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## National Report: Canada

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# NATIONAL REPORT: CANADA

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## I. GENERALITIES

In Canada, the federal authority and the provinces share jurisdiction for marriage. Same-sex marriage is legally authorized everywhere in Canada since 2005.

Current statistics concerning the entire Canadian territory are based on a census conducted in 2006, thus less than a year after the legalization of same-sex marriage by the Canadian federal parliament (July 2005). It was the first time that the Canadian statistics office counted same-sex married couples.

In 2006, the answers to the census showed a proportion of 0.6% of same-sex couples in comparison to the total number of couples in Canada. Moreover, 16.5% of the same-sex couples were married.

Finally, still in 2006, 53.7% of same-sex married couples were male couples and 46.3% were female couples.

In regard to the province of Quebec, the Statistic Institute of Quebec recently published a report concerning the five first years since the legalization of same-sex marriage. Observations:

- ❖ Between 2004 and 2008, 2% of the marriages celebrated in Quebec were same-sex marriages;
- ❖ Between 2004 and 2008, 12% of legally joined couples opted for a civil union;
- ❖ About a quarter of same-sex couples opted for a religious marriage (against 64% for married couples of opposite sex).

## II. QUESTIONS

### 1. Legal system in Canada

*Nature and organization of the legal system:*

The Canadian legal system is a bi-juridical system: it comprises both

common and civil law traditions. Canada is a federal democratic state, but also a constitutional monarchy born in 1867 from a law passed by the British parliament called the *British North America Act*.

The federal state is composed of 10 provinces (Alberta, British Columbia, Prince Edward Island, Manitoba, New Brunswick, Nova Scotia, Ontario, Quebec, Saskatchewan, Newfoundland and Labrador) and 3 territories (Northwest territories, Yukon and Nunavut). Only the province of Quebec is governed by civil law inherited from French and Roman law. The other provinces and territories are subject to common law inherited from Great Britain. Legislative authority is divided by the Constitution between the Canadian Parliament and the provincial and territorial legislatures. Parliament has jurisdiction to make laws in regard to domains concerning the entire Canadian territory, hence, notably commerce between provinces, national security, criminal law, taxes, but also in the domains of marriage and divorce (Article 92(26)). Domains which result from provincial or territorial legislation jurisdiction are rather education, property, civil rights, laws in relation to the celebration of marriages, as well as the administration of justice, hospitals etc. Finally, some jurisdiction are said to be “shared,” such as environment, transportation, agriculture, fishing, communication and, to some extent, immigration.

*Supreme Court of Canada:*

It is the highest court of the country, which hears appeals from federal and provincial courts. Except for cases of ipso jure appeal, the authorization to appeal before the Court is granted only if the dispute involves an important question for the public, or an important legal or mixed legal/fact question, or if, for any other reason, the importance of the dispute or its nature justifies the Court’s intervention.

The Supreme Court has special jurisdiction in the domain of referrals. It is a procedure enabling the governor in council to directly submit to the Court’s decision any important legal or factual question on, notably, the interpretation of the Constitution, the constitutionality or the interpretation of a federal or provincial legislative text, or any other important question.

*Constitution:*

What is called the Canadian Constitution is, in truth, composed of a group of texts of constitutional nature. It includes: the *Canada Act 1982*, the fourteen constitutional laws from 1867 to 1982 (including the texts emanating from British parliament) and eleven other legislative texts enumerated in the appendix of the *Constitution Act 1982*. The first part of the *Constitution Act 1982* is composed of the *Canadian Charter of Rights and Freedoms*. The Constitution also includes some federal laws, as well as

decrees from imperious councils. The power to amend the Constitution takes on several forms. The amendments can first result from ordinary law. In this respect, the provinces can amend the Constitution insofar as it concerns an amendment in respect to the internal constitution of the province. As for the federal legislator, he holds the power to amend the provisions in respect to the federal executive power in the House of Representatives and in Senate. These amendments must respect the *Canadian Charter of Rights and Freedoms*. Moreover, some provisions of the Constitution can only be amended pursuant to a complex procedure to which federal and provincial levels collaborate.

The interpretation of the Constitution and the constitutionality check are carried out by the judiciary. It must be reminded that it is this branch that applies the laws in respect to the Constitution's precedence, which is the supreme law of Canada.

## **2. Constitutional rules concerning marriage or any other type of same-sex unions**

The key constitutional provision in the domain of same-sex unions is Article 15 of the *Canadian Charter of Rights and Freedoms*, which enshrines the right to equality before the law.

