Is there a constitutionally valid legal bar to same sex marriage in Canada?

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The Canadian debate over the legal validity of same-sex marriage is not new, but since the Supreme Court of Canada has not yet been directly confronted with the issue, and indeed since it has taken great pains to carefully and deliberately avoid the issue [1], it remains ongoing. Soon the Justices of the Supreme Court of Canada will be forced to deal with the contentious politically charged question of whether there is a constitutionally sound legal bar to such marriages either in a statute or in the common law of Canada.

Three cases are currently being argued in the lower Courts, one in Ontario, one in British Columbia and one in Québec. All three cases seem destined for the Supreme Court of Canada regardless of the outcomes in the lower Courts. When the first of these cases reaches our highest Court, we will finally have a definitive ruling on the question which this paper seeks to answer : can same-sex couples enter in to a valid marriage in Canada?

One of the many peculiarities of the Canadian legal system is the division of powers relating to marriage between the Federal and Provincial governments. The Federal government has exclusive jurisdiction over marriage and divorce[2], while the Provinces have exclusive

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[1] See generally *M.* v. *H.*, [1999] 2 S.C.R. 3.

[2] *The Constitution Act, 1867* §91(26).

jurisdiction over the solemnization of marriage[3]. Neither level of government is expressly given the power to define or to alter the definition of the word "marriage". This leaves five possibilities:

1) the power to define and to revise or amend the definition of "marriage" is implicit in authority over "marriage and divorce" granted to the Federal Government;

2) the power to define or amend the definition of "marriage" is unassigned, and therefore falls to the federal government as part of its residual power under "peace order and good government"[4];

3) authority over the definition of "marriage" is inherent in the authority over the solemnization of marriage granted to the Provinces;

4) the definition of "marriage" as set by the common law of Canada in 1867 was implicitly crystalized in the *Constitution Act 1867* and it is only possible to change the definition of "marriage" to permit same sex marriages by a constitutional amendment;

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[3] *The Constitution Act, 1867*, §92(12).

[4] *The Constitution Act, 1867*, §91.

5) the definition of "marriage" resides in the domain of the common law and may be changed by judges.

The fifth possibility can arguably co-exist with either of the first, the second or the third alternatives. If the level of government which has jurisdiction to act to define marriage has not done so, or if after having done so has had its legislation interpreted by the Courts, then the Courts may also have some authority over the definition of "marriage" – subject of course to further legislation by the appropriate elected body.

There is no Federal legislative definition of "marriage", nor is there any Federally legislated denial of a same sex couple's capacity to marry. There is Federal legislation to prohibit marriage within specified degrees of (biological or deemed) consanguinuity[5], but none to either restrict marriage to opposite sex couples, or to define the term "marriage".

The Federal *Modernization of Benefits and Obligations Act §1.1*[6] does not, as some have suggested, impose an opposite sex requirement on marriage; rather it only clarifies that that Act is not to be interpreted as a legislative change to the common law definition of "marriage". True,

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[5] *Marriage (Prohibited Degrees) Act*, S.C. 1990, c.46.

[6] *Modernization of Benefits and Obligations Act,* S.C. 2000, c. 12.

the section does include a summary of what the legislature believed (and presumably believes) to be the common law definition of "marriage", but it also clearly states that:

"INTERPRETATION

1.1 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."* [emphasis added]

To argue that a last minute addition to a statute, under the heading of "Interpretation", which by its own terms does not change the definition of "marriage" does exactly what it purports not to do is not credible.

Alberta's Marriage Act[7] defines "marriage"[8] in §1(c) ,as *"*"marriage" means a marriage between a man and a woman;", which definition is purportedly protected by §2 of that Act which states:

"2 This Act operates notwithstanding

(a) the provisions of sections 2 and 7 to 15 of the Canadian Charter of Rights and Freedoms, and

(b) the Alberta Bill of Rights."

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[7] *Marriage Act*, R.S.A. 2000 c. M-5.

[8] *Marriage Act*, R.S.A. 2000 c. M-5 §1(c).

No doubt, the Alberta legislature enacted this provision in anticipation of a successful Charter based challenge to the constitutional validity of the common law definition of marriage. While this section is certainly a clear statement of legislative intent, and may be used as such in any construction of the Act, it can do nothing to prevent the striking down of the definition of marriage contained in §1(c) of the *Marriage Act*[9].

Under §91(26) of the *Constitution Act 1867*, "marriage", including capacity to marry, is reserved to the Federal government[10]. Any attempt to legislate in that area by a Province is *ultra vires*; the only exceptions being legislation having to do with form and ceremony for the solemnization of marriage under §92(12) of the *Constitution Act 1867*, or with an intersection of marriage with property and civil rights under §92(13) of the *Constitution Act 1867*.

Québec also includes an opposite sex definition of marriage in its Civil Code[11], though without any attempt to shield the definition from constitutional review. If the accepted common law opposite sex definition of marriage is successfully challenged under the Charter, only the

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9 Ibid

[10] *M.* v. *H.*, [1999] 2 S.C.R. 3 at para 227.

[11] Civil Code of Québec, S.Q. 1991, c. 64 at art. 365.

Federal government can invoke the protection of the "notwithstanding" clause[12] to implement or preserve it.

British Columbia, Saskatchewan, Manitoba, New Brunswick, Nova Scotia, Prince Edward Island, Yukon Territory, North West Territory and Nunavut have not included a definition of marriage in their respective Marriage Acts.[13]

The Federal Parliament having remained silent, and Provincial attempts to define "marriage" being *prima facie ultra vires* pursuant to the division of powers in §91 & §92 of the *Constitution Act 1867*, the Courts have had to look to the common law to ascertain the definition of "marriage".

Rightly or wrongly the Courts have adopted the definition of "marriage" espoused in the 1866 English case of *Hyde* v. *Hyde and Woodmansee*,[14] in a 1974 judgment of the Manitoba

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[12] *Canadian Charter of Rights and Freedoms*, §33.

[13] *The Marriage Act 1995*, S.S. 1995 c. M-4.1; *Marriage Act*, R.S.M. 1987 c. M-50; *Marriage Act*, S.N.B. 2001 c. M-3; *Solemnization of Marriage Act*, R.S.N.S. 1989 c. 436; *Family Law Act, S.P.E.I. 1995, c. 12*; *Marriage Act*, R.S.Y. 1986 c. 110; *Marriage*, R.S.N.W.T. 1988, c. M-4 (applies in both N.W.T. and Nunavut).

