

## MOVING TOWARD SAME-SEX MARRIAGE

Donald G. Casswell\*

Victoria

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*The definition of marriage in the Modernization of Benefits and Obligations Act, S.C., c. 12, s. 1.1 did not change the law leaving marriage limited to opposite-sex partners. The author argues that recent developments in Canada and elsewhere indicate that the exclusion of same-sex partners from marriage constitutes discrimination under the Canadian Charter. In the event of a successful challenge the writer believes it unlikely that Parliament would invoke the "notwithstanding" clause. Thus Canada is moving ineluctably to same-sex marriage.*

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*La définition du mariage dans la Loi sur la modernisation de certains régimes d'avantages et d'obligations, L.C. 2000, c. 12, art. 1.1, n'a pas changé le droit, le mariage restant réservé à des personnes de sexe opposé. L'auteur soutient que des développements au Canada et ailleurs appuient l'argument que l'exclusion des personnes de même sexe du mariage constitue de la discrimination au sens de la Charte canadienne. Dans l'éventualité d'une contestation, l'auteur croit qu'il est improbable que le Parlement veuille invoquer la "clause nonobstant". Le Canada est donc en route pour le mariage entre personnes du même sexe.*

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\* Donald G. Casswell, of the Faculty of Law, University of Victoria, Victoria, British Columbia. I thank Ena Ackerman (LL.B., U. Vic., 2001), Allison Fieldberg (LL.B., U. Vic., 2001), and Diana Moffat (LL.B., U. Vic., 2002) for their valuable research assistance. Of course, any errors or other shortcomings in this article are entirely my responsibility.

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### I. Introduction

In its May 20, 1999, decision in *M. v. H.*,<sup>1</sup> the Supreme Court of Canada held, by an eight Justice majority, that the definition of "spouse" applicable to partner support in Ontario's *Family Law Act*<sup>2</sup> was unconstitutional because it included unmarried opposite-sex partners but not same-sex partners. While the Court's decision applied only to this particular definition of "spouse," it was obviously of tremendous precedential significance with respect to all definitions of "spouse" and, indeed, all other family relationship signifiers in all Canadian legislation.<sup>3</sup> The majority emphasized, however, that the case had "nothing to

<sup>1</sup> [1999] 2 S.C.R. 3.

<sup>2</sup> R.S.O. 1990, c. F.3, s. 29.

<sup>3</sup> The Court specifically stated that its decision "[might] well affect numerous other statutes that rely upon a similar definition of the term 'spouse': *M. v. H.*, *supra* note 1 at para. 147. Decisions which have applied *M. v. H.* are referred to *infra* note 48.

do with marriage *per se*<sup>4</sup> and did not “challenge traditional conceptions of marriage.”<sup>5</sup> In particular, there was “no need to consider whether same-sex couples can marry.”<sup>6</sup> Strictly speaking, there was no doubt that was true. Nevertheless, the very fact that the majority took pains to stress that *M. v. H.* had nothing to do with marriage indicated that marriage — the inner sanctum of heterosexual privilege — was clearly on everyone’s mind.

Certainly marriage was on politicians’ minds and, on June 8, 1999, the House of Commons adopted a resolution that “in the opinion of this House, it is necessary, in light of public debate around recent court decisions, to state that marriage is and should remain the union of one man and one woman to the exclusion of all others, and that Parliament will take all necessary steps within the jurisdiction of the Parliament of Canada to preserve this definition of marriage in Canada.”<sup>7</sup> This resolution had no legal effect and, in any event, the common law already limited marriage to opposite-sex partners.<sup>8</sup> However, when Parliament in 2000 enacted the *Modernization of Benefits and Obligations Act*<sup>9</sup> in response to *M. v. H.*, as considered below, it included in section 1.1 of that *Act*, under the title “interpretation,” the following:

For 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.<sup>10</sup>

Significantly, however, Parliament did not take “all necessary steps within the jurisdiction of the Parliament of Canada to preserve this definition of marriage.”

<sup>4</sup> *M. v. H.*, *ibid.* at para. 52, *per* Cory J. Gonthier J., the lone dissenter in *M. v. H.*, disagreed: “I ... find Cory J.’s statement that ‘this appeal has nothing to do with marriage *per se*’ ... entirely unconvincing.” *M. v. H.*, *ibid.* at para. 231.

<sup>5</sup> *M. v. H.*, *ibid.* at para. 134, *per* Iacobucci J.

<sup>6</sup> *M. v. H.*, *ibid.* at para. 55, *per* Cory J.

<sup>7</sup> Parliament of Canada, *House of Commons Debates*, 8 June 1999; Hansard, 36th Parl., 1st Sess., Number 240, online: [www.parl.gc.ca/36/1/paribus/chambus/house/debates/240-1999-06-08/han240-e.htm](http://www.parl.gc.ca/36/1/paribus/chambus/house/debates/240-1999-06-08/han240-e.htm).

<sup>8</sup> *Hyde v. Hyde* (1866), L.R. 1 P. & D. 130 (Eng. P.D.A.); *Corbett v. Corbett* (No. 2), [1970] 2 All.E.R. 33 (Eng. P.D.A.); *Re: North and Matheson* (1974), 52 D.L.R.(3d) 280 (Man. Co. Ct.); and, *Layland v. Ontario (Minister of Consumer and Commercial Relations)* (1993), 104 D.L.R.(4th) 214 (Ont. Div. Ct.). *North and Matheson* and *Layland* are considered *infra* at text accompanying notes 74-89.

<sup>9</sup> S.C. 2000, c. 12.

<sup>10</sup> This definition is from *Hyde v. Hyde*, *supra* note 8 at 133, except that the words “for life” used there have been omitted, no doubt because of the modern prevalence of divorce. The *Modernization of Benefits and Obligations Act*, as originally introduced by the government, did not include this provision: Bill C-23, 2000 (first reading, February 11, 2000). However, because of pressure from opposition M.P.’s and some of its own backbenchers, the government later proposed amending the Bill to include the restrictive definition of “marriage”: See Ottawa: Canada Department of Justice News Release, “Government of Canada Proposes Amendment to Bill C-23” (22 March 2000), in which Justice Minister Anne McLellan said that “it [was] important to Canadians to clearly indicate in Bill C-23 that the definition of marriage [would] not change.”

Specifically, it did not invoke section 33 of the *Canadian Charter of Rights and Freedoms*<sup>11</sup> — the “notwithstanding clause” — and, therefore, did not insulate this affirmation of the common law restrictive definition of “marriage,” or the common law definition itself, from *Charter*-based judicial scrutiny. In particular, it can be argued, and it is my submission in this article, that the restrictive common law definition of marriage constitutes discrimination on the basis of sexual orientation — thus violating the right to equality guaranteed by section 15 of the *Charter* — and that it cannot be saved under section 1 of the *Charter*. Indeed, as will be considered, there are presently same-sex marriage claims before the courts in British Columbia, Ontario, and Québec.

I begin by briefly summarizing *Charter*-based court decisions that have recognized same-sex partnerships and legislative responses to those decisions. I then consider legislation concerning marriage, court decisions which have held that marriage is limited to opposite-sex partners, and recent statements in the Supreme Court of Canada concerning the nature of marriage, and refer to the same-sex marriage proceedings presently before the courts in British Columbia, Ontario, and Québec. I then look at recent court decisions in other countries that I submit may assist Canadian courts considering same-sex marriage claims and legislative reaction to those decisions. Finally, I suggest how Canadian courts may approach the question whether the common law exclusion of same-sex partners from marriage is unconstitutional and speculate on how Parliament might respond to a decision recognizing same-sex marriage.

## II. Recognition of Same-Sex Partners

### A. The Charter and the Courts

The *Charter* came into force on April 17, 1982, except for the equality guarantees of section 15, which came into force on April 17, 1985. Section 15 provides:

Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.<sup>12</sup>

“Sexual orientation” is not included in the enumerated grounds of prohibited discrimination. However, the crucially important words “in particular,” which precede the enumerated grounds, made everything possible for lesbian and gay people seeking equality. In its first consideration of section 15, in *Andrews v. Law Society of British Columbia*,<sup>13</sup> the Supreme Court held that section 15

<sup>11</sup> Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

<sup>12</sup> More precisely, this is section 15(1). However, for the purposes of this article, it is convenient to refer to these provisions as “section 15.”

<sup>13</sup> [1989] 1 S.C.R. 143.

prohibited discrimination not only on the basis of its enumerated grounds, but also on the basis of grounds that were analogous to those enumerated grounds. Then, in 1995, the Court unanimously held, in *Egan v. Canada*,<sup>14</sup> that sexual orientation was an analogous ground under section 15 and, therefore, discrimination on the basis of sexual orientation was unconstitutional. Numerous court decisions have since held that legislation dealing with such diverse matters as criminal law, medical services, pension benefits, adoption, and family relations discriminated against lesbians and gay men or, in particular, same-sex partners.<sup>15</sup>

Different legislatures responded differently to court decisions recognizing same-sex partners. British Columbia showed leadership by being the first jurisdiction in Canada to enact legislation recognizing same-sex partners in such important areas as medical services, pension benefits, and family relations law.<sup>16</sup> In each case, it was responding to court decisions recognizing same-sex partners.<sup>17</sup> Other provinces and territories and the federal government generally did not respond to such court decisions before *M. v. H.*<sup>18</sup> *M. v. H.* changed

<sup>14</sup> [1995] 2 S.C.R. 513 [hereinafter *Egan*].

<sup>15</sup> See R. Wintemute, *Sexual Orientation and Human Rights: The United States Constitution, the European Convention, and The Canadian Charter* (Oxford: Clarendon Press, 1995, and revised paperback edition, Oxford: Oxford University Press, 1997); D.G. Casswell, *Lesbians, Gay Men, and Canadian Law* (Toronto: Emond Montgomery Publications, 1996); K.A. Lahey, *Are We "Persons" Yet?: Law and Sexuality in Canada* (Toronto and Buffalo: University of Toronto Press, 1999); A. Robinson, "Le mariage pour les gays et lesbiennes: Futur inéluctable", online: [www.fugues.com/mariage](http://www.fugues.com/mariage) (2000); D.G. Casswell, "Any Two Persons in Canada's Lotusland, British Columbia" in R. Wintemute & M. Andenæs, eds., *Legal Recognition of Same-Sex Partnerships* (Oxford: Hart Publishing, 2001); and, K.A. Lahey, "Becoming "Persons" in Canadian Law: Genuine Equality or "Separate But Equal"?" in R. Wintemute & M. Andenæs, eds., *Legal Recognition of Same-Sex Partnerships*, *ibid.*

<sup>16</sup> *Medical and Health Care Services Act*, S.B.C. 1992, c. 76, s. 1 (now the *Medicare Protection Act* R.S.B.C., 1996, c. 286, s. 1); *Pension Statutes Amendment Act (No. 2)*, 1998, S.B.C. 1998, c. 40; *Pension Benefits Standards Amendment Act*, 1999, S.B.C. 1999, c. 41; *Family Relations Amendment Act*, 1997, S.B.C. 1997, c. 20, s. 1; and, *Family Maintenance Enforcement Amendment Act*, 1997, S.B.C. 1997, c. 19.

<sup>17</sup> With respect to medical services, *Knodel v. British Columbia* (1991), 58 B.C.L.R.(2d) 356 (S.C.); with respect to pension benefits, *Rosenberg v. Canada (Attorney-General)* (1998), 158 D.L.R.(4th) 664 (Ont. C.A.) (the federal government did not seek leave to appeal to the Supreme Court of Canada); and, with respect to family relations law, *M. v. H.* (1996), 142 D.L.R. (4th) 1 (Ont. C.A.), a decision which was subsequently affirmed by the Supreme Court of Canada, *supra* note 1.

<sup>18</sup> Exceptionally, however, most provincial and territorial legislatures and Parliament had enacted legislation to extend survivor pension benefits to same-sex partners of public service employees in response to *Rosenberg v. Canada (Attorney-General)*, *ibid.* In its News Release issued when it introduced the *Modernization of Benefits and Obligations Act*, the federal government referred to such legislation having been already enacted federally and in Manitoba, Québec, Saskatchewan, British Columbia, Ontario, New Brunswick, Nova Scotia, Yukon, Nunavut and the Northwest Territories: See Government of Canada, News Release, Ottawa, "Government of Canada to Amend Legislation to Modernize Benefits and Obligations" (11 February 2000) at 4.

everything. Between 1999 and 2001, British Columbia, Manitoba, Ontario, Québec, Nova Scotia, Saskatchewan and the federal government all enacted omnibus legislation to recognize same-sex partners. The scope and particular content of this legislation varied significantly, as will be considered. In particular, some amending statutes were far more comprehensive than others. I mention that Québec's legislation was introduced in the National Assembly two weeks before and approved in principle the day before *M. v. H.*, although it did not receive assent until later. In enacting omnibus legislation to recognize same-sex partnerships, legislatures were responding to the Supreme Court's indication in *M. v. H.* that it might be preferable to "address these issues in a more comprehensive fashion," rather than leaving them to "be resolved on a case-by-case basis at great cost to private litigants and the public purse."<sup>19</sup> New Brunswick and Newfoundland responded to *M. v. H.* by amending only their family relations law concerning partner support to include same-sex partners, thus dealing with the specific issue considered in the case.<sup>20</sup> Alberta has very recently announced that it plans to conduct a comprehensive review of its legislation which treats same-sex partners differently than opposite-sex partners, leaving only Prince Edward Island and the three territories as having to date not enacted or proposed legislation specifically in response to *M. v. H.*<sup>21</sup>

In the following sections, I consider the omnibus legislation enacted in several provinces and federally to recognize same-sex partnerships in the chronological order, more or less, in which it was enacted.

<sup>19</sup> *M. v. H.*, *supra* note 1, at para. 147.

<sup>20</sup> *An Act to Amend the Family Services Act*, S.N.B., 2000 c. 59; and, *An Act to Amend the Family Law Act*, S.N. 2000, c. 29. The Newfoundland legislation is actually slightly broader in scope, permitting same-sex partners to enter into cohabitation and separation agreements and, thus, order their affairs with respect to division of property and custody of and access to children, in addition to partner support. The New Brunswick legislation came into force in 2000, and the Newfoundland legislation partly in 2000 and partly in 2001.

<sup>21</sup> See Edmonton Journal, "Klein says province won't fight court ruling expanding gay rights," (4 April 2001) online: [www.edmontonjournal.com/news1/stories/010404/5033142.html](http://www.edmontonjournal.com/news1/stories/010404/5033142.html), with the "court ruling" referred to being *Johnson v. Sand*, [2001] A.J. No. 390 (Surrogate Court of Alta., April 2, 2001). Premier Klein emphasized, however, that Alberta "[would] not tamper with the definition of marriage": *ibid.* Interestingly, however, the Northwest Territories and the Yukon Territory both enacted, before *M. v. H.*, legislation which deals with very specific matters of family law and estate administration and which contains ungendered language capable of encompassing same-sex partners: (*Northwest Territories*) *Family Law Act*, S.N.W.T. 1997, c. 18, as am. by S.N.W.T. 1998, c. 17 and S.N.W.T. 1999, c. 5 (s. 1, "cohabit;" s. 4, "cohabitation agreement"); (*Yukon Territory*) *Estate Administration Act*, S.Y.T. 1998, c. 7, s. 1 ("common law spouse," in force 2000); (*Yukon Territory*) *An Act to Amend the Family Property and Support Act*, S.Y.T. 1998, c. 7, s. 10 ("spouse," in force 2000).

## B. British Columbia Legislation

In 1999, British Columbia enacted the *Definition of Spouse Amendment Act, 1999*<sup>22</sup> and, in 2000, the *Definition of Spouse Amendment Act, 2000*.<sup>23</sup> These Acts included same-sex partners in the definitions of “spouse” in various statutes that had already been extended to include unmarried opposite-sex partners. The result was to treat same-sex partners equally with unmarried opposite-sex partners and, in many but not all cases, equally with married spouses.<sup>24</sup> The 1999 Act amended five statutes but, before it was proclaimed in force, the British Columbia government decided to enact more comprehensive omnibus legislation in response to *M. v. H.* Proclamation of the 1999 Act was therefore delayed until after the enactment of the 2000 Act, which, *inter alia*, repealed and replaced parts of the 1999 Act. In the result, the 2000 Act amended 35 statutes, including the five that had already been amended by the 1999 Act. Proclamation of both Acts was coordinated, and they came into force in 2000.<sup>25</sup>

## C. Québec Legislation

In 1999, Québec enacted *An Act to amend various legislative provisions concerning de facto spouses*,<sup>26</sup> which amended 28 statutes that contained a definition of the concept of *de facto* spouse in order to allow *de facto* unions to be recognized without regard to the sex of the persons concerned. The result was that both same-sex partners and unmarried opposite-sex partners may be “*de facto* spouses.” The National Assembly passed this Act unanimously. This is not surprising when one remembers that Québec, in 1977, was the first jurisdiction in Canada to add sexual orientation to its human rights legislation as a prohibited ground of discrimination.<sup>27</sup> It took almost a decade before the next jurisdiction to do so, Ontario, amended its human rights legislation.<sup>28</sup> The provisions of the *Québec Civil Code*<sup>29</sup> concerning marriage and the rights and obligations of married spouses were not affected by the Act. In particular, as will be considered, the *Civil Code* explicitly limits marriage to opposite-sex partners.<sup>30</sup>

<sup>22</sup> S.B.C. 1999, c. 29.

