended to codify the traditional common-law definition of marriage. Former MP Dave Chatters introduced an identical bill in 2004 as Bill C-213.
- In 2004, MP Rob Moore introduced Bill C-268, An Act to confirm the definition of marriage and to preserve ceremonial rights. It, too, sought to legislate the common-law definition of marriage "[d]espite any other Act of Parliament."
- In 2004, MP Bill Siksay introduced Bill C-300, An Act to amend the Divorce Act, the Marriage (Prohibited Degrees) Act and the Modernization of Benefits and Obligations Act. This bill was intended to modify provisions in the listed statutes to incorporate same-sex marriage. In 2006 and 2007 respectively, Mr. Siksay introduced legislation to amend the CHRA in order to include gender identity or expression as a prohibited ground of discrimination (Bill C-326), and to amend the *Criminal Code* to include gender identity and expression as distinguishing characteristics for purposes of hate propaganda provisions and as aggravating factors for sentencing purposes (Bill C-494). In 2009, identical amending provisions were combined in Bill C-389.

4 CHRONOLOGY

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

1979 – The Canadian Human Rights Commission first recommended that the *Canadian Human Rights Act* (CHRA) be amended to include sexual orientation.

1985 – Section 15 of the *Canadian Charter of Rights and Freedoms* (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 CHRA.

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*).

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, was enacted, adding "sexual orientation" to the prohibited grounds of discrimination in the CHRA.

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

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

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

– Parliament adopted Bill C-78, the first federal legislation to provide for same-sex benefits. This major pension reform legislation introduced provisions recognizing gender-neutral "survivor" entitlement for unmarried heterosexual and homosexual spouses.

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

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

2000 – Parliament adopted the *Modernization of Benefits and Obligations Act*. The bill added the gender-neutral designation(s) "common-law partner" and/or "survivor" to dozens of federal statutes, restricting the term "spouse" to married couples. An interpretive government amendment provided that the bill did not affect heterosexual marriage.

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

2001 – Saskatchewan legislation amended provincial laws to expand the definition of "spouse" to include same-sex partners in programs thus far restricted to opposite-sex couples, or to extend to same-sex and unmarried opposite-sex partners benefits and obligations that had been available only to married couples.

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

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

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

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

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

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

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

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

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

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

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

2004 – In March, the Quebec Court of Appeal lifted the suspension of remedy imposed by the lower court, thus enabling same-sex couples to marry legally in the province with immediate effect.

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

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

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

2005 – In February, Bill C-38, the Civil Marriage Act, received first reading in the House of Commons. The controversial legislation codified a gender-neutral definition of marriage for the first time in Canada, replacing the former common-law understanding of civil marriage as a heterosexual institution. It also recognized that religious officials may refuse to perform marriages that conflict with their religious beliefs, while providing that no benefit will be denied or sanction imposed under federal law solely owing to the exercise of freedom of conscience and religion guaranteed by the Charter in respect of same-sex marriage. Bill C-38 took effect on 20 July.

– In February, the Ontario Legislature adopted *An Act to amend various statutes in respect of spousal relationships*, which removed the term "same-sex partner" and language recognizing exclusively opposite-sex spousal status from Ontario statutes. Its amendments to the Ontario

Human Rights Code and *Marriage Act* provided that registered religious officials for whom same-sex marriage is contrary to their religious beliefs are not required to solemnize such marriages.

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

- In December, amendments to Prince Edward Island's *Marriage Act* included a provision authorizing religious or civil officials to "refuse to solemnize a marriage that is not in accordance with that person's religious beliefs."

2006 – In December, the House of Commons defeated a government motion that would have called on the government "to introduce legislation to restore the traditional definition of marriage without affecting civil unions and while respecting existing same-sex marriages."

5 SELECTED CASES

A.A. v. *B.B.*, 2007 ONCA 2, 2 January 2007.

A. v. *Colloredo-Mansfeld (No. 3)* (1994), 23 C.H.R.R. D/328 (Ont. Bd. Inquiry).

Alliance for Marriage and Family v. *A.A.*, 2007 SCC 40, 13 September 2007.

Anderson et al. v. *Alberta Health and Wellness*, 4 December 2002 (Alberta Human Rights Com.).

Andrews v. *Law Society of B.C.*, [1989] 1 S.C.R. 143.

Andrews v. *Ontario (Ministry of Health)* (1988), 64 O.R. (2d) 258, 49 D.L.R. (4th) 585 (H.C.).

Bleau et Québec (Commission des droits de la personne et des droits de la jeunesse) c. *Québec (Procureur général)*, No. 500-09-007479-983, 1 March 2002 (C.A.Q.), reversing JE 99-85.

