Lesbian Love Stories: How We Won Equal Marriage in Canada

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We always knew we would win.
Because love is more powerful than hate. And marriage, ultimately, is about love.

Because the judges looked at the wedding pictures of jubilant brides and proud parents, family and friends laughing and celebrating.

Because we were defiant and did not apologize for our existence. We said that we were already married, because we were; the state just did not recognize it. In the same way that women were always persons, even before the law said we were. And now we are legally married.

Because we did not bow and scrape and plead that we were “just like” an idealized heterosexual couple. We were pierced lesbian sex radicals who wanted to transform marriage from the inside out and make it our own; we were aging men who tended to our friends and held on to each other through the AIDS crisis, forging thirty years of history together; we were lesbians with jobs and kids and dreams, struggling with two incomes at seventy cents on the dollar, and no time to think.

Because the lesbian lawyer said “we” want to marry with a massive pregnant belly, my body exploding the government’s lie that we cannot procreate.

On January 14, 2001, Anne Vautour married Elaine Vautour and Kevin Bourassa married Joe Varnell. These were the first legally recognized marriages between two persons of the same sex in modern times.

1. To me, equal marriage was all about love stories—the emotionally powerful words of the litigants that moved the courts to recognize the humanity of lesbians and gay men, and my own love story. My work on the case was inspired by, nurtured by, and done for the two loves of my life, my spouse, Maretta, and our child, Cameron. So, this paper is written in two voices: one telling the history of the marriage litigation in Canada and the other sharing fragments of one of the personal stories behind it, mine.

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3. Professor William Eskridge notes, “Same-sex unions have been culturally and legally recognized as marriages in dozens, and probably hundreds, of societies in human history.” The government’s own

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weddings were celebrated according to the Christian tradition of the publication of banns in the Toronto Metropolitan Community Church. On three successive Sundays, the intention of the parties to marry was announced during religious service, and, no lawful objection being made, the parties were legally married.

I was nervous sitting in the church pew. There were hundreds of police in the church’s basement in case of trouble and protestors wearing rubber devil masks picketing outside. The guy sitting in the row in front of me kept looking around suspiciously. I found out later he was security. A Metropolitan Community Church in the United States had been firebombed. But as the couples said their vows to each other, I was transported away, abandoning my uncomfortable fidgeting, standing as witness to these lovers and friends, and basking for a moment in the pleasure and happiness of their wedding. Here stood two women in love, pledging to care for each other the rest of their lives. A marriage.

Why was Canada the first country to celebrate legal marriage between two persons of the same sex? In this paper, I discuss two reasons: first, our functional approach to family law; and second, our substantive equality jurisprudence. By a functional approach to family, I mean that we give significant weight to the needs of persons living within families, rather than preoccupy ourselves with the formalities of whether those persons have marriage certificates. We seek to recognize and support the social, economic and emotional interdependencies that arise in all intimate relationships, married or not, different-sex or same-sex. This functional approach recognizes that family is forged over time, in love and labour, not in contract, and that all families may advance true family values. Within families, we are not liberal individualistic selves, atomistic, self-interested bargainers who are able to negotiate freely and make rational choices. We are tangled in webs of evidence acknowledged their existence, in many cultures and at many times in history. Record in Halpern v. Canada, Reply Affidavit of Dr. Eskridge, at page 170 - 173; Affidavit of Dr. Eskridge, particularly at page 372, 404.

4. The Ontario Marriage Act, R.S.O. 1990, Chap. M.3, s. 5(1), s. 17 permits valid civil marriages by publication of banns. No marriage licence is necessary in advance.


6. A functional approach to family is evident in children’s law in Canada. As one example, our courts avoid formal boundaries around standing in custody and access cases. In Ontario, any person may claim custody of a child, even without a relationship by blood or adoption. Other provinces rely on doctrines of in loco parentis and settled intention. This approach looks to safeguard the best interests of children by focussing on the realities of their individual families, from the children’s perspective. A relationship through blood or adoption may be a consideration, but ultimately, the only test is the best interests of the child. Similarly, Canadian courts would not enforce pre-conception agreements like donor or surrogacy contracts. Custody, access and child support are the right of the child and cannot be bargained away by the parents.
interrelatedness, marked by care, passion, sacrifice and trust. Simple justice requires that the law support the needs of all families, in all their forms.

The second reason Canada is a human rights leader in recognizing and affirming the relationships of same-sex couples is our developed articulation of a substantive approach to equality. Our equality aspirations compel an expansive, functional approach to family that resists definitional boundaries grounded in biology, tradition or religion. Instead, substantive equality challenges existing categories, recognizing that these may reflect and reinforce relations of dominance. To challenge discrimination, it is necessary to recognize the primacy of personal stories, to understand the lived effects of the law from the perspective of those marginalized by it. Our rejection of formalistic notions of equality, at least our intention to do so, is a promising avenue for improving the material conditions of people’s lives through the legal system. A functional framework and substantive equality approach together require that family law serve all our families well, meeting their needs with equal dignity and respect. It requires equal marriage for same-sex couples.

The paper then turns to an examination of the path to equal marriage in Canada. It surveys the history of the equal marriage litigation in this country, with a particular focus on the Ontario experience. As co-counsel to the Ontario couples seeking equal marriage, I share a personal account of the litigation, describing the parties, evidence, arguments, and results. I also review the federal government’s Reference to the Supreme Court of Canada and the draft equal marriage legislation currently being considered by Parliament. Finally, I conclude with some thoughts on the international impact of equal marriage in Canada.

I. A FUNCTIONAL APPROACH TO FAMILY LAW

The Canadian legal context is different than most other jurisdictions in that we recognize unmarried couples as spouses on an equal or similar footing to married spouses across many areas of law. In England, for example, no matter how long the relationship, cohabitants have no entitlement to property, support,

7. The Supreme Court of Canada has not been consistent in applying a substantive equality approach, despite its professed reliance on it. In particular, the Court faced a crisis in 1995 over whether to maintain substantive equality or a similarly situated or relevance approach, with the split in Egan and Miron. While the Court ostensibly reunited around a common approach in 1999 in the decision of Law v. Canada, [1999] 1 S.C.R. 497, elements of a relevance approach remain as part of the test. For a critique, see reasons of Justice Binnie in Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General), [2004] 1 S.C.R. 76; Beverley Baines, “Law v. Canada: Formatting Equality” (2000) 11:3 Constitutional Forum 65; June Ross, “A Flawed Synthesis of the Law” (2000) 11:3 Constitutional Forum 74.
or inheritance on intestacy.\textsuperscript{8} The situation is similar in most of the United States. Legal entitlements are very much based on marriage, excluding both different and same-sex unmarried couples from recognition. At the federal level alone, over 1,100 rights and obligations exist for married couples only, with hundreds more at the state level.\textsuperscript{9} The concepts of spousal support or spousal benefits for unmarried couples are almost totally unknown.\textsuperscript{10}

Once upon a time, Canadian family law too was only about married couples and children.\textsuperscript{11} The evolution of our laws began with the recognition that married relationships were an economic partnership under which women were experiencing financial ruin on separation. In 1975, the Supreme Court of Canada applied the common law notion of separate property to deny Mrs. Murdoch any interest in a cattle farm even though she had worked in the fields along side her husband for years.\textsuperscript{12} Mrs. Murdoch committed suicide. After huge public outcry, family law statutes across the country were revised to provide more equitable sharing of the fruits of marriage. At the same time, different-sex cohabitants started to be recognized in pension, spousal support and social assistance legislation. In 1978, the Ontario Legislature included unmarried different-sex cohabitants in spousal support rights and protections. In 1980, in \textit{Pettkus v. Becker}, the Supreme Court of Canada awarded an unmarried different-sex spouse an interest in property held in her spouse’s name on the basis of constructive trust.\textsuperscript{13}

In most cases, though, marriage was the only means to access legal recognition until the 1990s, when courts responded favourably to equality claims that unmarried different-sex couples ought to receive the same treatment

\textsuperscript{8} Although same-sex registered cohabitants may obtain similar rights and responsibilities to married couples under the \textit{Civil Partnership Act 2004} (c.33) that received Royal Assent on November 18, 2004.
\textsuperscript{9} Letter from Dayna K. Shah, Associate General Counsel, United States General Accounting Office, to the Honorable Bill Frist, Majority Leader, United States Senate (Jan. 23, 2004) ("[A]s of December 31, 2003, our research identified a total of 1,138 federal statutory provisions classified \textasciitilde to the United States Code in which marital status is a factor in determining or receiving benefits, rights, and privileges."); Paula L. Ettelbrick, \textit{Wedlock Alert: A Comment on Lesbian and Gay Family Recognition}, 5 J.L. & Pol’y 107, 126-29 (1996).
\textsuperscript{10} Of course, some jurisdictions provide alternative forms of limited relationship recognition, such as Vermont or Hawaii. These regimes provide some legal rights using a segregationist approach.
\textsuperscript{11} Canada is a common law jurisdiction, except for Quebec, which retains a civil law system. The Canadian Constitution divides responsibility between the federal and provincial governments. The federal government has jurisdiction over marriage and divorce. The provinces have jurisdiction over solemnization of marriage, and property and civil rights. Division of property is solely a provincial matter. Custody and support are areas of shared jurisdiction.
\textsuperscript{12} Murdoch v. Murdoch, [1975] 1 S.C.R. 423
\textsuperscript{13} The parties had developed a bee-keeping business together, with Ms Becker – weighing less than 100 pounds - assisting in lifting bee-hives weighing over 80 pounds. She was awarded a half-share of the property. Ultimately, though, Mr. Pettkus did not maintain the hives, the bees died, and Ms Becker killed herself, facing dire poverty and massive legal bills.
as married couples. The Canadian Charter of Rights and Freedoms\textsuperscript{14} was therefore critical in achieving a functional approach to family law.