This text provides in paragraph (1) that:

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

Although sexual orientation is not expressly aimed at, it has been recognized as an analogous ground for discrimination by the Supreme Court of Canada in 1995. It is on the constitutional basis of the right to equality before the law, and not of non-discrimination against same-sex couples, that same-sex marriage was subsequently recognized and accepted, first by provincial legislations, then by the federal parliament. Article 15 allowed the contestation of the definition that common law gave to marriage, which supposes the union of two persons of opposite sex.

Secondly, Article 2 was invoked to protect freedom of religion in respect to gay marriage. Thus, religious authorities maintain their freedom to celebrate or not same-sex marriages.

Finally, Article 33(1) of the *Charter* was invoked against the attempts to redefine marriage. This text is thus read:

Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter.

This dispensation provision, sometimes called “the notwithstanding clause,” which theoretically enables Parliament or a province’s legislative assembly to depart from Article 2 or from Articles 7 to 15 for a period of five years, is politically difficult to justify and, therefore, to apply.

### 3. The right to same-sex marriage in Canada, sources and histories

The recognition of same-sex spouses in Canada was fully reached with the legalization of marriages between persons of the same sex in 2005. The *Civil Marriage Act*, adopted by the federal parliament and entered into force on July 20, 2005, modified the definition of marriage as it was admitted in Canada in accordance with common law, in the name of the equality of same-sex couples before the law. From then on, Article 2 provides that: “Marriage, for civil purposes, is the lawful union of two persons to the exclusion of all others.”

The federal legislator’s decision to make marriage available to same-sex couples is the last step of an evolution that really began in the provinces.

Indeed, provincial legislations have been the ones to gradually grant to same-sex spouses the same social, and fiscal advantages that unmarried heterosexual spouses already have. Following some important decisions rendered in their jurisdictions concerning same-sex marriages, several provinces have adopted laws specifying or modifying the meaning of the word spouse in order to include in that meaning same-sex spouses, thereby enabling them to claim rights and advantages that laws grant to spouses, for example:

- ❖ Several laws adopted by British Columbia in the 1990s modify the definition of spouse and recognize same-sex couples which have a relationship comparable to marriage (*Definition of Spouse Amendment Act*, 1999 and 2000).
- ❖ In 1999, Quebec proceeded in the same way by adopting the *An Act to amend various legislative provisions concerning de facto spouses*.

Before the infamous Supreme Court case of *M. v. H.* in 1999, several provinces and territories also adopted the legislative modifications in order to grant same-sex couples benefits in respect to employment, in particular in regard to medical care and pension.

From 2000, it is in the domain of family law that several provinces adopted laws granting same-sex couples the same rights as opposite sex couples. Some provinces, while enlarging the notion of spouse to same-sex spouses, also conferred access to adoption and civil unions.

- ❖ In Nova Scotia, the 2000 *Law Reform Act* establishes a registered marital partnership intended for heterosexual and homosexual couples.

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- ❖ In 2002, Quebec adopted the *Act instituting civil unions and establishing new rules of filiation* by which same-sex couples as well as unmarried heterosexual couples can legally obtain marital status. It is a civil union contract consisting of rights and obligations similar to marriage.
- ❖ The same year, during the adoption of the *Charter Compliance Act*, Manitoba recognized more widely the rights and responsibilities of same sex couples, notably rights in respect to joint adoption or step-parent adoption.
- ❖ Northwest Territories also adopted in 2002 the *Act to Amend the Adoption Act and the Family Law Act* which allows same-sex spouses to adopt, and which grants them family support, separation of property.

However, the federal parliament had also taken measures aiming at insuring the equality of same-sex spouses before granting them the right to marry. One can, for example, think of the *Modernization of Benefits and Obligations Act* adopted in 2000. This law modified 68 other laws in order to insure a uniform application of federal laws to unmarried homosexual and heterosexual couples.

In parallel to this legislative activity in favor of the equality of same-sex couples before the law, parliamentary bills have multiplied between 1997 and 2005, in view of amending the law on marriage. Unaware of the position that the federal Parliament would take on this issue, some bills aimed at legislating this matter while waiting for a clear federal direction, in order to enlarge the definition of marriage in certain bills and sometimes in order to restrict its scope.

Thus, several representatives and senators regularly submitted bills aiming at defining marriage in an exclusive way, hence as the union between a man and a woman.

Examples:

- ❖ In 1997, bill C-225, *Act to amend the Marriage (Prohibited Degrees) Act and the Interpretation Act*, from representative Tom Wappel.
- ❖ From 2000 to 2003, the three bills of former representative Jim Pankiw aiming at amending the *Marriage (Prohibited Degrees) Act* so as to protect its legal definition (bills C-460, C-266 and C-450).
- ❖ In 2003, bill C-447 from former representative Grant Hill aiming at protecting the institution of marriage by codifying the traditional definition of common law.