Boissoin v. *Lund*, 2009 ABQB 592, 3 December 1009 (CanLII) (Alberta Court of Queen's Bench), reversing Human Rights Panel of Alberta File No. S 2002/08/137.

Boutilier v. *Canada (Natural Resources)*, [2003] C.H.R.D. No. 14 (Q.L.) 2003 CHRT 20.

Boutilier v. *Nova Scotia (Attorney General)*, [2004] N.S.J. No. 357 (Q.L.), 24 September 2004 (N.S. Sup. Ct.).

Bro and Scott v. *Moody (No. 2)*, 2010 BCHRT 8, 8 January 2010 (BC Human Rights Tribunal).

Brockie v. *Brillinger (No. 2)* (2002), 43 C.H.R.R. D/90 (Ont. Sup. Ct. Justice).

Brown v. *British Columbia (Minister of Health)* (1990), 19 A.C.W.S. (3d) 216, 48 C.R.R. 137 (B.C.S.C.).

Canada (Attorney General) v. *Boutilier*, [2000] 3 F.C. 27 (F.C.A), affirming [1999] 1 F.C. 459 (T.D.).

Canada (Attorney General) v. *Hislop*, 2007 SCC 10, 1 March 2007, affirming [2003] O.J. 5212 (Q.L.) (Ont. C.A.), *sub nom Hislop et al.* v. *Attorney General of Canada*.

Canada (Attorney General) v. *Moore*, [1998] 4 F.C. 585 (T.D.), dismissing applications for judicial review of (1996), 25 C.H.R.R. D/351 (C.H.R.T.), *sub nom Moore* v. *Canada (Treasury Board)*, and (1997), 29 C.H.R.R. D/185 (C.H.R.T.), *sub nom Canada (Attorney General)* v. *Moore (No. 2)*.

Canada (Attorney General) v. *Mossop*, [1993] 1 S.C.R. 554, affirming [1991] 1 F.C. 18, 71 D.L.R. (4th) 661, 12 C.H.R.R. D/355, 114 N.R. 241 (F.C.A.).

Canada (Attorney General) v. *Ward*, [1993] 2 S.C.R. 289.

Canada Post Corporation v. *Public Service Alliance of Canada* (Guévremont grievance), File No. 20101-CR-93-004, 8 March 1994 (grievance arbitration).

Canadian Broadcasting Corporation v. *Canadian Media Guild* (1995), 45 L.A.C. (4th) 353 (grievance arbitration), application for judicial review dismissed [1999] 2 W.W.R. 43 (Alta Q.B.).

Canadian Telephone Employees' Association (C.T.E.A.) v. *Bell Canada* (1994), 43 L.A.C. (4th) 172 (grievance arbitration).

Chamberlain v. *Surrey School District No. 36*, [2002] 4 S.C.R. 710, 2002 SCC 86, reversing (2000), 191 D.L.R. (4th) 128 (B.C.C.A.).

Clinton v. *Ontario Blue Cross* (1994), 21 C.H.R.R. D/342 (Ont. Ct. (Div. Ct.)), reversing (1993), 18 C.H.R.R. D/377 (Ont. Bd. Inquiry).

Comstock v. *Canada (Treasury Board)*, 2008 FCA 197, 28 May 2008, affirming *Comstock* v. *Public Service Alliance of Canada*, 2007 FC 335, 30 March 2007.

Crozier v. *Asselstine* (1994), 22 C.H.R.R. D/244 (Ont. Bd. Inquiry).

DeGuerre v. *Pony's Holdings Ltd.* (1999), 36 C.H.R.R. D/439 (B.C. Trib.).

Dosmakova v. *Canada (Citizenship and Immigration)*, 2007 FC 1357, 21 December 2007 (Fed. Ct.).

Douglas v. *The Queen*, [1993] 1 F.C. 264 (T.D.).

Dunbar and Edge v. *Yukon (Government of) and Canada (A.-G.)*, 2004 YKSC 54, 14 July 2004 (Yukon Sup. Ct.).

EGALE Canada Inc. v. *Canada (Attorney General)* (2003), 38 R.F.L. (5th) 32 (B.C.C.A.), reversing (2001), 88 C.R.R. (2d) 322 (B.C.S.C.); supplementary reasons (2003), 42 R.F.L. (5th) 341 (B.C.C.A.).

Egan v. *Canada*, [1995] 2 S.C.R. 513, affirming (1993), 103 D.L.R. (4th) 336, 153 N.R. 161 (F.C.A.), affirming [1992] 1 F.C. 687, 87 D.L.R. (4th) 320 (T.D.).

Geller v. *Reimer* (1994), 21 C.H.R.R. D/156 (Sask. Bd. Inquiry).

Grace v. *Mercedes Homes Inc*. (1995), 23 C.H.R.R. D/350 (Ont. Bd. Inquiry).