II. THE SUPREME COURT OF CANADA AND THE FAMILY

The Canadian Charter of Rights and Freedoms ("Charter") is part of the Constitution of Canada. The Charter guarantees fundamental rights and freedoms, subject to such reasonable limits as may be demonstrably justified in a free and democratic society. Any law inconsistent with the Charter is of no force and effect, and a court is empowered to award such "remedy as the court considers appropriate and just in the circumstances."\textsuperscript{15} The equality guarantee of the Charter, section 15, came into effect April 17, 1985. It provides:

15 (1) 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.

15 (2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

The guarantee is subject to the limitation of section 1 of the Charter:

1. The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

The Charter's equality guarantee inspired expanded protections for unmarried cohabitants, in different-sex and same-sex relationships. \textit{Miron v. Trudel}\textsuperscript{16} was the leading case in favour of extending spousal recognition to unmarried different-sex couples. The 1995 decision of the Supreme Court of Canada held that it was unconstitutional to exclude unmarried different-sex couples from the definition of "spouse" for the purposes of automobile accident benefits under the \textit{Insurance Act}.\textsuperscript{17} The Court recognized that persons involved in unmarried relationships constituted a historically disadvantaged group who continued to be stigmatized relative to married spouses. Marital status discrimination "touches the individual's freedom to live life with the mate of

\textsuperscript{14} Canadian Charter of Rights and Freedoms, Part 1 of the Constitution Act, 1982, being Schedule B to the Canada Act, 1982 (U.K.), c. 11.
\textsuperscript{15} Charter, s. 24(1), 52(1).
\textsuperscript{17} Insurance Act, R.S.O. 1990, c. I.8.
one’s choice in the fashion of one’s choice.” This is a matter of rejecting the argument that unmarried spouses ought to enjoy different rights and obligations from those of married persons since persons are free to choose whether or not to enter into marriage. The majority held that the “choice” of whether or not to marry may be more apparent than real.18

The dissent emphasized the relevance of limiting the benefit to married spouses, because the legislative benefit was directed at married relationships only. The majority recognized that this circular reasoning failed to interrogate “the effect or impact of the distinction in the social and economic context of the legislation and the lives of the individuals it touches.” Adopting this perspective, it was clear that the non-recognition of unmarried relationships discriminated in a substantive sense.

On the same day it decided Miron, the Supreme Court of Canada released its first same-sex relationship decision under the Charter, Egan v. Canada.19 In that case, a gay male couple challenged the constitutionality of the definition of “spouse” under the Old Age Security Act,20 which excluded same-sex cohabitants. The Supreme Court unanimously recognized sexual orientation as an analogous ground of discrimination, a protected characteristic frequently associated with discriminatory treatment like those grounds listed expressly in the Charter.

The case was otherwise a serious loss. In a 4-1-4 decision, a majority of the Court ruled that the definition of “spouse” was discriminatory but found the impugned provision to be demonstrably justified in a free and democratic society. The Court fractured over its commitment to substantive equality, with four judges stumbling over legislative intention and definitional boundaries of discrimination. In his swing decision, Justice Sopinka recognized that the law was discriminatory but held that, under section 1 of the Charter, the government was entitled to more time to respond to the “novel” claim.

Jim and Jack. Recognition of their relationship as “spousal” would be “too novel?” They had been together their entire adult lives. Jim Egan, Canada’s first gay activist, died at the age of 78 on 9 March 2000.21 His spouse for over fifty years, Jack Nesbitt, died a short time later the same year. Neither lived to see the achievement of civil marriage for same-sex couples in Canada.

18. Ibid. at para.153-156.
The *Egan* decision made it clear that the exclusion of same-sex spouses could not be justified much longer. In conjunction with the insistence on the equal treatment of unmarried different-sex couples in *Miron*, it seemed clear that the law was moving toward equal treatment for all intimate relationships.

Indeed, just four years later, in 1999, the Supreme Court of Canada released the breakthrough decision of *M. v. H.*\(^{22}\)

She had $5.64 in her bank account. Her clothes had been dumped in garbage bags on the front lawn. The locks to the house had been changed. The phone number at the business they had built together was being answered under a new name. Her spouse told her she was entitled to nothing because they were in a same-sex relationship. And her spouse was right. Until the Supreme Court of Canada ruled that exclusion from the protections of the spousal support scheme was unconstitutional — and so M’s story transformed family law.

In *M. v. H.*, our highest court held that the exclusion of same-sex couples from the definition of “spouse” violated the equality guarantee of the *Charter*. Embracing a substantive equality approach, the Court considered at the impact of the legislation within a larger social context of heterosexism and homophobia. The Court ruled:

The exclusion of same-sex partners ... promotes the view that M., and individuals in same-sex relationships generally, are less worthy of recognition and protection. It implies that they are judged to be incapable of forming intimate relationships of economic interdependence as compared to opposite-sex couples, without regard to their actual circumstances.... [S]uch exclusion perpetuates the disadvantages suffered by individuals in same-sex relationships and contributes to the erasure of their existence.

The violation of M’s right to equality was not demonstrably justified under section 1 of the *Charter*. The Court found that the objective of the *Family Law Act*\(^{23}\) was to provide for the equitable resolution of economic disputes that arise when intimate relationships involving financially interdependent persons break down, and to alleviate the burden on the public purse by shifting the burden of support to the other intimate partner rather than to the general body of taxpayers. There was no rational connection between the objectives of the legislation and the exclusion of same-sex couples; the government had failed to show that the rights of same-sex couples were impaired no more than reasonably necessary for the achievement of its goals and the deleterious effects of the measures were not outweighed by the promotion of laudable legislative goals.


\(^{23}\) R.S.O. 1990, c. F. 3.
Turning to possible remedies, the Court noted that same-sex couples were not covered under the provisions that allow both married and different-sex cohabiting couples to opt out of the legislative scheme by domestic contract. The Court therefore ruled that "reading in", which would permit an immediate remedy for same-sex couples, was not appropriate. The Court declared the definition of "spouse" for support purposes of no force or effect but suspended the remedy for a period of six months to allow the government time to respond. The Court also urged Legislatures to amend other statutory provisions to provide equal recognition and protection to same-sex couples.

Reading M. v. H. together with Miron strongly suggested that there had to be equal treatment for all spouses, whether married or unmarried, opposite-sex or same-sex. Legislatures therefore embarked on comprehensive law reform.

III. LEGISLATIVE REFORMS: EXPANDING RECOGNITION AND PROTECTION

The theme of the cross-country amendments was that in order to assist all our families, we would look at the function of family rather than its form. This functional approach was grounded in arguments that it was discriminatory to employ marriage and sexual orientation to define the boundaries of family. Some legislatures maintained some differences in the treatment of cohabitants versus married couples, and in the treatment of same-sex couples versus different-sex couples. Others granted equivalent treatment regardless of marital status or sexual orientation. Over time, and across the country, marriage largely lost its status as a privileged marker of entitlement.

24. If the government had not responded during the six-month suspension, and the Court's judgment became operative, the extended definition of "spouse" would have been struck down so that only married spouses would have been entitled to spousal support, and both unmarried different-sex and same-sex couples would have been excluded from support protections. This is not an equality-promoting result, and with respect, remedy was wrongly decided.

25. In fact, despite widespread predictions to the contrary, and in a significant reversal from Miron, a majority of the Supreme Court of Canada ruled in Nova Scotia (Attorney General) v. Walsh, [2002] 4 S.C.R. 325, that it was constitutional to draw distinctions between married and unmarried couples in matrimonial property law. Many provinces had already amended their statutes in a more inclusive manner, but Canada is not likely to achieve equal treatment of all intimate relationships in family law in the immediate future.

Nova Scotia introduced registered domestic partnerships to give many of the rights and obligations of married couples to same-sex spouses under provincial laws, including property rights in the event of death or separation. Quebec also passed civil union legislation to give couples in same-sex and common law relationships virtually the same rights and obligations as married couples. Manitoba introduced a registry system, providing access to many of the rights of married couples. Where cohabitants do not register, the couple will still be subject to default property sharing after the requisite period of cohabitation. In Saskatchewan, cohabiting partners enjoy the same benefits as married spouses, including matrimonial property division. Alberta, with the most conservative populace in Canada, introduced the *Adult Interdependent Relationships Act.* It sets out financial responsibilities for unmarried relationships involving economic and emotional interdependency, including committed platonic relationships where two people agree to share emotional and economic responsibilities. Two persons who live or intend to live in an interdependent relationship may enter into an adult interdependent partner agreement. Failing an agreement, the same responsibilities and benefits attach after three years of cohabitation or a child together.