In the same time period, on the opposite side of the spectrum, other bills in other provinces pursued the exact opposite goal: redefining marriage as

including same-sex couples. Examples:

- ❖ From 1998 to 2001, former representative Svend Robinson submitted three bills notably including a provision, which would have affirmed the validity of marriages binding same-sex persons.

Although some of these bills have been read during sessions, none eventually succeeded.

Only in 2005, with the federal government's bill C-38 entitled *The Civil Marriage Act*, did the issue of defining marriage become seriously studied largely because of the political and social controversy on the question. Before the bill's filing, the federal government was hesitant regarding the question. For that reason, it had sent a piece of legislation to the Supreme Court. The legislator asked to the Court if the right to marry that the bill planned to grant to same-sex persons was in conformity with the *Charter*. The Supreme Court held on December 9, 2004 that the new definition of marriage planned was indeed in conformity with the *Charter* and therefore, constitutional.

After several months of debates and studies during which partisans and detractors of gay marriages faced each other in Parliament, bill C-38 was adopted and entered into force on July 20, 2005.

#### **4. Differences between heterosexual and homosexual marriages in the Civil Marriage Act**

Strictly speaking, there is no difference in the treatment of married couples. In Canada, marriage is defined as the union of two persons, to the exclusion of all others, irrespective of their sex. However, the legislator included a specific provision at Article 3 of the *Civil Marriage Act* which provides that "It is recognized that officials of religious groups are free to refuse to perform marriages that are not in accordance with their religious beliefs." The detractors of homosexual marriages had requested the insertion of this provision. It specifies, as the Supreme Court reminded in the *Reference re Same-Sex Marriage*, that in virtue of the freedom of religion guaranteed by the *Charter*, the State could not impose a religious ceremony if it went against religious beliefs.

The provinces having jurisdiction to regulate the celebration of marriage, some have expressly recognized that cult minister/justice of the peace hold this freedom, and thus confirmed the principle in their respective provincial laws. Examples:

- ❖ The *Human Rights Code* as well as the *Marriage (Prohibited Degrees) Act*
- ❖ In Quebec, Article 367 of the *Civil Code of Québec* provides that "No minister of religion may be compelled to solemnize a

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marriage to which there is any impediment according to his religion and to the discipline of the religious society to which he belongs.”

Finally, in order to prevent gay marriages, some provinces have also vainly tried to extend the scope of this principle to civil servants charged of celebrating civil marriages, so as to allow them to invoke their religious convictions to refuse to celebrate the marriage between two persons of the same sex.

#### **5. Does not apply**

#### **6. Couples for which civil unions are available**

Civil unions or registered partnerships are institutions whose creation results not from federal but provincial jurisdictions. Indeed, some provinces such as Quebec have established civil unions similar to what Vermont has put in place. Other Canadian jurisdictions have opted to different types of registered domestic partnership mechanisms.

- ❖ In Nova Scotia, domestic partnership, created by a 2000 law, is available to all couples, of different or same sex.
- ❖ The civil union of Quebec, created in 2002, is also available to same-sex partners.
- ❖ In Manitoba, *The Common-Law Partners' Property and Related Amendments Act* of 2004 organizes the registration of de facto unions for heterosexual and homosexual couples.

#### **7. Differences in the treatment of homosexual and heterosexual couples in civil unions**

In Canada, no matter the type of status—civil union, marriage or de facto union, the equality of spouses must be secured independently of their sex, in order to comply with section 15 of the *Charter*. This explains why in the beginning of the twenty-first century, several provinces amended various laws and regulations concerning the rights and obligations of spouses, in order for same-sex spouses to have access to the same benefits as opposite sex spouses.

#### **8. Does not apply**

#### **9. Does not apply**

#### **10. Does not apply**



### 11. Does not apply

### 12. Main case law concerning gay marriage

*Hyde v. Hyde* (1866), L.R. 1 P. & D. 130:

It is the benchmark case on which homosexual marriage detractors relied on to define marriage in compliance with common law. In a dispute dealing with Mormons and the issue of polygamy, the judge of the British *courts of probate and divorce* held that marriage, as conceived by Christianity, can be defined as the voluntary lifelong union of a man and a woman, with the exception of no other person.

*North v. Manitoba (Recorder of Vital Statistics)*, 20 R.F.L. 112 (Manitoba County Court):

It is the first Canadian decision that had to decide on the validity of a marriage certificate for a couple composed of two men. In this particular case, the court had approved the Manitobans civil authorities' refusal, invoking the universal character of the definition of marriage as the union between two persons of opposite sex.