County Court[15]. Although that decision preceded the Charter and was not an appellate ruling, the same definition was accepted in cases after the Charter came into effect[16]

In *Re Hassan*[17], Justice Cory of the Ontario High Court of Justice (as he then was) suggests that the House of Lords in *Hyde* was defining not "marriage", but rather "a Christian marriage". Justice Cory reviewed the applicability of *Hyde* and concluded that it was no longer good law in Ontario; though his reasons arguably apply to the rest of Canada as well.

Since the followers of the Church of Jesus Christ of Latter Day Saints (the Mormons) are, and were in 1866, Christians, Justice Cory was only partly right – the House of Lords was not defining "marriage", it was defining a Christian marriage which is not polygamous and is

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[14] *Hyde* v. *Hyde and Woodmansee*, 1 L.R. P&D 130

15 *Re North et al. and Matheson (1974)*, 52 D.L.R. (3d) 280 (Man. Co. Ct.).

[16] See generally: *C.(L.) v. C.(C.) (1992), 10 O.R. (3d) 254; Layland* v. *Ontario (Minister of Consumer and Commercial Relations) (1993)*, 14 O.R. (3d) 658 (Div. Ct) and *EGALE* v. *Canada (Attorney General)*, [2001] B.C.J. No. 1995.

[17] *Re Hassan and Hassan (1976)*, 12 O.R. (2d) 432 (H.C.J.) At 434.

approved of by the Church of England. Furthermore, by its own terms the reference to the definition of "marriage" in *Hyde* was only for the purpose of determining the availability to one of the parties to such a marriage of the remedies, adjudication or relief provided by the matrimonial law of England.

In *Layland*[18], there is no mention of Justice Cory's rejection of the definition of marriage from *Hyde* in the case of *Re Hassan*, despite the fact that both *Layland* and *Re Hassan* deal directly with the definition of marriage (though not in the same context) in the Province of Ontario.

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The majority in *Layland* re-adopt the opposite sex definition of marriage essentially as it was set out in *Hyde*, and find that there is no discrimination against members of same sex couples imposed by this definition. To reach this conclusion, the majority fail to properly consider indirect or adverse effect discrimination and employ both questionable logic and the similarly situated test which has since been rejected by the Supreme Court of Canada in *Andrews*[19], to reach the following conclusion:

18*Layland* v. *Ontario (Minister of Consumer and Commercial Relations) (1993)*, 14 O.R. (3d) 658 (Div. Ct).

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

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

[emphasis added]

Southey and Sirois JJ then conclude that the common law prohibition of same sex marriage does not constitute discrimination under §15(1) of the *Charter.*

Interestingly, Southey and Sirois JJ. append the following *obiter* comment to their judgment :

"Whether parties to homosexual unions should receive the same benefits as parties to a marriage, without discrimination because of the nature of their unions, is another question."

I will return to this point later in this paper when I explore the question of the constitutional validity of any extant or hypothetical bar to same sex marriage in Canada.

In the most recently decided Canadian case[20], Justice Pitfield of the British Columbia Court adopted the position that the definition of "marriage"from *Hyde* was part of the common

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[20] *EGALE* v. *Canada (Attorney General)*, [2001] B.C.J. No. 1995.

law of what is now Canada in 1867 and can not therefore be changed by anyone other than by constitutional amendment. Justice Pitfield held that judges are restricted to amending the common law in incremental steps[21] and that the change to the definition of "marriage" required to extend the ability to marry to same sex couples would be too large a change to be classified as incremental[22]; that it is not within the purview of the Provinces to amend the definition since no such authority is bestowed upon them in §92 of the Constitution Act 1867; and that the Federal government is unable to amend the definition of "marriage" because the common law definition from 1867 is an integral part of the ascribing of power over marriage and divorce to the Federal government[23]. If that be true, as Justice Pitfield believes, any change to the definition of marriage would be a change in the definition of the Federal government's authority under the division of powers, and any such change must be done by a Constitutional amendment, something which the Federal government can not do unilaterally.

The case upon which Pitfield J. bases his assertion that the common law of 1867 prohibited same-sex marriage is *Hyde*[24], particularly the passage[25]:

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[21] *EGALE* v. *Canada (Attorney General)*, [2001] B.C.J. No. 1995 at para. 92.

[22] *EGALE* v. *Canada (Attorney General)*, [2001] B.C.J. No. 1995 at para. 93.

[23] *EGALE* v. *Canada (Attorney General)*, [2001] B.C.J. No. 1995 at para. 102,122 & 123.

[24] *Hyde* v. *Hyde and Woodmansee*, 1 L.R. P&D 130.

"I conceive that marriage, as understood in Christendom, may for this purpose be defined as the voluntary union for life of one man and one woman, to the exclusion of all others."

It is clear from the rest of the decision in *Hyde* that the excerpted passage was never intended to be a comprehensive definition of marriage. The words "for this purpose" in the above-quoted fragment of the ruling in *Hyde* refer to the determination of whether a potentially polygamous marriage performed in a jurisdiction which recognized such marriages as valid in accordance with a different (i.e. non-Christian) religious faith[26], should be recognized in England so as to entitle the parties to such a marriage to the remedies, adjudication or relief of the matrimonial law of England; specifically a decree of divorce.

The proposition that the legislative power over marriage assigned to the Federal parliament is forever defined by the narrowly focused definition in *Hyde* is contradicted by the very section of the *Constitution Act 1867* which confers that power. The definition of marriage

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[25] *Hyde* v. *Hyde and Woodmansee*, 1 L.R. P&D 130 at 133.

[26] Lord Penzance purports to define "marriage as understood in Christendom" and then distinguishes such marriages from the Mormon conception of "marriage" as though the Mormon faith (also known as the Church of Jesus Christ of Latter Day Saints) was not a Christian faith, which it was and continues to be.

in *Hyde* "*...the voluntary union* ***for life*** *of one man and one woman, to the exclusion of all others.*" (emphasis added) is incompatible with §91(26) of the *Constitution Act 1867* which grants the Federal Parliament authority over "Marriage and divorce", since a divorce terminates a marriage during the lives of both parties to the marriage.

Hyde was decided in 1866, only one year before the *Constitution Act 1867.* Surely the drafters of the *Constitution Act* were aware of *Hyde,* and that definition's incompatibility with the notion of divorce is readily apparent. It is therefore unlikely that the drafters of the *Constitution Act 1867* intended to enshrine the definition of marriage from *Hyde*.

Since, on a reading of the full decision in *Hyde,* it is clear that the aspect of marriage which was at issue was monogamy versus polygamy and not same sex versus opposite sex, that part of the decision which refers to the opposite sex nature of marriage is, even if correct, arguably *obiter dicta*.

