Redefining Marriage in Canada & the United States: Moving in the Same Direction, But at Different Speeds

Nicholas Bala, Queen's University, Canada

Abstract: Canada and the USA are both going through a process of reconsidering the definition of marriage. As the legal roles of “husband” and “wife” have merged into the androgynous concept of “spouse,” it is becoming easier to view marriage as an exclusive intimate union of two persons rather than the exclusive intimate union of one man and one woman. While there is growing legal recognition of same-sex relationships in both countries, the changes have been more dramatic in Canada.

In Canada, homosexual acts were decriminalized in 1969. In 1977 provinces began to enact human rights laws that prohibit discrimination based on sexual orientation for such purposes as employment. The Supreme Court ruled in 1999 that the Charter of Rights requires giving same-sex partners the same rights as opposite-sex unmarried cohabitants. In 2002 courts began to rule that it is unconstitutional to deny same-sex partners the right to marry, and by 2005 courts in most provinces recognized this right. Although highly controversial, same-sex marriage is supported by roughly half of the Canadian population, and in 2005 the federal government began the process of enacting legislation to provide for same-sex marriage throughout Canada. That legislation has been the subject of intense debate, but it has the support of a majority of Canadian Parliamentarians and should come into force before the end of the summer of 2005.

In the USA a 1986 Supreme Court decision upheld the validity of laws criminalizing homosexual acts. In 1999 the Vermont courts required the introduction of same-sex civil unions in that state, and in 2003 the Massachusetts Supreme Court held that the state constitution requires same-sex marriage, though those marriages are not recognized for federal purposes. In 2003 the US Supreme Court reversed its 1986 decision, and held that it is a violation of the constitutionally protected right of privacy to criminalize homosexual acts. A number of states and cities have enacted domestic partnership laws. However, there is much greater political and judicial resistance to the recognition of same-sex marriage in the USA than in Canada, and as a result of referenda, constitutions in several states have been amended to prohibit same-sex marriage.

With growing recognition of same-sex relationships, legal recognition of polygamy is being raised as an issue in both countries, but there are major concerns about the harmful effect of such relationships on women and children. Polygamy is a crime in both countries; courts in the USA have upheld the constitutionality of such laws.

The USA is a more religious and conservative country, with public opinions polls showing significantly higher levels of opposition to same-sex marriage than in Canada; these attitudinal differences are reflected in the differences in the legislative and the judicial developments in the two countries. This study illustrates that changes in social attitudes and laws about fundamental familial institutions are usually slow and controversial, with a complex interaction between legal and social change.

©PLEASE DO NOT REPRODUCE WITHOUT THE WRITER'S PERMISSION.
Redefining Marriage in Canada & the United States: Moving in the Same Direction, But at Different Speeds

Nicholas Bala

Introduction: Redefining Marriage in Canada & the U.S.A.

The debate over whether and how to redefine marriage and marriage-like relationships to accommodate same-sex couples is raging across two neighboring North American jurisdictions, Canada and the United States. While much of the controversy is over what legal and social recognition should be given to same-sex relationships, there are deeper issues about the nature of marriage and the roles of law and religion in society. Raising questions about whether two people of the same sex should be permitted to marry has also given rise to the question of whether polygamy should be legally recognized in these countries. While Canada and the United States share a common cultural and legal heritage, and there are many similarities and common influences in culture, economics and politics, there are also significant social and legal differences. In both countries constitutional litigation and legislative reforms have resulted in significantly greater recognition to same-sex relationships, but the process of recognition began earlier in Canada and has now progressed much further. Neither country, however, seems ready to change its laws to recognize polygamy, though it is practiced to a limited extent in both.

This paper compares the controversies over the definition of marriage and the evolution in the recognition of same-sex relationships in Canada and the United States over the past few decades, and considers the issue of polygamy in these two countries.

∗ Professor, Faculty of Law, Queen’s University, Canada. Email nicholas.bala@queensu.ca (tel 613-533-6000-ext 74275). This is a conference draft paper for presentation and discussion at the International Society of Family Law Conference, Salt Lake City, Utah, July 19-23, 2005. Comments directed to the author are welcome. The paper will be revised for submission in the publication of conference proceedings.

The writer wishes to acknowledge the research and editorial assistance of Ms. Katherine Duvall-Antonacopoulos (Queen’s University LL.B. Candidate 2006) and funding support from the Social Sciences and Humanities Research Council of Canada which assisted in the preparation of this paper and the writer’s attending the Conference.

For a more detailed (though inevitably somewhat dated) discussion of some of the issues raised in this paper, see earlier publications of the writer: Bala, “Controversy Over Couples in Canada: The Evolution of Marriage and Other Adult Interdependent Relationships,” 29 Queen’s L.J. 41 – 114 (2004); and Bala, “The History and Future of Marriage in Canada,” Univ. Toronto J. L & Equality (forthcoming 2005)
The paper includes a discussion of the influences in each of these countries of developments in the other, as these are issues for which advocates, courts and legislatures have been giving considerable attention to cross-border developments. I will not, however, consider the complex issues that the courts will have to address about the recognition of same-sex or polygamous marriages entered into in another jurisdiction.¹

The debate over the redefinition of marriage and the recognition of same-sex relationships has produced an enormous literature and a rapidly growing body of jurisprudence and legislation, and discussion here focuses only on broad themes and major developments, in the hope that insights can be gained about the nature of marriage and the process of legal change.

**The Change in the Nature of Marriage: Setting the Stage for Same-sex Marriage**

In both Canada and the USA the laws and expectations for husbands and wives within marriage have changed dramatically over the past half century, setting the stage for the possible redefinition of marriage to include same-sex partners.² The English common law, which is the historical basis of the law in both Canada and the USA, accorded the husband and wife distinctive roles, rights and obligations. The leading 18th Century English legal scholar, William Blackstone, expounded on the legal nature of marriage:³

> By marriage, the husband and wife are one person in law; that is the very being or legal existence of the woman is … consolidated into that of the husband.

Historically, from social, economic and religious perspectives, the procreation of children was viewed as a central purpose of marriage, as was reflected in common law

---

1. A significant legal issue is what legal recognition will be given to American same-sex partners who come to Canada to marry. Media reports suggest that as many as one third of all same-sex marriages in Canada have involved American couples, though there is significant doubt as to whether these marriages will have legal recognition in their home states: see e.g “Canada a Mecca for ‘quickie gay marriages,’” *National Post*, May 13, 2005.


concept of consummation; the inability or refusal to consummate a marriage (engage in opposite-sex intercourse) rendered a marriage voidable. At common law, children born out of wedlock were referred to as “illegitimate” and their fathers had no rights or obligations towards them.

Until the latter part of the twentieth century, the laws in both Canada and the United States clearly and explicitly reinforced moral expectations and sexual roles within marriage. Until late in the twentieth century, family law legislation was written in explicitly gendered terms. The law expected the husband to be employed, and the wife was regarded as a dependent caring for the home and children; only a wife was eligible to seek spousal support at the end of a marriage, but she would generally forfeit this right if she committed adultery, thereby breaching one of her fundamental expectations in marriage, even if this was after separation and her husband had already committed adultery. Throughout much of the twentieth century there was a strong presumption that after separation, children would be placed in the care of their mothers, unless the mother had violated the expectations for marriage by committing adultery.

