

SAME-SEX UNIONS AND THE LAW: AN INTRODUCTION

Like many struggles for equality, the struggle for equal treatment of gays, lesbians, bisexuals, and trans-gendered persons in Canada has a long and arguably sordid legal history. This is particularly true of gay and lesbian couples who seek state recognition of their relationships by entering valid, state-recognized marriages.¹ Governments and the majority of courts in Canada, like those in virtually every other country,² have — until now — held fast to traditional definitions of marriage as exclusive unions between men and women.³

Several recent decisions and legislative pronouncements nevertheless mark a fundamental change in the federal government's perspective on same-sex unions. On 10 June 2003, the Ontario Court of Appeal announced its decision in *Halpern v. Canada (A.G.)*.⁴ The unanimous ruling of the Court⁵ declared that the common law definition of marriage violates claimants' s. 15(1) equality rights and does not constitute a reasonable limit on those rights as contemplated by s. 1 of the *Canadian Charter of Rights and Freedoms*.⁶ Immediate declaratory relief was granted in *Halpern*, allowing the claimants to marry the following morning. Shortly thereafter, the Right Honourable Jean Chrétien, Prime Minister of Canada, announced that the Federal Government would not be appealing the decision.⁷ On 8 July 2003, the British Columbia Court of Appeal cited an unworkable inconsistency in the federal marriage law between the Provinces of Ontario and British Columbia.⁸ In that supplementary

¹ In consideration of Canadian developments, see Donald G. Casswell, *Lesbians, Gay Men and Canadian Law* (Toronto: Edmond Montgomery, 1996) and "Moving Toward Same Sex Marriage" (2001) 80 Can. Bar Rev. 810; Bruce MacDougall, "The Celebration of Same-Sex Marriage" (2001) 32 Ottawa L. Rev. 235. See also Nicole LaViolette, "Waiting in a New Line at City Hall: Registered Partnerships as an Option for Relationship Recognition Reform in Canada" (2002) 19 Can. J. Fam. L. 115; S. Loosemore, "*EGALE v. Canada: The Case for Same Sex Marriage*" (2002) 60 U.T. Fac L. Rev.; Law Commission of Canada, *Beyond Conjugal: Recognizing and Supporting Close Personal Adults Relationships* (Ottawa: Law Commission of Canada, 2001). For a collection of international perspectives, see Robert Wintemute & Mads Andenaes, eds., *Legal Recognition of Same-Sex Partnerships: A Study of National, European and International Law* (Oxford: Hart Publishing, 2001) [*Legal Recognition*].

² To date, the only exceptions are the Netherlands and Belgium, where same-sex marriages are legally recognized (see Kees Waaldijk, "Small Change: How the Road to Same-Sex Marriage Got Paved in the Netherlands" in *Legal Recognition*, *supra* note 1 at 437). See also Nancy G. Maxwell, "Opening Civil Marriage to Same-Gender Couples: A Netherlands-United States Comparison" (2001) 18 Ariz. J. Int'l & Comp. L. 141. The Belgian law received royal assent in January 2003 and has been criticized for still not allowing same sex couples to adopt children. See Chambre des Représentants de Belgique, "Project de Loi: ouvrant le mariage à des personnes de même sexe et modifiant certaines dispositions du Code civil" (30 January 2003) online: Chambre des Représentants de Belgique <www1.dekamer.be/FLWB/pdf/50/2165/50K2165003.pdf>.

³ The traditional definition of marriage as "the voluntary union for life of one man and one woman, to the exclusion of all others" is often cited to the landmark 19th Century case *Hyde v. Hyde and Woodmansee* (1866), L.R. 1 P&D 130 at 132-33.

⁴ (2003), 225 D.L.R. (4th) 529 [*Halpern*].

⁵ *Ibid.*, per McMurtry C.J.O., MacPherson and Gillese J.J.A.

⁶ Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [*Charter*].

⁷ 17 July 2003, "Statement by the Prime Minister on Same Sex Unions," online: Prime Minister of Canada <www.pm.gc.ca/default.asp?Language=E&Page=newsroom&Sub=NewsReleases&Doc=same_sexunions.20030617_e.htm>.