It is important to note in any analysis of the applicability of *Hyde* as a precedent in Canada, that the matrimonial law of England was different from the matrimonial law of what is now Canada even when *Hyde* was decided.

In 1753 the first statute regulating marriage in England was enacted[27]. *Lord Hardwicke's Act*, as the statute was known, recognized only marriages performed by the Established Church, the Church of England, as valid. There was no provision for civil marriage, and no other religious marriage would be valid; the only exceptions being the marriages of Quakers and of Jews. It is likely that when the House of Lords rendered judgment in *Hyde*, it was defining a "Christian marriage" as understood by *Lord Hardwicke's Act;* which specified by its own terms that it did not apply to the colonies beyond the seas (which would have included what is now Canada).

The clarification in *Hyde* that the definition was of a "Christian marriage" was most likely to distinguish such a marriage from marriages according to the Quaker and Jewish faiths which were also valid under *Lord Hardwicke's Act*. Nothing in the *Hyde* ruling suggests that the House of Lords was attempting a comprehensive definition of marriage for all people or for all purposes; in fact *Hyde* itself clearly indicates that the opposite is true.

Only ten years after the passage of *Lord Hardwicke's Act* in England, the Royal Proclamation of 1763 recognized and confirmed the authority of the Church of Rome in Canada

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[27] *An Act for the better preventing of clandestine marriages*, 26 Geo. II 7, c.33 (*Lord Hardwicke's Act*).

as well as of the Protestant Religion[28], something *Lord Hardwicke's Act* did not do in England. This recognition of the authority of the Church of Rome in Canada was affirmed in *The Constitutional Act , 1791*[29].

Marital laws in what is now Canada continued to evolve separately from those in England. Prior to confederation, Ontario passed a series of *Marriage Acts* in 1793[30], again in 1847[31], and 1857[32], each gradually extending recognition of marriage to a variety of religious

[28] Now better known as the Roman Catholic Church and the Church of England respectively.

[29] *The Constitutional Act, 1791*, 31 Geo. III c.31 (U.K).

[30] *An Act to confirm and make valid certain marriages now comprised within the Province of Upper Canada, and to provide for future solemnization of marriage within the same,* 33 Geo. III c.5 ("*Ontario Marriage Act of 1793*"), which was more restrictive than *Lord Hardwicke's Act* in that it recognized only marriages by the Church of England with no exception for Jews or Quakers.

[31] *An Act to extend the Provisions of the Marriage Act of Upper Canada to Ministers of all denominations of Christians*, 10&11 Vic., C. 18 ("*Marriage Act of 1847*").

faiths, before the *British North America Act 1867* (now the *Constitution Act 1867)* gave sole jurisdiction over marriage and divorce to the Federal Parliament. None of these laws were in effect in England in 1866 when Hyde was decided. The facts that *Hyde* was decided in a different country, under different laws, which developed through a different legislative history, and that by its own terms it is to be construed narrowly, make it improper to use the decision in *Hyde* as a binding precedent in Canada.

If the definition in *Hyde* properly formed part of the common law of Canada in 1867 (which I doubt), the legislative authority over marriage and divorce granted to the Federal Parliament **after** *Hyde* must have included the power to change the definition of the term "marriage".

If the definition in *Hyde* did not properly form part of the common law in Canada in 1867 it could not have been imported as an implied restriction on the Federal power over "marriage and divorce" granted by the *Constitution Act 1867.* That being so, the Federal government can and arguably must act to make any changes to the definition of "marriage" necessary to bring or

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[32] *An Act to amend the laws relating to the solemnization of Matrimony in Upper Canada*, 20 Vic., c.66 ("*Ontario Marriage Act of 1857*")., which extended legal recognition to marriages performed by any of the religious faiths in what is now Ontario.

keep it in compliance with the Charter. If Parliament does not act then it falls to the Courts to modify the definition of "marriage" as required to ensure it is consistent with the Charter[33].

Accepting, for the purposes of argument only, that "marriage" was defined conclusively by *Hyde*, and that definition is entrenched[34] in §91(26) of the *Constitution Act 1867*[35]; given that §92(12) reserves to the Provinces the power over the solemnization of marriage, no power over marriage remains to be conferred on the Federal parliament by the *Constitution Act 1867*.

In any event, attempting to ascertain whether it was intended that §91(26) of the *Constitution Act 1867* should either incorporate or supercede the definition of marriage espoused in *Hyde* is not the correct approach to the construction of that or any section of the *Constitution*

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[33] See generally *Schachter* v. *Canada*, [1992] 2 S.C.R. 679; and *R.* V. *Swain*, [1991] 1 S.C.R. 933 at 1034.

[34]Such an entrenchment of a definition would be contrary to the *living tree* doctrine enunciated by the Judicial Committee of the Privy Council in *Edwards* v. *Attorney General for Canada*, [1930] A.C. 124 at 136.

[35] As suggested by Pitfield J. in *EGALE Canada Inc.* v. *Canada (Attorney General)*, [2001] B.C.J. No. 1995 at para 101.

Act. What matters is not what was most likely intended, but rather what the Act **actually says**.[36] What §91(26) actually says is that the authority to legislate in the areas of marriage and divorce vests in the Federal Parliament.

Boiled down to its essence, the position adopted by Pitfield J. in *Egale* is that the Federal parliament has no authority over marriage because the *Constitution Act 1867* says that legislative authority over marriage resides with the Federal government. The word "marriage", having been defined in *Hyde*, serves to limit the power granted to the Federal Parliament, which is bound by that definition and limitation until and unless the *Constitution Act 1867* is amended to change the definition of "marriage".

By the same reasoning, since the *Hyde* definition of marriage precludes divorce, presumably the Federal government can not legislate so as to permit divorce but only to forbid it, since to permit divorce would be inconsistent with the definition of "marriage". This can not be the correct interpretation of §91(26) of the *Constitution Act 1867*, since it is not what §91(26) **actually says** and would make that section incompatible with itself.

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36 *Edwards* v. *Attorney General for Canada*, [1930] 1 D.L.R. 98 at 107, citing with approval *Brophy* v. *A.-G. Man.*, [1895] A.C. 202, at p. 216.