The laws of Canada and the United States have changed dramatically and now regard marriage as a “partnership of equals,” with a presumption in most jurisdictions that marital property will generally be divided equally, regardless of whose direct efforts resulted in the acquisition of specific assets. Laws no longer refer to “husbands” and “wives,” but are generally written in gender neutral terms, with, in theory, either partner being able to seek spousal support, though in practice both spouses are usually expected to be self-supporting. Unlike earlier family laws which had rigid expectations and generally refused to allow for marriage contracts, today, when marrying, spouses have significant autonomy to define their rights and obligations upon termination of their relationship. Spouses are viewed as legally equal; gender is no longer legally important for marriage.

Further the link between the traditional marriage and parenthood has become attenuated. With improvements in birth control, the number of children per family has fallen dramatically over the past century, and with rising infertility and changes in life choices being made by married women, a growing number of married couples are without children. Increasingly there is social acceptance of single parenthood, and a
smaller portion of all children in North America are being raised in two parent families. In Canada, all legal distinctions between children born in wedlock and out of wedlock (the formerly “illegitimate”) were abolished, and in the United States these distinctions have virtually disappeared. Further, with the development of artificial reproductive technology, same-sex couples are able to raise, from birth, children to whom one of the parents is biologically related. The view that marriage is inextricably intertwined with procreation no longer reflects social or legal reality.

With all of these changes, it is understandable that the question of the legal recognition of same-sex relationships is arising now. It is more difficult to argue that marriage requires two spouses of opposite gender, since there are no longer legally specified gender roles, and socially there is growing ambiguity about the roles of “husband” and “wife.” It is also understandable that most of those in North America who oppose same-sex marriage and favor upholding the traditional legal definition of marriage are social conservatives, who also tend to support relatively traditional social and economic roles for husbands and wives within marriage.

The Legal Recognition of Same-Sex Relationships in Canada

Throughout the world, homosexuals were long subjected to ridicule, harassment discrimination and abuse, and in many countries, including Canada they were subject to criminal prosecution. In the past half century, however, there have been dramatic changes in social and legal attitudes towards homosexuals in many countries, including Canada.

Homosexual acts, such as anal intercourse between consenting adults, were offences in Canada until 1969, when Parliament amended the Criminal Code to abolish

---

4 For a description of some of the salient changes in family life in Canada over the past half century, including statistics on the decline in the number of children in two parent families, and the increase in the labor force participation of married women, see Kerry Daly, “Reframed Family Portraits,” 35:1 Transition 3-11 (Ottawa: Vanier Institute for the Family, 2005). For data and descriptions from a number of jurisdictions, see Scott, Treas & Richards eds, The Blackwell Companion to the Sociology of the Family (Oxford UK: Blackwell, 2004).
6 Criminal Law Amendment Act, S.C. 1968-69, c. 38, s. 7; this abolished the offence of “sodomy”, so that it was no longer a crime for consenting adults to engage in anal intercourse in private.
these offences. Starting in 1977, provincial legislatures in Canada began to amend their human rights codes to add a prohibition of discrimination on the basis of sexual orientation, for example for such purposes as employment. After the introduction of the Canadian Charter of Rights and Freedoms in 1982, most politicians and members of the Canadian public were prepared to accept that it was wrong to overtly discriminate against individuals on the basis of their sexual orientation in regard to such issues as employment. By the late 1980s, there was growing social acceptance of homosexuality, which resulted in more gay and lesbian partners openly cohabiting, especially in urban areas. The demand for legal recognition of same-sex relationships increased, and Canadian courts started to give limited recognition to these relationships for family law purposes. In 1986, for example, a British Columbia court held that a same-sex partner could use the constructive trust doctrine in the same way as an opposite-sex unmarried partner to make a claim to property acquired during a domestic relationship.

Despite a growing consensus that overt discrimination against gays and lesbians would not be tolerated in Canadian society, homosexuals continued to face prejudice as well as acts of violence perpetrated against them because of their sexual orientation. In the early 1990s, politicians and judges were still unwilling to accord familial rights or spousal status to same-sex partners. In 1993 an Ontario court dismissed a Charter challenge by a same-sex couple who argued that their constitutional rights had been violated when they were refused a marriage license. The court ruled that since the legal definition of “marriage” was a union of “one man and one woman,” it was not discriminatory to preclude same-sex partners from marrying each other. One of the “principal purposes of the institution of marriage,” the court observed, is the procreation and care of children, which cannot be “achieved in a homosexual union,” and it is “this reality that is recognized in the limitation of marriage to persons of the opposite sex.”

7. Quebec was the first province to enact such a law: An Act to Amend the Charter of Human Rights and Freedoms, S.Q. 1977, c. 6. Alberta, Canada’s most conservative province, still has not added sexual orientation as a prohibited ground, though the Supreme Court of Canada has “read in” this term to that province’s human rights code: Vriend v Alberta, [1999] 2 S.C.R. 3.
10. Ibid. at 666.
In the mid 1990s judicial attitudes began to change, though initially not in cases claiming full “marital” rights. In one 1997 Ontario case, for example, the court accepted that under provincial child support laws, which had been enacted to impose support obligations on step parents, the lesbian partner of a child’s biological mother could have “parental” support rights and obligations as she had “demonstrated a settled intention” to treat the child as part of her family.11

While the Canadian Charter of Rights and Freedoms does not explicitly prohibit discrimination on the basis of sexual orientation, s. 15 of the Charter does provide that “[e]very individual is equal before and under the law and has the right to the equal protection and benefit of the law without discrimination.” Section 15 enumerates certain prohibited grounds of discrimination, such race, religion, sex, age and mental or physical disability. In its 1995 decision in Egan v. Canada,12 the Supreme Court of Canada considered a constitutionally based claim by long-term same-sex partners to “spousal” benefits under the old age pension legislation which provided benefits to both long term opposite-sex cohabitants and married “spouses.” Although a majority of the Court did not accept the particular claim, the entire Court agreed that sexual orientation is a “deeply personal characteristic that is either unchangeable or changeable only at unacceptable personal costs,”13 and that accordingly “sexual orientation” should be treated as “analogous” to the “enumerated” prohibited grounds in s. 15. Since Egan, sexual orientation has been accepted as a prohibited ground for discrimination under the Charter.