<sup>23</sup> S.B.C. 2000, c. 24.

<sup>24</sup> In this regard, See *Miron v. Trudel*, [1995] 2 S.C.R. 418, which required the Court to compare unmarried opposite-sex partners with married spouses.

<sup>25</sup> *Definition of Spouse Amendment Act, 2000*, *supra* note 23, s. 41; and, B.C. Reg. 280-00.

<sup>26</sup> S.Q. 1999, c. 14.

<sup>27</sup> *An Act to amend the Charter of Human Rights and Freedoms*, S.Q. 1977, c. 6.

<sup>28</sup> *Equality Rights Statute Law Amendment Act, 1986*, S.O. 1986, c. 64, ss. 18(1)-18(6).

<sup>29</sup> *Québec Civil Code*, S.Q. 1991, c. 64.

<sup>30</sup> *Infra* at text accompanying notes 67-70.

### D. Ontario Legislation

In 1999, Ontario enacted the *Amendments Because of the Supreme Court of Canada Decision in M. v. H. Act, 1999*.<sup>31</sup> In case the Act's title was not sufficient to indicate the Ontario government's distaste for same-sex partnership recognition, the Attorney General issued a press release which said: "The only reason we are introducing this [legislation] is because of the Supreme Court of Canada decision. ... Our proposed legislation complies with the decision while preserving the traditional values of the family by protecting the definition of spouse in Ontario law."<sup>32</sup> The legislation amended 67 statutes which contained provisions concerning the rights and obligations of unmarried opposite-sex partners similar to the provision of the (Ontario) *Family Law Act* which had been held unconstitutional in *M. v. H.* and created a new status in Ontario law, namely, "same-sex partner." The various statutes amended now contain some variation of the phrase "spouse or same-sex partner." Unmarried opposite-sex partners are encompassed within extended definitions of "spouse." This differential treatment of same-sex partners and unmarried opposite-sex partners raised concern that the legislation might have created a "separate but equal" regime for same-sex partners that was itself unconstitutional.<sup>33</sup> M., the plaintiff in *M. v. H.*, applied to the Supreme Court of Canada for a rehearing concerning remedy, intending to argue that the legislation's differential treatment of same-sex partners and unmarried opposite-sex partners did not satisfy the Court's May 1999 order. On May 25, 2000, however, the Court dismissed her application without reasons.<sup>34</sup>

### E. Federal Legislation

In 2000, Parliament enacted the *Modernization of Benefits and Obligations Act*,<sup>35</sup> which amended 68 statutes to extend benefits and obligations to same-sex partners on the same basis as they are extended to unmarried opposite-sex

<sup>31</sup> S.O. 1999, c. 6.

<sup>32</sup> Press Release, Ontario Ministry of The Attorney General, "Ontario protects traditional definition of spouse in legislation necessary because of Supreme Court of Canada decision in *M. v. H.*" (25 October 1999).

<sup>33</sup> The "separate but equal" doctrine, originally developed by American courts but subsequently rejected in *Brown v. Board of Education*, 347 U.S. 483 (1954), has been rejected in Canada as well: See for example, *Andrews v. Law Society of British Columbia*, *supra* note 13; *Egan v. Canada*, [1993] 3 F.C. 401 (C.A.), *per* Linden J.A., dissenting (whose finding of discrimination was subsequently affirmed by a majority of the Supreme Court of Canada in *Egan v. Canada*, *supra* note 14, although his comments on the "separate but equal" doctrine were not referred to there); and *Canada (Attorney General) v. Moore*, [1998] 4 F.C. 585 (T.D.).

<sup>34</sup> *M. v. H.*, [1997] S.C.C.A. No. 101. (Despite the 1997 date, the dismissal of M.'s 2000 application is referred to in the procedural history summarized at this cite.)

<sup>35</sup> *Supra* note 9.



partners. Indeed, the *Act* went farther than required by *M. v. H.*, since it additionally extended to both same-sex partners and unmarried opposite-sex partners certain benefits and obligations which had previously applied only to married spouses.<sup>36</sup> The *Act* created the designation “common-law partner,” which is defined as “a person who is cohabiting with [another] individual in a conjugal relationship, having so cohabited for a period of at least one year.” In the result, the various statutes which were amended now refer to “spouses,” which, at common law, is limited to married spouses, and to “common-law partners,” who may be either same-sex partners or unmarried opposite-sex partners. Interestingly, the *Act* effectively “demoted” unmarried opposite-sex partners, who previously had been “spouses” under many federal statutes, to the status of “common-law partner.” Clearly the federal government intended to maintain heterosexual privilege by reserving “spousal” status as an option available only to opposite-sex partners. Further, as already mentioned, the *Act*, in section 1.1, reaffirmed the common law definition of “marriage” with respect to the *Act* and the 68 statutes amended by it.

#### F. *Nova Scotia Legislation*

In 2000, Nova Scotia enacted the *Law Reform (2000) Act*,<sup>37</sup> which came into force in 2001. The full title of the *Act* was *An Act to Comply with Certain Court Decisions and to Modernize and Reform Laws in the Province*, that is, a hybrid of the Ontario legislation’s “the courts made us do it” title and the federal legislation’s title. The *Act* amended 10 Nova Scotia statutes to contain ascriptive provisions deeming individuals who had cohabited in a conjugal relationship for a specified period of time to be “common-law partners” and, further, established a “domestic partner” regime which individuals who were cohabiting or intended to cohabit in a conjugal relationship could opt into.

The 10 amended statutes now include a new status, “common-law partners,” in addition to “spouses.” “Spouse” is now defined as “either of a man or woman who are married to each other.” “Common-law partners” are defined as individuals who have cohabited in a conjugal relationship for a period of either one year or two years, the required cohabitation period varying, somewhat unusually, among the statutes amended. Thus, “common-law partners” may be either same-sex partners or unmarried opposite-sex partners. The *Law Reform (2000) Act* effectively “demoted” unmarried opposite-sex partners, who previously had been “spouses” under some Nova Scotia legislation. In this regard, the Nova Scotia Legislature followed in Parliament’s footsteps.

The *Law Reform (2000) Act* also amended the (*Nova Scotia*) *Vital Statistics Act*<sup>38</sup> by adding a new Part to it dealing with “domestic partnerships.” Any “two

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<sup>36</sup> In this regard, Parliament was responding to *Miron v. Trudel*, *supra* note 24.

<sup>37</sup> A.N.S. 2000, c. 29.

<sup>38</sup> R.S.N.S. 1989, c. 494.

individuals” who are not married, who have attained the age of majority, and “who are cohabiting or intend to cohabit in a conjugal relationship may make a domestic-partner declaration.” Domestic partners who register a domestic-partner declaration have, both as between themselves and with respect to any person, the same rights and obligations as “spouses” under 12 enumerated Nova Scotia statutes. Significantly, some of these enumerated statutes are not included among those statutes into which “common-law partners” are ascriptively included.<sup>39</sup> Thus, these statutes apply to partners only if they effectively opt into them by registering a domestic partnership declaration or, in the case of opposite-sex partners, marry. It is important to emphasize that Nova Scotia’s domestic partnership regime is available to any “two individuals” and, therefore, is available on the same basis to both same-sex partners and unmarried opposite-sex partners. Of course, marriage and spousal status are still reserved exclusively for opposite-sex partners. Nova Scotia’s domestic partnership legislation came into force on June 4, 2001 and, the same day, three same-sex couples became the first to register their partnerships.<sup>40</sup>

### G. Manitoba Legislation

In 2001, Manitoba enacted *An Act to Comply with the Supreme Court of Canada Decision in M. v. H.*<sup>41</sup> The *Act* amended 10 statutes to extend certain rights and benefits to same-sex partners which previously were afforded only to opposite-sex partners. The *Act* established a new status, “common-law partners,” who are any two unmarried people who cohabit in a conjugal relationship. Thus, both same-sex partners and unmarried opposite-sex partners may be “common-law partners.” As in the federal and Nova Scotia legislation, unmarried opposite-sex partners were effectively “demoted” since, previously, under some statutes, they had been “common-law spouses” and, further, had in some situations been included within extended definitions of “spouses.” Most of the *Act* came into force on July 6, 2001 and the remainder will come into force on January 1, 2002.<sup>42</sup>

<sup>39</sup> Notably, the (*Nova Scotia*) *Intestate Succession Act*, R.S.N.S. 1989, c. 236; the (*Nova Scotia*) *Matrimonial Property Act*, R.S.N.S. 1989, c. 275; and, the *Testators’ Family Maintenance Act*, R.S.N.S. 1989, c. 465.

<sup>40</sup> Sarah McGinnis, “‘It’s not quite like getting married’ – Same-sex couples register relationships,” *Halifax Chronicle-Herald* (5 June 2001) A1.

<sup>41</sup> Manitoba Bill 41, *An Act to Comply with the Supreme Court of Canada Decision in M. v. H.*, first reading, 30 May 2001. The Manitoba Attorney General emphasized that “[t]he legislation would not affect marriage, which is within the constitutional authority of the federal government. The Federal Modernization of Benefits and Obligations Act defines marriage as the lawful union between a man and a woman to the exclusion of all others.”: Manitoba government News Release, “Legislation Introduced to Comply with Supreme Court Ruling in *M. v. H.*,” (30 May 2001) online: at [www.gov.mb.ca/chc/press/top/2001/05/2001-05-30-06.html](http://www.gov.mb.ca/chc/press/top/2001/05/2001-05-30-06.html).

<sup>42</sup> *Ibid.*, s. 11.

## H. *Saskatchewan Legislation*

In 2001, Saskatchewan enacted *The Miscellaneous Statutes (Domestic Relations) Amendment Act, 2001*, and *The Miscellaneous Statutes (Domestic Relations) Amendment Act, 2001 (No. 2)*.<sup>43</sup> These *Acts* amended 24 statutes to extend to both same-sex partners and unmarried opposite-sex partners the same legal rights and benefits afforded married spouses. Under the amended statutes, “spouse” is now defined as “the legally married spouse of a person or a person with whom that person is cohabiting as spouses.” Several of the amended statutes now contain analogous definitions of “spousal relationship.” Thus, Saskatchewan joined British Columbia as only the second province to include same-sex partners in extended definitions of “spouse.”<sup>44</sup> Most of the provisions of these two *Acts* came into force on July 6, 2001, and the remainder will come into force in stages depending, in part, on the coming into force of other legislation.<sup>45</sup>

## I. *Unfinished Business*

Immediately after *M. v. H.*, many governments indicated that they intended to introduce omnibus legislation to bring their jurisdictions’ statutes into line with that decision.<sup>46</sup> However, to date, only British Columbia, Manitoba, Ontario, Québec, Nova Scotia, Saskatchewan and the federal government have enacted comprehensive (more or less, as has been considered) legislation to recognize same-sex partners. As previously mentioned, Alberta has also very recently announced that it plans a comprehensive review of its legislation. In any event, I submit that it is now clear that *M. v. H.* effectively determined that same-sex partners are to be treated equally with unmarried opposite-sex partners with respect to all legal rights, benefits, protections, and obligations, despite the qualification of the Supreme Court itself, which emphasized that the case did not require it “to consider ... whether same-sex couples must, for all purposes, be treated in the same manner as unmarried opposite-sex couples.”<sup>47</sup>

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<sup>43</sup> *The Miscellaneous Statutes (Domestic Relations) Amendment Act, 2001*, Bill No. 47 of 2001, first reading, May 30, 2001; and *The Miscellaneous Statutes (Domestic Relations) Amendment Act, 2001 (No. 2)*, Bill No. 48 of 2001, first reading, May 30, 2001.

<sup>44</sup> The Saskatchewan Government, in a news release issued the day the *Acts* were introduced, stated, however, that “[t]his legislation does not affect the definition of marriage, which is federal jurisdiction. The federal government recently affirmed in the Modernization of Benefits and Obligations Act [that] marriage is the union of one man and one woman.”: Saskatchewan Government News Release, Justice-380, “Rights Extended to Unmarried Couples”. (30 May 2001) online at [www.gov.sk.ca/newsrel/2001/05/30-380.html](http://www.gov.sk.ca/newsrel/2001/05/30-380.html).

<sup>45</sup> *The Miscellaneous Statutes (Domestic Relations) Amendment Act, 2001*, *supra* note 43, s. 20; and, *The Miscellaneous Statutes (Domestic Relations) Amendment Act, 2001, (No. 2)*, *supra* note 43, s. 12.

<sup>46</sup> See for example, C.B.C. News, “Most premiers ready to make changes after same-sex ruling”, (posted 26 May 1999), online: <http://cbc.ca/cgi-bin/templates/view.cji.category=Canada&story=/news/1999/05/21/gay990521>.

<sup>47</sup> *M. v. H.*, *supra* note 1 at para. 55.

Certainly, several subsequent court decisions have taken this broad interpretation of *M. v. H.* in fact situations concerning definitions of "spouse" and partnership recognition.<sup>48</sup> It is an unfortunate reality, however, that until legislation is enacted comprehensively recognizing same-sex partnerships, same-sex partners have no alternative but to bring costly court proceedings to have their rights recognized in those situations of statutory *lacunae* with respect to same-sex partnership recognition.

Additionally, there remains significant inequality between same-sex partners and opposite-sex partners due to the fact that opposite-sex partners have the option of choosing to marry and thereby acquiring all the rights, benefits and protections incidental to marriage — under federal, provincial and territorial law — and, just as importantly, the status afforded uniquely to married spouses, whereas same-sex partners cannot choose to marry. Comprehensive consideration of the rights, benefits, and protections afforded exclusively to married spouses under federal, provincial and territorial legislation is beyond the scope of this article.<sup>49</sup> However, a few examples of federal legislation that was not amended by the *Modernization of Benefits and Obligations Act* will suffice to illustrate the inequality. First, in the *Immigration Regulations*, a person's "spouse" is defined as "the party of the opposite sex to whom that person is joined in marriage."<sup>50</sup> Thus, for example, a person cannot sponsor their same-sex partner as an immigrant to Canada in the same way another could sponsor their married spouse.<sup>51</sup> Second, the *Criminal Code* provides that a "husband and wife" may

<sup>48</sup> See for example, *Vincent v. Ontario (Ministry of the Attorney General)*, [1999] O.J. No. 4905 (Ont. S.C.J.); *Grigg v. Berg Estate* (2000), 186 D.L.R. (4th) 160 (B.C. S.C.); *W.X. v. Y.Z.*, [2000] N.B.J. No. 331 (Q.B.F.D.); *Walsh v. Bona* (2000), 186 D.L.R. (4th) 50 (N.S. C.A.), application for leave to appeal to S.C.C. granted, February 15, 2001; [2000] S.C.C.A. No. 517; *Ferguson v. Armbrusi* (2000), 187 D.L.R. (4th) 367 (Sask. Q.B.), notice of appeal filed in Sask. C.A., May 23, 2000, 187 D.L.R. (4th) 367n; *Johnson v. Sand*, *supra* note 21.

<sup>49</sup> For a more comprehensive consideration, see K.A. Lahey, "Becoming "Persons" in Canadian Law: Genuine Equality or "Separate But Equal"?", *supra* note 15. This situation persists despite *Miron v. Trudel*, *supra* note 24.

<sup>50</sup> *Immigration Regulations, 1978*, SOR/78-172, s. 2(1), as amended. Interestingly, the *Regulations* contain a second definition of "spouse" of more limited application, namely, a citizen or permanent resident may co-sponsor, with their "spouse," a family class immigrant, "spouse" for this purpose being extended to include a cohabiting unmarried opposite-sex partner: *Immigration Regulations, 1978, ibid.*, s. 5(1). It would seem clear that, after *M. v. H.*, the opportunity afforded under this provision for an unmarried opposite-sex partner to undertake an obligation to the federal government would be extended equally to a willing same-sex partner as well.