⁸ *EGALE Canada v. Canada (A.G.)*, 2003 BCCA 406 [*EGALE*].

judgment, the Court amended its earlier decision⁹ to suspend a remedy similar to that ordered by the Court in *Halpern* and granted immediate relief to the appellants instead.¹⁰

Most recently, the Honourable Martin Cauchon, Minister of Justice and Attorney General of Canada, announced that draft legislation allowing same-sex unions will be examined by the Supreme Court of Canada. Parliament has sought a Reference from the Court to ensure that its proposed legislation is in compliance with the *Charter* and at the same time maintains religious freedoms.¹¹

The *Alberta Law Review* has long been one of Canada's leading generalist law journals that publishes on the topic of gay and lesbian equality issues. The journal has published several articles and case comments cited throughout the major decisions leading up to *Halpern* and *EGALE*.¹² It is our pleasure to sustain that dialogue by introducing the present Forum on Same-Sex Unions and the Law. We are grateful for this opportunity, as well as to our readers for their ongoing interest and support, and to the three authors for their timely efforts in furthering this critical area of legal discourse.

In his thorough analysis of Germany's new Partnership Law, Greg Taylor assesses the potential advantages, disadvantages, and implications of such alternatives to legal "marriage" as a means of legitimating gay and lesbian relationships. By contextualizing his analysis of the German law and related legal developments, he provides readers with an opportunity to draw inferences about parallel developments in Canada and elsewhere. F.C. DeCoste

⁹ (2003), 225 D.L.R. (4th) 472.

¹⁰ These decisions echo equality analyses articulated by the Ontario Divisional Court a year prior in *Halpern v. Canada (A.G.)*, (2002), 215 D.L.R. (4th) 223, and the Quebec Superior Court in *Hendricks c. Québec (P.G.)* (2003) J.E. 2003-466.

¹¹ Canada, Department of Justice, "Minister of Justice Announces Reference to the Supreme Court of Canada" Press Release (Canada: Department of Justice, 17 July 2003), online: Department of Justice <www.canada.justice.gc.ca/en/news/nr/2003/doc_30944.html>. See also Canada, Department of Justice, "Reference to the Supreme Court of Canada" Background, (Canada: Department of Justice, 17 July 2003), online: Department of Justice <www.canada.justice.gc.ca/en/news/nr/2003/doc_30946.html>, where the precise questions in the Reference submission, Canada — Privy Council 2003-1055, dated 16 July 2003, are reproduced as follows:

1. Is the... Proposal for an Act respecting certain aspects of legal capacity for marriage for civil purposes within the exclusive legislative authority of the Parliament of Canada? If not, in what particular or particulars, and to what extent?
2. If the answer to question 1 is yes, is section 1 of the proposal, which extends capacity to marry to persons of the same sex, consistent with the *Canadian Charter of Rights and Freedoms*? If not, in what particular or particulars, and to what extent?
3. Does the freedom of religion guaranteed by paragraph 2(a) of the *Canadian Charter of Rights and Freedoms* protect religious officials from being compelled to perform a marriage between two persons of the same sex that is contrary to their religious beliefs?

¹² See e.g. Ron Levy, "Expressive Harms and the Strands of *Charter* Equality: Drawing Out Parallel Coherent Approaches to Discrimination" (2002) 40 Alta. L. Rev. 393; Julie C. Lloyd, "Defining Marriage, Step One: *EGALE v. Canada*" (2002) 39 Alta. L. Rev. 963; Craig D. Bavis, "*Vriend v. Alberta, Law v. Canada, Ontario v. M. and H.*: The Latest Steps on the Winding Path to Substantive Equality" (1999) 37 Alta. L. Rev. 683; James R. Olchow, "Inside McClung J.A.'s 'Closet' in *Vriend v. Alberta*: The Indignity of Misrecognition, the Tool of Oppressive Privacy, and an Ideology of Equality" (1999) 37 Alta. L. Rev. 648; F.C. DeCoste, "Sexual Orientation and Liberal Polity" (1996) 34 Alta. L. Rev. 950; Shannon K. O'Byrne and James F. McGinnis, "Plessy Revisited: Lesbian and Gay Rights in the Province of Alberta" (1996) 34 Alta. L. Rev. 892; Wayne N. Renke, "Discrimination, Burdens of Proof, and Judicial Notice" (1996) 34 Alta. L. Rev. 925.

establishes a liberal democratic framework from which to advance his critique of *Halpern*, and to challenge the very basis for active state and judicial intervention within “the realm of the social” — in this case, the institution of marriage. In her essay, Julie C. Lloyd considers the predictability of the recent decision in *Halpern*. In light of the contextual history of rights-based struggles among same-sex partners under the *Charter*, she suggests that the decision was overdue as an inevitable application of *Charter* principles as they have been interpreted by the courts.

Read together, the essays are clearly complementary. Ideally, however, they may serve a bolder purpose. Our hope is that the following Forum on Same-Sex Unions and the Law will encourage further reasoned, democratic debate and development in what remains a contentious and vital area of law.

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