In Ontario, the government passed omnibus legislation, *Amendments because of the Supreme Court of Canada decision in M. v. H. Act* ("M. v. H. Act"). The legislation did not amend the definition of "spouse" to include same-sex couples. Instead, it introduced a new category, "same-sex partner," meaning either of two persons of the same sex who have cohabited continuously for a period of not less than 3 years or are in a relationship of some permanence if they are the natural or adoptive parents of a child. The *M. v. H. Act* ensured that almost all statutes providing rights and obligations to unmarried different-sex couples extended the same protections to "same-sex partners." Whenever rights and obligations were accorded to "families" for different-sex partners, the same were granted to the "households" of same-sex partners. The government claimed that the Act responded to the Supreme Court of Canada decision "while preserving the traditional values of the family by protecting the definition of "spouse" in Ontario law."  


27. S.A. 2002, c. A-4.5; It is worthy of note that the conservative response to equal marriage is to demand extension of relationship recognition to non-conjugal relationships. In the Canadian context, this possibility was studied and discussed in the report of the Law Commission of Canada, *Beyond Conjugalilty: Recognizing and Supporting Close Personal Adult Relationships* (Ottawa, December 21, 2001).


29. Legislative Assembly, Ontario Hansard (27 October 1999) at 1830 [emphasis added].
While the legislation provided equivalent treatment to same-sex couples, it missed the message of substantive equality, as same-sex couples were framed as a threat to the "values of the family." Substantive equality is not about securing the same financial rights and obligations, but has the more transformative goal of achieving full and equal dignity and respect at law for oppressed peoples. Instead of eliminating the offence to dignity, segregated status under the \textit{M. v. H. Act} merely reconfigured discrimination against gay and lesbian spouses.

Language is imbued with power. Gays and lesbians were excluded from the terms "spouse" and "family" because words are more than just labels. Words are embedded with statements of value, with accepted societal significance. Different nomenclature on the basis of sexual orientation, within a wider social context of homophobia and heterosexism, perpetuated and promoted the view that same-sex relationships and families were less worthy of recognition or value in Canadian society.\textsuperscript{30}

Although equal adoption had been available to lesbians and gays in Ontario since 1995 by judicial intervention,\textsuperscript{31} the adoption provisions of the \textit{Child and Family Services Act}\textsuperscript{32} were amended in a different manner. The government did not include "same-sex partners" in this statute at all, but instead provided that an adoption application may be made by single individual, jointly by spouses, or "by any other individuals that the court may allow, having regard to the best interests of the child." The latter category was meant to include adoptions by same-sex couples. Arguably, it also permitted adoptions by parties of three or more. While this legislative drafting could be read as expansive and inclusive, the refusal to include the phrase "same-sex partner" in the adoption legislation, especially when it had already been judicially amended, was clearly motivated by homophobia. The government no doubt

\textsuperscript{30} On M's behalf, we brought a motion for rehearing of \textit{M v H.} before the Supreme Court of Canada arguing that the government had failed to comply with the judgment within the period of suspension, since the \textit{Act} failed to amend the unconstitutional definition of "spouse" in a non-discriminatory manner. The Court dismissed the motion for rehearing, without reasons, likely on the basis that a rehearing was the inappropriate procedure. While it would have been more proper to challenge the legislation in a court of first instance, it would have been costly, time-consuming and utterly impractical. The motion for rehearing was not fruitless, however. It registered dissent and fostered dialogue around the differential nomenclature. This may have been a factor in the Ontario government's recent elimination of the offensive "same-sex partner" language.

\textsuperscript{31} In \textit{Re K.} (1995), 23 O.R. (3d) 679 (Prov. Ct.), in response to a constitutional challenge, Justice Nevins re-wrote an exclusionary definition of "spouse" so as to include same-sex couples for the purposes of family and stranger adoptions. Applications by non-biological mothers to adopt children birthed by their partners are now routine and are processed in Toronto without a court attendance, unless the family wants to take photographs with the judge granting the order. No home study is required. In addition to lesbian "step-parent" adoptions, many same-sex couples have successfully accessed stranger adoptions. For years now, the Toronto Children's Aid Society has been actively recruiting same-sex couples as adoptive parents.

\textsuperscript{32} R.S.O. 1990, c. C. 11, s. 146(4).
wished to avoid any mention of same-sex relationships in a child-related context.\footnote{33}

The \textit{M. v. H. Act} amended dozens of other statutes, including the \textit{Family Law Act},\footnote{34} \textit{Land Transfer Tax Act},\footnote{35} \textit{Mortgages Act},\footnote{36} \textit{Change of Name Act},\footnote{37} \textit{Succession Law Reform Act}\footnote{38} and the \textit{Pension Benefits Act}.\footnote{39} The general theory was that all unmarried couples, whether of the same sex or different sex, would have the same rights and obligations. The rights and obligations that applied to married spouses only (for example, intestacy protections\footnote{40} and matrimonial property division\footnote{41}) were not amended to include same-sex spouses.

I sat in the Ontario Legislature with "M" and Martha on the day it passed the legislation prompted by her case, "The Act to Amend Certain Statutes Because of the Supreme Court of Canada Case in M. v. H." — popularly known as the "Devil Made Me Do It Act." We watched, silent in the balcony, as the Members of Provincial Parliament did crossword puzzles, looked at photos or stood to congratulate themselves on their respect for human rights.

M. left—stunned—wondering what her eight years of litigation were for. She never got any spousal support.\footnote{42} She never had a hearing of her family law case. \textit{M. v. H} was supposed to be about social inclusion, changing discriminatory attitudes, giving same-sex couples respect and recognition in law.

\textbf{33.} There was no reason to deviate from the "same-sex partner" language in this instance, other than homophobic concern about "gays and children." Same-sex parenting is the "hot button issue" for social conservatives. This likely originates in the homophobic myth that gays and lesbians are pedophiles. Others express concern that same-sex couples are unable to educate children in heterosexuality and proper gender performance. A significant measure of the anxiety around equal marriage actually revolves around the perceived link between marriage and parenting. In Ontario, when the "gay-positive," socially progressive New Democratic Party was in power, they introduced Bill 167, which would have given same-sex couples equal rights and obligations to unmarried different-sex couples. When it looked like support for the Bill was failing, the government "threw women and children overboard" [in Michael Leshner’s language] and abandoned the proposed amendment of the adoption legislation. Bill 167 was put to a free vote in the Legislature and was defeated, to significant and immediate protest by gays and lesbians. Security personnel wearing rubber gloves forcibly removed those in the gallery of the Legislature shouting, "Shame!" This use of rubber gloves is notorious in the GLBT community because it signified quite clearly to us that GLBT people were looked upon as dirty, contaminated, and infectious.

\textbf{42.} M., tired of fighting, settled the issue of support after the decision of the Court of Appeal in her case. The constitutional issue had to be heard and finally decided before a hearing of the merits of her support claim, and looking ahead at possibly years of future litigation, M. waived her right to support and settled for her minimum property entitlement.
Instead, the Premier suggested that the “traditional family” needed to be protected from same-sex couples. While the government was grudgingly willing to give same-sex couples equivalent rights and obligations, it refused to accord full and equal spousal status, marking lesbians and gay men as deviant outsiders to legal notions of family and community.

In contrast to Ontario’s segregationist nomenclature, the federal government took a more inclusive approach. Parliament responded to the Supreme Court of Canada’s decision in \(M. v. H.\) by passing the Modernization of Benefits and Obligations Act ("MBOA"). The MBOA amended 68 statutes to extend benefits and obligations to all conjugal couples equally, including the Old Age Security Act, Canada Pension Plan Act, and the Income Tax Act. Married, different-sex unmarried and same-sex couples were all granted equivalent rights and obligations. The MBOA adopted a new category “common law partnership,” defined as a relationship between two persons who are cohabiting in a conjugal relationship having so cohabited for at least one year.

So, while American gays and lesbians pursued marriage in the early 1990’s, Canadians were winning equal treatment between same-sex and different-sex unmarried spouses. As a result, by the turn of the century, one of the only significant items withheld from gays and lesbians in Canada was marriage itself.