Hackman v. *Canada (Minister of Citizenship and Immigration)*, 2006 FC 968, 11 August 2006 (Fed. Ct.).

Haig v. *Canada* (1992), 94 D.L.R. (4th) 1, 9 O.R. (3d) 495 (Ont. C.A.).

Hall (Litigation guardian of) v. *Powers*, [2002] O.J. No. 1803 (Q.L.), 10 May 2002, leave to discontinue granted, [2005] O.J. No. 2739 (Q.L.), 28 June 2005 (Ont. Sup. Ct. Justice).

Halm v. *Canada* (M.E.I.), [1995] 2 F.C. 331 (T.D.), Appeal No. A-171-95, discontinued.

Halpern v. *Canada (Attorney General)* (2003), 36 R.F.L. (5th) 127 (Ont. C.A.), affirming [2002] O.J. No. 2714 (Q.L.), (Ont. Sup. Ct. Justice (Div. Ct.)).

Harrison v. *Canada (Attorney General)*, [2005] N.B.J. No. 257 (Q.L.) (N.B.Q.B.).

Heintz v. *Christian Horizons*, 2008 HRTO 22, 15 April 2008 (Human Rights Tribunal of Ontario).

Hendricks c. *Québec (Procureur général)*, [2002] R.J.Q. 2506 (C.S.Q.).

Hewens v. *Treasury Board*, File No. 166-2-22733, 25 November 1992 (Public Service Staff Relations Board).

Holt v. *Surfside Recovery House*, 2007 BCHRT 42, 23 January 2007 (British Columbia Human Rights Tribunal).

Hughson v. *Kelowna (City)* (2000), 37 C.H.R.R. D/122, 2000 B.C.H.R.T. 24 (B.C. Trib.).

Johnson v. *Sand* (2001), 83 C.R.R. (2d) 60 (A.C.Q.B.).

K. (Re) (1995), 23 O.R. (3d) 679 (Ont. Ct. (Prov. Div.)).

Kane v. *Ontario (Attorney General)* (1997), 152 D.L.R. (4th) 738 (Ont. Ct. (Gen. Div.)), Appeal No. C28417, appeal abandoned.

Kempling v. *The British Columbia College of Teachers*, 2005 BCCA 327 (B.C.C.A.), leave to appeal denied 19 January 2006, SCC Appeal File No. 31088.

Knodel v. *British Columbia (Medical Services Commission)* (1991), 58 B.C.L.R. (2d) 356 (B.C.S.C.).

L.(C.) v. *Badyal* (1998), 34 C.H.R.R. D/41 (B.C. Trib.).

Lahl Sarson, CUB 33909, 4 May 1996 (Umpire).

Layland and Beaulne v. *Ontario* (1993), 104 D.L.R. (4th) 214, 17 C.R.R. (2d) 168 (Ont. Div. Ct.), Appeal No. C15711, *sub nom Schoucervou C. et al. (formerly Layland)* v. *Ontario (M.C.C.R.)*, dismissed as abandoned.

Leshner v. *Ontario (Ministry of the Attorney General)* (1993), 16 C.H.R.R. D/184, (Ont. Bd. Inquiry).

Ligue catholique pour les droits de l'homme c. *Hendricks*, [2004] J.Q. No. 2593 (Q.L.) (C.A.Q.).

Little Sisters Book and Art Emporium v. *Canada (Commissioner of Customs and Revenue)*, [2007] 1 S.C.R. 38, 2007 SCC 2.

Little Sisters Book and Art Emporium v. *Canada (Minister of Justice)*, [2000] 2 S.C.R. 1120, 2000 SCC 69, reversing in part (1998), 160 D.L.R. (4th) 385 (B.C.C.A.).

Lorenzen v. *Treasury Board* (1993), 38 L.A.C. (4th) 29 (Public Service Staff Relations Board).

M. v. *H* [1999], 2 S.C.R. 3, affirming (1996), 142 D.L.R. (4th) 1, 31 O.R. (3d) 417 (Ont. C.A.), affirming 132 D.L.R. (4th) 538, 35 C.R.R. (2d) 123 (Ont. Ct. (Gen. Div.)), application for rehearing denied 25 May 2000.

McAleer v. *Canada (Human Rights Commission)* (1999), 36 C.H.R.R. D/255 (F.C.A.), affirming [1996] 2 F.C. 345 (T.D.).

Minister of Human Resources Development v. *Donald Fisk* (1998), *Canadian Employment Benefits and Pension Guide Reports* 6330 (Pension Appeals Board), judicial review granted 3 September 1999, File No. A-25-98 (F.C.A.).

Moffatt v. *Kinark Child and Family Services (No. 4)* (1998), 35 C.H.R.R. D/205 (Ont. Bd. Inquiry).