<sup>51</sup> Same-sex partners are currently admitted under the government's discretionary power to admit persons for "compassionate or humanitarian considerations": *Immigration Act*, R.S.C. 1985, c. I-2, s. 114(2); and, *Immigration Regulations, 1978, ibid.*, s. 2.1. See D.G. Casswell, *Lesbians, Gay Men, and Canadian Law*, *supra* note 15 at 567-575. Bill C-11, 2001, *Immigration and Refugee Protection Act* (first reading, 21 February 2001), clause 12(2), would, if enacted, permit a citizen or permanent resident to sponsor their "common-law partner" as an immigrant. The Bill does not define "common-law partner" but if, as in the *Modernization of Benefits and Obligations Act*, a definition of "common-law partner"

lawfully engage in anal intercourse if engaged in in private and if both of them consent.<sup>52</sup> With respect to any other two persons, as, for example, same-sex partners, they must in addition each be 18 years of age or more.<sup>53</sup> Third, the provisions of the *Canada Evidence Act* concerning spousal competence and compellability and spousal communication privilege refer to “husband” and “wife.”<sup>54</sup> It is unclear whether these provisions, and the common law rule of spousal incompetency, apply to married spouses alone or extend also to, in particular, despite the gendered statutory language, same-sex partners.<sup>55</sup>

### III. Marriage

#### A. Legislation

The Constitution of Canada provides that legislative jurisdiction with respect to marriage is shared between the federal and provincial governments. Parliament has exclusive jurisdiction concerning “marriage and divorce”<sup>56</sup> and the provincial Legislatures have exclusive jurisdiction concerning “solemnization of marriage in the province”<sup>57</sup> and “property and civil rights in the province.”<sup>58</sup> The case law interpreting these provisions of the Constitution is complex. However, two points are generally accepted. First, the Constitution provides for

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is later put into the *Immigration Regulations* which includes a one-year cohabitation requirement, it would in many situations be impossible for same-sex partners of different nationalities to satisfy such a definition. For comment on the possibility of a cohabitation requirement, and other concerns about Bill C-11, See EGALE Canada, “EGALE Response to Immigration Consultation Discussion Document On FAMILY ISSUES”, (31 August 2000), online at [www.egale.ca/documents/immigration-issues.htm](http://www.egale.ca/documents/immigration-issues.htm) (this response was in respect to a predecessor immigration Bill which, for present purposes, was the same as Bill C-11, namely, Bill C-31, 2000, *Immigration and Refugee Protection Act*, first reading, 6 April 2000, and which died on the order paper when the November 2000 federal election was called); and EGALE Canada, “EGALE Brief to the House of Commons Standing Committee on Citizenship and Immigration”, Bill C-11: the Immigration and Refugee Protection Act, (27 March 2001), online: at [www.egale.ca/documents/c-11committeebrief.htm](http://www.egale.ca/documents/c-11committeebrief.htm). (Before February 2001, “EGALE Canada” was named “Equality for Gays and Lesbians Everywhere” and referred to by the acronym “EGALE.” For convenience I use “EGALE Canada” only).

<sup>52</sup> *Criminal Code*, R.S.C. 1985, c. C-46, s. 159(2)(a).

<sup>53</sup> *Ibid.*, s. 159(2)(b). I wonder why the federal government does not simply repeal section 159, since it has been held to be unconstitutional: see *R. v. M.(C.)* (1995), 98 C.C.C. (3d) 481 (Ont. C.A.); and, *R. v. Roy* (1998), 125 C.C.C. (3d) 442 (Qué. C.A.). Leave to appeal to the Supreme Court of Canada was not sought in either case.

<sup>54</sup> *Canada Evidence Act*, R.S.C. 1985, c. C-5, s. 4.

<sup>55</sup> See *Ex parte Coté* (1971), 5 C.C.C. (2d) 49 (Sask. C.A.); *R. v. Duvivier* (1990), 60 C.C.C. (3d) 353 (Ont. Gen. Div.); *R. v. Edelenbos*, [2000] O.J. No. 2147 (Ont. S.C.J.); and H. Stewart, “Spousal Incompetency and the Charter” (1996) 34 Osgoode Hall L.J. 411.

<sup>56</sup> *Constitution Act, 1867*, (U.K.) 30 & 31 Vict., c. 3, s. 91(26), reprinted in R.S.C. 1985, App. II, No. 5.

<sup>57</sup> *Ibid.*, s. 92(12).

<sup>58</sup> *Ibid.*, s. 92(13).

overlapping legislative authority. Second, Parliament has legislative authority with respect to the capacity to marry, that is, with respect to who can or cannot marry.<sup>59</sup> Parliament has enacted legislation prohibiting certain persons who are related by blood or adoption from marrying<sup>60</sup> and, under its criminal law power,<sup>61</sup> has prohibited certain conduct with respect to marriage, such as bigamy, polygamy, and solemnizing a marriage known to be unlawful.<sup>62</sup> Provincial and territorial Legislatures have enacted legislation dealing with matters such as obtaining marriage licences, medical certificates, how old one has to be to marry, who can perform marriages, witnesses to marriages, and registration of marriages. References in such legislation to the persons to be married or who have been married may use ungendered language such as "persons intending to marry"<sup>63</sup> or "any person,"<sup>64</sup> or gendered language such as "woman," "man," "wife" and "husband,"<sup>65</sup> or indeed both in different provisions in a single statute.<sup>66</sup>

Until very recently, only Québec had enacted legislation specifically limiting marriage to opposite-sex partners. The *Québec Civil Code* provides that "marriage may be contracted only between a man and a woman."<sup>67</sup> Then, in 2000, the Alberta *Marriage Act* was amended to define "marriage" as "a marriage between a man and a woman."<sup>68</sup> While the legislative jurisdiction of a provincial Legislature includes "enact[ing] conditions as to solemnization which may affect the validity of the [marriage] contract,"<sup>69</sup> Québec's and Alberta's legislation limiting marriage to opposite-sex partners clearly concerns the capacity to marry. Thus, the question arises whether these provisions are *ultra vires*. In 2001, however, Parliament enacted legislation not in force as of

<sup>59</sup> *In Re Marriage Legislation in Canada*, [1912] A.C. 880 (Canada P.C.); and *Hellens v. Densmore*, [1957] S.C.R. 768. For a comprehensive analysis of the complex and uncertain jurisprudence concerning legislative jurisdiction with respect to marriage, see EGALE Canada, *Division of Powers and Jurisdictional Issues Relating to Marriage* (Ottawa: Law Commission of Canada, 2000), online: at [www.lcc.gc.ca/en/themes/pr/cpra/egale/index.html](http://www.lcc.gc.ca/en/themes/pr/cpra/egale/index.html).

<sup>60</sup> *Marriage (Prohibited Degrees) Act*, R.S.C. 1985, c. M-2.1, s. 2.

<sup>61</sup> *Constitution Act, 1867*, *supra* note 56, s. 91(27).

<sup>62</sup> *Criminal Code*, *supra* note 52, ss. 214, 290-291, 293, 295.

<sup>63</sup> For example, the (*British Columbia*) *Marriage Act*, R.S.B.C. 1996, c. 282, ss. 15, 16.

<sup>64</sup> For example, the (*Ontario*) *Marriage Act*, R.S.O. 1990, c. M.3, s. 5(1).

<sup>65</sup> For example, the (*Newfoundland*) *Solemnization of Marriage Act*, R.S.N. 1990, c. S-19, s. 11; (*Nova Scotia*) *Solemnization of Marriage Act*, R.S.N.S. 1989, c. 436, s. 23(2); (*Ontario*) *Marriage Act*, *ibid.*, s. 31; (*Prince Edward Island*) *Marriage Act*, R.S.P.E.I. 1988, c. M-3, s. 10(2); and, (*Saskatchewan*) *Marriage Act, 1995*, S.S. 1995, c. M-4.1, s. 31(b).

<sup>66</sup> For example, the (*Ontario*) *Marriage Act*, *supra* note 64, ss. 5(1), 31.

<sup>67</sup> *Québec Civil Code*, *supra* note 29, art. 365.

<sup>68</sup> (*Alberta*) *Marriage Act*, R.S.A. 1980, c. M-6, s. 1(c.1), as enacted by the *Marriage Amendment Act, 2000*, S.A. 2000, c. 3, s. 4.

<sup>69</sup> *In Re Marriage Legislation in Canada*, *supra* note 59 at 887.

the date of writing which gave its *imprimatur* to Québec's legislation limiting marriage to opposite-sex partners, thus eliminating the *vires* concern with respect to Québec's legislation.<sup>70</sup> This legislation did not, however, apply to any province or territory other than Québec<sup>71</sup> and, therefore, did not affect the *vires* concern with respect to Alberta's legislation limiting marriage to opposite-sex partners, which would seem virtually certain to be *ultra vires*. The 2000 Alberta marriage legislation further amended the *Marriage Act* to declare that it operated notwithstanding the *Charter*<sup>72</sup> and to add a preamble, which provided, *inter alia*, that the "principles" listed in it were "fundamental in considering the solemnization of marriage."<sup>73</sup> First, while invoking section 33 of the *Charter* does protect the *Act* from *Charter*-based judicial scrutiny, such a declaration cannot cure a jurisdictional defect. Second, the preamble's reference to "solemnization of marriage" is, I submit, a rather pathetic attempt to legitimize *ultra vires* legislation.

I now consider, first, the only two Canadian court decisions directly involving challenges to the limitation of marriage to opposite-sex partners and, second, recent statements in the Supreme Court of Canada concerning marriage.

#### B. *North and Matheson (1974)*<sup>74</sup>

Two men went through a form of marriage and then requested that their marriage be registered under the Manitoba *Marriage Act*,<sup>75</sup> which neither defined "marriage" nor used gendered language. The registrar refused to

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<sup>70</sup> *Federal Law - Civil Law Harmonization Act, No. 1*, S.C. 2001, c. 4, harmonizes federal law with Québec civil law in a number of specific areas, including marriage. Section 5 of the *Act* provides that "[m]arriage requires the free and enlightened consent of a man and a woman to be the spouse of the other." Section 4 of the *Act* provides, *inter alia*, that section 5 "appl[ies] solely in the Province of Québec" and that it is intended to "be interpreted as though [it] formed part of the Civil Code of Québec." Sections 4 and 5 came into force on June 1, 2001: SI/2001-71. Interestingly, on the same day that this *Act* was introduced, 31 January 2001, as Bill S-4, Senator Anne Cools, concerned that the definition of "marriage" enacted in the *Modernization of Benefits and Obligations Act*, *supra* note 9, only applied to the interpretation of that *Act* and, in turn, the statutes amended by it, and not to federal law generally, introduced a Bill which would clearly apply to all federal legislation a definition of "marriage" limited to opposite-sex partners: See Bill S-9, 2001, *An Act to Remove Doubts Regarding the Meaning of Marriage* (first reading, 31 January 2001). In the opposite direction, Svend Robinson, M.P., on Valentine's Day 2001, introduced a Bill in the House of Commons which would extend legal marriage to same-sex partners: Bill C-264, 2001, *An Act to amend the Marriage (Prohibited Degrees) Act (marriage between persons of the same sex)* (first reading, 14 February 2001). Neither Bill is likely to be enacted.

<sup>71</sup> *Federal Law - Civil Law Harmonization Act, No. 1*, *ibid.*, s. 4.

<sup>72</sup> (*Alberta*) *Marriage Act*, *supra* note 68, s. 1.1(a), as enacted by the *Marriage Amendment Act, 2000*, *supra* note 68, s. 5.

<sup>73</sup> (*Alberta*) *Marriage Act*, *supra* note 68, as amended by the *Marriage Amendment Act, 2000*, *supra* note 68, s. 2.

<sup>74</sup> *Supra* note 8.

<sup>75</sup> At the time, (*Manitoba*) *Marriage Act*, R.S.M. 1970, c. M-50.

register their marriage and the men applied to the Manitoba County Court for an order compelling registration. This was a pre-*Charter* case, and no constitutional issues were argued. Philp Co.Ct.J. (now Philp J.A.) held that at common law marriage was limited to persons of the opposite sex<sup>76</sup> and then stated that “[i]t is of equal importance in the determination of the issue before me that the meaning of marriage is universally accepted by society in the same sense.”<sup>77</sup> He concluded that it was “self-evident” that there was no marriage to register.<sup>78</sup>

C. *Layland v. Ontario (Minister of Consumer and Commercial Relations) (1993)*<sup>79</sup>

Two men applied for a marriage licence, were refused, and then commenced action against the Ontario government. The federal government was granted leave to intervene. The case involved consideration of both the common law meaning of “marriage” and whether limiting marriage to opposite-sex partners violated section 15 of the *Charter*. A majority of the Ontario Divisional Court held that at common law marriage was limited to persons of the opposite sex and that the limitation did not violate the *Charter*.

On the first issue, Southey J., for himself and Sirois J., in a stunning example of circular reasoning, stated: “Unions of persons of the same sex are not ‘marriages’, because of the definition of marriage.”<sup>80</sup> Greer J., dissenting, was of the view that the common law did not restrict marriage to persons of the opposite sex. She stressed that the common law “does not remain static” and that “[i]ts very essence is that it is able to grow to meet the expanding needs of society.”<sup>81</sup> She noted that lesbians and gay men enter into permanent relationships, some unite in religious commitment ceremonies recognized by some religious congregations, and that recognition of same-sex marriage would strengthen those relationships, assist in the parenting of children within those relationships, and reduce the stigma associated with being lesbian or gay. Greer J. stated:

Surely the argument ... that there is only one societal concept of marriage is flawed. One has only to examine how multiple marriages have become almost the norm in our North American society, how step-parents have become an integral part of children’s lives in these marriages, how divorce has become widely recognized in society, and how “common law” relationships have become classified as marriages without the sanction of a marriage certificate but with most of the benefits conferred by one. There

<sup>76</sup> Philp Co.Ct.J. relied upon *Hyde v. Hyde*, *supra* note 8; and, *Corbett v. Corbett (No. 2)*, *supra* note 8.

<sup>77</sup> *North and Matheson*, *supra* note 8 at 285.

<sup>78</sup> *Ibid.*

<sup>79</sup> *Supra* note 8.

<sup>80</sup> *Ibid.* at 223. See A. Woolley, “Excluded by Definition: Same-Sex Couples and the Right to Marry” (1995) 45 U.T.L.J. 471, for a response to *Layland* and a conceptually rooted inquiry into what “marriage” means.

<sup>81</sup> *Ibid.* at 224.



was even a time in history when a woman became the property of her husband. That concept of marriage became no longer valid and the institution of marriage had to adjust to such changes. ... The common law and legislated law both change to meet a changing society.<sup>82</sup>

With respect to the *Charter* challenge, Southey J. held that the common law limitation of marriage to opposite-sex partners did not constitute discrimination on the basis of sexual orientation. He stated that “[o]ne of the principal purposes of the institution of marriage is the founding and maintaining of families in which children will be produced and cared for, a procedure which is necessary for the continuance of the species,”<sup>83</sup> and, referring to the position of “professed homosexuals”<sup>84</sup> in this regard, continued as follows:

That principal purpose of marriage cannot, as a general rule, be achieved in a homosexual union because of the biological limitations of such a union. It is this reality that is recognized in the limitation of marriage to persons of opposite sex.

It is true that some married couples are unable or unwilling to have children, and that the incapacity or unwillingness to procreate is not a bar to marriage or a ground for divorce. Despite these circumstances in which a marriage will be childless, the institution of marriage is intended by the state, by religions and by society to encourage the procreation of children.

The law does not prohibit marriage by homosexuals, provided it takes place between persons of the opposite sex. Some homosexuals do marry. The fact that many homosexuals do not choose to marry, because they do not want unions with persons of the opposite sex, is the result of their own preferences, not a requirement of the law.<sup>85</sup>

Greer J. held that limiting marriage to opposite-sex partners did constitute discrimination on the basis of sexual orientation contrary to section 15 of the *Charter*. In particular, she considered that “[t]he *Charter* cases show that our courts have found that ‘choice’ is a benefit of the law. In the case at bar, the applicants have been denied their right to choose whom they wish to marry. In my view, the right to choose is a fundamental right and applies to the context of marriage in our society.”<sup>86</sup> She also quoted with approval from a previous sexual orientation discrimination case, in which it had been said that “marriage and the ‘traditional family’ are sustaining institutions of society, but ... they should not be used as a means to impose discrimination and disadvantage on others. Support for the traditional family or for the institution of marriage should not entail the exclusion and disadvantaging of other family forms.”<sup>87</sup>

Greer J. further held that the discrimination could not be justified under section 1 of the *Charter*, and stated:

<sup>82</sup> *Ibid.* at 236-37.

<sup>83</sup> *Ibid.* at 222.

<sup>84</sup> *Ibid.* at 221.

<sup>85</sup> *Ibid.* at 222-23.

<sup>86</sup> *Ibid.* at 229.

<sup>87</sup> *Ibid.* at 231-32, quoting from *Leshner v. Ontario* (1992), 16 C.H.R.R. D/184 (Ont. Bd. of Inquiry), at D/203.

In the case at bar, it is surely in the interest of the state to foster all family relationships, be they heterosexual or same-sex relationships. ... [A]ny such justification would fail the proportionality limb of the *Oakes* test. To exclude gays and lesbians from marriage will not prevent heterosexuals from marrying. Therefore, heterosexuals will not be circumscribed or in any way limited by extending to gays and lesbians the right to marry. [sic]

Further, I agree with counsel for the applicants that there is no rational connection between supporting heterosexual families and denying homosexuals the right to marry. It is illogical and has no beneficial impact on the goal. To deny them the right to marry is a complete denial of their relationship and a denial of their constitutional rights.<sup>88</sup>

The claimants were granted leave to appeal to the Ontario Court of Appeal. However, one of them, an American citizen, was forced to return to the United States when Immigration Canada refused to extend his employment authorization and they decided not to attempt to continue living as partners. The Court of Appeal permitted another gay couple who had also been refused a marriage licence to join the appeal. Their appeal was scheduled for a hearing late in 1995, but was stayed after they were urged by many in the lesbian and gay communities not to proceed for fear that a loss would adversely affect other lesbian and gay rights claims then before the courts.<sup>89</sup>

#### D. *Recent Statements in the Supreme Court of Canada Concerning Marriage*

The Supreme Court of Canada has not yet been called upon to consider whether same-sex partners should be excluded from marriage. Three recent cases before the Court did, however, involve conjugal relationships sometimes characterized as "marriage-like" or "near marriage."<sup>90</sup> Two cases, *Egan v. Canada*<sup>91</sup> ("*Egan*") and *M. v. H.*,<sup>92</sup> required the Court to compare same-sex partners with unmarried opposite-sex partners and the third, *Miron v. Trudel*,<sup>93</sup> required it to compare unmarried opposite-sex partners with married spouses. In their reasons in these cases, several Justices stated that marriage is both a social and a legal institution, that it confers status, and that individual choice is central to marriage. Beyond such safe territory, most Justices have not gone, preferring to say that those cases did not require them to consider marriage *per se*.<sup>94</sup> Others were not so careful. La Forest J., in *Egan*, delivering reasons on behalf of himself and Lamer C.J. and Gonthier and Major, JJ., stated:

<sup>88</sup> *Ibid.* at 233.