In 1999 the Supreme Court of Canada held that provincial legislation which permits partners in long-term opposite-sex relationships to seek “spousal” support at the end of their relationship violated the Charter by discriminating against homosexuals by not affording them “spousal” status. Justice Cory, writing for a majority of the Court in M. v. H14, emphasized the social importance of recognizing same-sex relationships:

The exclusion of same-sex partners from the benefits of [spousal support law] . . . promotes the view that . . . individuals in same-sex relationships . . . are less worthy of recognition and protection. It implies that

---

13. Ibid. at para. 5, La Forest J., writing for the full Court on this issue.
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 . . . [T]he human dignity of individuals in same-sex relationships is violated by the impugned legislation.15

In M. v. H. the Supreme Court was careful to observe that it was only ruling that it was discriminatory to deny same-sex conjugal partners the rights enjoyed by unmarried opposite-sex conjugal partners, and the Court was not directly comparing same-sex partners to married opposite-sex couples. However, the Court’s analysis and rhetoric clearly suggested that the Court would be sympathetic to a future argument that the failure to allow same-sex partners to marry is an affront to their “human dignity.” The Court recognized in M. v. H. that “there is evidence to suggest that same-sex relationships are not typically characterized by the same economic and other inequalities which affect opposite-sex relationships,”16 and thus these relationships will less frequently result in economic dependency and claims to spousal support. Nevertheless, the Court said:

same-sex couples will often form long, lasting, loving and intimate relationships. . . . While it is true that there may not be any consensus as to the societal perception of same-sex couples, there is agreement that same-sex couples share many . . . “conjugal” characteristics. In order to come within the definition, neither opposite-sex couples nor same-sex couples are required to fit precisely the traditional marital model to demonstrate that the relationship is “conjugal.”17

In response to M. v H. the federal and provincial governments enacted legislation to give same-sex partners the same legal recognition as opposite-sex partners, based on a period of “conjugal cohabitation”18 (e.g. generally 1 to 3 years depending on the jurisdiction). Nova Scotia, Manitoba and Quebec went further by also enacting a registered domestic partnership law,19 allowing unmarried conjugal partners, whether of

15. Ibid. at paras. 73-74 [emphasis added].
16. Ibid. at para. 110, per Iacobucci J.
17. Ibid. at paras. 58-59, per Cory J.
the same or opposite-sex, to register and thereby gain some significant rights and obligations of married spouses, to the extent permitted by provincial law (i.e. for such purposes as marital property, support and succession).

Under the Constitution Act, Canada has a complex division of jurisdiction over family law and marriage. Under s. 91(26) the federal Parliament has exclusive jurisdiction over “marriage and divorce,” but under s. 92(12) of the Constitution Act, the “solemnization of marriage” is a matter of provincial and territorial jurisdiction. The federal Parliament has jurisdiction over the law of capacity to marry, which includes the basic definition of “marriage,” and the issue of whether same-sex partners can marry. For most of its history, Canada relied on the common law to define capacity to marry, including such issues as the law of physical capacity to consummate the marriage. The legal definition of marriage in Canada was long based on the 1866 English case of *Hyde v Hyde*, where Lord Penzance stated: 20

Marriage…may …be defined as the voluntary union …of one man and one woman to the exclusion of all others.

After *M v H*, gays and lesbian seeking to marry began Charter-based challenges to this traditional definition, claiming that it discriminated against them on the basis of sexual orientation. In a number of decisions starting in 2002, courts in most jurisdictions in Canada recognized that it is a violation of the Charter to deny same-sex partners the right to marry. By early in 2005, courts in eight provinces and two territories had issued such rulings. While each of these decisions dealt with the federal law governing marital capacity, each decision was only binding in the province or territory of the court that gave it. The first cases were thoroughly litigated, with the federal and provincial governments defending the traditional definition of marriage, but after the 2003 Ontario Court of Appeal judgment in *Halpern v. Canada (Attorney General)*, 21 the federal government announced that it would not appeal that decision to the Supreme Court of Canada, and the later cases were quickly resolved. There were no applications made to the courts in the remaining two provinces, Alberta and Prince Edward Island; which, perhaps not

coincidentally, are among the most socially conservative in Canada. Same-sex marriage in those two jurisdictions awaited federal legislation.

The Ontario Court of Appeal decision in *Halpern* is the most frequently cited judgment in Canada on the constitutional right of same-sex partners to marry. On the importance of giving same-sex partners the right to marry, the Court of Appeal wrote:

> Marriage is . . . one of the most significant forms of personal relationships. For centuries, marriage has been a basic element of social organization in societies around the world. Through the institution of marriage, individuals can publicly express their love and commitment to each other. . . . This public recognition and sanction of marital relationships reflect society’s approbation of the personal hopes, desires and aspirations that underlie loving, committed conjugal relationships. This can only enhance an individual’s sense of self-worth and dignity.  

The Court of Appeal emphasized the importance of the “choice” that opposite-sex partners have when deciding whether to get married or only have the more limited rights and obligations which the law in Canada affords unmarried cohabitants based on a period of cohabitation. The Court of Appeal wrote:

> [M]arried couples have instant access to all benefits and obligations . . . Same-sex couples are denied access because they are prohibited from marrying, and same-sex couples are excluded from a fundamental societal institution-marriage. The societal significance of marriage, and the corresponding benefits that are available only to married persons, cannot be overlooked. . . . Exclusion perpetuates the view that same-sex relationships are less worthy of recognition than opposite-sex relationships. In doing so, it offends the dignity of persons in same-sex relationships.  

In the course of these decisions, the courts had to consider what has been the strongest secular concern about same-sex marriage: that it may endanger the family and society. One commentator, for example, argued that there is “danger in taking the country down the path marked out by the court . . . [which] would undermine an institution so

---

22. *Halpern*, ibid. at paras. 5-8. The decision was a unanimous ruling by McMurtry C.J.O., MacPherson and Gillese J.J.A.

essential to the well-being of Canadians." 24 In rejecting this type of argument in Halpern, the Ontario Court of Appeal observed: 25

We fail to see how the encouragement of procreation and childrearing is a pressing and substantial objective of maintaining marriage as an exclusively heterosexual institution. Heterosexual married couples will not stop having or raising children because same-sex couples are permitted to marry. Moreover, an increasing percentage of children are being born to and raised by same-sex couples.

While the widespread legal recognition given to opposite-sex cohabitants in Canada may well have dissuaded some opposite-sex couples from marrying, it is hard to believe that recognizing same-sex unions would deter any heterosexual person from marrying or having children. Further, it is becoming more common for same-sex couples in Canada to have the care of children, conceived to one partner by artificial insemination, adopted by the couple or born to one partner prior to entering the same-sex relationship. There is now a substantial body of social science literature concerning the impact on children of being raised by two homosexual partners (usually lesbians) as custodial parents. The overwhelming preponderance of research serves to alleviate fears that children who are raised in these relationships are worse off than children raised by opposite-sex parents. There are no significant differences in emotional or cognitive developmental outcomes or in terms of mental health between children raised by same-sex couples and opposite-sex couples. 26 As early as the mid 1970s, Canadian courts began to accept that lesbian mothers could be awarded custody after separation from

26. For a detailed study of spousal behavior and parenting by homosexuals in Canada, see Dr. Anne-Marie Amberto, "Same-Sex Couples and Same-Sex Parent Families: Relationships, Parenting, and Issues of Marriage" (Ottawa: Vanier Institute, 2005), http://www.vifamily.ca/library/publications/samesexd.html (accessed, June 29, 2005). See also J. Stacey and T. Biblarz, “How Does Sexual Orientation of Parents Matter?” 66 Am. Soc. Rev. 159 (2001); and Stephen Newman, “The Use and Abuse of Social Science in the Same-Sex Marriage Debate,” 49 N.Y. L Sch. Rev. 537 (2004). While there have been some relatively small differences in terms of sexual orientation of children raised in gay and lesbian households, there are likely genetic explanations for these differences; further a majority of children raised by homosexual parents grow up to be heterosexuals.
heterosexual fathers. In 1976, one Canadian judge remarked that “the manner in which one fulfills one’s sexual needs does not relate to the abilities of being a good parent.”