In the Ontario equal marriage litigation, the government could therefore argue that gays and lesbians already received equivalent treatment, so there was no reasonable complaint of discrimination. Extensive relationship recognition, but exclusion from marriage, actually highlighted the government’s intention to privilege heterosexuality—to declare it normal, natural and normatively superior, uniquely worthy of the state sanction of civil marriage. This context also made it clear that the case was about the recognition of our humanity, and love, rather than access to financial benefits. Our fight was for marriage itself: the unique expressive resource, the public commitment, the ritual that makes lovers into family members, the currency of the word “marriage” in our

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46. R.S.C. 1985, c. 1 (5th Supp.).
48. While same-sex couples have fought for the freedom to marry, Canadian different-sex couples have increasingly chosen to cohabit outside of marriage. Between 1995 and 2001, the number of couples living in common-law relationships rose by 20%. Statistics Canada, “Changing conjugal life in Canada,” The Daily (July 11, 2002); Married couples accounted for 70% of all families in 2001, down from 83% in 1981, while the proportion of common-law couples rose from 6% to 14% in the same period. In 2001, 13% of Canada’s children lived with common-law parents, a fourfold rise from 20 years earlier. In Quebec, the ratio was closer to 29%. Statistics Canada, “2001 Census: Marital status, common-law status, families, dwellings and households,” The Daily (October 22, 2002).
everyday lives, the feeling of enhanced security for our children, the culturally understood rite of passage that binds friends and families together.

Marriage was on the federal government’s mind as it extended equivalent rights and obligations to same-sex couples. The MBOA included an interpretation clause which stated that, “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.”

After winning M. v. H. in 1999, the time was clearly ripe for litigation seeking equal marriage. The “interpretation clause” of the MBOA underlined the government’s insecurity around the constitutionality of exclusion of same-sex couples from marriage. Following M. v. H., it was going to be impossible to exclude same-sex couples from civil marriage on a substantive equality rights analysis.

IV. SUBSTANTIVE EQUALITY

Canada’s substantive approach to equality was instrumental in achieving early successes in gay and lesbian rights litigation. Our courts have said that substantive equality is aimed not just at solving individual problems of inequity, but rooting out and ending systemic discrimination. It is therefore necessary to look closely at the lived experience of people’s lives. The objective is to prevent the violation of human dignity and freedom, and to promote a society in which all persons enjoy equal recognition at law and are treated as equally deserving of concern, respect and consideration.

A substantive equality analysis may be contrasted with the American model of formal equality. Formal equality, relying on the similarly situated test, is theorized as treating likes alike. Formal equality concentrates on the purpose of the law and tests likeness by reference to that purpose. It therefore requires comparisons between groups, maintaining those currently accorded rights as the norm.

In contrast, the Canadian substantive equality approach focuses on the lived experience of the claimants. It looks at effects, in the larger social and political context of the claim. The central consideration is whether the impugned law offends the claimant’s human dignity. This inquiry is both subjective and objective. The relevant point of view is that of the reasonable person, fully apprised of the background and circumstances of the claimant, who takes into account the contextual factors relevant to the claim. In every case, the focus is whether, from the requisite subjective-objective perspective, the law demeans the claimant.

49. S.C. 2000, c. 12, s. 1.1.
In *R. v. Morgentaler*, Justice Bertha Wilson offered a substantive approach to equality. In describing women’s thinking about abortion, she writes:

This decision is one that will have profound psychological, economic and social consequences for the pregnant woman. The circumstances giving rise to it can be complex and varied and there may be, and usually are, powerful considerations militating in opposite directions. It is a decision that deeply reflects the way the woman thinks about herself and her relationship to others and to society at large. It is not just a medical decision; it is a profound social and ethical one as well. Her response to it will be the response of the whole person.

It is probably impossible for a man to respond, even imaginatively, to such a dilemma not just because it is outside the realm of his personal experience (although this is, of course, the case) but because he can relate to it only by objectifying it, thereby eliminating the subjective elements of the female psyche which are at the heart of the dilemma.  

Diana Majury describes this analysis as one of the best and strongest articulations of substantive equality:

It is contextual, focused on inequality, and premised on women’s experiences. The context is the human rights context of women’s inequality and the history of women’s struggle to be admitted as distinct persons within that context. There is no need for a comparator group; in fact, attempts to find a comparator group would undermine this analysis. Substantive equality is about recreating society and societal structures to incorporate “differences,” not to distort them, appropriate them, reject them through objectification or denial, merely “accommodate” them, or assess them against some presumably “un-different” comparator group.  

Those opposed to equal marriage urge an “objective” assessment of the exclusion of same-sex couples from marriage, from a discriminatory perspective that presumes the superiority of heterosexuality. They say gays and lesbians, our relationships and our families, are fundamentally different, and “do not fit” within the purposes of marriage.

Substantive equality requires that we refrain from judging the subjective experience of the claimant against an “objective” standard that reifies relations of dominance. Instead, the requirement of a contextualized approach and subjective-objective perspective is meant to allow us to pivot the centre to situate the analysis within the full, lived experience of the claimant. As advocates, we urged the court to step into the shoes of a reasonable person with

the same traits, history, and circumstances as the claimants, to "walk a mile" in our shoes.

We explained to the court that this shift in perspective is necessary because social "outsiders" have a different perspective, different knowledge. We know the "centre," meaning that we have to understand dominant frameworks to function in the mainstream, and we know the margin. We told the Court that, to advance substantive equality, it is necessary to "pivot the centre"—to situate the analysis within the full, lived experience of the claimant. We challenged the Bench to go beyond dominant ways of thinking, perhaps their own privileged viewpoint, to see the world from the perspective of those on the margin.

This analysis borrows heavily from feminist standpoint theory, which suggests that oppressed groups may have epistemic privilege. While feminist standpoint theory has been critiqued as essentialist by assuming a common experience, it is a highly useful approach to substantive equality litigation. In that context, it forces the Court to take seriously people's lived experience. It acknowledges particularity and difference because the group of litigants is limited and has a specific commonality of interests. This approach offers a means for people to tell stories that may result in concrete change.

*If you walk a mile in the shoes of the reasonable gay or lesbian person...*

*You know that the history of same-sex relationships is one of erasure, closeting and fear so that the stories of relationships between persons of the same sex—let alone marriages—are often hidden in history.*

*You know that heterosexuality and marriages are celebrated as an ideal—And the mantle in almost every house is full of joyful wedding pictures.*

*If you walk in our shoes, you know that gay teenagers are three times more likely to commit suicide than their straight counterparts because they think they will never have a normal life...*

*You know that any two 18 years olds who have known each other only a day can get married, if they are heterosexual.*

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52. This approach largely derives from the writings of bell hooks, most significantly, *feminist theory: from margin to center* (Cambridge: South End Press classics; v. 5) and Elsa Barkely Brown, "African-American Women's Quilting: A Framework for Conceptualizing and Teaching African-American Women's History," 14 *Signs* (Summer 1989).

You know that any two 81 year-olds who have no hope of procreating can get married, if they are heterosexual.

If you walk in our shoes, you know that you love your spouse and want to spend your life with her, have kids, live together for richer or poorer, in sickness and in health...

You know that you are capable of marriage, and that your love is worthy of the state sanction that is civil marriage.

This is the context of the claim. This is the context in which gays and lesbians live our lives.

V. THE LITIGATION

In the spring and summer of 2000, three groups of litigants pursued equal marriage in Canada. Their cases were Halpern in Ontario, EGALE in British Columbia, and Hendricks in Quebec.

We acted for the applicant couples in Halpern v. Canada – Hedy and Colleen, Mike and Michael, Dawn and Julie, Al and Tom, C.J. and Carolyn, Barb and Gail, and Alison and Joyce. We introduced them in our factum as men and women from all walks and stages of life who simply wanted to share their love for their partner in civil marriage. They included a nurse, a psychotherapist, university students, a Crown Attorney, and a church deacon. Four of the couples parented children together, and three more of the couples hoped to rear children in the coming years. Some were Jewish, some Christian; two met and fell in love as Anglican clergy. Some had been previously married to a different-sex partner, some had married their same-sex partner in a non-legally recognised ceremony, and some waited for legal recognition before they would marry. A few had lived together a short time; others had already shared their lives more than 25 years. They hailed from across Canada – from Newfoundland, from Ile du Grand Calumet, from Kingston, from Fredericton, from Saskatoon. All had a very ordinary, usually taken-for-granted wish: to marry the person they loved.

We planned to seek funding to represent these potential litigants in a marriage case. We asked the couples to apply for marriage licences, and quietly “go get rejected” as part of the application for litigation funding. Instead, one of our clients, a Crown Attorney, was so offended by the City Clerk’s summary dismissal that he demanded written reasons for her decision. The Clerk forwarded the issue to the City legal department. Over the course of

54. Factum of the Applicant Couples in Halpern v. Canada (A.G.), Court File No. 684/00 (Div. Ct.). Note that the definitional preclusion and substantive equality analysis is best explored in the Reply Factum (Div. Ct.).
the week waiting for the answer, rumours circulated wildly that licences would be issued.

In the end, the legal department said it was unsure whether licences should be granted to the couples. There was no statutory impediment to equal marriage. The Divisional Court decision excluding same-sex couples from marriage—*Layland v. Ontario*55—pre-dated *M. v. H.*, the Supreme Court precedent that strongly suggested that same-sex couples were entitled to equal relationship recognition. The Province had issued a directive not to issue licences. The Clerk decided it would seek directions from the Court as to whether it should issue licences. To ensure that our clients had carriage of the litigation, we quickly pulled together our application materials and filed on the same day as the City.