If there is a legal bar on same sex marriage either in legislation or in the common law, or if one were to be enacted by Parliament or declared by the Courts, then for that restriction to continue in force it must survive a *Charter* analysis. The Courts have consistently held that the common law must be interpreted in a manner that is consistent with the *Charter*.[37] Where such interpretation is not possible and the common law is in conflict with the *Charter*, it is reasonable to strike down the common law in the same way as a statute would be struck down when it is irreconcilably in conflict with the *Charter*[38]. Courts should have less difficulty modifying or striking down common law rules than statutes since there is no question of deference to the legislature.

Although cited by Justice Pitfield in his decision in *EGALE* as authority for his conclusion that judges can only modify the common law in incremental steps, the Supreme Court of Canada rulings in *R* v. *Salituro*[39] and in *Hill v. Church of Scientology*[40], do not restrict the

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[37] *R.* v. *Swain*, [1991] 1 S.C.R. 933 at 1034; *R.* v. *Salituro*, [1991] 3 S.C.R. 654; *Hill* v. *Church of Scientology*, [1995] 2 S.C.R. 1130; *R.W.D.W.U.* v. *Dolphin Delivery Ltd.*, [1986] 2. S.C.R. 573.

[38] *The Constitution Act, 1982*, §54.

[39] *R* v. *Salituro*, [1991] 3 S.C.R. 654 at 666.

[40] *Hill* v. *Church of Scientology*, [1995] 2 S.C.R. 1130 at 1169.

Courts ability to modify or strike down the common law. Properly read, these decisions affirm the power of the judiciary to effect changes to the common law but caution that Courts should only make those changes which are necessary to bring the common law back into step with current societal values including the Charter.

In *Salituro*, the Supreme Court does indicate that some changes may require a complex balancing of competing interests and that where it is unclear exactly how best to change the common law due to public policy concerns, the task may be best left to the Legislature[41]; but the language is permissive rather than restrictive. Nowhere does the Supreme Court state that changes which are other than incremental are the exclusive purview of the Parliament[42].

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41 Hence the ability of the Court to suspend a declaration of invalidity to permit a legislative response to the declaration before it takes effect.

[42]For an extreme example of a more than incremental change see: *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island; Reference re Independence and Impartiality of Judges of the Provincial Court of Prince Edward Island R. v. Campbell; R. v. Ekmecic; R. v. Wickman Manitoba Provincial Judges Assn. v. Manitoba (Minister of Justice)*, [1997] 3 S.C.R. 3.

Neither does an economic argument constitute either a refutation of a violation of a Charter right nor justification under §1 of the Charter.[43] In *R.* V *Swain*[44] the Supreme Court of Canada held that the Court has "*...the responsibility of modifying the common law so as to make it constitutional in all its dimensions...*". Not only do the Courts therefore have the **ability** to change the common law definition of "marriage" as much as necessary to bring it into compliance with the Charter, they have a **responsibility** to do so.

Rightly or wrongly, the definition of marriage from *Hyde* was adopted into the common law of Canada by the British Columbia Supreme Court in 1991[45]; this despite the same definition having been rejected in Ontario by Justice Cory in *Re Hassan* in 1976. The incompatibility of *Hyde* and the *Divorce Act*[46] §8(1), which grants a court of competent jurisdiction authority to grant a divorce, was not addressed by the British Columbia Court. This leaves us in an interesting position: until and unless either the Supreme Court of Canada rules on the matter, or the Federal Parliament intervenes legislatively, *Hyde* would appear to be valid at common law in

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[43] *Tétrault-Gadoury* v. *Canada (Employment and Immigration Commission)*, [1991] 2 S.C.R. 22.

[44] *R.* v. *Swain*, [1991] 1 S.C.R. 933.

[45] Keddie v. Currie (1991), 60 B.C.L.R. (2d) 1, at p. 14.

[46] *Divorce Act*, R.S.C., 1985, c. 3 (2nd Supp.)

British Columbia, and possibly in Ontario. The rest of Canada has neither expressly adopted nor rejected *Hyde*, and both the Supreme Court of Canada and the Federal parliament have so far avoided the issue.

British Columbia's Marriage Act[47] does not define marriage, but does, in §6, purport to import the common law of England as it was on November 19, 1858 in all matters not provided for relating to:

> *(a) the mode of solemnizing marriages;*
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> *(b) the validity of marriages;*
>
> *(c) the qualification of parties about to marry;*
>
> *(d) the consent of guardians or parents, or any person whose consent is necessary to the validity of a marriage.*

While there can be no doubt that §6(a) is *intra vires* the Province, there can also be no doubt that §6(b), (c), and (d) are *ultra vires* the Province, as these sections deal with validity of marriage generally and capacity to marry, both having been assigned exclusively to the Federal Parliament under §91(26) of the *Constitution Act 1867*. Since joining confederation British Columbia has lacked any legislative authority over the validity of marriage in a general sense

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[47] Marriage Act, R.S.B.C. 1996, c.282.

(although validity of marriage for purposes limited to property and civil rights matters remain within Provincial jurisdiction pursuant to §92(12) of the *Constitution Act 1867*). The Province can no more indirectly legislate matters within Federal jurisdiction by importing the common law of England than it could directly legislate within the Federal sphere. Until and unless these provisions are challenged directly, they are likely to stand, at least formally.

Whether the Provinces could, either in response to or in anticipation of a successful Charter challenge to the opposite sex requirement for marriage, legislate an opposite sex requirement for the solemnization of marriage as a restriction on the type(s) of valid marriages they would permit to be created within their borders; and whether such a provision would be rejected as an attempt to indirectly legislate a matter under a Federal head of power or whether it could be defended either without the use of or by the invocation of the "notwithstanding" clause are interesting questions, but are beyond the scope of this paper.

As discussed above, there may or may not be a current common law bar to same sex marriage; there may or may not also be a statutory bar at the Federal level. If there is such a bar it is undoubtedly derived from, but not identical to, the definition in *Hyde*[48]. There are two statutory bars enacted at a Provincial level, but as already discussed they are *ultra vires* the Provincial governments, at least as enacted. For the purposes of this paper's further

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[48]The definition of "marriage" in *Hyde* specifies that it is a "*union **for life***" which would preclude the possibility of divorce, so it must be "read down" at least to that extent.

constitutional analysis, I will assume that the definition of marriage is as the Federal Parliament stated it in the *Modernization of Benefits Act*[49], whether by that statute or by the current common law.

A definition of "marriage" which restricts the availability of that institution to opposite sex couples could be challenged under a number of sections of the *Charter*.

The imposition of a requirement that all marriages be not only monogamous but also of an opposite sex couple, having evolved from a religious doctrine, could be seen as an attempt to impose all or part of one religion's beliefs and values on all members of society regardless of their beliefs, and therefore be a violation of freedom of religion rights under §2(a) of the Charter[50].