Although politicians could have left the issue of same-sex marriage to be resolved by the courts and allowed various cases to proceed to the Supreme Court of Canada, there was intense pressure for Parliament to become involved in dealing with this issue. Social and religious conservatives were demanding action to protect the traditional definition of marriage, while gay and lesbian advocates and their liberal religious and civil liberties supporters were advocating that the government abandon any appeals and enact legislation to permit same-sex marriage everywhere in the country.

In 2001, the federal Liberal government had responded to M. v. H. with the Modernization of Benefits and Obligations Act, which amended 68 federal statutes to recognize as “common-law partners . . . two persons who are cohabiting in a conjugal relationship” for at least one year. This extended to homosexual partners the same rights and obligations as were already afforded to unmarried opposite-sex partners for purposes such as federal income tax law and federal pension plan eligibility. At that time, however, the Liberal government also felt obliged to reassure the public that it did not intend to undermine the institution of marriage. Thus, the federal statute specified that “for greater certainty, the amendments . . . 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 the Ontario Court of Appeal decision in Halpern, the federal politicians had a very limited range of options. One was to appeal Halpern to the Supreme Court of Canada, but a growing number of court decisions concluded that the Charter requires recognition of same-sex marriage, and the outcome of any appeal seemed a foregone conclusion.


28 S.C. 2000, c. 12 s. 2(3) [emphasis added].

29 Ibid. s. 1.1. See also Federal Law—Civil Law Harmonization Act, No. 1, S.C. 2001, c. 4, s. 5: Marriage requires the free and enlightened consent of a man and a woman to be the spouse of the other.

30 See e.g. EGALE v Canada, [2003] B.C.J. No. 994 (C.A.) rendered a few weeks before Halpern. The British Columbia Court of Appeal also ruled that s. 15 of the Charter was violated by denying same-sex partners the right to marry, but the decision received less attention because the Court initially suspended the granting of a remedy for two years in order to give Parliament time to act. That suspension was revoked after the Halpern decision was rendered by the Ontario Court of Appeal.
conclusion. Further, there was growing pressure within the Liberal government to not be seen to be taking an “anti-Charter” position. Although some politicians favored a “civil union” compromise, the court decisions had explicitly stated that any response which restricted marriage to opposite-sex partners and only allowed homosexuals to have a registered domestic partnership would violate s.15 of the Charter; distinctive treatment of homosexual intimate unions was not an option. Under Canada’s Constitution, Parliament may also choose to override a Charter based right for a five year period by enacting ordinary legislation and invoking the “Notwithstanding Clause,” thus permitting Parliament to effectively overriding the court decisions. However, even among conservative politicians opposed to same-sex marriage, there was a reluctance to invoke this explicitly rights-denying provision.

Within a week of the Ontario Court of Appeal’s judgment in Halpern, the federal Cabinet announced that it was in principle supportive of same-sex marriage and it would not appeal the decision. However, reflecting the divisions over the issue, the government also announced that prior to having Parliament vote on legislation to allow same-sex couples to marry, a reference case would be brought before the Supreme Court of Canada to answer some questions about the constitutionality of the proposed law.

In its December 2004 decision in Reference Re Same-Sex Marriage, the Supreme Court answered the three least contentious questions posed by the federal government, making clear that the federal government could enact such a law and that no religious celebrant could be required to perform a marriage ceremony for a same-sex couple; this last issue was not contentious, as no gay or lesbian in Canada has ever sought to compel a religious celebrant to perform a marriage ceremony. The Court, however, declined to answer the most contentious question posed by the federal government, whether the


32 See e.g Janice Tibbetts “Ottawa to legalize gay marriage” National Post (18 June 2003). In Canada, the Supreme Court of Canada has original jurisdiction in dealing with constitutional questions that the federal government may choose to “refer” to the Court for answers; this is known as a “reference case.” This is not done frequently.


34 Depending on provincial law or policy, civil officials who perform marriages may be required to perform same-sex wedding ceremonies are give up their employment.
Charter requires recognition of same-sex marriage, as the federal government had indicated its intention to address the issue of same-sex marriage legislatively regardless of the Court’s opinion on this question. Despite declining to explicitly answer this question, the Court seemed to signal its support for same-sex marriage, noting the importance of the “protection” of the rights already acquired by same-sex partners who had married after Halpern and similar decisions in other jurisdictions in Canada.

By the time of the Supreme Court Reference, Prime Minister Martin came to view same-sex marriage as human rights issue, and the government brought the Civil Marriage Act (Bill C-38) to Parliament in February 2005 to define as “marriage” as “the lawful union of two persons to the exclusion of all others.” In the spring of 2005 there was intense lobbying of members of Parliament over same-sex marriage, with demonstrations, advertising and letter writing campaigns; much of the anti-same-sex marriage advocacy was undertaken by conservative, religious based groups, including the prominent American Christian organization, Focus on the Family. There were lengthy Parliamentary Committee hearings and debates over same-sex marriage. Although no party had a majority in Parliament, and some Members of Parliament in the governing Liberal Party opposed same-sex marriage, an even larger number of opposition MP’s supported Bill C-38, and it was passed by the House of Commons by a vote of 158 to 133 on June 28, 2005. Passage by the Canada’s appointed Senate is regarded as a formality, and the law should be in force by the end of the summer. The law includes an explicit statement that “no person or organization should be obliged to all be deprived of any benefit…solely by reason of their exercise, in respect of marriage between persons of the same sex, of the freedom of conscience and religion…in respect of the expression of their beliefs in respect of marriage as the union of a man and woman to the exclusion of all others.” This is intended to assure churches that they will not lose their tax exempt religious status by refusing to perform same-sex marriages.

35 Bill C-38, 38th Parliament, 1st Session, 1st Reading  Feb. 1, 2005, s.2.
37 “Same-sex marriage law passes Commons,” National Post, June 29, 2005.
The largest opposition party in Parliament, the Conservatives, almost all voted against Bill C-38, and Party leader Stephen Harper has vowed to make same-sex marriage an issue in the next election campaign.\textsuperscript{38} He has pledged that if elected Prime Minister, he will bring back the issue of same-sex marriage to Parliament for another free vote. However, given the Charter-based court decisions on this issue and the apparent unwillingness of the Conservatives to invoke the Notwithstanding Clause, there will be no effective way to end same-sex marriage in Canada.

Same-sex marriage is very controversial in Canada, with public opinion essentially divided, though a number of public opinion polls have shown that a narrow majority of Canadians support same-sex marriage, with greater support amongst the young and urban voters.\textsuperscript{39} The opposition is generally greatest among older Canadians, those who are most religiously observant, and in rural areas. It would appear that the Canadian courts pushed politicians to take action that has the support of a narrow majority of Canadians in the face of opposition from a vocal, committed minority who strongly oppose same-sex marriage.

\textbf{Recognition of Same-Sex Relationships in the U.S.A.}

While historically homosexuals very likely faced the similar levels of discrimination and social hostility in Canada as in the USA, over the past decade gays and lesbians in the USA have had greater difficulty in gaining legal recognition for their relationships. Even in the USA, however, there has been very significant legal change over the past decade.

While Canada’s Parliament repealed its criminal laws making homosexual acts between consenting adults an offence in 1969, the United States Supreme Court in 1986

\textsuperscript{38} “House order may end debate on same-sex marriage,” \textit{National Post}, May 30, 2005.