The Court ruled that we would have carriage of the case.56 Later, two couples that were married at the Metropolitan Community Church, and the Church itself were added as party intervenors in our case, we were added as intervenors in their case, and the two cases were heard together.57 The Church adduced the evidence from varied faith groups, including Quakers, a Catholic priest who was censured for his participation,58 Jews, and Anglicans. The Church’s intervention highlighted that our case was only about civil marriage. It also demonstrated that marriage for same-sex couples was not counter to religious freedom, but enhanced it. The British Columbia and Quebec equal marriage cases started shortly thereafter.

In all provinces, the applicant couples faced formidable opposition from the federal government. The government spent almost half a million dollars on expert evidence, scouring the nation, and indeed the globe, for academics opposed to equal marriage. Many engaged in truly bizarre speculation. A professor of comparative religion warned against the extension of marriage to same-sex couples, worrying that social norms of heterosexuality are necessary to draw men and women together since they are so different. Without cultural

58. Rev. Tim Ryan filed an affidavit stating, “Many others of us [Catholics] believe that the Catholic tradition’s long-established and profoundly held commitment to fundamental human rights and social justice requires that we support the notion of equality for gay and lesbian individuals and that our courts are correct in their judgement that this must include the right to marry. We therefore welcome the proposed legislation as it creates equality for gays and lesbians while continuing to safeguard the Church from being forced to perform marriages that are not in conformity with its beliefs and rituals.” The priest’s support of the MCCT application led to his suspension of his active ministry status within the Archdiocese of Toronto, and he is no longer permitted to celebrate mass in public or to preach. He wrote, “If the price of siding publicly with our courts and government in their effort to extend basic human rights to a minority in Canada in the year 2004 requires that I pay this heavy a price within my own church community, then I feel very deeply saddened, but at peace with my decision.”
incentives, it was said, women would no longer have any need for men in the world, except for a "teaspoon full of sperm" for donor insemination.\textsuperscript{59}

We had to find experts who were willing to help us with the case for free, but were able to obtain the assistance of nineteen exceptional expert witnesses, including Dr. Rosemary Barnes, psychologist; Dr. Margrit Eichler, University of Toronto sociologist; Dr. William Eskridge, Professor of Jurisprudence at Yale Law School; Dr. Jerry Bigner, Professor of Child and Family Development; Dr. Ellen Lewin, Professor of Anthropology and Women's Studies; Drs. Judith Stacey, Timothy Biblarz, and Barry Adam, sociologists; Dr. Andrew Koppelman, Dr. Robert Wintemute, and Professor Evan Wolfson, foreign law experts; Drs. Bettina Bradbury and Randolph Trumbach, historians; Dr. Katherine Arnup, Professor of Canadian Studies; Drs. Cheshire Calhoun and Adele Mercier, philosophers; and Dr. David Rayside, University of Toronto Professor of Political Science. Finally, we had the ultimate expert—a PFLAG\textsuperscript{60} mom.

At any counsel meeting, numerous government lawyers would sit behind stacks of research, writing and analysis, across from me, a relatively junior attorney armed only with a notepad. Rumour has it they had at least a dozen lawyers on the case full time. In contrast, Martha and I tried to represent paying clients with child support variations and Friday afternoon access problems, as well as litigate perhaps the most important equality case of our generation. The government wanted to cross-examine every deponent, including the couples themselves. We wondered about what — whether they loved each other enough to marry? We obtained an order from the case conference judge that cross-examinations would be limited. The Attorney General conducted four.\textsuperscript{61} We conducted none.

\textit{The government lawyer says, "You might be surprised at my views, you know. I am not homophobic at all." "Sure, whatever, I understand you are doing your job," I mutter. "Well, it is just a question of what the Charter is meant to do. It is like a dog is a dog, and a cat is a cat", she says. I let her go on. "The Charter is not meant to change the meaning of words." I say something about how...}
this conversation makes me feel, the effect of claiming my marriage does not "fit", but she claims that is not relevant.

What a bizarre conversation, I think when I put down the phone. And what twisted ideas. You – heterosexual - are a dog, and I – lesbian—am a cat? We are both human beings, both part of the human family. But we are not both entitled to the fundamental right to marry.

The government was joined by two intervenor coalitions opposing equal marriage, the Interfaith Coalition on Marriage and the Family and the Association for Marriage and the Family. The Interfaith Coalition included Catholics, Sikhs, Muslims, and Evangelical organizations. The Association was comprised of Focus on the Family, REAL Women of Canada (an anti-feminist “traditional” family group) and the Canadian Family Action Coalition (an anti-equal-marriage group).

The federal government and these intervenors made similar arguments. They alleged there was no discrimination in excluding same-sex couples from marriage; marriage “just is” the union of one man and one woman. A philosopher of language testified that the “marriage” of a same-sex couple was an oxymoron. In the same way as applying the descriptor “women” does not discriminate against men, limiting the application of the word marriage to the unions of men and women did not discriminate against same-sex couples.

Same-sex couples were essentially different. We did not fit within the institution of marriage, a pre-legal concept that has existed since time immemorial as a virtually universal norm. We lacked the essential complementarity that resulted in the birth of “natural” children. Moreover, the government and anti-marriage intervenors suggested that same-sex parenting might have negative outcomes for children. Here, the government relied on the evidence of the official spokesperson of the Catholic Archdiocese of Toronto who has a doctorate in anthropology; a professor of comparative religion whose evidence was on sociobiology; and the report of a demographer who insisted that the sample sizes were too small in the voluminous same-sex parenting research so that no conclusions could be safely drawn about the outcomes for children of lesbians and gay men. The “traditional family values” intervenor relied on an expert opinion warning of the inferiority of same-sex parenting which was replete with irrelevant evidence and citations to the work of an author expelled from the American Psychological Association and censored by the American Sociological Association for disreputable practices.

62. The affidavits of Suzanne Scorsone, Katherine Young and Stephen Nock, filed by the Attorney General of Canada, in Halpern v. Canada (A.G.), Court File No. 684/00.

63. The affidavit of Craig Hart, filed by the Association for Marriage and the Family, in Halpern v. Canada (A.G.), Court File No. 684/00.
The government also argued that there was no substantive inequality. There was no offence to dignity. Same-sex couples had access to all the same rights and obligations as married couples, at least a federal level. The provinces could cure any remaining differences in treatment. All that same-sex couples lacked was identical nomenclature. A formal difference in language, without more, did not create discrimination in a substantive sense. Certainly, the international evidence demonstrated that Canadian gays and lesbians were comparatively well treated relative to our brothers and sisters in other nations.

The federal government also proposed that each province ought to introduce registered domestic partnerships, while the federal government would "preserve" marriage for heterosexuals only. The government pointed to the debate within queer communities around the value of equal marriage. Expressly relying on "anti-assimilationist" queer theory, the government proposed that identical treatment was not necessary and that "alternatives" might be more appropriate.

Perhaps all of you anti-marriage queers need to question whether your arguments are truly transgressive when you find yourselves snuggled up to the religious right as bedfellows. Your "anti-assimilationist" critiques have serious political consequences in this fight-for-our-lives debate. And your bold coldness threatens many people's everyday dreams. Hannah and Robbie want to celebrate their moms' marriage. Michael and Mike want to dance with their mothers on their wedding day. Some gay and lesbian teens just want to feel like they can live a normal life, and for them, that means falling in love, getting married and raising kids.

Hate marriage? Fine. Don't get married. But you cannot make a coherent political statement against marriage when you do not even have the choice. Why should straight people have the authority to define marriage? Feminist critiques of marriage have reflected the experiences of heterosexual women. Lesbian marriage is not patriarchal. Our marriages necessarily subvert male and heterosexual dominance. We must be the change we want to see in the world.

As counsel looking to legal theory to assist with the litigation, it was frustrating that the majority of scholarly writing was so unhelpful. From my vantage point, trying to achieve a remedy for real people, the marriage

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64. Transcript of cross-examination of John Fisher on his affidavit sworn January 10, 2002, on June 19, 2001, in Toronto, Questions 35-73. The government, in its cross-examination of the Executive Director of EGALE, Canada's national GLBT rights group, relied on the anti-assimilationist critiques of Brenda Cossman, Nancy Polikoff, Claudia Card and Michael Warner. See, for example, Warner, Michael. The Trouble with Normal: Sex, Politics, and the Ethics of Queer Life (New York: Free Press, 1999). Much of the U.S. commentary is concerned with privileging married over unmarried relations, and the failure to provide basic protections to all, untied to conjugality. In Canada, these criticisms have less force: we have extensive recognition of unmarried relationships and socialized medicine. It is possible to pursue both equal marriage recognition and expansive family recognition and protection for all. In fact, these goals are complementary and mutually reinforcing.
critique—while purporting to be radical—was reactionary. It also seemed that the anti-assimilationist writers were indifferent to the political consequences of their abstract theorizing. Did they ever pause to consider the effect of their position on Dawn and Julie and other families currently fighting for the right to marry? It may be “assimilationist,” but when Alison and Joyce turn to each other in moments of crisis and despair, or joy and celebration, and find the enduring love to which they have committed themselves and shared with their children, they know that they are human beings equally capable of the love and commitment of marriage.