<sup>89</sup> See D.G. Casswell, *Lesbians, Gay Men, and Canadian Law*, *supra* note 15 at 236.

<sup>90</sup> See *Miron v. Trudel*, [1995] 2 S.C.R. 418 at para. 169, referring to counsel's submissions.

<sup>91</sup> *Supra* note 14.

<sup>92</sup> *Supra* note 1.

<sup>93</sup> *Ibid.*

<sup>94</sup> Recall *supra* notes 4-6 regarding *M. v. H.*, and see also *Egan*, *supra* note 14 at para.

[M]arriage has from time immemorial been firmly grounded in our legal tradition, one that is itself a reflection of long-standing philosophical and religious traditions. But its ultimate *raison d'être* transcends all of these and is firmly anchored in the biological and social realities that heterosexual couples have the unique ability to procreate, that most children are the product of these relationships, and that they are generally cared for and nurtured by those who live in that relationship. In this sense, marriage is by nature heterosexual. It would be possible to define marriage to include homosexual couples, but this would not change the biological and social realities that underlie the traditional marriage. ...

I am not troubled by the fact that not all ... heterosexual couples in fact have children. It is the social unit that uniquely has the capacity to procreate children and generally cares for their upbringing, and as such warrants support by Parliament to meet its needs. This is the only unit in society that expends resources to care for children on a routine and sustained basis. ...

[Homosexual] couples undoubtedly provide mutual support for one another, and that, no doubt, is of some benefit to society. They may, it is true, occasionally adopt or bring up children, but this is exceptional and in no way affects the general picture.<sup>95</sup>

La Forest J.'s reliance on "the general picture" as a basis for equality analysis drew academic fire.<sup>96</sup> As will be seen below, it has also drawn judicial fire. La Forest J. retired from the Court before *M. v. H.* Lamer C.J. and Gonthier and Major JJ. all participated in *M. v. H.* (Lamer C.J. has since retired.) The Court's decision in *M. v. H.* was that of an eight-Justice majority, with Gonthier J. being the lone dissenter. Lamer C.J. concurred in the principal set of majority reasons, delivered by Cory and Iacobucci, JJ. on behalf of six Justices, in which they said that the case had nothing to do with marriage *per se*. Major J. delivered brief reasons concurring in the result but said nothing about marriage. Gonthier J., however, stated: "I ... find Cory J.'s statement that 'this appeal has nothing to do with marriage *per se*' ... entirely unconvincing."<sup>97</sup> He further stated that "marriage is a fundamental social institution because it is the crucible of human procreation and the usual forum for the raising of children. That is the primary, though not sole, purpose of the institution of marriage: *Layland v. Ontario (Minister of Consumer and Commercial Relations)*."<sup>98</sup> Gonthier J. further stated:

Of course, not all procreation takes place within marriage. Indeed, recognition of this growing reality was an important impetus to the legislature's decision to extend certain rights and obligations to unmarried common law opposite-sex couples in the 1970s. There is, obviously, no requirement that married couples bear children, or have the capacity to do so. Some married couples are unable to have children. Some choose not to have children. Some married couples adopt children. Conversely, it is possible for same-sex couples to have children, either from previous opposite-sex relationships, through adoption, or through artificial insemination. So too, of course, can some

<sup>95</sup> *Egan*, *supra* note 14 at para. 21, 25-26.

<sup>96</sup> See in particular, R. Wintemute, "Discrimination Against Same-Sex Couples: Sections 15(1) and 1 of the Charter: *Egan v. Canada*" (1995) 74 C.B.R. 682.

<sup>97</sup> *M. v. H.*, *supra* note 1 at para. 231.

<sup>98</sup> *Ibid.* at para. 228.

single individuals. These circumstances are, however, as La Forest J. observed in *Egan*, ... "exceptional". To acknowledge that they exist does not alter the demographic, social, and biological reality that the overwhelming majority of children are born to, and raised by, married or cohabiting couples of the opposite sex, and that they are the only couples capable of procreation. Indeed, by definition, no child can be born of a same-sex union: a third party must be involved.<sup>99</sup>

Bastarache J., who had been appointed to the Court after *Egan*, delivered concurring reasons. He considered marriage, "the traditional family," and "non-traditional families" as follows:

[T]he failure to provide same-sex couples with any consensual avenue for mutual and public recognition perpetuates a legal invisibility which is inconsistent with the moral obligation of inclusion that informs the spirit of our *Charter*. ...

Society has an interest in the traditional family. The vast majority of children born in our society are born and raised in this environment, notwithstanding the development of reproductive technologies which arguably make this family form biologically unnecessary. In truth, this opposite-sex family form is a product of socialization. In recognition of the significance of the procreative and socializing role of the opposite-sex family, the modern state has created a host of inducements for this family form, in addition to the obligations between the parties which are intended to mitigate the insecurities created by traditional patterns of gender inequality and specialization.

Both the inducements, and the rights and obligations within the couple, confer an objective benefit to society by creating a regime in which opposite-sex partners will suffer the least harm by virtue of engaging in the sometimes risky enterprise of a family. Even though the institution of marriage is imbued with moral significance for many people, which is the source of their objection to the extension of any marital or quasi-marital status to same-sex couples, there is a social function performed by that legal status which grants a benefit on society, and which is typically applicable to male-female unions, given the current social context of gender inequality. To the extent that moral factors play a role in supporting an important social institution, I do not believe it is wrong for the Court to be aware of the special sensitivities of those judgments in society. Like all factors, they must necessarily be assessed in light of *Charter* values.

I am satisfied, however, that the government's legitimate interest in setting social policies designed to encourage family formation can be met without imposing through exclusion a hardship on non-traditional families. There is no evidence that the social purpose of [the impugned legislation] would be endangered by the extension in its application. In fact, the extension sought is consistent with the legislative purpose of ensuring a greater degree of autonomy and equality within the family unit.<sup>100</sup>

I submit that Bastarache J.'s analysis may provide a key to resolving what may initially appear to some to be a dilemma in equally recognizing same-sex partners and their families and opposite-sex partners and their families. While there is no doubt that opposite-sex partners do raise most children and, further, assuming for the moment without accepting, that opposite-sex partners have the "unique capacity" to procreate, it does not follow that same-sex partners are not

<sup>99</sup> *Ibid.* at para. 236.

<sup>100</sup> *Ibid.* at paras. 308, 318-320.

equally worthy of the state recognition and freedom of choice afforded to opposite-sex partners. It strikes me, with respect, that Bastarache J.'s analysis manifests the principle of inclusivity at the heart of equality analysis. While same-sex partners and opposite-sex partners may be unique in different ways, both are equally worthy of the state recognition afforded through marriage.

### E. *Current Challenges to the Exclusion of Same-Sex Partners from Marriage*

In the last several years, same-sex partners in Nova Scotia, Québec, Ontario and British Columbia have applied for marriage licences. Until very recently, such applications were routinely refused.<sup>101</sup> A Québec same-sex couple who had been refused a marriage licence commenced action in the Québec Superior Court,<sup>102</sup> and a British Columbia same-sex couple who had been refused a marriage licence filed a human rights complaint against the British Columbia government.<sup>103</sup>

In 2000 and 2001, however, a dramatic change of events occurred. First, in 2000, when a number of same-sex couples in Toronto applied for marriage licences, the City of Toronto, concerned that *M. v. H.* had raised doubt as to the legality of refusing marriage licences to same-sex partners, decided not to simply reject these applications. Instead, the City put them in abeyance and applied to the Ontario Superior Court of Justice for direction. This was the first time that officials responsible for issuing marriage licences had sought court guidance, rather than simply rejecting a marriage licence application by same-sex partners. Six same-sex couples have joined the City of Toronto in its application, and the Ontario Superior Court of Justice has since transferred the application to the Ontario Divisional Court.<sup>104</sup> Second, also in 2000, another same-sex couple in British Columbia applied for a marriage licence.<sup>105</sup> Rather

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<sup>101</sup> EGALE Canada, Press Release: "EGALE Board-Member Applies for Marriage Licence. Calls for Full Legal Equality for Same-Sex Couples" (26 May 2000) online: [www.egale.ca/pressrel/000526.htm](http://www.egale.ca/pressrel/000526.htm).

<sup>102</sup> *Michael Hendricks et René LeBoeuf c. La Procureure Générale du Canada et la Procureure Générale du Québec et Tout Greffier de la Cour Supérieure*, request for declaratory judgment filed 14 September 1998, Cour supérieure du Québec, No. 500-05-059656-007. See also, A. Robinson, *supra* note 15.

<sup>103</sup> *Peter Cook and Murray Warren, Complainants; Her Majesty in right of the Province of British Columbia as represented by the Ministry of Health and Ministry Responsible for Seniors, Respondent*, Case No. 2000234, filed on 17 July 2000, with Vancouver Office of British Columbia Human Rights Commission.

<sup>104</sup> See *Halpern v. Toronto (City) Clerk*, [2000] O.J. No. 3213 (Sup. Ct. Jus.) (transfer of application to Divisional Court), and (2000), 51 O.R.(3d) 742 (Sup. Ct. Jus.) (EGALE Canada granted intervener status); and, *Halpern v. Canada (Attorney General)*, [2001] O.J. No. 879 (Div. Ct.) (Metropolitan Community Church of Toronto, The Association for Marriage and the Family in Ontario, and The Interfaith Coalition on Marriage and Family granted intervener status).

<sup>105</sup> EGALE Canada, "EGALE Board-Member Applies for Marriage Licence, Calls for Full Equality for Same-Sex Couples", *supra* note 101.

than rejecting their application, the Director of Vital Statistics sought the direction of the British Columbia Attorney General, who, in turn, petitioned the Supreme Court of British Columbia for declaratory relief recognizing the legal validity of same-sex marriage.<sup>106</sup> The application was truly an historic breakthrough. Never before in Canada had a government taken the position of supporting same-sex marriage. Then, in 2001, two same-sex couples were married in the Metropolitan Community Church of Toronto, after the Church had complied with a provision in the Ontario *Marriage Act* permitting the reading of banns as an alternative to obtaining a marriage licence.<sup>107</sup> However, when the Church applied to register these marriages under the Ontario *Vital Statistics Act*,<sup>108</sup> the Ontario Attorney General refused to allow the registration. The Church has applied to the Ontario Divisional Court for judicial review of this refusal.<sup>109</sup>

Thus, there are currently proceedings challenging the exclusion of same-sex partners from legal marriage before the courts in British Columbia, Ontario, and Québec.

<sup>106</sup> *In the Matter of Applications for Licences by Persons of the Same Sex Who Intend to Marry; and, In the Matter of the Marriage Act and the Judicial Review Procedure Act*, British Columbia Supreme Court, Vancouver Registry No. L001944, 20 July 2000. See also, British Columbia Ministry of Attorney General, Media Release, "B.C. Seeks Court Decision on Same-Sex Marriage, (20 July 2001) online: [www.ag.gov.bc.ca/media-releases/july2000/0112.htm](http://www.ag.gov.bc.ca/media-releases/july2000/0112.htm). EGALE Canada and a group of British Columbia same-sex partners have also filed similar applications in the British Columbia Supreme Court: See *EGALE Canada Inc. et al. v. Attorney General of Canada et al.*, No. L002698; and, *Dawn Barbeau and Elizabeth Barbeau et al. v. Attorney General of British Columbia et al.*, No. L003197. See also, *Marriage Act (Can.) (Re)* [sic], [2001] B.C.J. No. 38 (S.C.) (application by the Attorney General of Canada to strike out the petition of the Attorney General of British Columbia dismissed).

<sup>107</sup> The (*Ontario*) *Marriage Act*, *supra* note 64, s. 5(1) provides that "[a]ny person who is of the age of majority may obtain a licence or be married under the authority of the publication of banns, provided no lawful cause exists to hinder the solemnization." The use of the non-gendered word "person" in section 5(1) must be compared with the use of the gendered language "man and wife" in section 31 of the *Act*.

<sup>108</sup> (*Ontario*) *Vital Statistics Act*, R.S.O. 1990, c. V.4, s. 19.

<sup>109</sup> *Metropolitan Community Church of Toronto v. Attorney General of Canada et al.*, Ontario Superior Court of Justice (Divisional Court), No. 39/2001. See also, Global TV, "2 Lesbians, 2 Gays Tie A Controversial Knot, Church Performs First "Legal" Gay Marriages," (15 January 2001) online: <http://toronto.globaltv.com/ca/news/stories/news-20010114-154311.html>; Global TV, "Ontario Still Refuses to Recognize Gay Marriages, Federal Law Defines Marriage As "A Union Between One Man And One Woman", (15 January 2001) online: <http://toronto.globaltv.com/ca/news/stories/news-20010115-135243.html>; Global TV, "Minister Hopes To Get Gay Marriages Registered, Province Says It Won't Register Homosexual Couples", (16 January 2001) online: <http://toronto.globaltv.com/ca/news/stories/news-20010116-144154.html>; and, Global TV, "Feds, Ontario Sued In Same Sex Marriage Debate, Both Governments Refusing To Legalize Marriages", (20 January 2001) online: <http://toronto.globaltv.com/ca/news/stories/news-20010120-084613.html>. If these marriages, which were performed on 16 January, 2001, were eventually held by the courts to have been legally valid from the date

#### IV. A Comparative Perspective

##### A. Recent Developments in Other Countries

In recent years, there have been important legislative and judicial developments recognizing same-sex partners in Australia, Belgium, Britain, France, Germany, Hungary, Italy, the Netherlands, New Zealand, the Nordic countries, Portugal, Spain, South Africa, the United States, and elsewhere. A comprehensive consideration of these developments is beyond the scope of this article.<sup>110</sup> However, one recent development is particularly significant and salient to the topic of this article. The Netherlands became, in 2001, the first country in the world to extend legal marriage to same-sex partners on exactly the same basis as afforded opposite-sex partners.<sup>111</sup> Interestingly, when the

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they were performed, they would arguably be the world's first legal same-sex marriages, beating out by a few weeks the legal same-sex marriages performed in the Netherlands on 1 April 2001 (which are considered *infra* at text accompanying notes 111-112). Or, would any attempt at such an argument merely be Canadian chauvinism?

<sup>110</sup> See for example, M. Kirby (The Hon. Justice), "Same Sex Relationships – Some Australian Legal Developments" (1999) 19 Australian Bar Rev. 4; D. Borrillo, "Sexual Orientation and Human Rights in Europe" in G.S. Bhatia et al., eds., *Peace, Justice and Freedom: Human Rights Challenges for the New Millennium* (Edmonton: University of Alberta Press, 2000); K. Waaldijk, "Civil Developments: Patterns of Reform in the Legal Position of Same-Sex Partners in Europe" (2000) 17 C. J. Fam. L. 62; C. Forder, "European Models of Domestic Partnership Laws: The Field of Choice" (2000) 17 C. J. Fam. L. 371; W.N. Eskridge, Jr., "Comparative Law and the Same-Sex Marriage Debate: A Step-by-Step Approach Toward State Recognition" (2000) 31 McGeorge L. Rev. 641; R. Wintemute & M. Andenæs, eds. *Legal Recognition of Same-Sex Partnerships*, *supra* note 15; and International Lesbian and Gay Association (ILGA), "The World Legal Survey", online: [www.ilga.org/information/legal-survey/ilga-world-legal-survey%20introduction.htm](http://www.ilga.org/information/legal-survey/ilga-world-legal-survey%20introduction.htm). South Africa deserves, I believe, "honourable mention" since it was the first country in the world to include in its written constitution a prohibition against discrimination on the basis of sexual orientation: *Constitution of the Republic of South Africa*, Act 200 of 1993 (date of commencement: April 27, 1994), Chapter 3 (Fundamental Rights), Section 8 (Equality), online: [www.polity.org.za/govdocs/legislation/1993/constit0.html](http://www.polity.org.za/govdocs/legislation/1993/constit0.html); now, *Constitution of the Republic of South Africa 1996*, Chapter 2 (Bill of Rights), Section 9 (Equality), online: [www.polity.org.za/govdocs/constitution/saconst.html](http://www.polity.org.za/govdocs/constitution/saconst.html). See also P. Gerber, "Case Comment: South Africa: Constitutional Protection for Homosexuals – A Brave Initiative, But Is It Working?" (2000) 9 Australasian Gay and Lesbian L. J. 37.