\textsuperscript{39} A survey in July 2004 by the Centre for Research and Information on Canada and Environics Research found that 57% of Canadians supported allowing same-sex marriage, while only 38% were opposed. 
\url{http://www.cric.ca/pdf_re/new_canada_redx/new_canada_redx_summary.pdf}. One poll in 2005 reported 52% against same-sex marriage and 44% in favor, but this poll shows significantly more opposition than any other recent Canadian poll and may not accurately reflect public opinion; see “Canadian deeply split on same-sex marriage, poll suggests,” C.B.C. 10 April 2005. For a more detailed study of public attitudes, including an analysis by religious faith and observances, see Reginald W. Bibby, "Religion and the Same-sex Debate" (Ottawa: Vanier Institute, 2004). 
\url{http://www.vifamily.ca/newsroom/press_dec_10_04.html} (accessed June 29, 2005).
in *Bowers v Hardwick* upheld the constitutional validity of a Georgia statute that made sodomy an offence;\(^{40}\) at that time about half of the states made homosexual acts a criminal offence. While a number of states repealed these laws in the following years, in 2003 when the United States Supreme Court decided to overrule *Bowers*, more than a dozen states retained these profoundly homophobic statutes. In its 2003 decision in *Lawrence v. Texas*,\(^{41}\) the majority of the Supreme Court held that the Texas “Homosexual Conduct” law was unconstitutional as a violation of the Due Process Clause of the Fourteenth Amendment. Justice Kennedy held that the “liberty interest” encompasses a number of freedoms, including freedom of adults to engage in intimate sexual conduct in their homes. He held that the Fourteenth Amendment protects against “unwarranted government intrusions” into the home, observing that the Texas statute in question sought to control

> the most private human conduct, sexual behavior, and in the most private of places, the home. The statutes do seek to control a personal relationship that, whether or not entitled to formal recognition in the law, is within the liberty of persons to choose without being punished as criminals.”\(^{42}\)

Justice Kennedy was careful to limit the decision to the criminal context. However, in his dissent, Justice Scalia, noted the Ontario Court of Appeal decision in *Halpern*, decided just a few weeks before (perhaps the first time that an Ontario case was cited in a United States Supreme Court judgment), and observed that the reasoning of the majority “leaves on pretty shaky ground the laws limiting marriage to the opposite sex.”

While in Canada the federal government has primary jurisdiction over the same-sex marriage issue and much of family law, in the U.S.A. most family law matters and the recognition of same-sex marriage are dealt with at the state level, and in the context of state constitutions. There are significant similarities in the state constitutions in their general articulation of protections for liberty and equality (and indeed between those statements and the words of Canada’s *Charter of Rights*), but generally each state Supreme Court is the final arbiter of that state’s constitution and different courts may give very different interpretations to similar words. Further, as discussed below, in a

\(^{40}\) 478 U.S. 186 (1986)
\(^{41}\) 539 U.S. 558
\(^{42}\) At para 25
number of states, the state constitutions have recently been amended by referenda to explicitly prohibit same-sex marriage.

The first constitutional challenges in the USA to the traditional definition of marriage date to the 1970s, but it was only in 1996 that any of these challenges were successful, when a Hawaii trial court held that denying same-sex couples the right to marry violated the state constitution because it discriminated on the basis of sex. Before an appeal could be completed, the voters of Hawaii passed a state constitutional amendment to allow the state legislature to limit marriage to opposite-sex couples. There was a similar development in Alaska where a trial court held that the exclusion of same-sex couples from the right to marry violated the state constitution’s right to privacy and the right to be free from discrimination on the basis of sex, but as in Hawaii, the Alaska Constitution was amended in a referendum to define marriage as the union of one man and one woman, ending that legal challenge.

In response to these challenges to the traditional definition of marriage, and with concern about the possible response of activist judges to future challenges, in 1996 Congress enacted the Defense of Marriage Act (DOMA). This law provides that for all purposes of federal law, “marriage” means a “legal union between a man and a woman.” This significantly reduces the practical effect of any state decisions recognizing same-sex marriage, as it means that for such purposes as federal income tax, immigration and social security, these marriages will not be recognized. Further, DOMA is intended to reaffirm the power of states to make their own decisions about the meaning of marriage within their state, providing that no state “shall be required” to give legal effect to a same-sex marriage entered into in another state. This law was passed by wide margins in Congress, which gives a clear indication of the views of a majority of politicians in the United States about same-sex marriage. However, there are concerns about the constitutionality of this federal law, as there are arguments that it infringes state jurisdiction over family law and may be inconsistent with the Full Faith and Credit

43 Baker v. Nelson, 191 N.W.2d 185 (Minn. 1971); Singer v Hara, 522 P. 2d 1187 (Wash., 1974)
Clause of the U.S. Constitution, which requires recognition by the courts of judgments rendered in other states. 47 As a result of these concerns, some conservative politicians, including President Bush, are calling for an amendment to the United States Constitution to “protect marriage in America,”48 by having a constitutional provision that would be similar to DOMA. There does not, however, seem to be sufficient political support at this time to adopt such an amendment.

In 1999 in *Baker v State*, the Vermont Supreme Court held that the state’s failure to provide committed same-sex partners with the benefits and privileges granted to married couples violated the Common Benefits Clause of the Vermont State Constitution (a provision similar to the Equal Protection Clause in the U.S. Constitution and to the Equality Provision in s. 15 of Canada’s *Charter*).49 The Vermont Supreme Court cited some of the Canadian jurisprudence, and directed the state legislature to remedy this constitutional infringement, though allowing the legislature to decide whether to create an equivalent institution to marriage or allow same-sex partners to marry. In response to the Court's decision, the Vermont legislature enacted a law permitting same-sex couples to enter into “civil unions,” which give same-sex partners who register all of the rights and obligations of married persons under state law, such as rights upon separation. Further, third parties like businesses are required to treat marriages and civil unions equally. However, persons in a civil union are not granted any of the rights and responsibilities of marriage under federal law.

In November 2003, the Massachusetts Supreme Judicial Court held in *Goodridge v. Department of Public Health*, in a 4 to 3 split decision, that denying marriage and its protections to same-sex couples violates the Equality and Liberty provisions of the Massachusetts State Constitution. The Court focused on a discussion of American jurisprudence, but it also cited some of the Canadian decisions, including *Halpern*, and concluded:

> The marriage ban works a deep and scarring hardship on a very real segment of the community for no rational reason. The absence of any

49. 744 A. 2d 864 (Vt. 1999)
reasonable relationship between, on the one hand, an absolute disqualification of same-sex couples who wish to enter into civil marriage and, on the other, protection of public health, safety, or general welfare, suggests that the marriage restriction is rooted in persistent prejudices against persons who are (or who are believed to be) homosexual. Limiting the protections, benefits, and obligations of civil marriage to opposite-sex couples violates the basic premises of individual liberty and equality under law protected by the Massachusetts Constitution.50

The Court construed “civil marriage to mean the voluntary union of two persons as spouses, to the exclusion of all others,” and gave the legislature 80 days to comply with the ruling. In January 2004, the Massachusetts State Senate asked the Supreme Judicial Court whether a law allowing same-sex couples to enter into civil unions would comply with the Court’s opinion in Goodridge. In February 2004, the Supreme Judicial Court rendered an advisory opinion making clear that civil unions would not provide full equality to same-sex couples as mandated by the Massachusetts Constitution. The Court stated that having a separate institution for same-sex couples would compound, not correct, the constitutional infirmity. The Court wrote that establishing a separate "civil union" status for same-sex couples “would have the effect of maintaining and fostering a stigma of exclusion that the Constitution prohibits.”51 The state of Massachusetts began granting marriage licenses to same-sex couples on May 17, 2004, though these same-sex marriages are not recognized for purposes of federal law.