At root, is it not important to recognize that, across sexual orientations, people with a desire to marry do have something important in common? A universal [dare I say it?] experience that is part of being human: falling in love, wanting to share your life with someone and make a family together. Is it not a good thing for heterosexuals to recognize that same-sex couples love each other just as much as different sex couples?

I debated one queer writer on a radio broadcast heard by thousands of rush-hour commuters. He supported exclusion from marriage on the basis that “gays” were biologically incapable of sexual exclusivity and marriage was therefore an inappropriate institution for the gay community. With his “insider” authority as a “minority” speaker, he had more credibility than a religious fundamentalist but his analysis was very much the same, except that he celebrated sexual freedom rather than vilified it. At the same time that he weakened support for equal marriage in the heterosexual community, he managed to significantly further discriminatory stereotypes about men and male sexuality, contributed to lesbian erasure and implied that male sexual violence was inevitable. With friends like this...

Our answer in reply, throughout the litigation, was to situate our claim within the larger context of homophobia and heterosexism, to describe the lived impact of exclusion from marriage on human dignity, and to tell our love stories. We made it clear that the federal government sought to privilege different-sex relationships as normal, natural, fundamental, and normatively superior. We said this was bigotry and used analogical arguments, looking at the history of excluding classes of people by “definitional boundaries.” We returned again to the mandate of substantive equality: to reject definitional imperatives of exclusion grounded in tradition, religion, and so-called biological necessity. We sought instead to interrogate “common-sense” meaning by privileging the voices of those excluded by the law.

The voices of the couples revealed that marriage and citizenship are such intertwined notions, that it is not possible to bar a group of people from
marriage without undermining their status as citizens.\(^\text{65}\) As long as the state denied us civil marriage recognition, gay and lesbian Canadians were not treated as "equally worthy of full participation in Canadian society."\(^\text{66}\)

We argued that the discriminatory impact of exclusion from marriage was clearly revealed "in the context of the place of the group in the entire social, political and legal fabric of our society."\(^\text{67}\) We noted the historic and current denigration of lesbians, gays, and our relationships, the corresponding celebration of heterosexuality as a normative ideal, the relative political powerlessness of gay and lesbian people, the changes to marriage over time, and the continuing cultural significance and privileged status of marriage. In this context, the exclusion of same-sex couples from the institution of marriage was a denial of equal membership and full participation in Canadian society. It attacked self-respect, self-worth, psychological integrity and empowerment. It denied substantive equality.

All of the couples emphasized that the denial of the freedom to marry stigmatized gay and lesbian relationships. It promoted a culture of intolerance. "[M]arriage... is the institution that accords to a union the profound social stamp of approval and acceptance of the relationship as being of the highest value."\(^\text{68}\) The denial of marriage sanction treated the relationships of same-sex couples as inferior to those of different-sex couples. Michael Leshner, who wished to marry Mike Stark wrote,

Being denied a marriage licence suggests that Mike and I do not love each other, and that our hopes, our dreams, our life together do not exist. Mike and I, while supposedly equal citizens of this great country, are deemed non-persons, because we are gay.\(^\text{69}\)

We argued that only full and equal inclusion in marriage would promote substantive equality. If we won equivalent rights and obligations, but were denied the status of marriage itself, the case would be lost. As stated by leading sociologist Dr. Margrit Eichler, in her affidavit in the proceeding:

"Marriage" is imbued with unique cultural meaning that cannot be replicated by some other means of partnership recognition. Given the history of oppression of gay and lesbian people, the denial of the freedom to marry perpetuates and promotes stigma and invisibility. The creation of a separate regime marks lesbian and gay relationships

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65. This argument is developed by Cheshire Calhoun, who was a deponent in Halpern, in Feminism, the Family, and the Politics of the Closet: Lesbian & Gay Displacement. Oxford University Press, 2000.
as inherently different from and inferior to the relationships of heterosexuals.\(^7\)

Marriage is the public, well-understood manner for the State and spouses to recognize, affirm and celebrate an intimate relationship in our society. It has completely different social, psychological, and political meanings and consequences besides the provision of equivalent material rights and obligations through some other mechanism. As Justice McLachlin (as she then was) wrote in *Miron v. Trudel*, "To most in our society, marriage is a good thing; to many a sacred thing. There is nobility in the public commitment of two people to each other to the exclusion of all others."\(^7\) Domestic partnership laws and ascribed social status simply do not strike the same emotional, spiritual chord. Alison did not want to say to Joyce, "Do you want to register together?" She wanted to ask, in the same words as her own parents and countless generations, "Will you marry me?"

Marriage is about ritual, tradition, family, love. All of our Applicant Couples spoke to the profound and unique meaning of marriage in our society. In legal terms, they described exclusion from marriage as an offence to dignity, as a restriction on their freedom of expression, as a violation of their liberty interests, and as a denial of their freedom of conscience and religion. Above all, though, they described in very personal terms how they loved their spouses and wished to express that love and commitment in marriage. Dawn Onishenko, one of the *Halpern* applicants, wrote about her spouse, Julie Erbland:

> I love this person with all of my heart and soul. I know that I will spend the rest of my life with her regardless of the obstacles we face together and as individuals. Julie is my family in the fullest sense of the word. She is the life of my life and the heart of my heart. I am a better person because she is in my life. I am a better daughter, sister, friend and citizen. I live my life more fully because of her. I care more deeply. I want to tell her and the world of this love. I want to manifest this commitment through marriage.\(^7\)

### VI. THE COURTS’ DECISIONS

With litigants seeking equal marriage in three provinces, the British Columbia decision, *EGALE*, was released first.\(^7\) Justice Pitfield held that there was an invisible, yet constitutionally entrenched meaning to “marriage,” so that

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73. *EGALE Canada Inc. v. Canada (AG)* (2001), 19 RFL (5th) 59.
recognizing the marriages of same-sex couples would require a constitutional amendment. Constitutional scholars immediately rejected his reasoning.\(^7\)

The Ontario\(^7\) and Quebec\(^7\) decisions followed shortly thereafter. The three-judge panel in Ontario found that the common law definition of marriage discriminated in a manner that could not be justified in a free and democratic society. The Quebec court declared of no force and effect the opposite-sex requirement for marriage in section 5 of the \textit{Federal Law-Civil Law Harmonization Act, No. 1}, the interpretive provision in the federal \textit{MBOA} and Quebec's Civil Code.\(^7\) The Ontario Divisional Court was divided on the appropriate remedy, but a majority of that Court and Justice Lemelin in Quebec both suspended their declarations for two years.

On May 1, 2003, the British Columbia Court of Appeal rejected the frozen rights argument adopted by Justice Pitfield.\(^7\) The Court of Appeal held that the common law definition of marriage discriminated on the basis of sexual orientation and the rights violation could not be justified. The Court adopted the same remedy as the Ontario and Quebec lower courts, reformulating the common law rule and suspending the remedy for two years.

Just one month later, and less than two months after argument, the Ontario Court of Appeal upheld the Divisional Court decision in \textit{Halpern}, and held that the common law definition of marriage was unconstitutional.\(^7\) The Court also allowed our cross-appeal and gave its judgment immediate effect. Marriage, as of June 10, 2003, was now “the voluntary union for life of two persons to the exclusion of all others.” The City Clerk was ordered to commence issuing licences immediately.

\begin{quote}
Martha and I are listening to “A New Day Has Come” as we drive down to the courthouse, singing in full voice like we are in Church. We are true believers. A new day has come. We can feel it. I tell Maretta to bring our passports to the press conference, just in case we win an immediate remedy and can marry this very day.

When they pass out the judgment, we flip right to the last page. Immediate effect. The Clerk compelled to issue licences immediately.
\end{quote}


\(^{75}\) \textit{Halpern v. Canada (Attorney General)} (2002), 60 O.R. (3d) 321 (Div.Ct.).

\(^{76}\) Hendricks v Quebec (PG), [2001] J.Q. No 3350.

\(^{77}\) \textit{Federal Law–Civil Law Harmonization Act, No. 1, S.C. 2001, c. 4, s. 5; Modernization of Benefits and Obligations Act, S.C. 2000, c. 12, s. 1.1; Article 365 of the Quebec Civil Code.}

\(^{78}\) EGALE Canada Inc. v. Canada (AG), (2003), 38 R.F.L. (5th) 32 (B.C.C.A.).

We are getting legally married, at last. How appropriate for a wedding day – overwhelming joy, happy tears. During the press conference, Maretta slips down unnoticed to the City Clerk’s desk. She fills out an application, and our marriage licence is granted. Congratulations.

The Court of Appeal’s immediate remedy is almost too delicious to be true. We find a judge to marry us. And our baby kicks enthusiastically when we are pronounced legally married spouses that afternoon. A family affirmed in law. It is a day of celebration of all of our love and all of our lives. The day of our marriage.

A week later, the Prime Minister announced there would be no appeal. He and the Minister of Justice note that marriage is a fundamental right, and that discrimination is intolerable under the Charter. The government says it will introduce legislation so equal marriage is available across the country.