<sup>111</sup> Under legislation enacted in December 2000, the provisions of the Dutch Civil Code concerning marriage were amended to apply equally to same-sex and opposite-sex partners: for a summary of and a link to an English translation of the legislation, see K. Waaldijk, "Latest News About Same-Sex Marriage in the Netherlands (and What It Implies for Foreigners)" online: <http://ruljis.leidenuniv.nl/user/cwaaldijk/www/NHR/news.htm>. The amendments came into force on 1 April 2001. Amsterdam's Mayor Job Cohen officiated, beginning at midnight on 31 March 2001, at the first four legal same-sex marriages: See for example, B.B.C. News World Service, "Dutch gay couples exchange vows", (1 April 2001) online: at <http://news.bbc.co.uk/hi/english/world/europe/newsid-1253000/1253754.stm>; and, Washington Post Foreign Service, Washington Post, "Gay Partners Make it Official: Same-Sex Couples Are First to Marry Under Dutch Law" (1 April 2001) online: at A21 and online: <http://n14.newsbank.com/n1-search/we/Archives?product=W.P>.

federal government introduced the *Modernization of Benefits and Obligations Act* in the House of Commons, it had issued a “backgrounder” statement in which it stated that “[a]lthough a few European countries have limited recognition of same-sex partnerships, a clear distinction is maintained in the law between marriage and same-sex partnerships.”<sup>112</sup> Not anymore!

In this section I focus on court decisions in other countries which I submit may provide guidance to Canadian courts considering whether the common law exclusion of same-sex partners from marriage is unconstitutional. With one exception, the court decisions in this section all involved claims by same-sex partners that limiting marriage to opposite-sex partners, or other legal rules which treated same-sex partners differently than married spouses, violated entrenched constitutional rights. I include one statutory construction case—the 1997 same-sex marriage decision of the New Zealand Court of Appeal in *Quilter v. Attorney-General*<sup>113</sup>—since one of the judges in that case commented specifically on *Layland* and *Egan*. I consider legislation only as enacted in reaction to these court decisions, since that experience is relevant to my speculation concerning the possible use by Parliament of section 33.

#### B. *New Zealand Same-Sex Marriage Case: Quilter v. Attorney-General (1997)*

Three lesbian couples in long-term relationships attempted to file notices of intended marriage under the New Zealand *Marriage Act 1955*,<sup>114</sup> were refused, and anticipated that the marriage registrar would refuse to issue them the licences necessary for valid marriages. The registrar took the position that the *Marriage Act* did not provide for marriage between persons of the same sex. The couples argued that the New Zealand *Bill of Rights*,<sup>115</sup> which, *inter alia*, prohibited discrimination on the basis of sexual orientation,<sup>116</sup> required that “marriage” be interpreted as including same-sex marriage. The New Zealand Court of Appeal unanimously held that while the *Marriage Act* did not define “marriage,” the common law meaning of “marriage” was limited to opposite-sex partners and the *Act* had to be given the same traditional interpretation. The reasoning of one judge is, I submit, of particular relevance to Canadian courts. Thomas J. thought “it would be unduly legalistic to rest the Court’s decision on the meaning of the *Marriage Act* without squarely confronting the question of discrimination.”<sup>117</sup> He concluded that “as a matter of law the exclusion of

<sup>112</sup> *Supra* note 18, page 3 (“Backgrounder”).

<sup>113</sup> [1998] 1 N.Z.L.R. 523 (C.A.).

<sup>114</sup> N.Z.S., 1955, No. 92.

<sup>115</sup> *New Zealand Bill of Rights Act, 1990*, N.Z.S., 1990, No. 109, as am. by, *Human Rights Act, 1993*, N.Z.S. 1993, No. 82.

<sup>116</sup> *Bill of Rights Act, ibid.*, s. 19, as am. by *Human Rights Act, 1993, ibid.*, s. 21(1)(m).

<sup>117</sup> *Quilter v. Attorney General, supra* note 113 at 528.



gay and lesbian couples from the status of marriage is discriminatory and contrary to s. 19 of the *Bill of Rights*. They are denied the right to marry the person of their choice in accordance with their sexual orientation.”<sup>118</sup> However, the effect of a violation of the New Zealand *Bill of Rights* is completely different than the effect of a violation of our *Charter*. The New Zealand *Bill of Rights* does not permit courts to strike down legislation which violates its stated rights, but instead, requires them, in interpreting legislation, to prefer a meaning which is consistent with the *Bill of Rights*. The courts may not, however, adopt a meaning that goes beyond the common usage of words or which is clearly contrary to Parliament’s intent. Thomas J. was therefore constrained to concur with his colleagues in the result. However, in his reasoning concerning sexual orientation discrimination, he had rather harsh words concerning both Southey J.’s reasoning in *Layland* and La Forest J.’s reasoning in *Egan*. With respect to *Layland*, Thomas J. stated:

The argument that gay and lesbian persons are not discriminated against because they are free to marry persons of the opposite sex is unconvincing. Indeed, I believe it is lacking in logic. The argument first assumes a definition of marriage which excludes gay and lesbian persons so as to then hold that they are not excluded from marriage. Thus, the argument is circular. To claim that the fact gays and lesbians do not want unions with persons of the opposite sex is the result of their own sexual preferences and not a requirement of law is to beg the question whether they are denied equal treatment through the law and the equal benefit of the law in not being able to marry persons of the same sex in accordance with their sexual orientation. It is to avoid the very issue which the Marriage Act raises.

The circular and question-begging nature of the argument can be illustrated by substituting the parties’ race for their sexual orientation. Could it be seriously contended that if the Marriage Act prohibited the marriage of a person of one race to a person of another race, it would not be discriminatory on the grounds of race?<sup>119</sup>

Thomas J. then referred to La Forest J.’s reasons in *Egan* and stated:

La Forest J. professes to be untroubled by the fact that not all heterosexual couples have children, or wish to have children, and many more again do not regard procreation as the objective of their partnership. Nor is he diverted by the fact that some gay and lesbian couples rear and raise children. Marriage, he asserts, is the social unit that uniquely has the “capacity” to procreate children and generally care for their upbringing and, as such, warrants exclusivity to heterosexual couples. I doubt, with respect, that shifting the emphasis to the “capacity” of heterosexual couples to procreate children makes any significant difference.<sup>120</sup>

Another justification frequently relied upon for arguing that marriage must remain limited to opposite-sex partners is some formulation of a religious and historical perspective privileging heterosexuals. Thomas J. referred to these

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<sup>118</sup> *Ibid.*

<sup>119</sup> *Ibid.* at 537.

<sup>120</sup> *Ibid.* at 534.

religious and historical arguments in a section of his reasons titled “[a] sliver of history”<sup>121</sup> as follows:

Excursions into history and a review of the reluctance of the common law to prohibit discrimination are necessarily of limited, if any, value in determining whether the exclusion of gays and lesbians from the status of marriage amounts to discrimination on the grounds of sex or sexual orientation. History, in general, has not been kind to minorities. People who, because of their religious beliefs, ethnic background, nationality, colour, race, sex, or sexual orientation, could be described as “different” have not fared well. ... For the most part, to look to history to determine whether discrimination exists on the grounds of sex or sexual orientation, or any other ground, is to look to the cause to resolve the effect.

Further, if regard is to be had to history there is no reason why the perspective taken should be selective or limited. For example, scholars such as William Eskridge and John Boswell have pointed out that the perception of marriage as a heterosexual institution is a contemporary perception. In ancient Greece, Mesopotamia, Rome and even Christian states, same-sex unions were accepted and even celebrated.<sup>122</sup>

Thomas J. summarized the legal, social and personal aspects of denying lesbians and gay men access to marriage as follows:

[G]ays and lesbians are denied access to a central social institution and the resulting status of married persons. They lose the rights and privileges, including the manifold legal consequences which marriage conveys. They are denied a basic civil right in that freedom to marry is rightly regarded as a basic civil right. They lose the opportunity to choose the partner of their choice as a marriage partner, many again viewing the right to choose as a basic civil right of all citizens. In a real sense, gays and lesbians are effectively excluded from full membership of society.

But the denial of the opportunity for gay and lesbian couples to marry should not be seen solely in terms of a denial of access to an important social institution, a special status, the resulting legal consequences and benefits, or to civil rights and freedoms. It has a personal dimension which is not difficult to understand. With many gay and lesbian couples the inability to marry must impinge on almost all aspects of their lives. It can only add to the stigmatisation of their relationship and have the detrimental effect on their sense of self-worth.<sup>123</sup>

<sup>121</sup> *Ibid.* at 549.

<sup>122</sup> *Ibid.* With respect to Thomas J.’s reference to John Boswell and William Eskridge in the context of the history of same-sex unions, see J. Boswell, *Christianity, Social Tolerance, and Homosexuality: Gay People in Western Europe from the Beginning of the Christian Era to the Fourteenth Century* (Chicago: University of Chicago Press, 1980); J. Boswell, *Same-Sex Unions in Premodern Europe* (New York: Villard Books, 1994); and, W.N. Eskridge, Jr., “A History of Same-Sex Marriage” (1993) 79 *Virginia L. Rev.* 1419.

<sup>123</sup> *Ibid.* at 537.

### C. *American Same-Sex Marriage Cases*

#### 1) The Early Cases

From the 1970s until the early 1990s, several American court decisions upheld the limitation of marriage to opposite-sex partners.<sup>124</sup> As William Eskridge has written, sexual orientation discrimination was not until recently a concern of the American plurality.<sup>125</sup> However, in the 1990s, changing attitudes toward lesbians and gay men, and same-sex partners in particular, permitted three major same-sex marriage victories for lesbian and gay claimants.<sup>126</sup>

#### 2) *Baehr v. Lewin* (1993); *Baehr v. Miike* (1999)<sup>127</sup>

Three same-sex couples applied for marriage licences but were refused solely on the basis that they were of the same sex. The provisions of the Hawaii Marriage Law<sup>128</sup> did not define “marriage,” but used the gendered terms, “the man and woman to be married,” “wife,” and “husband.” The couples filed a complaint seeking a declaration that the Marriage Law violated their right to equal protection of the laws and due process of law as guaranteed by the Hawaii Constitution.<sup>129</sup> A five-judge panel of the Hawaii Supreme Court heard their

<sup>124</sup>The principal cases were *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971), appeal dismissed, 409 U.S. 810 (1972); *Jones v. Hallahan*, 501 S.W.2d 588 (Ky. 1973); *Singer v. Hara*, 522 P.2d 1187 (Wash. C.A. 1974), review denied, 84 Wash.2d 1008 (S.C. 1974); and *Dean v. District of Columbia*, 653 A.2d 307 (D.C. App. 1995). For citation of other cases in this period and commentary, see W.B. Rubenstein, *Cases and Materials on Sexual Orientation and the Law*, 2d ed., (St. Paul, Minnesota: West Publishing Co., 1997) at 727-35, 748-49.

<sup>125</sup>W.N. Eskridge, Jr., *Gaylaw: Challenging the Apartheid of the Closet* (Cambridge, Mass.: Harvard University Press, 1999).

<sup>126</sup>I only consider these cases’ equal protection and due process analyses and, in particular, omit their statutory construction and privacy analyses, since it is the former analyses which are more directly relevant to section 15 equality analysis.

<sup>127</sup>This case was commenced on 1 May 1991 and finally ruled moot by the Hawaii Supreme Court on 9 December 1999. Major steps along the way were: *Baehr v. Lewin*, 852 P.2d 44 (Hawaii Supreme Court, 1993, ordering trial to determine whether Hawaii Marriage Law unconstitutional); 875 P.2d 225 (Hawaii Supreme Court, 1993, clarification of decision ordering trial); *Baehr v. Miike*, 1996 WL 694235 (Hawaii Cir.Ct., 1st Cir., 1996, not reported in P.2d, trial decision ruling Hawaii Marriage Law unconstitutional, change in style of cause due to new Director of the Department of Health, State of Hawaii); 994 P.2d 566, 1999 Haw. LEXIS 391 (Hawaii Supreme Court, 1999, ruling case moot due to constitutional amendment; I include the LEXIS cite since the P.2d cite only reports the court’s order, not its reasons).

<sup>128</sup>Hawaii Revised Statutes, Section 572-1 (1985).

<sup>129</sup>Hawaii Constitution, Article I, Section 5 (1978). No person shall be deprived of life, liberty or property without due process of law, nor be denied the equal protection of the laws, nor be denied the enjoyment of the person’s civil rights or be discriminated against in the exercise thereof because of race, religion, sex or ancestry.

case. However, the temporary assignment to the Court of one judge expired prior to the filing of the Court's opinion. Of the four remaining judges, three held that the question whether the plaintiffs' constitutional rights were violated constituted a triable issue and ordered a trial, and one dissented. The three-judge majority was split in its reasoning, two judges issuing a plurality opinion and one judge issuing a concurring opinion.

Levinson J. delivered the opinion of the two-judge plurality. He referred to the state's submission that "the right of persons of the same sex to marry one another does not exist because marriage, by definition and usage, means a special relationship between a man and a woman"<sup>130</sup> as "circular and unpersuasive."<sup>131</sup> He further held that the Marriage Law regulated access to marriage on the basis of applicants' sex and, therefore, established a sex-based classification. Since the Hawaii Constitution expressly prohibited discrimination against persons in the exercise of their civil rights on the basis of sex, Levinson J. held that the Marriage Law would be unconstitutional unless the state could show that its sex-based classification could be justified by a compelling state interest and that it was narrowly drawn to avoid unnecessary abridgements of the plaintiffs' constitutional rights. I emphasize that the plurality's reasoning was based entirely on sex discrimination, not sexual orientation discrimination. In the result a trial was ordered to determine whether the state could establish a compelling interest in the Marriage Law's sex-based classification. Burns J. concurred and Heen J. dissented. Since the case was decided solely under the Hawaii Constitution, no appeal to the United States Supreme Court was possible.

The trial ordered by the Supreme Court was held in 1996. Extensive evidence was led concerning lesbians, gay men, lesbian and gay parenting, and marriage. Chang J. concluded that the state had not established the existence of a compelling state interest sufficient to justify withholding the legal status of marriage from same-sex partners. In particular, he held that the state had failed to present evidence demonstrating that the public interest in the well-being of children and families, or the optimal development of children, would be adversely affected by same-sex marriage. Nor had the state demonstrated how same-sex marriage would adversely affect the public purse, the state interest in assuring recognition of Hawaii marriages in other states, the institution of traditional marriage, or any other important public or governmental interest. In the result, Chang J. held that the Hawaii Marriage Law violated the equal protection guarantee of the Hawaii Constitution and was, therefore, unconstitutional. He ordered the state to stop denying marriage licences solely on the basis that applicants were of the same sex.

The state appealed to the Hawaii Supreme Court and Chang J.'s order was stayed. However, while the appeal was pending, the Hawaii Legislature in 1997 enacted legislation to amend the Hawaii Constitution by investing in the

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<sup>130</sup> *Baehr v. Lewin*, *supra* note 127 at 852 P.2d 61.

<sup>131</sup> *Ibid.*

Legislature the power “to reserve marriage to opposite-sex couples,” and this amendment was ratified by voters in 1998.<sup>132</sup> In 1999, the Hawaii Supreme Court held that this constitutional amendment validated the Marriage Law “by taking the statute out of the ambit of the equal protection clause of the Hawaii Constitution, at least insofar as the statute, both on its face and as applied, purported to limit access to the marital status to opposite-sex couples.”<sup>133</sup> In short, “[t]he marriage amendment has rendered the plaintiffs’ complaint moot.”<sup>134</sup> The Supreme Court therefore ordered that Chang J.’s judgment be reversed and that judgment be entered in favour of the state.<sup>135</sup>

### 3) *Brause v. Bureau of Vital Statistics* (1998)<sup>136</sup>

Two men applied for a marriage licence and were denied solely on the basis that they were of the same sex. The Alaska Marriage Code specifically prohibited same-sex marriage.<sup>137</sup> The men commenced action, arguing that the Code’s prohibition against same-sex marriage violated the equal protection provisions of the Alaska Constitution.<sup>138</sup> Before addressing this argument, Michalski Super. J. emphasized that a merely definitional approach to the plaintiffs’ constitutional challenge of the Marriage Code was insufficient. He stated that “[i]t is not enough to say that ‘marriage is marriage’ and accept without any scrutiny the law before the court. It is the duty of the court to do more than merely assume that marriage is only, and must only be, what most are

<sup>132</sup>Hawaii Constitution, Article I, Section 23.

<sup>133</sup>*Baehr v. Miike*, *supra* note 127 at 1999 Haw. LEXIS 391, 6 of Court’s reasons.

<sup>134</sup>*Ibid.* at 8 of Court’s reasons.

<sup>135</sup>Interestingly, the Justices also skirmished among themselves as to what precisely had been held in the Court’s original 1993 decision in the case. see M. Strasser, “Baehr Mysteries, Retroactivity, and the Concept of Law” (2000) 41 Santa Clara L. Rev. 161. For comment on *Baehr v. Lewin* from a Canadian perspective and consideration of whether a foreign same-sex marriage would be recognized in Canada, see M. Bailey, “Hawaii’s Same-sex Marriage Initiatives: Implications for Canada” (1998) 15 Can. J. Fam. L. 153.