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

In this decision, the Ontarian Court held that the law does not prohibit the marriage of homosexuals, as long as it occurs between persons of opposite sex. Some homosexual people marry; the fact that several choose not to marry, because they do not wish to be bound to persons of opposite sex is a question of personal preference and not a legal prescription.

*Egan v. Canada*, [1995] 2 S.C.R. 513 (Supreme Court of Canada):

The appellant couple challenged the constitutional validity of the *Old Age Security Act* since one of the spouses was refused the right to the benefits prescribed by the law. According to the applicable legislative provisions, the benefits only applied to heterosexual couples.

This dispute was the opportunity for the Supreme Court of Canada to unanimously recognize sexual orientation as an analogous ground for discrimination by virtue of section 15 of the *Charter*. However, while the majority recognized that discrimination existed in the case, they decided that it was justified by virtue of Article 1 of the *Charter*. Indeed, according to the majority, this difference in treatment does not discriminate because the law had a legitimate goal, that is to protect heterosexual family units, which are the only family units capable of procreating, and which daily devote their resources to the education of children.

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*M. v. H.*, [1999] 2 S.C.R. 3 (Supreme Court of Canada):

In this dispute, a former spouse, which had formed a couple with another woman, challenged the validity of the *Family Law Act* of Ontario which reserves the right to claim alimony to spouses of opposite sex only. The Supreme Court of Canada was recognizing for the first time rights and obligations between same-sex spouses. The official recognition of de facto homosexual unions was concretely going in the direction of the legalization of gay marriage.

*Halpern v. Attorney General of Canada* (2002), 60 O.R. (3d) 321 (Div. Gen) (Ontario):

In this dispute, 7 gay and lesbian couples wished to celebrate their love and commitment to one another by getting married through a civil ceremony. They applied to a judge to have this right recognized. It is the first decision by which a Canadian court declares the traditional definition of marriage to be in violation of the Constitution, thus of section 15 of the *Charter*. Contrary to a previous decision in British Columbia, the Ontarian court felt that the violation of equality before the law was not justified by section 1 of the *Charter*, and decided to suspend the decision of invalidity for two years in order to enable Parliament to rephrase himself the definition of marriage. A year later, the Court of Appeal of Ontario confirmed this decision ((2003) 65 O.R. (3d) 201).

*Hendricks and Leboeuf v. Quebec (Attorney General)*, [2002] R.J.Q. 2506 (C.S.) (Quebec):

In this dispute, the Superior Court of the District of Montreal had to study a homosexual couple's claim for the right to marry which invoked the unconstitutionality and the inoperative character of any law, federal or provincial, which forbid such marriage. The claimants could have made their union official thanks to the *Act instituting civil unions and establishing new rules of filiation*, which was entering into force and which is very similar to marriage, but they wanted the right to marry. The judge admitted their claim raising the discriminatory and thus inoperative character of section 5 of the *Federal Law – Civil Law Harmonization Act, No.1* according to which marriage requires the consent of a man and a woman.

The Court of Appeal of Quebec confirmed this decision in 2004 (*Ligue catholique pour les droits de l'homme v. Hendricks*, [2004] R.J.Q. 851 (C.A.)).

*Egale Canada Inc. v. Canada (Attorney General)* (2003), 225 D.L.R. (4th)

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472 (C.A.) (British Columbia):

The Court of Appeal of British Columbia held that the common law traditional definition of marriage is discriminatory, declared inoperative the common law prohibition of homosexual marriages, and rephrased the definition of marriage as the legitimate union between two persons. It also specified that procreation was not a sufficiently important ground to justify harming the fundamental right of homosexuals wishing to marry anymore.

*Reference re Same-Sex Marriage*, [2004] 3 S.C.R. 698 (Supreme Court of Canada):

In this referral to the Supreme Court of Canada, four issues were submitted to the Court to validate the constitutionality of the federal government's bill:

1. Is the annexed *Proposal for an Act respecting certain aspects of legal capacity for marriage for civil purposes* within the exclusive legislative authority of the Parliament of Canada? If not, in what particular or particulars, and to what extent?

Answer: With respect to s. 1: Yes. With respect to s. 2: No.

2. If the answer to question 1 is yes, is section 1 of the proposal, which extends capacity to marry to persons of the same sex, consistent with the *Canadian Charter of Rights and Freedoms*? If not, in what particular or particulars, and to what extent?

Answer: Yes.