However, since there is no prohibition or limitation on any person's ability or right to practice the religion of their choice in the manner of their choice inherent in the definition of "marriage", and neither is there a requirement to practice any religion at all imposed, it is extremely unlikely that a complaint on this basis of a violation of §2(a) *Charter* right would

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[49] *Modernization of Benefits and Obligations Act,* S.C. 2000, c. 12.

[50] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c.11.

succeed. Differential treatment of religions under the law is not the same as prohibition or imposition of religion by law, and is more properly a matter for argument under the equality guarantees of §15(1) of the *Charter*.

A refusal to allow same sex couples to marry could also be characterized as an infringement of their freedom of expression rights, since a marriage is, in part, an expression of love and commitment. Arguably, if same sex couples can not legally marry, they can also not identify themselves as "married", either verbally, in print, or by any other means of communication. As a marriage ceremony typically involves a peaceful gathering of people, it could also be argued that denying same sex couples the right to marry infringes their right to peaceful assembly. Further, a marriage can be characterized as an association – each party to the marriage enters into an association with the other. If same sex couples can not marry, they can not enter into such an association.

Realistically, no complaint of a violation of a right under §2(b) (freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication) or under either §2(c) (freedom of peaceful assembly) or §2(d) (freedom of association) is likely to succeed. There is no legislative or common law restriction or prohibition on any of those activities. The only restriction is on the legal recognition of the marriage, not the expression of affection, love or commitment which may form part of the ceremony, not the gathering for the ceremony, not the ceremony itself and not the beliefs underlying the ceremony.

Once again, the unequal or inequitable conferring or denying of a benefit of the law is a matter for §15 argument and analysis.

Same sex couples, if they can not marry, must cohabit for a period of time which varies from Province to Province before they can claim whatever benefits are accorded to "common law" unmarried couples. It could be argued that the variation in required cohabitation periods and the inability of the same sex couple to choose to immediately receive the benefits accorded to opposite sex married couples constitutes an infringement of their mobility rights under §6(2) of the *Charter*.

While it may be true that the requirement for a period of cohabitation, and the inconsistency in the length of that period between Provinces could act to dissuade a same sex couple from exercising their mobility rights, a complaint that a requirement that all marriages be of an opposite sex nature violates or infringes a same sex couple's the mobility rights under §6(2) of the *Charter* is also unlikely to succeed.

The core of the issue is not that same sex couples can not move to, take up residence in, or pursue a livelihood in any Province. It is rather that such couples must cohabit for a period of time before being entitled to the benefits which are immediately available to opposite sex married couples because they can not enter into a legally recognized marriage. That the residency periods vary from Province to Province may be found to infringe slightly on mobility rights. However, the alternative of requiring all Provinces to accede to a Federal standard within

the Provincial head of legislative authority over property and civil rights under §92(13) of the *Constitution Act 1867,* would be a violation of the division of powers.

Since the pith and substance of the complaint is not the differing cohabitation periods for unmarried couples (whether same or opposite sex), but rather the inability of a same sex couple to choose between marriage, and take advantage of the immediate granting of rights and obligations, and "common law"[51] spousal status with its attendant varying cohabitation periods. A Court would therefore likely find that either mobility rights are not engaged, or are not violated, or are not to be used to invalidate another part of the Constitution[52], such as the division of powers.

An opposite sex requirement for marriage could also arguably infringe on the guarantee of all rights referred to in the *Charter* being available equally to both men and women under §28 of the *Charter*. There is no direct reference to the right to marry in the *Charter,* so for a §28 based argument to succeed it would have to be determined that the right to marry is referred to indirectly by some other section of the *Charter*. Assuming that that could be established, if a man has the right to marry a woman, but not a man; and a woman has the right to marry a man,

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[51]The use of the term "common law" is not used here in the sense of judge made law, but rather in the sense of the vernacular for cohabitants who are deemed to be spouses.

[52]*Reference Re Bill 30, an Act to Amend the Education Act,* [1987] 1 S.C.R. 1148 at 1197.

but not a woman, then men and women do not have the same rights and §28 *Charter* guarantees have been infringed.

One benefit to a complainant of winning a §28 or a §6 based *Charter* argument is that in neither case would it be possible for either the Federal Parliament or any Provincial legislature to invoke the notwithstanding provisions of §33 of the *Charter*; since that section only provides for the possibility of an exemption from §2 and §7 to §15.

However, the right to marry can be characterized in two ways: first, as a right to marry a member of the opposite sex, in which case men and women have exactly the same right with regard to marriage and there is no violation of §28 guarantees, or, as suggested above, the right to marry could be seen as the right of a man to marry a woman and of a woman to marry a man.

Since, where it is possible to interpret the law in two ways, one of which offends the *Charter* and one which does not, the Courts must accept the analysis which does not offend the *Charter*[53], no §28 based complaint is likely to succeed.

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[53] *R.* v. *Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606 at para 120; *Hills* v. *Attorney General of Canada*, [1988] 1 S.C.R. 513.

The counter argument is that there is a difference in interpretation between a right to marry a member of the opposite sex which is guaranteed equally to men and women, and a right for a man to marry a woman (but not a man) or for a woman to marry a man (but not a woman), but that in their effects they are identical. The difference being one of semantics, it would be inequitable to allow a play on words to work against the spirit and intent of the *Charter*. Again though, in pith and substance what is at issue is an unequal or inequitable conferring or denying of a benefit of the law, either by direct or adverse effect discrimination,[54] which is properly a matter for §15 argument and analysis.

The most likely basis for a successful challenge to an opposite sex requirement for marriage, whether by statute or common law, is §15(1) of the *Charter*. In pith and substance the issue is a differential treatment under the law. This differential treatment affects other rights to varying degrees, but those are only the effects. The cause, the differential treatment, must be addressed directly.

There are three separate tests which a complainant must satisfy to establish a violation of a §15(1) *Charter* right[55]:

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54 For definitions of direct and adverse effect discrimination see: Ontario Human Rights Commission v. Simpsons-Sears Ltd., [1985] 2 S.C.R. 536, at para 18.

[55] *Law* v. *Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497 at 524.

(a) Does the impugned law draw a formal distinction between the claimant and others on the basis of one or more personal characteristics, or fail to take into account the claimant's already disadvantaged position within Canadian society resulting in substantively differential treatment between the claimant and others on the basis of one or more personal characteristics?