Newfoundland (Human Rights Commission) v. *Newfoundland (Minister of Employment and Labour Relations)* (1995), 24 C.H.R.R. D/144 (Nfld. Sup. Ct. (T.D.)), Appeal No. 1996, No. 63.

Nichols v. *M.J.*, 2009 SKQB 299, 17 July 2009 (Queen's Bench for Saskatchewan), dismissing appeal from May 2008 decision of Saskatchewan Human Rights Tribunal.

Nova Scotia (Birth Registration No. 1999-02-004200) (Re), [2001] N.S.J. No. 261 (Q.L.), 28 June 2001 (N.S.S.C. (Fam. Div.)).

Odetoyinbo v. *Canada (Citizenship and Immigration)*, 2009 FC 501, 14 May 2009 (Fed. Ct.).

Orville Nichols v. *Department of Justice, Government of Saskatchewan*, 25 October 2006 (Saskatchewan Human Rights Tribunal).

Owens v. *Saskatchewan (Human Rights Commission)*, 2006 SKCA 41, reversing 2002 SKQB 506 (Sask. C.A.).

P.(S.E.) v. *P.(D.D.)*, 2005 BCSC 1290, 14 September 2005.

Paul Boulais, File No. 105-655-781, 5 March 1997 (Review Tribunal).

Pottle et al. v. *Attorney General of Canada et al.*, 2004 01T 3964, 21 December 2004 (Sup. Ct. Nfld. & Lab. (T.D.)).

Québec (Commission des droits de la personne) c. *Camping & Plage Gilles Fortier Inc.* (1996), 25 C.H.R.R. D/506 (T.D.P.Q.).

Québec (Comm. des droits de la personne et des droits de la jeunesse) c. *Michaud* (1998), 34 C.H.R.R. D/123 (T.D.P.Q.).

Reference re Same-Sex Marriage, [2004] 3 S.C.R. 698, 2004 SCC 79.

R. v. *M.(C.)* (1995), 30 C.R.R. (2d) 112, 23 O.R. (3d) 629 (Ont. C.A.).

R. c. *Roy*, [1998] R.J.Q. 1043 (C.A.Q.).

Rosenberg v. *Canada (Attorney General)* (1998), 158 D.L.R. (4th) 664 (Ont. C.A.), reversing (1995), 127 D.L.R. (4th) 738, 25 O.R. (3d) 612 (Ont. Ct. (Gen. Div.)).

School District No. 44 (North Vancouver) v. *Jubran*, 2005 BCCA 201, 6 April 2005 (B.C.C.A.), reversing 2003 BCSC 6, leave to appeal denied 20 October 2005, SCC Appeal File No. 30964.

Smith and Chymyshyn v. *Knights of Columbus and others*, 2005 BCHRT 544, 29 November 2005.

Thébeau v. *Thébeau*, 2006 NBBR 154, 28 April 2006 (N.B.Q.B.).

Trembliuk v. *Canada (Minister of Citizenship and Immigration)*, 2003 FC 1264 (Fed. Ct.).

Trinity Western University v. *British Columbia College of Teachers*, [2001] S.C.R. 772, 2001 SCC 31, affirming (1998), 35 C.H.R.R. D/435 (B.C.C.A.).

Veysey v. *Canada (Correctional Service)* (1990), 43 Admin. L.R. 316, 109 N.R. 300 (F.C.A.), affirming (1989), 29 F.T.R. 74 (F.C.T.D.).

Vogel v. *Manitoba* (1997), 31 C.H.R.R. D/89 (Man. Bd. Adjudication) upon referral from (1995), 23 C.H.R.R. D/173 (Man. C.A.), reversing (1992), 90 D.L.R. (4th) 84 (Man. Q.B.).

Vogel et al. v. *Attorney General of Canada et al.*, File No. FD 04-01-74476, 16 September 2004 (Man. Q.B.).

Vriend v. *Alberta*, [1998] 1 S.C.R. 493, reversing (1996), 132 D.L.R. (4th) 595, 34 C.R.R. (2d) 243 (Alta C.A.), reversing (1995), 23 C.R.R. (2d) D1 (Alta Q.B.).

W. (N.) v. *Canada (Attorney General)*, 2004 SKQB 434, 5 November 2004 (Sask. Q.B.).

Waterman v. *National Life Assurance Company of Canada (No. 2)* (1993), 18 C.H.R.R. D/176 (Ont. Bd. Inquiry).

Whatcott v. *Saskatchewan Human Rights Tribunal et al.*, 2010 SKCA 26, reversing 2007 SKQB 450 (Sask. C.A.).

Wilson Hodder, File No. 104-241-492, 9 January 1997 (Review Tribunal).

Yarrow v. *Treasury Board*, File No. 166-2-25034, 5 February 1996 (Public Service Staff Relations Board).