3. Does the freedom of religion guaranteed by paragraph 2(a) of the *Canadian Charter of Rights and Freedoms* protect religious officials from being compelled to perform a marriage between two persons of the same sex that is contrary to their religious beliefs?

Answer: Yes.

4. Is the opposite-sex requirement for marriage for civil purposes, as established by the common law and set out for Quebec in section 5 of the *Federal Law-Civil Law Harmonization Act, No. 1*, consistent with the *Canadian Charter of Rights and Freedoms*? If not, in what particular or particulars and to what extent?

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Answer: The Court exercises its discretion not to answer this question.

*Vogel v. Canada (Attorney General)*, [2004] M.J. No 418 (Q.B. (Fam. Div.)) (Q.L.) (Manitoba):

Pursuant to this decision, the Manitoban Court of Queen's Bench decided to adopt the analysis, the grounds and the conclusions of the Ontario Court of Appeal in the case *Halpern v. Toronto (City)*. It felt that traditional definition of marriage was inoperative because it violated the equality before the law guaranteed by section 15 of the *Charter*.

*Boutilier v. Nova Scotia (Attorney General)*, [2004] N.S.J. No. 357 (S.C.) (Q.L.) (Nova Scotia):

In this case, the Supreme Court of Nova Scotia held that civil marriage was defined as the legitimate lifelong union of two persons, excluding any other person, and that the civil marriage of same-sex persons was valid in this province. Consequently, the judge recognized the validity of the couple's gay marriage (the claimants), which had been celebrated a year earlier in Ontario.

*N.W. v. Canada (Attorney General)*, [2004] S.J. No. 669 (Q.B. (Fam. Div.)) (Q.L.) (Saskatchewan):

Seized by five couples of a claim aiming at modifying the definition of marriage, the Saskatchewan Court of Queen's Bench held that the marriage of individuals of the same sex were valid in this province.

*Pottle et al. v. Attorney General of Canada et al.*, [2004] N.J. No. 470 (S.C. (T.D.)) (Q.L.):

Based on numerous legal precedents in this particular domain, and, more specifically, based on the previous *Halpern v. Toronto (City)* Ontarian decision as well as the Supreme Court's referral, the Supreme Court judge of this province held that same-sex marriages were valid in Newfoundland and Labrador.

*Dunbar & Edge v. Yukon (Government of) & Canada (A.G.)*, [2004] Y.J. No. 61 (S.C.) (Q.L.) (Yukon territory):

With this decision, the Supreme Court of Yukon modified the traditional current definition of marriage in this territory to include same-sex couples.

*Harrison v. Canada (Attorney General)*, [2004] N.B.J. No. 257 (Q.B. (T.D.)) (Q.L.) (New Brunswick):

The New Brunswick Court of Queen's Bench's decision was rendered only a month after the *Civil Marriage Act* entered into force. It is based on legal precedents of other provinces that the judge held that the definition of marriage in the province of New Brunswick was, on the civil plan, the legitimate lifelong union of two persons, excluding any other person.

### 13. Other commentaries

As the previous examples demonstrate, numerous decisions held by provincial jurisdictions from 2002 on have pushed the federal government to modify its position regarding gay marriage. On June 8, 1999, however, a motion was introduced into the House of Representatives to reaffirm that marriage was the union of a man and a woman. What happened between 1999 and 2003, the year of the first decision confirming the discrimination against homosexuals with respect to marriage?

In Canada, we commonly situate the history of homosexual marriage as an exclusively constitutional issue. The advent of gay marriage is thus seen as the triumph of the right to equality before the law guaranteed by the *Charter*. But this way of presenting the issue eclipses a part of reality, which must be reminded of.

In this respect, one must highlight the importance of gay and lesbian's mobilization in the process of legalizing gay marriage. The Quebec example can illustrate this phenomenon. The collective and structured action of the gay and lesbian movement started in the 1970s allowed this minority to gather some conditions necessary to the recognition of their intimate relationships. Such a collective action could not be effective unless the persons concerned mobilized themselves. First, the gay and lesbian community had to start by becoming fully aware of the discriminations and inequalities they were facing in all aspects of their lives. Thereby, the goals of their demands could be effectively targeted and framed by this social movement, which became particularly dynamic.

An important educational and collective action allowed for a change in the social perception that the population could have towards sexual minorities. This change in values and opening to differences achieved by this minority group was certainly an essential step in the process of recognizing homosexual marriage in Canada. Indeed, gay and lesbian action allowed the sensitization of public opinion in respect to the social inequalities they suffered. And public opinion influences the interpretation of the law by courts, and unmistakably the political decision-makers, which explains the furthering of homosexuals' rights, recorded in the case law of provincial courts.