(b) Was the claimant subject to differential treatment on the basis of one or more of the enumerated and analogous grounds? and,

(c) Does the differential treatment discriminate in a substantive sense, bringing into play the purpose of s. 15(1)?.

The Supreme Court of Canada has held that the purpose of §15(1) of the *Charter* is to:

> *"prevent the violation of essential human dignity and freedom through the imposition of disadvantage, stereotyping, or political or social prejudice, and to promote a society in which all persons enjoy equal recognition at law as human beings or as members of Canadian society, equally deserving of concern, respect and consideration".*[56]

[56] *Law* v. *Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497 at 518.

It is also well established law that the constitution is not to be interpreted in a narrow manner but should be given a *"broad and liberal interpretation"*[57]. Further, the Supreme Court of Canada, in a recent unanimous judgment clearly stated:

> *"The Constitution must be interpreted flexibly over time to meet new social, political and historic realities"*[58].

It is clear that any law which effectively denies same sex couples a right which it accords to opposite sex couples, has drawn a distinction between same sex couples, including the individuals who make up such couples, and others. Sexual orientation is a personal characteristic, and has been recognized as such and as being well established as an analogous ground for purposes of §15(1) analysis.[59] According or denying access to a legal right on the

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[57] *Edwards* v. *Attorney General for Canada,* [1930] A.C. 124 at 136.

[58] *Ward* v. *Canada (Attorney General),* [2002] S.C.J. No 21 at para. 30; citing with approval *Hunter* v. *Southam Inc.*, [1984] 2 S.C.R. 145 at p. 155-56; *Edwards* v. *Attorney-General for Canada,* [1930] A.C. 124; *Reference re Secession of Quebec,* [1998] 2 S.C.R. 217 at para 52; *Reference re Provincial Electoral Boundaries (Sask.),* [1991] 2 S.C.R. 158 at p. 180; *Law Society of Upper Canada* v. *Sapinker,* [1984] 1 S.C.R. 357 at 365; *Attorney General of British Columbia* v. *Canada Trust Co.,* [1980] 2 S.C.R. 466 at 478; *R.* V. *Big M Drug Mart Ltd.,* [1985] 1 S.C.R. 295 at 343-44.

[59] *Egan* v. *Canada,* [1995] 2 S.C.R. 513 at para 5; *M.* v. *H.,* [1999] 2 S.C.R. 3 at para 64.

basis of such a distinction is clearly subjecting individuals to substantially and substantively different treatment on the basis of a personal characteristic. Having a right conferred by law is itself a benefit of the law. When the exercise of that right confers additional rights, the differential treatment becomes all the more serious.

That the benefits of marriage are denied to same sex couples by a definition of marriage which expressly excludes them from marriage because of their sexual orientation clearly meets the standards set by the first two phases of a §15(1) analysis. The remaining test is whether the differential treatment discriminates in a substantive sense, thus bringing in to play the purpose of §15(1).

The importance and significance of marriage to an individual and to society has been recognized by the Supreme Court of Canada, as shown by the following quotation of L'Heureux-Dubé J. In *Miron* v. *Trudel*[60]

> *"In my view, the decision of whether or not to marry can, indeed, be one of the most personal decisions an individual will ever make over the course of his or her lifetime. It can be as fundamental, as momentous, and as personal as a choice regarding, for instance, one's citizenship or even one's religion."* [61]

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[60] *Miron* v. *Trudel*, [1995] 2 S.C.R. 418.

[61] *Miron* v. *Trudel*, [1995] 2 S.C.R. 418 at para. 95.

Also in *Miron* v. *Trudel,* McLachlin J. says:

"There is ample evidence that unmarried partners have often suffered social disadvantage and prejudice. Historically in our society, the unmarried partner has been regarded as less worthy than the married partner. The disadvantages inflicted on the unmarried partner have ranged from social ostracism through denial of status and benefits."[62]

Any differential treatment which affects such a fundamental and momentous personal choice must surely engage a consideration of its compatibility with the purpose of §15(1) of the *Charter*.

Once a violation or infringement of a §15 *Charter* right has been established by a complainant, the onus shifts to the government to establish that the legislative or common law infringement is reasonable in a free and democratic society and therefore saved under §1 of the *Charter*[63]. The test for §1 was set out by the Supreme Court of Canada in *Oakes*[64], and was

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62*Miron* v. *Trudel*, [1995] 2 S.C.R. 418 at para 152.

[63] *Law Society of British Columbia* v. *Andrews*, [1989] 1 S.C.R. 143 at para 9; citing with approval *R.* v. *Oakes*, [1986] 1 S.C.R. 103.

modified slightly in *Dagenais*[65]. Whether or not something is reasonable in a free and democratic society, and may therefore be justified under §1 of the *Charter*, is essentially an ethical judgment rather than a legal one. The test under §1 is now as follows:

> *"First, the objective, which the measures responsible for a limit on a Charter right or freedom are designed to serve, must be "of sufficient importance to warrant overriding a constitutionally protected right or freedom""*[66]

The first, and possibly the most crucial step in successfully defending a statutory or common law provision which infringes a *Charter* right under §1 of the *Charter* is defining the purpose of the impugned provision. A discriminatory purpose will itself run afoul of the *Charter*, so the purpose of the restriction of marriage to opposite-sex couples will likely be phrased as "to protect" the institution of marriage and to promote the family unit which is the foundation of our society. Given the changing nature of the term "family" in Canada, inclusion

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[64] *R.* v. *Oakes*, [1986] 1 S.C.R. 103.

[65] Dagenais v. Canadian Broadcasting Corp., [1994] 3 S.C.R. 835 at para. 95.

[66] *Law Society of British Columbia* v. *Andrews*, [1989] 1 S.C.R. 143 at para 10.

of the ideal of promotion of the family might detract from the government's argument in favour of preserving an extant bar on same-sex marriages[67].