After Goodridge, challenges by same-sex partners claiming a violation of state constitutions as a result of denial of their right to marry failed in Arizona and Indiana. In California, Connecticut, Florida, Maryland, New Jersey, New York, and Washington similar cases, based on claims under state constitutions are proceeding through the courts.52 Although in one case a New York state trial judge ruled in favor of the same-sex partner applicants, two other judges in the same state have ruled against the applicants.53 In June 2005, in New Jersey an intermediate state appeal court rejected a claim by same-


52 These cases and similar developments are tracked on a number of websites, see e.g http://www.nclrights.org/publications/marriage_equality0305.htm [National Centre for Lesbian Rights ]; http://www.lambdalegal.org/cgi-bin/iowa/issues/record2?record=9 [Lambda Legal]
sex partners seeking the right to marry, summarizing many of the arguments that have been used to reject these claims:  

Plaintiffs have failed to identify any source in the text of the Constitution, the history of the institution of marriage or contemporary social standards for their claim that the Constitution mandates state recognition of marriage between members of the same sex…. Our society and laws view marriage as something more than just a state recognition of a committed relationship between two adults. Our leading religions view marriage as a union between a man and a woman recognized by God … and our society considers marriage between a man and a woman to play a vital role in propagating the species and providing the ideal environment for raising children.

It will likely take many months before any of these cases reach their state supreme courts, but it is far from certain that the success of gay and lesbian advocates in Massachusetts and Vermont will be repeated in any other state.

It is not surprising that the two state supreme courts which have been most receptive to claims by gays and lesbians of the right to marry have been in two of the most liberal states, Vermont and Massachusetts, and even then the decisions were highly controversial. It is interesting to observe that in Massachusetts, immediately after the Goodridge decision was rendered, state politicians opposed to the ruling began the process of trying to have the state constitution amended to prevent same-sex marriage. However, since the decision has been in effect, support for same-sex marriage has increased markedly in the state, and the efforts to amend the Massachusetts state Constitution to ban same-sex marriage may be stalling.

Conservative and religious political groups are much more powerful in the USA than in Canada, and these groups have mobilized to oppose same-sex marriage, and “judicial activism” that might lead to its imposition. In eighteen states referenda have

---

54 Lewis v Harris (Sup. Ct N.J., App. Div, June 14, 2005)
55 See e.g http://www.thetaskforce.org/downloads/RecentStateMay2005.pdf Support for same-sex marriage in Massachusetts increased from 40% at the time that the decision was rendered to 62% a year and a half later.
been held to amend their state constitutions to prohibit same-sex marriage. The votes against the recognition of same-sex marriage have passed by wide margins, and the process of constitutional change has been commenced in at least a dozen other states. The fact that a state constitution has been amended to in some way reaffirm that marriage is defined as the “union of a man and a woman” or to prevent courts from recognizing out of state same-sex marriages makes it more difficult for advocates to succeed in gaining same-sex marriage either through litigation or by the process of having legislation enacted. The wording and nature of these constitutional provisions varies, however, and in some cases it has been possible to persuade a court to have a voter ratified amendment to a state constitution stuck down for violating the U.S. Constitution, as recently happened in Nebraska where a federal court ruled that the amendment was so broad and destructive of rights as to violate the federal Constitution’s Equal Protection guarantees and hence was invalid. In California, a 2000 amendment to the state Constitution which provided that the state would only “recognize” marriages between a man and a woman has not prevented constitutional litigation to achieve same-sex marriage within the state or efforts to have the state Legislature amend the state family law code to define marriage as between “two persons,” as it is being argued that the amendment only bans recognition of out-of-state same-sex marriages.

More than a dozen American states have enacted “registered domestic partnership” (or “civil union”) laws, which are intended to confer specified rights and responsibilities on couples who chose to register with the state, and provide for some process for resolution of disputes upon the termination of such a relationship. While in a number of states these laws allow any two unmarried adults to register, these laws are clearly directed at same-sex couples, with the intent of giving them specified rights, and at least some security and recognition for their relationships. In Vermont, the civil union law was enacted as a result of constitutional litigation and a court order, but in most states these laws have been enacted by the legislature in some response to political advocacy,

59. A very broad amendment to the Nebraska Constitution which banned not merely same-sex marriage but also any legal recognition of any form of “civil union, domestic partnership, or other similar same-sex relationship” has been held by a Federal Court to violate the U.S. Constitution: see “Judge voids same-sex marriage ban in Nebraska,” New York Times, May 13, 2005.
60 See e.g “California gay marriage bill clears one hurdle,” New York Times, April 26, 2005.
61 See e.g. http://www.nclrights.org/publications/marriage_equity0305.htm
not litigation. Some states, such as Vermont, Connecticut and California have civil union laws that give registered same-sex partners virtually the same rights and responsibilities as married couples, to the extent permitted under state law. Other states, such as Hawaii, confer only a quite limited range of rights, in particular focusing on medical treatment decisions and upon death of a partner; these narrower laws were generally enacted in response to concerns about how gay couples could deal with the AIDS crisis. Some cities have also enacted domestic partnership laws that, for example, allow municipal employees to register to gain status for purposes of giving employment benefits to a partner. None of these state and municipal laws confer any status under federal law, and there are real concerns about how much recognition any of these unions will have outside the state that the parties registered.

Perhaps the most significant and intense aspects of the debate over the “m” word are symbolic and emotional. Prominent conservative politicians, like President George Bush, say that they are not against gays and lesbians, and many are prepared to give them significant legal recognition to their relationships though domestic partnership laws, but they also feel that it is necessary to take steps to “preserve marriage.”62 Opinion polls in the United States generally show a substantial majority of the public is opposed to same-sex marriage, but also in favor of some form of domestic partnership law.63 While from a practical perspective broadly drafted domestic partnership statutes, such as those in Vermont and California, give significant legal recognition to same-sex relationships, from a symbolic and emotional perspective there is a significant difference between “marriage” and a “domestic partnership,” both for those who enter into them and for society as a whole. It is, however, also significant to appreciate that when prominent opponents of same-sex marriage feel obliged to speak in support of civil unions and avoid making openly derogatory comments about gays and lesbians, the “center of gravity” on the debate over the legal recognition of gays and lesbians has significantly shifted.

Polygamy: Marriage For More than Two?

In both Canada and the United States, polygamy is not a legally recognized form of marriage, and it is a criminal offence to enter into a polygamous relationship. One of the arguments being raised by the opponents of giving legal rights to same-sex partners is that if this change is accepted to the definition of marriage, there may be further changes that will result in the legal recognition of polygamy. For example, in his dissent in *Lawrence v Texas*, Justice Scalia raised the specter of criminal prohibitions on incest and polygamy being invalidated if the criminal laws on homosexual acts were ruled unconstitutional. Given the history of marriage and the acceptance of polygamy in many countries in the world today, it is understandable that the issue of polygamy would be raised in the course of the debate over legal recognition for same-sex relationships.