Toronto celebrates. It is almost Pride Week and there are more than 800 marriages of same-sex couples in this city in the first month. The City Clerk’s Office is open all weekend for ceremonies, couples cruise down Church Street in wedding attire, and the newspapers are full of stories about people from all around the world coming to Toronto to celebrate their love in civil marriage.

With the British Columbia Court of Appeal judgment suspended, some of the applicant couples in that Province flew to Ontario to marry immediately. Others moved to lift the suspension in their home province. The federal government consented to that order, and marriages proceeded in British Columbia after July 8, 2003. During press conferences following the judgment, the Minister of Justice urged all other provinces to start issuing marriage licences.

In Quebec, a Catholic religious intervenor had appealed. We were retained by Hendricks and LeBeouf at this point, and brought a motion to dismiss the appeal and lift the suspension of Justice Lemelin’s judgment. The federal government effectively consented to lifting the suspension, and the motion to dismiss the appeal was granted on March 19, 2004. Michael Hendricks and Rene LeBoeuf were married just before their 30th anniversary, on April 1, 2004.

While the federal Attorney General invited other provinces to commence marrying same-sex couples, none did so without court orders. Same-sex couples across the country continued to litigate for the freedom to marry and

80. The intersection of Church and Wellesley is the centre of the organized GLBT (or more precisely gay male) community in Toronto.
won province-by-province, first in the Yukon, and then without opposition by the federal Attorney General in Saskatchewan, Nova Scotia, Manitoba, and Newfoundland. Litigation is underway or will soon commence in Alberta and New Brunswick. That means that only Prince Edward Island, Nunavut and the Northwest Territories are without marriage or litigation to obtain marriage.

Even though same-sex couples have been married since June 10, 2003, many provincial and federal statutes do not recognize married same-sex spouses. For example, same-sex married spouses have no access to divorce because the definition of “spouse” under the Divorce Act is drafted in heterosexist language. This was challenged in Ontario where the discriminatory definition of “spouse” was struck down and an inclusive definition was read-in. At the provincial level, no Ontario statutes were changed to recognize equal marriage for same-sex couples until March 9, 2005, when Bill 171, An Act to amend various statutes in respect of spousal relationships, received Royal Assent. This omnibus legislation amended all Ontario legislation so that all married couples are treated the same, regardless of sexual orientation. At the same time, as part of this legislation, the government eliminated all “same-sex partner” language from the statute books. Now, same-sex couples are “spouses” in exactly the same way as different-sex couples. M. is finally vindicated.

VII. THE FEDERAL GOVERNMENT REFERENCE

After announcing its intention not to appeal, the federal government stated that it would ask the Supreme Court of Canada to hear a Reference on its proposed equal marriage legislation. This may have been an attempt to encourage Parliamentarians to support the legislation. The Members of Parliament could take comfort in the fact that our highest court had addressed all concerns about equal marriage. Others, I think, correctly, believe the Reference was an attempt to pass a political hot potato to the judiciary so that yet again the courts could take the blame on a controversial social issue.
The operative text of the proposed legislation was as follows:

1. Marriage, for civil purposes, is the lawful union of two persons to the exclusion of all others.

2. Nothing in this Act affects the freedom of officials of religious groups to refuse to perform marriages that are not in accordance with their religious beliefs.

The Reference initially posed three questions with respect to the government's draft equal marriage legislation:

- Whether the proposed legislation was within the exclusive legislative authority of the Parliament of Canada?
- Whether extension of the capacity to marry to persons of the same sex was consistent with the Canadian Charter of Rights and Freedoms?
- Whether freedom of religion under the Charter protected religious officials from being compelled to perform a marriage between two persons of the same sex that is contrary to their religious beliefs?

After Paul Martin replaced Jean Chretien as Prime Minister, and shortly before he called an election, a new question was added:

- Whether the opposite-sex requirement for marriage for civil purposes was consistent with the Charter?

Our clients were appalled by the addition of the fourth question, which was essentially an attempt to re-litigate Halpern. The Court of Appeal had ruled on the unconstitutionality of exclusion of lesbians and gays from marriage, the appeal period had expired, and the government had publicly affirmed the correctness of the decision. We said the matter was res judicata. The government was a party to a ruling that finally determined an issue. It should be bound.

The addition of the fourth question was particularly frustrating when, for the hearing of the Reference, our clients were reduced to intervenors rather than parties, with a short factum and limited time for oral argument. The Applicant Couples, who had been the starring figures in fighting for and winning the right to marry, were now reduced to a bit part in the drama. A Supreme Court bench ordinarily interested in strictly limiting intervenors granted leave to twenty-

91. Polls show that a majority of Canadians support equal marriage, especially those who are younger, female, and better educated. However, those opposed are well-organized and well-funded, often by US organizations like Focus on the Family. According to the most recent polling by Environics Research Group, conducted December 14, 2004 to January 5, 2005, more than half (54%) of Canadians believe that Parliament should pass equal marriage legislation, while 43 percent think it should not. http://erg.enviroincs.net/news/default.asp?aID=570 (last viewed March 18, 2005).

92. On January 28th, 2004, Martin claimed that the addition of the fourth question would allow a complete debate of the issue, but it was also designed to allow him to avoid media inquiries with the stock answer that the matter was before the courts. In the end, to distinguish himself from the Conservatives who were gaining ground politically, Martin made his defence of the Charter and minority rights a central theme in his campaign.
eight interest groups, more than in any case ever before the Court. The Court heard from civil liberties associations, a group of seven people interested in civil unions, human rights commissions, faith groups supporting and opposed to equal marriage, gay and lesbian equality rights groups, and the Canadian Bar Association. Even Martin Dion, citizen of Quebec and heterosexual married father, was granted leave to intervene. He argued that marriage for same-sex couples demeaned his marriage and submitted that all marriages of same-sex couples that have occurred in Canada should be declared illegal.

In our limited time for submissions, we decided to bring the voices of the couples before the Court. We thought it important to let the Bench hear from the people whose marriages were at stake. While most equality cases describe how the applicant thinks he or she would feel more dignity and self-respect after being granted the claimed benefit, in this case, we had evidence from the couples and families about how getting married changed their lives. It was clear from their eloquent evidence that substantive equality required equal marriage. Alison Kemper, now civilly married to Joyce Barnett, wrote:

[Our marriage] was a life-passage, a milestone in our lives, that we felt bonded us together with family and friends and the wider community. We feel more social confidence. We feel more legitimate as a couple and as parents. We feel more like full citizens.

Their son, Robbie Barnett-Kemper, age 12, dictated a wise, moving affidavit. He deposed:

I am the son of Alison and Joyce. I am 12 years old. The day of their wedding, I did not feel like anything was changing. I certainly did not feel any differently about them. I didn’t cry like my sister.

But I do feel different now that my parents are married, and I feel that people treat me differently, and treat my mothers differently, and that their marriage affected others around us.

I am beginning to feel like a regular kid.

I feel more accepted. I feel like my parents are more like other kids’ parents. Now other kids can’t say I don’t have a real family.

I don’t think civil unions would have these effects. If I told my friends that my parents were getting civilly united, they would not even understand what I was talking about. They sure wouldn’t think I was the same as them. They would think I was different and weird.

Marriage is a journey and my parents have embarked on that journey together. They have always said that there was only one reason they wanted to get married, and that is to improve my life and

93. The Working Group on Civil Unions included the former associate editor of the Catholic New Times and an Associate Professor of Christian Ministry from a religious college and seminary.

my sister's life, to make us feel safe, strong and secure. Since their marriage, we understand what they were talking about. Things really have changed.

I am proud to be a Canadian who lives in a society where two people of the same gender are allowed to love each other as much as two people of different gender. I am thankful to all of the judges who made this possible, all of the lawyers who worked so hard, and most of all, my mothers who had the courage to stand up for what is right.95

Even though they had been together almost thirty years at the time of the hearing, Michael Hendricks and Rene LeBeouf found that equal marriage had transformed their lives.

It is like a new life together and nothing we could have anticipated. We feel different in our interaction with others. We feel equal to others. We feel that we are good enough, like our relationship is important enough, to have civil marriage. When people asked us why we were not satisfied with civil unions, we would say that marriage is the gold standard in our society. We feel that gold standard in our lives now.96

About two months after the hearing, on December 9, 2004, the Supreme Court of Canada issued its advisory opinion in Reference re Same-Sex Marriage.97 Our highest court affirmed that marriage for same-sex couples flows from the equality guarantee of the Charter. The Court ruled that the meaning of marriage is not a frozen concept limited to heterosexual unions, but has evolved to include the marriages of same-sex couples within its purview. So, just as the Privy Council recognized women within the category of "persons" for the purposes of public office, despite centuries of exclusion from civil life,98 the Court held that the commitments of lesbians and gay men have now come to be recognized within the concept of marriage, despite a long history of denigration of same-sex relationships.