The Court further states that:

"It is necessary, at a minimum, that an objective relate to concerns which are pressing and substantial in a free and democratic society before it can be characterized as sufficiently important."[68]

Therefore, to invoke the protection marriage and of the family as the purpose for the infringing of same sex couples' *Charter* rights, the government will have to establish that there exist pressing and substantial concerns that permitting same sex couples to marry would threaten the institutions of marriage and the family themselves. It would not be enough to suggest that it is possible, conceivable or likely that marriage and the family could suffer if same sex couples

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67See generally: Nicholas Bala, *"Alternatives for Extending Spousal Status in Canada*" (2000) 17 No.1 Can. J. Fam. L. 169; Nicholas Bala & Rebecca Jaremko Bromwich "Context and Inclusivity in Canada's Evolving Definition of Family", to be published in the summer of 2002 in volume 16 of the *International Journal of Law, Policy & the Family.*

[68] *Law Society of British Columbia* v. *Andrews,* [1989] 1 S.C.R. 143 at para 10.

were permitted to marry – the government must meet the standard set by the Supreme Court of Canada in *R.J.R.-MacDonald*[69] in the following terms:

> *"...the state must show that the violative law is "demonstrably justified." The choice of the word "demonstrably" is critical. The process is not one of mere intuition, nor is it one of deference to Parliament's choice. It is a process of demonstration. This reinforces the notice inherent in the word "reasonable" of rational inference from evidence or established truths."*

In *Egale*[70], Pitfield J. quotes the Attorney General's position as being "that across cultures, opposite-sex marriage is intended to 'complement nature with culture for the sake of reproduction and the intergenerational cycle'" and that "the universal norm of marriage has been a culturally approved opposite-sex relationship intended to encourage the birth (and rearing) of children". Assuming the Attorney General is correct in everything quoted above, what justification is there in any of the above quoted passage for the exclusion of same sex couples from the institution of marriage?

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[69] *RJR-MacDonald Inc.* v. *Canada (A.G.)*, [1995] 3 S.C.R. 199 at 328.

[70] *Egale Canada Inc.* v. *Canada (Attorney General)*, [2001] B.C.J. No. 1995.

A long history of social acceptance of discrimination is not justification for continuing discrimination. The world is a very different place than it was when the present common law restriction on marriage was expressed in *Hyde*. Reproductive technology is advancing at an incredible rate. Sexual intercourse is no longer required for reproduction. The technology for human cloning (completely asexual reproduction), if it doesn't yet exist, is just around the corner. Surely the relevance of the promotion of opposite sex marriages as a means of ensuring or encouraging the repopulation of our society must therefore be reduced.

Further, it is no longer true, if it ever was[71], that all of Christendom refuses to recognize same sex marriage. Even the Anglican Church appears to be prepared to solemnize same sex unions. In a recent vote, the Diocese of New Westminster in British Columbia voted 215 to 129 in favour of allowing a religious ceremony to bless same sex unions.[72]

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71 See: John Boswell, *Same-Sex Unions in Premodern Europe*, (New York: Villard Books, 1994)

72 CBC News, *"B.C. Anglican diocese approves blessing for same-sex unions"* online:http://cbc.ca/cgi-bin/templates/view.cgi?category=Canada&story=/news/2002/06/15/churchsame_sex020615, last updated 15 June 2002.

As Nicholas Bala and Rebecca Jaremko Bromwich point out[73], the definition of "family" is rapidly changing and evolving in Canada. The notion of "illegitimate" children has been abolished; the definition of "spouse" has been expanded to include same sex partners. Single parent families and "blended" families are now recognized as families. If same sex couples can be spouses, and can raise children, and are included in a modern colloquial definition of "family", how can the goal of promoting "the family" be furthered by denying same sex couples access to marriage?

There are children waiting to be adopted and raised by a forever family rather than by a Children's Aid Society. A recent report by the American Academy of Pediatrics[74] indicates that many long held beliefs about differences in parenting skills between opposite-sex couples and same-sex couples are wrong, and that:

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[73] In an article entitled "Context and Inclusivity in Canada's Evolving Definition of Family", to be published in the summer of 2002 in volume 16 of the *International Journal of Law, Policy & the Family.*

[74] American Academy of Pediatrics, "Technical Report: Coparent or Second-Parent Adoption by Same-Sex Parents" (2002) 109 No.2 Pediatrics 341, online: American Academy of Pediatrics <http://www.aap.org/policy/020008t.html> (date accessed: 19 June 2002).

"*...the weight of evidence gathered during several decades using diverse samples and methodologies is persuasive in demonstrating that there is no systematic difference between gay and nongay parents in emotional health, parenting skills, and attitudes toward parenting. No data have pointed to any risk to children as a result of growing up in a family with 1 or more gay parents.*"

The position adopted by the Attorney General in defense of a restriction on the right to enter into a legally valid marriage raises some obvious questions:

1) Does the institution of marriage require protection (is it threatened if *Charter* rights are not infringed to protect it)?

2) What (or whom) is it that the institution of marriage requires protection from?

3) How is the term "family" to be defined?

4) If same sex couples are to be excluded from the definition of "family", is that exclusion itself discriminatory and inconsistent with *Charter* values?

5) Is the promotion of "the family" consistent with the protection of "marriage"?

While it is true that the institution of marriage is an important, even fundamental, part of our society, it is not necessarily the case that the defense of marriage is a pressing and substantial objective; unless there is evidence that the institution of marriage is under a serious (i.e. substantial) and imminent (i.e. pressing) threat. If marriage is not threatened, or if the threat is trivial, then the objective of protecting the institution of marriage, no matter how noble, can not be pressing and substantial.

The onus of proving an infringement of a *Charter* right to be saved under §1 being on the Federal government, it falls to the government to establish that the expansion of the institution of marriage to include same sex couples is a real danger to the institution's continued value to Canadian society.

Is society better served by a restrictive definition of "marriage" than by an inclusive definition? In its report "*Beyond Conjugality: Recognizing and supporting close personal adult relationships"*[75], the Law Commission of Canada defines marriage, and arguably the purpose of marriage in modern society as:

75" Canada, Law Commission of Canada, *Beyond Conjugality: Recognizing and supporting close personal adult relationships* at chapter 4 (Ottawa: Minister of Public Works and Government Services, 2001) online: http://www.lcc.gc.ca/en/themes/pr/cpra/chap4.html#131e.

"...a means of facilitating in an orderly fashion the voluntary assumption of mutual rights and obligations by adults committed to each other's well-being."

I believe this definition to be both more accurate in modern society and consistent with the *Charter* in that it does not exclude anyone. Using this definition as written would also permit polygamous marriages, the debate about which is entirely outside the scope of this paper. The insertion of the word "two" between the words "by" and "adults" would preserve our current restriction on marriage to a couple, without discriminating based on gender or sexual orientation.

Where is the danger in allowing same sex couples in relationships which are in all other ways equivalent to opposite sex relationships to enter into the institution of marriage just as an opposite sex couple can? Is it reasonable to fear that opposite sex couples would refuse to get married if same sex couples can do so? What, if any, would be the impact on opposite-sex marriage rates if same-sex couples could also marry?