<sup>136</sup>*Brause v. Bureau of Vital Statistics*, 1998 WL 88743 (Alaska Super., 1998). This case is not reported in P.2d.

<sup>137</sup>The Alaska Marriage Code provided: A.S. 25.05.011(a) Marriage is a civil contract entered into by one man and one woman that requires both a licence and a solemnization. A.S. 25.05.013(a) A marriage entered into by persons of the same sex, either under common law or under statute, that is recognized by another state or foreign jurisdiction is void in this state, and contractual rights granted by virtue of the marriage, including its termination, are unenforceable in this state. A.S. 25.05.013(b) A same-sex relationship may not be recognized by the state as being entitled to the benefits of marriage.

<sup>138</sup>The Alaska Constitution provided: Article I, Section 1: Inherent Rights. This constitution is dedicated to the principles that all persons have a natural right to life, liberty, the pursuit of happiness, and the enjoyment of the rewards of their own industry; that all persons are equal and entitled to equal right, opportunities, and protection under the law; and that all persons have corresponding obligations to the people and to the State. Article I, Section 3: Civil Rights. No person is to be denied the enjoyment of any civil or political right because of race, color, creed, sex or national origin.

familiar with. In some parts of our nation mere acceptance of the familiar would have left segregation in place.”<sup>139</sup> On the equal protection issue, Michalski Super. J. concluded that “the personal choice of a life partner is fundamental and that ... choice may include persons of the same sex.”<sup>140</sup> Therefore, the equal protection guarantee of the Alaska Constitution had been violated and the state would be required to establish a compelling state interest to justify the exclusion of same-sex couples from marriage. In the result, he directed the parties to proceed to trial on that issue. A trial never took place, however, since, later in 1998, the voters of Alaska approved an amendment to the Alaska Constitution providing that “a marriage may exist only between one man and one woman”<sup>141</sup> and thus, effectively, overruled Michalski Super. J.’s decision.<sup>142</sup>

#### 4) *Baker v. Vermont* (1999)<sup>143</sup>

Three same-sex couples applied for marriage licences. Each couple was refused on the basis that only opposite-sex couples were eligible to marry under Vermont marriage law. The couples sued the State of Vermont, seeking a declaration that the refusal to issue them marriage licences violated both the Vermont marriage statutes and the Vermont Constitution. The Vermont Supreme Court unanimously held that the marriage legislation, in denying same-sex couples access to civil marriage licences, violated the “Common Benefits Clause” of the Vermont Constitution – which the Vermont Supreme Court referred to as “Vermont’s constitutional commitment to equal rights”<sup>144</sup> and which provided in part “[t]hat government is, or ought to be, instituted for the common benefit, protection, and security of the people, nation, or community, and not for the particular emolument or advantage of any single person, family, or set of persons, who are a part only of that community.”<sup>145</sup> The Court was divided, however, with respect to the appropriate remedy. A majority of four judges – in two sets of reasons – declined to order the issuance of marriage licences to same-sex partners and, instead, left it to the Vermont Legislature to determine how to respond to the unconstitutional denial of same-sex partners’ rights. One judge dissented with respect to remedy and would have ordered the issuance of marriage licences.

<sup>139</sup> *Brause v. Bureau of Vital Statistics*, *supra* note 136 at 2.

<sup>140</sup> *Ibid.* at 5.

<sup>141</sup> Alaska Constitution, Article I, Section 25.

<sup>142</sup> Jay Brause and his partner, Gene Dugan, have now refocused their legal proceedings to obtain same-sex partnership recognition, and are claiming that they are denied 115 separate rights which are available to people who can marry: see *Brause v. State, Dept. of Health & Social Services*, 21 P.3d 357 (Alaska, 2001). Matthew J. delivered the opinion of the Supreme Court of Alaska, holding that their claim was not yet ripe for adjudication. Bryner J. dissented and disagreed that the claim was not ripe for adjudication.

<sup>143</sup> *Baker v. Vermont*, 744 A.2d 864 (Vermont, 1999).

<sup>144</sup> *Ibid.* at 870.

<sup>145</sup> Vermont Constitution, Chapter I, Article 7.

Amestoy C.J., writing for himself and two other judges, delivered the opinion of the Court. He construed the common benefits clause as being founded on the “the principle of inclusion.”<sup>146</sup> The state argued that the principal purpose served by excluding same-sex partners from marriage was the government’s interest in “furthering the link between procreation and child rearing.”<sup>147</sup> Amestoy C.J. responded by saying that, while the state had a legitimate interest in promoting a permanent commitment between partners for the security of their children and the majority of children were conceived by opposite-sex partners, “the reality today is that increasing numbers of same-sex couples are employing increasingly efficient assisted-reproductive techniques to conceive and raise children” and, “[t]herefore, to the extent that the state’s purpose in licensing civil marriage was, and is, to legitimize children and provide for their security, [the impugned legislation] plainly exclude[s] many same-sex couples who are no different from opposite-sex couples with respect to these objectives.”<sup>148</sup> Amestoy C.J. therefore held that the State of Vermont had to extend to same-sex partners the same benefits and protections that flowed from marriage under Vermont law. However, he left it to the Legislature to determine whether this should be achieved by including same-sex partners within the state’s marriage laws or instead by enacting a parallel “domestic partnership” or similar statutory alternative. In conclusion, Amestoy C.J. stated that the Court’s extension of the consequences of marriage to same-sex partners was “simply, when all is said and done, a recognition of our common humanity.”<sup>149</sup> Dooley J. concurred in the result and the remedy ordered, but delivered separate reasons. Johnson J. agreed with her colleagues that the state’s marriage laws violated rights guaranteed same-sex partners, but would have ordered the state to issue marriage licences to same-sex partners. She referred to two Canadian decisions – those of the Ontario Court of Appeal in *Rosenberg v. Canada*<sup>150</sup> and the Supreme Court of Canada in *Vriend v. Alberta*<sup>151</sup> – in support of her reasoning. Since the case was decided exclusively under the Vermont Constitution, the state could not appeal to the United States Supreme Court.<sup>152</sup>

The Vermont Legislature responded quickly and, in 2000, enacted legislation which created a new legal status, “civil union,” available to same-sex couples only, and which provided that “[p]arties to a civil union shall have all the

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<sup>146</sup> *Baker v. Vermont*, *supra* note 143 at 875.

<sup>147</sup> *Ibid.* at 881.

<sup>148</sup> *Ibid.* at 882.

<sup>149</sup> *Ibid.* at 889.

<sup>150</sup> *Supra* note 17.

<sup>151</sup> [1998] 1 S.C.R. 493.

<sup>152</sup> The plaintiffs had raised arguments based on the Constitution of the United States, but the Vermont Supreme Court’s resolution of the common benefits claim under the Vermont Constitution obviated the necessity of addressing those arguments: *Baker v. Vermont*, *supra* note 143 at 870, n. 2.

benefits, protections and responsibilities under law, whether they derive from statute, administrative or court rule, policy, common law or any other source of civil law, as are granted to spouses in a marriage.”<sup>153</sup> [www.leg.state.vt.us/docs/2000/acts/act091.htm](http://www.leg.state.vt.us/docs/2000/acts/act091.htm). Under the legislation, same-sex partners may become parties to a civil union by obtaining a civil union licence from their town clerk in the same way opposite-sex partners may obtain a marriage licence. Similarly, if a civil union breaks down, the parties may go to family court to obtain “dissolution of civil union” following the same procedures and subject to the same substantive rights and obligations that pertain to the obtaining of a divorce from marriage. Vermont’s civil union legislation is the first in any American state to permit same-sex partners consensually to acquire a legal status with all the consequences incidental to marriage.<sup>154</sup>

### 5) *Legislative Reaction*

The 1993 decision of the Hawaii Supreme Court in *Baehr v. Lewin* raised fears in other states that, if same-sex marriage were ultimately recognized in Hawaii, they would have to recognize such marriages performed in Hawaii under the full faith and credit provision of the United States Constitution.<sup>155</sup> As a result, in 1996, the United States Congress enacted the *Defense of Marriage Act*,<sup>156</sup> which provided that no state would be required to give effect to any law in another state recognizing same-sex marriage.<sup>157</sup> As of early 2001, 35 American states had enacted some form of legislation opposing same-sex marriage, although only four states – Alaska, Hawaii, Nebraska, and Nevada – had amended, or were in the process of amending, their constitutions to exclude same-sex partners from marriage. Notably, Nebraska also prohibited state

<sup>153</sup> An Act Relating to Civil Unions, H.847.

<sup>154</sup> For comment on *Baker v. Vermont* and Vermont’s civil union legislation, see the special symposium issue of Volume 25 of the Vermont Law Review, namely (2000) Vermont L. Rev. 1-353; and, Harvard Law Review Editors, “Recent Legislation – Domestic Relations – Same-Sex Couples – Vermont Creates System of Civil Unions” (2001) 114 Harv. L. Rev. 1421. Hawaii, which already has domestic partnership legislation, may be the next state to enact civil union legislation. *A Bill for an Act relating to Civil Union*, H.B. No. 1468, House of Representatives, Twenty-First Legislature, 2001, State of Hawaii, was introduced on 26 January 2001. Unlike Vermont’s civil union legislation, however, civil union status under this Hawaii Bill would be available to both same-sex and opposite-sex partners. The Bill was not passed in the 2001 sitting of the Hawaii Legislature and will not be considered until and if, at the earliest, it is re-introduced during the 2002 sitting of the Legislature.

<sup>155</sup> There is a veritable plethora of American journal literature dealing with same-sex marriage and the full faith and credit provision of the United States Constitution.

<sup>156</sup> Public Law 104-199, 110 Stat. 2419, September 21, 1996 (H.R. 3396).

<sup>157</sup> *Ibid.*, s. 2. The *Act* also defined “marriage” and “spouse” as referring, in all federal United States laws, to “only a legal union between one man and one woman as husband and wife” and “only to a person of the opposite sex who is a husband or wife,” respectively: *ibid.*, s. 3.



recognition of civil unions, domestic partnerships, or any “other similar same-sex relationship.”<sup>158</sup>

D. *South African Same-Sex Partner Immigration Case: National Coalition for Gay and Lesbian Equality v. South Africa (Minister of Home Affairs) (1999)*<sup>159</sup>

In *National Coalition for Gay and Lesbian Equality v. South Africa (Minister of Home Affairs)*, the Constitutional Court of South Africa unanimously held that it was unconstitutional for immigration law to facilitate the immigration into South Africa of the spouses of permanent South African residents but not afford the same benefit to lesbians and gay men in permanent same-sex life partnerships with South Africans. Ackermann J., for the Court, held that the relevant South African legislation<sup>160</sup> unfairly discriminated against South Africans who were partners in permanent same-sex life partnerships on the grounds of both their sexual orientation and marital status. This discrimination limited their equality rights and their right to dignity as guaranteed under the Constitution of South Africa.<sup>161</sup> He further held that this limitation was not reasonable or justifiable in an open and democratic society based on human dignity, equality and freedom. In the result, therefore, the impugned legislation was inconsistent with the Constitution and the Court ordered that the words “or partner, in a permanent same-sex life partnership” be read into it after its reference to “spouse.” Ackermann J. relied heavily upon Canadian decisions, citing nine in the Supreme Court of Canada and one in the British Columbia Supreme Court.

<sup>158</sup> W. van der Meide, *Legislating Equality: A Review of Laws Affecting Gay, Lesbian, Bisexual, and Transgendered People in the United States* (New York: National Gay and Lesbian Task Force Policy Institute, 2000) at 8 (also available online: [www.ngltf.org/downloads/leqeq99.pdf](http://www.ngltf.org/downloads/leqeq99.pdf)), as updated by National Gay and Lesbian Task Force, “Specific Anti-Same-Sex Marriage Laws in the U.S. – January 2001”, online: [www.ngltf.org/downloads/marriagemap0201.gif](http://www.ngltf.org/downloads/marriagemap0201.gif). The amendments to the Nebraska and Nevada constitutions were approved by ballot questions in November 2000. For the amendment to the Nevada Constitution to take effect, the anti-same-sex marriage initiative must be approved by voters again in 2002.

<sup>159</sup> *National Coalition for Gay and Lesbian Equality v. South Africa (Minister of Home Affairs)*, 2000 (2) S.A. 1 (Constitutional Court, 1999). Also, link to reasons at [www.concourt.gov.za/date1999.html](http://www.concourt.gov.za/date1999.html).

<sup>160</sup> Aliens Control Act 96 of 1991, s. 25(5).

<sup>161</sup> The relevant provisions of the Constitution of South Africa, *supra* note 110, are: Chapter 2: Bill of Rights Section 9(1). Everyone is equal before the law and has the right to equal protection and benefit of the law. Section 9(3). The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth. Section 10. Everyone has inherent dignity and the right to have their dignity respected and protected.

Three aspects of Ackermann J.'s reasoning are, I submit, of particular relevance to Canadian courts considering same-sex marriage claims. First, he dismissed the government's argument that there was nothing preventing lesbians and gay men from marrying persons of the opposite sex and thus being able to immigrate to South Africa as "spouses," and, therefore, "the fact that they did not enjoy the advantages of a spousal relationship was of their own choosing."<sup>162</sup> Ackermann J. stated:

What the submission implies is that same-sex life partners should ignore their sexual orientation and, contrary thereto, enter into marriage with someone of the opposite sex.

I am unable to accede to this line of argument. It confuses form with substance and does not have proper regard for the operation, experience or impact of discrimination in society. ...

The [government's] submission that gays and lesbians are free to marry in the sense that nothing prohibits them from marrying persons of the opposite sex, is true only as a meaningless abstraction. This submission ignores the constitutional injunction that gays and lesbians cannot be discriminated against on the grounds of their own sexual orientation and the constitutional right to express that orientation in a relationship of their own choosing.<sup>163</sup>

Second, Ackermann J. referred to "the fact that a same-sex couple cannot procreate in the same way as a heterosexual couple",<sup>164</sup> which is "often used to bolster the prejudice against gay and lesbian sexuality,"<sup>165</sup> and then stated:<sup>1</sup>

From a legal and constitutional point of view procreative potential is not a defining characteristic of conjugal relationships. Such a view would be deeply demeaning to couples (whether married or not) who, for whatever reason, are incapable of procreating when they commence such relationship or become so at any time thereafter. It is likewise demeaning to couples who commence such a relationship at an age when they no longer have the desire for sexual relations. It is demeaning to adoptive parents to suggest that their family is any less a family and any less entitled to respect and concern than a family with procreated children. I would even hold it to be demeaning of a couple who voluntarily decide not to have children or sexual relations with one another; this being a decision entirely within their protected sphere of freedom and privacy.<sup>166</sup>

Third, Ackermann J. referred to the government's submission that recognizing same-sex partnerships for immigration purposes would threaten traditional marriage and stated:

We were pressed with an argument [on behalf of the government], that it was of considerable public importance to protect the traditional and conventional institution of marriage and that the government accordingly has a strong and legitimate interest to protect the family life of such marriages and was entitled to do so by means of [the impugned legislation]. Even if this proposition were to be accepted it would be subject

<sup>162</sup> *National Coalition for Gay and Lesbian Equality*, *supra* note 159 at para. 34.

<sup>163</sup> *Ibid.* at paras. 34-35, 38.

<sup>164</sup> *Ibid.* at para. 50.

<sup>165</sup> *Ibid.*

<sup>166</sup> *Ibid.* at para. 51.

to two major reservations. In the first place, protecting the traditional institution of marriage as recognised by law may not be done in a way which unjustifiably limits the constitutional rights of partners in a permanent same-sex life partnership.

In the second place, there is no rational connection between the exclusion of same-sex life partners from the benefits under [the impugned legislation] and the government interest sought to be achieved thereby, namely the protection of families and the family life of heterosexual spouses. No conceivable way was suggested, nor can I think of any, whereby the appropriate extension of [the impugned legislation] to same-sex life partners could negatively affect such protection.<sup>167</sup>

## V. Analyzing a Same-Sex Marriage Claim

### A. The Principal Issue

In the same-sex marriage claims currently before the courts the principal issue, which I consider in this section, is whether the common law exclusion of same-sex partners from marriage is unconstitutional because it violates section 15 of the *Charter* and the violation cannot be justified under section 1. Other issues that may be considered in the various proceedings include the following, none of which I consider in this article. Does either the ungendered language used in some provincial and territorial marriage legislation or the gendered language used in other provincial and territorial marriage legislation implicitly or explicitly limit marriage to opposite-sex partners? In any event, is such legislation, to the extent that it might be held to deal with the capacity to marry, *intra vires* the provincial and territorial Legislatures? The *vires* of the Alberta and Québec legislation limiting marriage to opposite-sex partners has already been considered.<sup>168</sup> (The *vires* of the Alberta legislation is not presently called into question, since to date no same-sex marriage claim has been commenced in Alberta.) What is the meaning at common law of “marriage” and, in particular, has it evolved to include same-sex partners?<sup>169</sup> In the Québec proceedings, what is the impact of the prohibition against discrimination on the basis of sexual orientation in the *Québec Charter of Human Rights and Freedoms*?<sup>170</sup> In the British Columbia and Ontario proceedings, what is the impact of human rights legislation prohibiting discrimination on the basis of sexual orientation in the provision of services customarily available to the public and, in particular, is issuing marriage licences a service customarily available to the public?<sup>171</sup>

<sup>167</sup> *Ibid.* at paras. 55-56 (footnotes in quotation suppressed).