The Court answered that the power to define marriage to include same-sex couples is exclusively within federal jurisdiction, that equal marriage for same-sex couples is not contrary to the Charter and that religious officials cannot be compelled to perform marriages for same-sex couples contrary to their religious beliefs. The Court refused to answer the fourth question, whether the old common law definition of marriage was constitutional, on the basis that the

98. This is perhaps the first reliance by the Supreme Court on the ratio of the famous "Persons" case in which a group of women won the right to be considered "persons" for the purposes of public office, in Edwards v. Attorney-General for Canada, [1930] A.C. 124.
The federal government had promised to introduce equal marriage legislation regardless of the Court's answer, and because the couples who had already married had vested interests that ought not be brought into question.

The Court confirmed that any alternative forms of partnership recognition such as civil unions were different from equal marriage and outside of federal jurisdiction. It also made it clear that no province—like Alberta—has the power to legislate to deny same-sex couples the freedom to marry, even through the use of the override clause of the Charter. The Reference opinion gave the federal government the "green light" to proceed with its equal marriage legislation.

The Civil Marriage Act is currently being considered by Parliament. It is slightly different from the draft Bill put before the Supreme Court on the Reference. It continues to address solemnization, even though the Court declared the similar provision in the draft ultra vires. The legislation states:

1. This Act may be cited as the Civil Marriage Act.
2. Marriage, for civil purposes, is the lawful union of two persons to the exclusion of all others.
3. It is recognized that officials of religious groups are free to refuse to perform marriages that are not in accordance with their religious beliefs.
4. For greater certainty, a marriage is not void or voidable by reason only that the parties are of the same sex.

The Bill also includes a number of consequential amendments. It will correct the definition of "spouse" under the Divorce Act to read "either of two persons who are married to each other." The Marriage (Prohibited Degrees) Act will provide that, "no person shall marry another person if they are related lineally, or as brother or sister or half-brother or half-sister, including by adoption." In the Income Tax Act, the concept of "natural or adoptive" parent is replaced by the phrase "legal parent." There are two statutes of significance that could have been amended but were not, the Evidence Act spousal incompetence provisions and the Criminal Code sodomy prohibition exemptions.

99. Despite the Premier of Alberta's initial acknowledgment that the Province was powerless to resist equal marriage, he now states that the Province will renew its legislation that purports to invoke a constitutional override to bar equal marriage. http://www.cbc.ca/story/canada/national/2005/03/18/klein-samesex500318.html (last viewed March 21, 2005).
100. Bill C-38, An Act respecting certain aspects of legal capacity for marriage for civil purposes, 38th Parl., 1st Session, currently at 1st reading.
101. R.S.C. 1985, c. 3 (2nd Supp.).
102. S.C. 1990, c. 46.
103. R.S.C. 1985, c. 1 (5th Supp.).
104. Canada Evidence Act, R.S.C. 1985, c. C-5, s. 4. Inclusion of same-sex married spouses was said to be too controversial, as spousal incompetence is subject to significant criticism. Criminal
The Bill, expected to pass in spring of 2005, will have national effect, and ensure that equal marriage is available to same-sex couples across Canada. The legislation furthers our commitment to a functional and pragmatic approach to family recognition while advancing substantive equality.

Already, thousands of same-sex couples have valid legal marriages celebrated in the seven provinces and one territory that have litigated the issue. In Toronto, Canada's most populous city, 2,210 marriage licences have been issued to same-sex couples (936 female and 1,274 male) between June 10, 2003 and March 17, 2005.106

The Supreme Court of Canada's advisory opinion on the Reference would seem to confine equal marriage to those jurisdictions that have litigated the issue. In contrast, the Ontario and Quebec couples and other intervenors supported the view of the Quebec Court of Appeal that the rulings of the appellate courts were binding across Canada since the federal government had been a party to the litigation and conceded the unconstitutionality of federal common law and expressly approved of its reformulation.107 If the scope of equal marriage is limited to those jurisdictions with rulings, this means that, unless and until legislation passes, litigation must continue province-by-province until equal marriage is available across Canada.

It also means that divorce for same-sex couples is currently only available in the Province of Ontario, the only province in which the issue has been litigated. This will change with the passage of the government's equal marriage legislation, which will correct the Divorce Act as one of the consequential amendments. Again, unless and until the legislation passes, litigation for equal access to divorce must continue province-by-province.

Despite geographical limitations in its immediate effect, and the failure to answer the fourth question, the Reference is internationally important. The validation of equal marriage makes Canada a world leader, alongside the

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106. The Toronto statistics are as follows: Couples from the United States—842 Couples. Other international—91. Couples from Canada but not Ontario—325. Couples from Ontario but not Toronto—122. Couples from Toronto—928. These numbers do not add up because individuals within the couples were from different areas. For comparison purposes, the number of different-sex marriage licences issued—27,791. Personal communications with Diane Mitantis, Office of the City Clerk, Toronto, Ontario, March 17, 2005. In British Columbia, which keeps statistics at the provincial, rather than local level, there have been 1,878 marriages between same-sex couples to date, including couples from Hong Kong, Guam, Singapore, Indonesia, Switzerland and France. Personal communications with BC Registry Office, March 21, 2005.

Netherlands, Belgium and Massachusetts, in the recognition of same-sex relationships.

VIII. THE INTERNATIONAL IMPACT OF EQUAL MARRIAGE IN CANADA

We are waiting in line with our son, going to New Haven, Connecticut for a conference on equal marriage. We have filed in our customs declaration, as always, one per family. The customs officer looks at us with disdain. “How are you two related?” We are two women – one white, one brown—together with a light brown child. “We are married,” we tell her. She sneers, “That is a Canadian thing. We don’t recognize that here.” I feel my blood pressure rise. My heart races. It is as though I have been punched in the stomach and cannot breathe. The uniformed agent, representing the “land of the free,” is empowered to deny the existence of our relationship, our family, our very personhood. And my 18-month old son watched, listened and learned, absorbing the whole hateful episode, like a sponge. How dare she?

We rely on tradition. I say, “We have always done one customs form for our family without any problems.” She barks, “I’m happy for you. But you” – gesturing at my spouse – “will have to leave this area, go back, fill out your own card and go to another customs officer. Look, I don’t make the laws.”

Maretta is expelled from the line. A public reject. I move on, with an overtired breast-demanding toddler, my arms spilling coats, hats, scarves, mittens, plane tickets, and a massive bag of child-related paraphernalia falling out of the stroller basket. A mess. And burning anger that again, yet again, and in an instant, we can be rendered the loathsome other, less-than-human, unworthy of social inclusion, respect and recognition.

By the time we are reunited after security, my spouse has decided she will never again travel to the United States. I think she is probably right.

Then I listen to the Asian-American Dean of Yale Law School talk about love in a room full of pictures of white men. We are all in this together: all working towards bringing more love to this world. “Nobody’s free until everybody’s free.” Fannie Lou Hamer. I am glad I came.

It is happening. There is an unstoppable movement towards equality for lesbians and gay men in achieving the right to marry. We have setbacks as well as advances, but the direction of change is clear: Hawaii, Alaska, Canada, the Netherlands, Belgium, Massachusetts, Oregon, New Jersey. We are coming to a state near you. I respond at length to an email from a lawyer in Ireland who
Lesbian Love Stories is seeking recognition of a Canadian marriage. The recent opinion of the State Court of California is so simple, so indisputably right. We win equal marriage. Love prevails.

Other countries are moving towards equal marriage—South Africa, Taiwan, Israel, Brazil, and Columbia. And so is Europe, both as a community and country by country, including Sweden, Spain, the United Kingdom and France.

Courts internationally have relied on the Canadian example. The Massachusetts Supreme Judicial Court in its equal marriage decision, Goodridge v. Department of Public Health, 108 relied on the precedent of Halpern. The dissent in Lawrence v. Texas 109 warned of the perils of striking down the criminal prohibition of anal intercourse, as demonstrated by the advent of equal marriage in Canada. On November 30, 2004, the Supreme Court of Appeal of South Africa [the highest court for non-constitutional matters with primary jurisdiction over the interpretation of legislation and common-law rules] relied extensively on Halpern in ruling discrimination in marriage to be unconstitutional. 110

It is fitting that Canada is a leader on the world stage in the area of human rights for lesbians and gay men. In a speech in the House of Commons on February 17, 1981, the Honourable Jean Chrétien, then Minister of Justice, said the following in reference to the planned introduction of the Charter:

We have the occasion . . . to build for our children and the children of our children a better Canada - a Canada which will recognize the diversity and equality which should be in our society, a Canada which will protect the weakest in society . . . a Canada which will be an example to the world. 111

And so, with equal marriage, Canada is an example to the world and a better, more loving place for all of our children.

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108. 440 Mass. 309; 798 N.E.2d 941; 2003 Mass. LEXIS 814 (Supreme Judicial Court of Massachusetts). At the operative part of the judgment, the Court cited and relied upon the Ontario Court of Appeal in Halpern:

We face a problem similar to one that recently confronted the Court of Appeal for Ontario . . . In holding that the limitation of civil marriages to opposite-sex couples violated the Charter, the Court of Appeal refined the common-law meaning of marriage. We concur with this remedy, which is entirely consonant with established principles of jurisprudence empowering a court to refine a common-law principle in light of evolving constitutional standards.