Although there is no clear empirical research either way, (which is itself a problem for the government, since it bears the burden of establishing the pressing and substantial nature of the objective), it is beyond the bounds of common sense to suggest that Jack and Jill (an opposite sex couple) will be influenced greatly in their decision as to whether or not to get married by whether Tony and Jean, a married couple, are both male, both female, or one male and one

female. While I am sure that a couple will often consider many factors before deciding to get married, I doubt that the gender and marital status of other couples is such a factor.[76]

Certainly an expansion of the definition of "marriage" to admit same sex couples would represent a change in the institution, but a change does not necessarily equate with a threat. Change may also indicate progress.

Assuming a Court held that the government objective in either enacting an expressly opposite-sex definition of "marriage", or in refusing to legislatively amend the common law definition as expressed in the *Modernization of Benefits Act*[77] in §1.1, was pressing and substantial and of sufficient importance to warrant an override of a *Charter* right, the next question is whether the infringed right or freedom is minimally impaired by the means chosen by the government, or whether less intrusive means could also achieve the objective.

76Preliminary data from the Netherlands, where same sex marriages have been available since 01 April 2001, seem to support this opinion. Statistics relating to marriage (same and opposite sex) and registered domestic parterships (same and opposite sex) are available online at : http://statline.cbs.nl/StatWeb/start.asp?LA=en&DM=SLEN&lp=Search/Search; See also Kees Waaldijk, *"Latest news about same-sex marriage in the Netherlands (and what it implies for foreigners)"* online: http://ruljis.leidenuniv.nl/user/cwaaldij/www/NHR/news.htm (Date accessed: 19 June 2002).

[77]*Modernization of Benefits and Obligations Act,* S.C. 2000, c. 12.

At this point in the analysis it is critical to bear in mind that marriage is an institution the entry into which is accompanied by certain rights, privileges and responsibilities. Same sex couples who seek the ability to have their relationship recognized as a marriage are not seeking only the use of the word "marriage"; neither are they seeking only the rights which are accorded to couples who are validly "married". In seeking the right to enter the institution of marriage, same sex couples are seeking both the use of the word and the rights which normally come with it. In refusing to allow opposite sex couples to marry the government is denying such couples **both** access to the institution (the use of the word) **and** the rights, privileges and responsibilities which accompany entry into a marriage. Thus, with respect, the majority of the Court in *Layland* erred when they said that the denial of the rights associated with marriage to same sex couples was a separate question from the refusal to allow those couples to marry.

To properly determine whether the refusal to allow a same sex couple to marry violates the *Charter*, a Court should answer at least the following questions:

1) Is the refusal to allow same sex couples to marry constitutionally valid?

If the answer to question 1) is yes, the Court should proceed to answer:

2) Is the denial to same sex couples of equal access to all of the rights, privileges, benefits and responsibilities which opposite-sex couples assume by getting married constitutionally valid?

If the answer to question 2) is yes, for its analysis to be complete, the Court should determine **for each right which is either infringed or denied**, whether the infringement or denial of that right to a same sex couple is constitutionally valid. The denial or infringement of each individual right or benefit under the law should be either validated or invalidated; otherwise rights may be infringed without justification. Unfortunately, this is not the approach taken by Canadian Courts to date.[78]

For the government to prevail in the minimal impairment analysis it would have to establish that there is no way to achieve their objective other than by a complete denial of same sex couples equality rights under §15(1) of the *Charter* with respect to both issues identified above. Further, the government must establish, as to both above-identified issues, that the salutary effects outweigh the deleterious effects of the established infringement of equality rights.

78See *Egale Canada Inc.* v. *Canada (Attorney General)*, [2001] B.C.J. No. 1995; *Layland* v. *Ontario (Minister of Consumer and Commercial Relations) (1993).*

For there to be salutary effects of the infringement, the government will have to establish that there would be detrimental effects but for the infringement. Again, in the absence of social science evidence, this may prove impossible.

If the government prevails in a §1 analysis on the grounds of defending or preserving the historic and crucial institution of marriage, is there a justification for denying same-sex couples an institution which is identical to opposite-sex marriage in every way but name? If not, then given the division of powers[79], is it possible for either the Federal or Provincial level of government to create such an institution? Unfortunately, the answer may well be no.

Under the division of powers, the Federal Parliament has exclusive jurisdiction over marriage and divorce, which would permit it to change the definition of marriage so as to include same sex couples. At first glance it would seem a simple thing for the Federal Parliament to create an equivalent but differently-named institution (hereinafter "Glong"). However, Glong could not be enacted under the Federal jurisdiction over marriage and divorce since by definition Glong is not marriage.

The Federal Parliament would therefore have to rely on its residual power to legislate for the peace order and good government of Canada to create Glong for same sex couples. The

[79] *The Constitution Act, 1867,* §91 - 92.

difficulty for the Federal Parliament is that marriage has several attendant rights which fall squarely within Provincial jurisdiction over matters of property and civil rights, and which are therefore beyond the ability of the Federal Parliament to include in Glong.

Provincial Legislatures would also not be able to create an institution identical to marriage except in name, because many of the features of marriage are within the federal sphere of authority, including its portability. Once a couple is married in one Province or Territory that marriage is recognized in all Provinces and Territories (and most likely internationally). No Province or Territory has the authority to impose its definition (of Glong or of anything else) on any other Province or Territory. A Provincial Legislature would also be constrained by the division of powers, and would have to tailor Glong carefully to avoid trenching on a Federal head of power.

The Supreme Court of Canada could dictate that where there is a reference to marriage in any statute or regulation the equivalent reference to the institution of Glong must be read in if it does not appear, and that any differentiation between marriage and Glong (other than in name) is unconstitutional. The question then would be, if the Court is prepared to equate Glong with marriage, why is it not prepared to include same sex couples in the definition of marriage and avoid all the confusion as to what Glong is?

The best solution would be for the Federal Parliament to show leadership, act on the Law Commission of Canada's recommendation 33[80], and pass legislation specifically overriding any common law definition of "marriage" and substituting a definition which clearly permits same sex marriages in Canada. Failing this, the Supreme Court of Canada will be forced to either state or amend the common law definition of "marriage" when the first of the three cases currently headed their way (which will most likely be *EGALE*[81]) arrives.

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80 Canada, Law Commissio n of Canada, *Beyond Conjugality: Recognizing and supporting close personal adult relationships* at chapter 4 (Ottawa: Minister of Public Works and Government Services, 2001) online: http://www.lcc.gc.ca/en/themes/pr/cpra/chap4.html#131e

81 See *Egale Canada Inc.* v. *Canada (Attorney General)*, [2001] B.C.J. No. 1995.