<sup>168</sup> *Supra* at text accompanying notes 67-73.

<sup>169</sup> This issue was considered in *Layland v. Ontario (Minister of Consumer and Commercial Relations)*, *supra* note 8, considered *supra* at text accompanying notes 79-82.

<sup>170</sup> R.S.Q. 1977, c. C-12, s. 10.

<sup>171</sup> The (*British Columbia*) *Human Rights Code*, R.S.B.C. 1996, c. 210, s. 8; and the (*Ontario*) *Human Rights Code*, R.S.O. 1990, c. H.19, s. 1. The definition of “public” varies with the service: see *University of British Columbia v. Berg*, [1993] 2 S.C.R. 353.

## B. *Guidance from Canadian Court Decisions*

Only two Canadian decisions, considered above, have yet dealt with same-sex marriage claims. *North and Matheson* provides no assistance since it was solely a statutory construction decision. While *Layland* was a *Charter* case, Southey J.'s circular reasoning and specious comment that "[t]he law does not prohibit marriage by homosexuals, provided it takes place between persons of the opposite sex" have now been so persuasively disagreed with by judges in New Zealand, South Africa, and the United States that I submit it is highly problematic what assistance, if any, a court considering a same-sex marriage claim today would obtain from his reasons. I suggest that Greer J.'s dissenting reasons resonate far better with the reasoning in the recent "near marriage" cases decided by the Supreme Court, namely, *Miron v. Trudel*, *Egan*, and *M. v. H.* However, those cases all involved consideration of the legal consequences of a particular status, and not status *per se*. While status and the consequences of status are obviously closely linked, they are at the same time quite distinct. More importantly, the majority of the Supreme Court in *M. v. H.* should be given the benefit of being believed when they said, no less than three times, that they were not deciding anything about marriage. In short, perhaps stating the obvious, whether the common law exclusion of same-sex partners from marriage is unconstitutional is entirely an open question.

## C. *Guidance from Court Decisions in Other Countries*

The American same-sex marriage cases, *Quilter*, and *National Coalition for Gay and Lesbian Equality* were significantly different from *M. v. H.* since, in all those cases, courts were called upon to determine whether same-sex partners had the same rights as married spouses – not "just" unmarried opposite-sex partners – or, indeed, whether same-sex partners had the right legally to marry. Other than *Quilter*, these cases all concluded, essentially, that same-sex partners were to be treated equally with married spouses. However, the differences among the particular matters in contention in those cases must be emphasized. Thomas J.'s reasoning in *Quilter* that excluding same-sex partners from marriage was discriminatory provides, I submit, valuable guidance to Canadian courts, despite the statutory construction-driven result in that case. In *Baehr* and *Brause*, courts were also required to consider same-sex marriage directly. In *Baehr*, after a trial on the merits, it was held that same-sex partners had the right legally to marry. In *Brause*, it was held that same-sex partners would have the right legally to marry unless the state established, through evidence at a trial, a compelling state interest justifying limiting marriage to opposite-sex partners. On the other hand, *Baker* and *National Coalition for Gay and Lesbian Equality* were quite different from *Baehr* and *Brause*, since neither held that same-sex partners had the right legally to marry. Specifically, in *Baker*, not only did the court not order that same-sex partners be permitted legally to marry – instead leaving the precise remedy to cure the constitutional violation

it had found to be determined by the Legislature – but also Amestoy C.J. centered the case on the legal consequences of marriage rather than marriage *per se*. He stated that “[w]hile many have noted the symbolic or spiritual significance of the marital relation, it is the plaintiffs’ claim to the secular benefits and protections of a singularly human relationship that, in our view, characterizes this case.”<sup>172</sup> He also stated that “[w]hile some future case may attempt to establish that – notwithstanding equal benefits and protections under Vermont law – the denial of a marriage licence operates *per se* to deny constitutionally-protected rights, that is not the claim we address today.”<sup>173</sup> Similarly, in *National Coalition for Gay and Lesbian Equality*, which in any event was an immigration and not a same-sex marriage case, Ackermann J. emphasized that the case did not require the court to “reach the issue of whether, or to what extent, the law ought to give formal institutional recognition to same-sex partnerships and this issue [was] left open.”<sup>174</sup> In short, *Baehr*, *Brause*, and Thomas J. in *Quilter* (Thomas J. in *obiter*) all reasoned that legal marriage should be extended to same-sex partners, while *Baker* and *National Coalition for Gay and Lesbian Equality* held that same-sex partners should have the same rights, benefits and protections – and obligations – as married spouses.

#### D. Section 15: Discrimination?

The foundation for analysis of an equality claim is located primarily in the Supreme Court’s 1989 decision in *Andrews v. Law Society of British Columbia*,<sup>175</sup> the 1995 trilogy of *Miron v. Trudel*, *Egan*, and *Thibaudeau v. Canada*,<sup>176</sup> and its 1999 decision in *Law v. Canada (Minister of Employment and Immigration)*.<sup>177</sup> In *Law*, a unanimous nine-Justice Court concurred in one set of reasons, delivered by Iacobucci J., and stated that while “[s]ection 15 ... is perhaps the *Charter*’s most conceptually difficult provision”<sup>178</sup> and “there ha[d] been differences of opinion among the members of th[e] Court as to the appropriate interpretation of s. 15(1),”<sup>179</sup> there was nevertheless “general consensus regarding the basic principles relating to the purpose of s. 15(1) and the proper approach to equality analysis.”<sup>180</sup> Iacobucci J. further stated that the case afforded “a useful juncture at which to summarize and comment upon these basic principles, in order to provide a set of guidelines for courts that are called upon to analyze a discrimination claim under the *Charter*.”<sup>181</sup>

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<sup>172</sup> *Baker v. Vermont*, *supra* note 143 at 888-89.

<sup>173</sup> *Ibid.* at 886.

<sup>174</sup> *National Coalition for Gay and Lesbian Equality*, *supra* note 159, at para. 60.

<sup>175</sup> *Supra* note 13.

<sup>176</sup> [1995] 2 S.C.R. 627.

<sup>177</sup> [1999] 1 S.C.R. 497.

<sup>178</sup> *Ibid.* at para. 2.

<sup>179</sup> *Ibid.* at para. 5.

<sup>180</sup> *Ibid.*

<sup>181</sup> *Ibid.*

The Court stated that consideration of an equality claim requires three broad inquiries, the relevant parts of which are, for present purposes, as follows.<sup>182</sup> First, does the impugned law draw a formal distinction between the claimant and others on the basis of one or more personal characteristics?<sup>183</sup> If so, there is differential treatment for the purpose of section 15. Second, is the claimant subject to differential treatment based on an enumerated or analogous ground? Third, does the differential treatment discriminate by imposing a burden upon or withholding a benefit from the claimant in a manner which reflects the stereotypical application of presumed group or personal characteristics, or which otherwise has the effect of perpetuating or promoting the view that the individual is less capable or worthy of recognition or value as a human being or as a member of Canadian society, equally deserving of concern, respect, and consideration? Concerning this third inquiry, Iacobucci J. identified a number of relevant contextual factors, which he was careful to emphasize were not intended to be taken as an exhaustive enumeration. If the answer to both the second and third inquiries is affirmative, then the differential treatment constitutes discrimination in the substantive sense intended by section 15. During the section 15 analysis, the burden of proof is on the claimant.

With respect to the first and second inquiries, clearly the common law exclusion of same-sex partners from marriage formally distinguishes between same-sex partners and opposite-sex partners on the basis of their sexual orientation, since, as acknowledged in *M. v. H.*, one chooses one's partner in harmony with one's sexual orientation. Further, as previously held in *Egan*, sexual orientation is an analogous ground under section 15. With respect to the third inquiry, the Supreme Court has consistently recognized the social, political, and historical context of disadvantage and stereotyping experienced by lesbians and gay men.<sup>184</sup> Thus, the only remaining issue in the section 15 stage of analysis is whether the common law exclusion of same-sex partners from marriage denies a benefit or imposes a burden or disadvantage on lesbians and gay men in a manner which reflects and perpetuates this context of disadvantage and stereotyping.

Certain aspects of marriage are uncontested. First, marriage is "something more than a contract" since, in addition to creating mutual rights and obligations, "it confers a status."<sup>185</sup> Indeed, marriage is so centrally important in our society that it is often referred to as both a social and a legal "institution."<sup>186</sup> Second, entering into a marriage is an important exercise of an individual's freedom of

<sup>182</sup> See *ibid.* at paras. 39, 88.

<sup>183</sup> With respect to this first inquiry, Iacobucci J. referred to both differential treatment due to a formal distinction and differential treatment due to substantive effect: *ibid.* For present purposes, inquiry concerning formal distinction suffices.

<sup>184</sup> *Egan v. Canada*, *supra* note 14; *Vriend v. Alberta*, *supra* note 151; and *M. v. H.*, *supra* note 1.

<sup>185</sup> *Hyde v. Hyde*, *supra* note 8 at 133.

<sup>186</sup> *Hyde v. Hyde*, *supra* note 8; *Miron v. Trudel*, *supra* note 24; *Egan v. Canada*, *supra* note 14; and, *M. v. H.*, *supra* note 1.

choice.<sup>187</sup> Certainly, the Supreme Court has referred to the general importance of fundamental personal choices in informing *Charter* analysis. Justices have stated that “[t]he *Charter* requires that individual choices not be restricted unnecessarily,”<sup>188</sup> and that, “[t]he idea of human dignity finds expression in almost every right and freedom guaranteed in the *Charter* ... [and] the basic theory underlying the *Charter* [is] that the state will respect choices made by individuals and, to the greatest extent possible, will avoid subordinating these choices to any one conception of the good life.”<sup>189</sup> In particular, “[the] Court [has] recognized that being deprived of the right to choose could be a disadvantage or burden for the purposes of an analysis under section 15(1) of the *Charter*.”<sup>190</sup> Further, recent statements in the Supreme Court have specifically characterized the freedom to choose one’s partner, to choose the type of partnership shared, and the status afforded by relationship recognition, as benefits of the law for the purposes of section 15. In *Egan*, Cory J. considered an extended definition of “spouse” which included unmarried opposite-sex partners but not same-sex partners<sup>191</sup> and stated that “[t]he law confers a significant benefit by providing state recognition of the legitimacy of a particular status. The denial of that recognition may have a serious detrimental effect upon [the] sense of self-worth and dignity of members of a group because it stigmatizes them.”<sup>192</sup> He also referred to the “right to make a choice”<sup>193</sup> afforded to opposite-sex partners, an opportunity which was denied to same-sex partners, and then stated that “[t]he choice of a spouse is a matter of great importance to the individuals involved. ... This benefit of the law is very significant. Its importance can be seen by considering what the result might be if, for example, the benefit were denied to couples because the individuals were of different races or different religions. The public outcry would, I think, be immediate and well merited.”<sup>194</sup> Similarly, in *Miron v. Trudel*, McLachlin J. (now Chief Justice), delivering the reasons of the plurality, stated that “the individual’s freedom to live life with the mate of one’s choice in the fashion of one’s choice ... is a matter of defining importance to individuals.”<sup>195</sup> One of the contextual factors Iacobucci J. identified in *Law* as relevant in determining whether differential treatment discriminates was to

<sup>187</sup> See for example, Gonthier J.’s reasoning in *M. v. H.*, *supra* note 1.

<sup>188</sup> *R. v. Salituro*, [1991] 3 S.C.R. 654 at 674 *per* Iacobucci J.

<sup>189</sup> *R. v. Morgentaler*, [1988] 1 S.C.R. 30 at 166 *per* Wilson J.

<sup>190</sup> *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519 at 553 *per* Lamer C.J., referring to *R. v. Turpin*, [1989] 1 S.C.R. 1296.

<sup>191</sup> *Old Age Security Act*, R.S.C. 1985, c. O-9, s. 2, as amended by R.S.C. 1985, c. 34 (1st Supp.), s. 1(1). This definition has now been repealed and a definition of “common-law partner” added to the *Act* by the *Modernization of Benefits and Obligations Act*, *supra* note 8, s. 192. The net result is that the *Old Age Security Act* now refers to “spouse” (undefined and, therefore, at common law, meaning married spouses only) and “common-law partner.”

<sup>192</sup> *Egan*, *supra* note 14 at para. 161.

<sup>193</sup> *Ibid.* at para. 160.

<sup>194</sup> *Ibid.* at para. 161.

<sup>195</sup> *Miron v. Trudel*, *supra* note 24 at para. 151.

examine the nature and scope of the interest affected by the impugned law or other state action. In particular, he stated:

L'Heureux-Dubé J. explained [in *Egan*] that the discriminatory calibre of differential treatment cannot be fully appreciated without evaluating not only the economic but also the constitutional and societal significance attributed to the interest or interests adversely affected by the legislation in question. Moreover, it is relevant to consider whether the distinction restricts access to a fundamental social institution, or affects "a basic aspect of full membership in Canadian society," or "constitute[s] a complete non-recognition of a particular group."<sup>196</sup>

I submit that a court considering whether the exclusion of same-sex partners from marriage is unconstitutional will find this direction particularly salient. In summary, I submit, therefore, that a law which excludes a person from marriage, thereby denying them the status and freedom of choice afforded others, denies them benefits of law or conversely imposes burdens or disadvantages upon them for the purposes of section 15. In conclusion therefore with respect to the discrimination stage of analysis, I submit that a court considering a same-sex marriage claim would hold that the common law exclusion of same-sex partners from marriage constitutes discrimination on the basis of sexual orientation contrary to section 15.

#### E. Section 1: Justification?

##### 1) History, Religion, "the Traditional Family", Procreation and Child-Rearing

If a court determines that the common law exclusion of same-sex partners from marriage violates section 15, it must then consider section 1 of the *Charter*, which provides that the rights guaranteed in the *Charter* are "subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." Obviously, the common law exclusion is a limitation "prescribed by law." The section 1 analysis – based primarily upon the Supreme Court's decisions in *R. v. Oakes*<sup>197</sup> and *Dagenais v. Canadian Broadcasting Corp.*<sup>198</sup> – will then proceed, with the burden of proof on the government to establish the following. First, the government will have to establish that the common law exclusion serves a purpose sufficiently important to warrant violating section 15 and, at a minimum, that the objective relates to a concern that is pressing and substantial in a free and democratic society. Second, the government will have to establish that the exclusion strikes a reasonable balance between the objective it serves and the means chosen to achieve that objective. In other words, the government must establish that the

<sup>196</sup> *Law v. Canada (Minister of Employment and Immigration)*, *supra* note 177 at 540.

<sup>197</sup> [1986] 1 S.C.R. 103.

<sup>198</sup> [1994] 3 S.C.R. 835.



exclusion is reasonable and demonstrably justified. This is a “proportionality test,” which has three branches. First, the exclusion must not be unfair or based on irrational considerations, but rather must be rationally connected to its objective. Second, the exclusion should interfere as little as possible with section 15. Third, the government must establish that there is proportionality between the deleterious effects of the exclusion and the objective served by it and also proportionality between the deleterious and salutary effects of the exclusion itself. If the government fails at any stage of the analysis, the exclusion will not be saved under section 1. As Wilson J. stated in *Andrews v. Law Society of British Columbia*, “[g]iven that s. 15 is designed to protect those groups who suffer social, political and legal disadvantage in our society, the burden resting on government to justify the type of discrimination against such groups is appropriately an onerous one.”<sup>199</sup>

The government will probably rely on some combination of the following closely related assertions, all of which have been raised in both Canada and other countries in cases involving same-sex partnership recognition claims: (1) society has historically recognized marriage as limited to opposite-sex partners; (2) religious organizations have historically recognized marriage as limited to opposite-sex partners; (3) to include same-sex partners in the institution of marriage would undermine “the traditional family;” and, (4) opposite-sex partners have the unique capacity to procreate and also raise most children, and, therefore, should be legally privileged through marriage.

First, will the government be able to lead evidence sufficient to establish any of these assertions? Second, even if a court finds that any of these assertions have been factually established, would it hold that sufficient to justify excluding same-sex partners from marriage? I submit that the government will face serious factual and normative obstacles in attempting to justify the exclusion of same-sex partners from marriage.

A few examples will illustrate the evidentiary problems the government may have. Scholars have marshalled impressive evidence indicating that same-sex unions were given religious sanction in many faiths in many societies, including, in particular, in both the Catholic and Orthodox Churches in pre-modern Europe.<sup>200</sup> Similarly, most Canadians no longer live in “traditional families,” certainly if that expression is intended to connote a family in which the female adult does not participate in paid employment.<sup>201</sup> With respect to

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<sup>199</sup> *Andrews v. Law Society of British Columbia*, *supra* note 13 at 154. For a comprehensive review of the application of section 1 in equality cases, see S. Martin, *Balancing Individual Rights to Equality and Social Goals* (2001) 80 Can. Bar. Rev. 299 at 336-61.