This issue is of more than rhetorical interest as there are a significant number of Fundamentalist Mormons living in openly polygamous relationships in isolated communities in a number of western American states, including Utah, Arizona, Idaho and Texas, as well as in British Columbia. These communities have a history which goes back to the late nineteenth century, when the Mormon Church rejected polygamy and Fundamentalists left that Church to continue to practice polygamy. Media reports raise concerns about adolescent girls being coerced into plural arranged marriages with much older men and adolescent boys being forced out of these communities to allow some men to have multiple wives. There are concerns that children in these communities are being indoctrinated into this faith without adequate exposure to the outside world, as well as allegations of high rates of child abuse and neglect, and welfare fraud to support very large families.

---

64 *Lawrence v. Texas*, 538 U.S. 558 (2003) at 590
65 There are also reports of Muslim polygamous families in North America; not much is known about these families but they appear to be relatively few in number. They are generally immigrants from countries where polygamy is legal, although legal migration to Canada and the USA by members of known polygamous families is generally not permitted. See “Canadian Muslim leader defends polygamy,” *National Post*, January 21, 2005; and Dena Hassouneh-Phillips, “Polygamy and Wife Abuse: A Qualitative Study of Muslim Women in America” 22 Health Care for Women International 735-748.
66 See e.g [www.polygamyinfo.com](http://www.polygamyinfo.com) and [www.rickross.com](http://www.rickross.com) (date accessed June 29, 2005). See e.g. “After Fleeing Polygamist Community, an Opportunity for Influence,” *New York Times*, June 29, 2005
While a number of women who have left polygamous communities have raised significant concerns about the mistreatment of women and children in these communities, recently women living in polygamous marriages have sought publicity to advocate in favor of social and legal recognition for these relationships. Some of their rhetoric is similar to that used by gay and lesbian advocates. For example, in April 2005, a group of women hosted a “Polygamy Summit” in British Columbia, inviting the media and members of the public to a public meeting where they defended polygamy as their “freely chosen lifestyle.”

They offered testimonials to such benefits of polygamy as the pooling of resources and sharing of housework, as well as the opportunity to marry a man who had “proven” himself. They also denied reports that women are forced to marry against their will or that adolescents were being pressured to marry. One woman, who identified herself as a registered nurse and midwife, was quoted as saying:

We are women that have chosen the Bountiful lifestyle. We love it and we believe in it. We know better than any of you what our culture is like. It’s not for everyone, but for us it’s the right choice and we wouldn’t change it for anything in the world.

Over the past half century there have been very few prosecutions for polygamy in the USA, and none in Canada, despite the fact that the communities where polygamy is practiced are well known to the authorities. One reason for the failure to actively enforce the law is that a major police raid on a polygamous community in Arizona in the early 1950s resulted in many women being imprisoned along with their husbands, as well many of their children being traumatized and placed in foster care, and seemed to have no long term effect on the practice polygamy. More recently some questions have been raised about the constitutionality of these laws.

In challenging the constitutionality of polygamy laws, especially the criminal statutes, Fundamentalist Mormons can make arguments based on violations of constitutional guarantees of Equality and Liberty that are similar to those raised by gays

---

68. “Polygamists take the offensive: Public meeting; ‘We're not locked in harems,’ said one” Montreal Gazette (21 April 2005) A10.
and lesbians. Further, Fundamentalist Mormons can argue based on an infringement of their religious freedom, as unlike Islam which allows but does not require the practice of polygamy, Fundamentalist Mormons are required by the precepts of their faith to enter into a plural marriage if directed to do so by one of their religious leaders, and believe that they will enter into a higher level of heaven if they are in a polygamous marriage.

There have been occasional recent prosecutions of male polygamists in the USA, in particular if they are known to have taken adolescent girls as plural wives, as occurred when Tom Green was prosecuted for polygamy in Utah, based on his having “spiritually married” a 13 year old girl who bore his child soon after the “celestial marriage.” His appeal of the conviction on the grounds that the law violates freedom of religion as guaranteed by the American Constitution was rejected, with the Utah Supreme Court concluding that the law is rationally connected to a legitimate government purpose.70 The Utah Supreme Court found that the object of the statute was not directed at restricting a religiously motivated practice, but rather at the regulation of marriage and the support of monogamy, observing that modern American society is based on a monogamous concept of marriage and this law supports that institution, as well as protecting vulnerable people from abuse and exploitation.

Since Lawrence v. Texas, the statutory and constitutional anti-polygamy provisions have been upheld as not being inconsistent with the United States Constitution. In the 2005 case of Bronson v. Swenson,71 Utah’s criminal law and constitutional provisions prohibiting polygamy were challenged on the grounds that they violated the plaintiffs’ right to free exercise of their religious beliefs under the First Amendment and right to privacy under the Fourteenth Amendment of the American Constitution. The plaintiffs argued that their religion requires the practice of polygamy, and they brought the action after one of the plaintiffs was denied a marriage license on the grounds that he was already married. The court, in upholding the prohibition on polygamous marriage, observed that the state has a “compelling interest in prohibiting polygamy,” as monogamous marriage is the “bedrock upon which our culture is built.” The court ruled that prior decisions about the validity of polygamy laws going back over

70 State v. Green, 2004 UT. 76
71 Bronson v. Swenson, 2005 U.S. Dist. LEXIS 2374; the court cited and in passages quoted Potter v Murray City, 760 F.2d 1065 (10th Cir. 1985).
100 years were not reversed by *Lawrence v. Texas*, as the United States Supreme Court had carefully delineated the limitations of its ruling in *Lawrence*.

As courts and legislatures in North America are taking an increasingly pluralistic and functional approach to the definition of the marriage, it is legitimate to ask whether polygamy is so contrary to accepted values and so concerning as regards social policy as to merit criminal prohibition. However, the argument that recognition of same-sex marriage will necessarily lead to legal recognition of polygamy is specious, as polygamy is very different from monogamous marriage, in social, cultural and economic terms.

There is no credible social science research which indicates that same-sex relationships involve a greater social cost, more abuse, or greater risks for vulnerable individuals or children than opposite-sex relationships. Indeed, there are social and economic advantages to recognizing same-sex relationships, for example in terms of having dependent individuals look to their partners rather than the state for financial support and health care. In contrast, there is a growing, international body of literature on the harmful effects of polygamy for women and children, and its practice is inconsistent with the fundamentally accepted principle of gender equality. Compared to women in monogamous relationships in any society, women in polygamous relationships have a greater prevalence of low self-esteem and depression, and are in an inherently vulnerable and unequal position in social and economic terms; they also seem more likely to be victims of domestic violence. There are also studies which have found that in comparison to children from monogamous families, children from polygamous families have lower self-esteem, higher levels of self-reported family dysfunction, and lower levels of socio-economic status and academic achievement. There is a growing worldwide trend towards prohibiting polygamy, even in societies where it has long, religiously based traditions, such as Tunisia and Turkey, reflecting the greater recognition of equality, especially gender equality.

72 See e.g David Chambers, “Polygamy and Same-sex Marriage,” 26 Hofstra L. Rev. 53 (1997).
There are strong arguments in favor of continuing the legal prohibitions against polygamous marriage in the present laws in North America. However, care must be taken not to further victimize women in polygamous unions, who may have been coerced to enter into such relationships, and their children. There may be limited purposes for which the courts should accept that rights and obligations should arise out of such relationships, most obviously the obligation of child support, but perhaps also claims to property rights, for example upon death.

**Conclusion: Redefining Marriage in Canada & the U.S.A.**

Marriage is one of the oldest, most universal and important of social and legal institutions. It has, however, dramatically changed over the course of recorded history, and even today there is great variation around the world in the laws and mores of marriage in different countries.

Marriage for opposite-sex partners in North America is increasingly considered a relationship of equals without distinctive gender roles in law. Marriage, procreation and child-rearing are becoming less closely intertwined, with fewer children being raised in marital relationships, more children being raised by single parents, and even a growing number of children being raised by same-sex couples. There is also a growing commitment to ending discrimination, including that based on sexual orientation. These developments have all helped fuel the movement towards legal recognition of same-sex partnerships in North America. There are, however, significant differences in Canada and the United States in the speed at which legal recognition for same-sex relationships. In Canada, by the end of the summer same-sex partners will have the full right to marry everywhere in the country, while nowhere in the USA can same-sex partners enter into a marriage with a fully equivalent status as opposite-sex married partners, and only one state at present allows for even a limited form of same-sex “marriage.”

One interesting aspect to a comparison in developments in the two countries is the relationship between the development of the law and public opinion. While the words of American constitutional documents are very similar to those in Canada, the political reality is that there is much greater public opposition to same-sex marriage in the USA. For all of the complex constitutional argumentation, in some important ways American
courts are simply reflecting the policies favored by a more conservative, more religious populace, while Canadian courts are reflecting the more liberal sentiments and values of the Canadian people. It is far from coincidental that the American states where the courts have been most receptive to recognizing same-sex relationships, Vermont and Massachusetts, are also the most politically liberal. Further, levels of public support for polygamy are much lower than for same-sex marriage, suggesting that legal recognition of polygamy will not occur, however logical the constitutional arguments in its favor might appear.

Developments in the two countries also reveal an interesting relationship between legal change and attitudinal change. It is very difficult to effect dramatic legal change, even through litigation, in the face of strong social resistance, but gradual legal change can help to change social attitudes, which can in turn support further legal change. It seems very unlikely that a society can go quickly from having laws that criminalize homosexual acts directly to a society that recognizes same-sex marriage; there need to be some intermediate stages to allow time for social attitudes to change in response to new legal realities and to more socially visible same-sex relationships. The litigation experience in Canada in the 1990s suggests that a constitutionally based claim for same-sex marriage is more likely to succeed if it is the culmination of a series of discrimination based claims, and that it is legally and politically easier to start with discrimination based claims in the economic sphere. If the Canadian courts had started in the 1990s with

---

76 One lower court judge in New York recently held that it is a violation of the state constitution to deny same-sex couples the right to marry, though a majority of courts in that state have thus far rejected that argument: see, “Judge's Ruling Opens Window for Gay Marriage in New York City,” February 5, 2005, New York Times.

77 A recent public opinion survey found that 80% of Canadians disapprove of polygamy and would not accept it being practiced. Though 20% stated that they would tolerate it, only 4% personally “approve” of the practice for themselves or others. In contrast, the survey found that 50% of Canadians agree that “same sex couples should be allowed to marry.” R. W. Biddy, “Polygamy and the Same-sex Debate”, The Vanier Institute for the Family (25 January 2005), online: Vanier Institute for the Family <http://www.vifamily.ca/newsroom/press_jan_25_05.html> (accessed: June 12, 2005).

78 In a poll in Utah in March 2000, 58% favored more aggressive criminal prosecution of polygamists, 26% were opposed to more aggressive prosecutions, and 15% were undecided: seehttp://www.polygamyinfo.com/plygmedia%2000%2062desnews.htm (accessed: June 15, 2005) Kees Waaldijk, “Civil Developments: Patterns of Reform in the Legal Position of Same-Sex Partners in Europe” (2000), 17 Can. J. Fam. L. 62 argues that European experience reveals a “standard sequence” of decriminalization, followed by anti-discrimination provisions, and then partnership legislation, and perhaps finally, same-sex marriage.
decisions requiring same-sex marriage, they would have been very much out-of step with public opinion, but by the time that the courts in Canada began to make same-sex marriage decisions in the new millennium, public opinion had shifted, and in significant measure because earlier decisions on less contentious situations of discrimination helped to change social attitudes.

Canada is moving inexorably towards the recognition of same-sex marriage throughout the country. The recognition of same-sex marriage will promote equality and fairer treatment both for gays and lesbians, but it will also reflects the recognition that marriage today is a relationship of equals, without clear gender roles, at least in legal terms.

While there are significant similarities in family law in Canada and the United States, there are also some substantial differences. In general, the laws of the United States take a narrower approach to the recognition of familial relationships that give rise to rights and obligations. There is, for example, much greater legal recognition in Canada for unmarried opposite-sex cohabitation and for the role of step parents. Conversely, marriage and biological parentage play a greater role in family law in the United States, so it is perhaps understandable that changing the definition of “marriage” is more difficult in the USA. Despite the differences in the pace of change, the United States is also moving towards greater recognition of same-sex relationships, with even President Bush endorsing some form of domestic partnerships for gays and lesbians, but the movement towards recognition of same-sex marriage is clearly progressing more slowly and much more unevenly than in Canada.

It is also interesting to note the effect of the different division of powers provisions in the two countries. In Canada, the issue of same-sex marriage is a federal issue; this has resulted in liberal judges and politicians imposing same-sex marriage on some of the more conservative parts of the country, like Alberta, where a majority of the population is clearly opposed. In the USA, family law is largely a state issue. This has allowed at least limited forms of recognition of same-sex relationships to be achieved in some of the most liberal states where there is the most significant support, without any

79. For a somewhat dated but still largely valid comparison, see Bala, "Family Law in Canada and the U.S.A.: Different Visions of Similar Realities" (1987), 1 International Journal of Law and the Family 1-46
direct threat to the legal regime in more conservative states. If this were a federal issue in the USA, it would be much more difficult to ever achieve recognition for same-sex relationships. Given the more conservative and religious nature of American society, it may be many years before same-sex marriage is accepted in a majority of American states. The experience with same-sex marriage in Canada over the coming years, assuming that it is positive (and it has been thus far), may also serve to demonstrate to Americans that there is no danger and much potential value in giving equal treatment to gay and lesbians families. American courts will also have to grapple with the question of what legal recognition (if any) to give same-sex partners who married in Canada and live in the USA.

Like prior debates in the family law field over such fundamental issues as no-fault divorce, the debates over same-sex marriage are occurring simultaneously in different jurisdictions. As in those prior debates, the direction of change seems clear, at least in Western countries, but the pace of change varies greatly, and different countries will have different resolutions to the controversies. These debates are intense and widely engaging because they involve not only politicians, justice system professionals, academics and those directly affected by any legal change, but they also are profoundly important in symbolic and emotional terms for all of society.