<sup>200</sup> See *supra* note 122.

<sup>201</sup> See Y. Péron et al., *Canadian Families at the Approach of the Year 2000* (Montréal: Centre inter universitaire d'études démographiques, 1999) at 250-55, concerning women's participation in paid employment. This study contained no data concerning same-sex partners and their children, since no census had yet collected such data. The 2001 census did, however, for the first time, ask people whether they lived with a common-law partner

procreation and child-rearing, should these obviously fundamentally important social functions be held to be unique to opposite-sex partners? Judges who have considered same-sex partners and their families, including La Forest J. in *Egan*, have had to concede that some same-sex partners do raise children. Further, evidence establishes that same-sex partners can be just as good, or just as bad, parents as opposite-sex partners.<sup>202</sup> Resiling instead to a focus on the “capacity” to procreate and referring to the biological necessity of uniting one egg cell with one sperm cell from somewhere, somehow, in order to justify privileging opposite-sex partners generally — whether they have children or not and, if they have children, regardless of how their children were created — is, I submit, hardly convincing. More importantly, judges in New Zealand, South Africa, and the United States have recently indicated that they are not convinced and have rejected procreation-based generalizing and stereotyping in their equality reasoning.

Indeed, the barrenness of the procreative difference rationalization for excluding same-sex partners from marriage is vividly demonstrated by how quickly courts are prepared to abandon it, if necessary, in order to uphold the validity of a marriage between opposite-sex partners. For example, a marriage between opposite-sex partners remains valid even if they consistently employ contraception to preclude the possibility of procreation.<sup>203</sup> In such a case, the court may focus on the “power” of the partners to engage in “ordinary and complete intercourse,” rather than procreation.<sup>204</sup> If the married opposite-sex partners are unable to engage in sexual intercourse as, for example, due to the impotence of the husband, the marriage will nevertheless still be valid where, for example, the “prime motive” of the marriage had been “companionship,” rather than procreation.<sup>205</sup> In short, I submit, it is rather obvious that courts have used procreation as a rationalization to justify excluding same-sex partners from marriage not because they cannot procreate, but simply because they are same-sex partners.<sup>206</sup>

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of the same sex and explicitly stated that children of a person’s common-law same-sex partner should be considered that person’s children as well. Thus, there will soon be some data concerning same-sex partners and their children. It is reasonable to anticipate, however, that continuing discrimination against lesbians and gay men will result in under-reporting of lesbian and gay families. See EGALE Canada, “2001 Census Kit” (May 2001), online: [www.egale.ca/documents/census-kit-e.htm](http://www.egale.ca/documents/census-kit-e.htm).

<sup>202</sup> See consideration of extensive evidence concerning same-sex partner parenting in, *Re K. & B.* (1995), 125 D.L.R. (4th) 653 (Ont. Prov. Div.).

<sup>203</sup> *Baxter v. Baxter*, [1948] A.C. 274 (H.L.).

<sup>204</sup> *Ibid.* at 286-287.

<sup>205</sup> *Foster v. Foster*, [1953] 2 D.L.R. 318 (B.C.S.C.); and, *Norman v. Norman* (1979), 9 R.F.L.(2d) 345 (Ont.U.F.C.) at 349.

<sup>206</sup> I agree entirely with R. Wintemute, “Sexual Orientation Discrimination as Sex Discrimination: Same-Sex Couples and the Charter in *Mossop*, *Egan* and *Layland*” (1994) 39 McGill L.J. 429 at 452-53: “Even assuming that marriage could justifiably be restricted to couples able and willing to have children with genetic input from both partners, ... the common law definition [of marriage] does not do that. Rather, it permits all opposite-sex

I emphasize that I think there should be no question that companionship is a perfectly reasonable objective of marriage. But, if opposite-sex partners who cannot procreate can marry for companionship, why should same-sex partners be precluded from doing so? More generally, providing mutual support for family members and, in particular, providing a safe and stable environment for children, caring for one another, and publicly sharing mutual commitments are all valid objectives of marriage. While procreation is unquestionably socially important and may be part of the basis underlying a couple's decision to marry, it is certainly not essential. In short, procreation is not the defining *raison d'être* of marriage. To argue that procreation is the *raison d'être* of marriage seems, I submit, to take a rather impoverished view of conjugal relationships.

Certainly, Justices of the Supreme Court have in several recent cases rejected assertions based on history, religion, "the traditional family" and procreation as justifying excluding same-sex partners from benefits afforded unmarried opposite-sex partners. For example, L'Heureux-Dubé J. stated that "[i]t is possible to be pro-family without rejecting less traditional family forms. It is not anti-family to support protection for non-traditional families. The traditional family is not the only family form, and non-traditional family forms may equally advance true family values."<sup>207</sup> Iacobucci J. echoed this view when he said that it eluded him "how according same-sex couples the benefits flowing to opposite-sex couples in any way inhibits, dissuades or impedes the formation of heterosexual unions. Where is the threat? In the absence of such a threat, the denial of the s. 15 rights of same-sex couples is anything but proportional to the policy objective of fostering heterosexual relationships."<sup>208</sup> Similarly, as noted above, Bastarache J. has stated that while "[s]ociety has an interest in the traditional family ... the government's legitimate interest in setting social policies designed to encourage family formation can be met without imposing through exclusion a hardship on non-traditional families."<sup>209</sup> However, to repeat and emphasize once again, these statements were all made in cases concerning the consequences of legal status, rather than status *per se*. Nevertheless, it is interesting to note that, in *M. v. H.*, Bastarache J. did refer to status as well as the consequences of status, as follows:<sup>210</sup> "Denial of status and benefits to same-sex partners does not *a priori* enhance respect for the traditional family, nor does it reinforce the commitment of the legislature to the values in the *Charter*." At a minimum, what was abundantly clear in both Iacobucci J.'s and Bastarache J.'s section 1 reasoning in *M. v. H.*, was that neither was inclined to be receptive to an argument that a violation of section 15 in this context was justified.

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couples (who are not closely related to each other) to marry regardless of procreative capacity or willingness to have children, and excludes all same-sex couples even if they have already procreated by alternative means or have adopted, or are able and willing to do so."

<sup>207</sup> *Canada (Attorney General) v. Mossop*, [1993] 1 S.C.R. 554 at 634.

<sup>208</sup> *Egan v. Canada*, *supra* note 14 at para. 211.

<sup>209</sup> *M. v. H.*, *supra* note 1 at paras. 318, 320.

<sup>210</sup> *Ibid.* at para. 356.

With respect to any assertion by the government that religious organizations have historically recognized marriage as limited to opposite-sex partners, it is important to distinguish religious marriage from civil marriage. Only the latter is in issue in the same-sex marriage claims currently before the courts. In particular, legally extending civil marriage to same-sex partners will not require religious congregations, contrary to their beliefs, to marry same-sex partners. First, the *Charter's* guarantee of freedom of religion<sup>211</sup> would protect religious congregations from any legislative attempt to compel them to perform same-sex marriages (not that I for a moment think any such legislation is at all likely). Second, while human rights legislation prohibits discrimination on the basis of sexual orientation with respect to access to services customarily available to the public,<sup>212</sup> it is doubtful whether marriage in any particular religious congregation would ever be held to be a service customarily available to the public.<sup>213</sup> Thus, same-sex partners could not legally compel a religious organization to marry them.

## 2) *Something Other Than Marriage Good Enough for Same-Sex Partners?*

The government may argue that the status and freedom of choice interests of lesbians and gay men might be sufficiently satisfied to achieve equality by affording same-sex partners access to "domestic partnership," "registered partnership," "civil union," or some other legal status alternative to marriage, while continuing to reserve marriage exclusively for opposite-sex partners.<sup>214</sup> In particular, if domestic partnership, civil union, or some other legal status alternative to marriage was available to same-sex partners and, further, that status afforded to same-sex partners all the benefits and rights afforded through marriage to opposite-sex partners, the government might argue that a claim by same-sex partners to marriage involved "only status" concerns and that the alternative status was sufficient to satisfy the equality claims of same-sex partners. I submit that courts should resist any such suggestion.

<sup>211</sup> *Canadian Charter of Rights and Freedoms*, *supra* note 11, s. 2(a).

<sup>212</sup> See for example, (*British Columbia*) *Human Rights Code*, *supra* note 171, s.8; and, (*Ontario*) *Human Rights Code*, *supra* note 171, s. 1.

<sup>213</sup> The definition of "public" varies with the service: See *University of British Columbia v. Berg*, *supra* note 171.

<sup>214</sup> See for example, British Columbia Law Institute, *Report on Recognition of Spousal and Family Status* (Vancouver: British Columbia Law Institute, 1999), online: [www.bcli.org/pages/projects/rrsfs/contents.html](http://www.bcli.org/pages/projects/rrsfs/contents.html), which recommended enactment of a provincial *Domestic Partner Act*; and N. Bala, "Alternatives for Extending Spousal Status in Canada" (2000) 17 Can. J. Fam. L. 169 at 179, which argued for federal legislation permitting same-sex partners "the right to enter a relationship that is called *something other than marriage*, such as 'same-sex partnership' or 'domestic partnership'" (emphasis in original). I submit that the British Columbia Attorney General was correct not to follow the Institute's domestic partnership recommendation, but instead to challenge in court the exclusion of same-sex partners from marriage. I emphasize, however, that there is nothing wrong with domestic partnership *per se*, or indeed any other legal status alternative to

First, equality includes concerns about status, as the passage from Iacobucci J.'s reasons in *Law*, for the Court, reproduced above, made clear.<sup>215</sup> Marriage is fundamentally important as a symbol of recognition of the value of a couple's commitment to each other. Second, a "separate but equal" approach does not constitute equality.<sup>216</sup> There is already a well-established legal status for recognizing conjugal relationships, namely, marriage. I submit that the *Charter's* guarantee of equality for lesbians and gay men requires either that legal marriage be extended to same-sex partners or that the state get out of "the marriage business"<sup>217</sup> entirely, enacting instead domestic partnership or civil union legislation which would be equally available to same-sex partners and opposite-sex partners and thus leaving marriage exclusively to religious organizations. Since it is unlikely that the state will do this anytime soon, and since in any event such an approach would leave a certain "equality with a vengeance" bad taste, I submit that the only method of achieving equality of relationship recognition for same-sex partners is to extend civil, state-sanctioned, non-religious marriage to same-sex partners. In conclusion, therefore, with respect to the section 1 stage of analysis, I submit that a court should, and probably will, hold that the common law exclusion of same-sex partners from marriage is not saved under section 1.

#### F. Remedy

If a court determines that the common law exclusion of same-sex partners from marriage constitutes discrimination and further that the discrimination cannot be justified, it must then determine the appropriate remedy.<sup>218</sup> Since same-sex marriage is obviously a socially and politically contentious issue, I anticipate that a court would declare the exclusion to be of no force or effect but, as was done in *M. v. H.*, temporarily suspend its order to give Parliament time to consider how to respond.

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marriage, as long as whatever legal status options exist are equally accessible by both same-sex and opposite-sex partners. For comprehensive consideration of issues concerning relationship status and legal consequences of status, see M. Bailey, *Marriage and Marriage-Like Relationships* (Ottawa: Law Commission of Canada, 1999), online: at [www.lcc.gc.ca/en/papers/rapport/bailey.html](http://www.lcc.gc.ca/en/papers/rapport/bailey.html); W. Holland, "Intimate Relationships in the New Millennium: The Assimilation of Marriage and Cohabitation?" (2000) 17 Can. J. Fam. L. 114; B. Cossman and B. Ryder, ng2057 *The Legal Regulation of Adult Personal Relationships: Evaluating Policy Objectives and Legal Options in Federal Legislation* (Ottawa: Law Commission of Canada, 2000) online: at [www.lcc.gc.ca/en/themes/pr/cpra/cr/index.html](http://www.lcc.gc.ca/en/themes/pr/cpra/cr/index.html); and, Law Commission of Canada, *Discussion Paper: Recognizing and Supporting Close Personal Relationships Between Adults* (Ottawa: Law Commission of Canada, 2000), online: at [www.lcc.gc.ca/en/forum/cpra/paper.html](http://www.lcc.gc.ca/en/forum/cpra/paper.html).

<sup>215</sup> *Supra* at text accompanying note 196.

<sup>216</sup> See *supra* note 33.

<sup>217</sup> In *Baehr v. Lewin*, *supra* note 127 at 58, Levinson J. referred to "the state's monopoly on the business of marriage creation."

<sup>218</sup> See *Schachter v. Canada*, [1992] 2 S.C.R. 679.

### G. Possible Override by Parliament

Section 33 of the *Charter* provides that Parliament may enact legislation which expressly declares that it shall operate notwithstanding, *inter alia*, section 15 of the *Charter*. Thus, Parliament could respond to a court ruling that the common law exclusion of same-sex partners from marriage was unconstitutional by simply enacting legislation codifying the common law exclusion together with a declaration overriding section 15. To date, Parliament has never used section 33 and, notably, did not invoke it when it enacted section 1.1 of the *Modernization of Benefits and Obligations Act*. Since Parliament did not invoke section 33 when it enacted section 1.1, would it invoke it to override a court decision, especially a decision of the Supreme Court of Canada, recognizing same-sex marriage? Certainly, section 33 has been invoked by provincial Legislatures, but only a very few times, and only once in connection with lesbian and gay rights, namely, in 2000 by the Alberta Legislature in enacting its restrictive definition of “marriage,” as noted above.

Speculating as to whether Parliament would use section 33 to override a court decision effectively extending legal marriage to same-sex partners is a matter of politics, not law, which would ultimately be determined by public opinion. In that regard, it is interesting to note that a survey released on June 9, 1999 – the day after the House of Commons adopted its “one man and one woman” marriage resolution in reaction to *M. v. H.* – indicated that 53% of Canadians favoured extending legal marriage to same-sex partners.<sup>219</sup> More recently, a survey conducted in April 2001 showed that 55% of Canadians supported allowing lesbian and gay couples to marry and another in June 2001 concluded that 65% supported same-sex marriage.<sup>220</sup> Perhaps by the time Parliament has to respond to a court ruling extending marriage to same-sex partners, public support for same-sex marriage will be strong enough to persuade politicians to accept the court’s ruling.<sup>221</sup> In any event, a declaration pursuant to section 33 ceases to have effect, at the latest, five years after it came into effect. Thus, in order to continue insulating a restrictive definition of “marriage,” Parliament would have to re-enact an overriding declaration every

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<sup>219</sup> Angus Reid Group survey for The Globe and Mail and CTV, conducted between 25 May and 30 May 1999, that is, shortly after the Supreme Court’s decision in *M. v. H.* See *Globe and Mail*, 10 June 1999, press release online: [www.angusreid.com/media/content/pdf/pr990609-PDF](http://www.angusreid.com/media/content/pdf/pr990609-PDF).

<sup>220</sup> Environics Research Group, “Most Canadians Favour Gay Marriage; Approval of Homosexuality Continues to Increase” (10 May 2001), online: <http://erg.environics.net/news/default.asp?aID=432>.

<sup>221</sup> For data concerning Canadians’ increasingly positive attitudes toward lesbian and gay rights more generally, see J.F. Fletcher and P. Howe, “Supreme Court Cases and Court Support: The State of Canadian Public Opinion” (2000) 6 *Institute for Research on Public Policy (IRPP): Choices* 30 at 37-42, 50, online: [www.irpp.org/choices/archive/vol6no3.pdf](http://www.irpp.org/choices/archive/vol6no3.pdf); Environics Research Group, May 10, 2001, “Most Canadians Favour Gay Marriage; Approval of Homosexuality Continues to Increase”, *ibid.*; and Presse canadienne/Léger Marketing, *ibid.*

five years. I submit that at some point Parliament would cease to do so. The only means available permanently to exclude same-sex partners from marriage is an amendment to the Constitution of Canada. Amending the Constitution of Canada is a far more difficult matter<sup>222</sup> than amending the constitution of an American state and I really do not foresee such an amendment as a real possibility. In the absence of an amendment to the Constitution, even if Parliament did invoke section 33 in response to a court decision recognizing same-sex marriage, I suspect that debating a renewal of the override every five years would be such a horrible open sore on our body politic that at some point Parliament would not renew the declaration and the court's ruling in favour of same-sex marriage would become effective.

## VI. *Conclusion*

I submit that the courts will hold that the common law exclusion of same-sex partners from marriage is unconstitutional. Speculating as to how Parliament would react to such a ruling is more difficult. In any event, Parliament's response will ultimately be determined by public opinion, which recent evidence indicates increasingly supports same-sex marriage. Even if Parliament did initially invoke section 33 to enact a same-sex marriage override, it is, I submit, difficult to imagine it re-enacting an override of the right to equality every five years. Such a process would simply be too divisive. Would Canadians really want to say, every five years, in legislation no less, that lesbians and gay men are not as worthy as heterosexuals of the state recognition afforded through marriage? Not equally entitled to the right to choose whether to marry the person they love? Essentially, not full citizens? I personally hope not. Instead, I believe that as Canadians increasingly welcome lesbians and gay men into the political and social plurality, legal same-sex marriage will ineluctably become a reality.

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<sup>222</sup> Part V of the *Constitution Act, 1982*, *supra* note 11.