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Same-Sex Marriage in Canada

 Feature by [Jay Makarenko](#) | [Judicial System & Legal Issues](#) | Jan 1, 2007

In July 2005, Canada became the fourth country in the world, after the Netherlands, Belgium, and Spain, to legalize same-sex marriages nationwide. This new legal status for gays and lesbians has been a controversial issue in Canada, both in the public and in Parliament. This article provides a historical and legal overview of same-sex marriage in Canada. It outlines how gay and lesbian rights have evolved in Canada over time, important court cases that motivated the legalization of same-sex marriage, and key tenets of the federal legislation that officially recognized same-sex marriage.

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Credits: This article was initially written by Rhonda Lauret Parkinson. It has since been altered and updated by Jay Makarenko.

Gay & Lesbian Rights: From Criminals to Equality

How has the legal status of homosexuals changed over the years?

The legal status of homosexuals in Canada has evolved dramatically over the last 50 years. In the 1960s, men engaging in homosexual activities found themselves subject to criminal charges and imprisonment. In contrast, today's gay and lesbian communities possess substantial legal benefits and protections.

The following provides a brief overview of the evolution of gay and lesbian rights.

Homosexuality and the Criminal Law

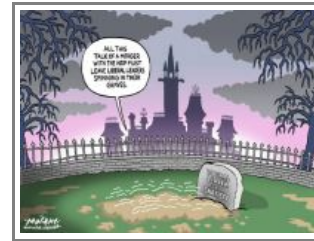
Prior to the 1970s, homosexuality was a criminal offence in Canada. Those accused of homosexual activities were charged as sex offenders and, if convicted, could be sentenced to long prison terms.

The case of Everett Klippert provides an excellent example of this. In 1965, Mr. Klippert was held and interrogated by police as part of an arson investigation. During his interrogation, Mr. Klippert admitted to having homosexual relations with several men during a two-year period. When doctors determined he was unlikely to stop engaging in these activities, Mr. Klippert was charged and convicted as a dangerous sexual offender and sentenced to an indefinite term of imprisonment. The Supreme Court of Canada dismissed Mr. Klippert's appeal in 1967, upholding the government's legal ability to imprison men convicted of homosexuality.

Mr. Klippert's sentence triggered a public debate in Canada over homosexuality and whether gay men should be imprisoned for their sexual activities. In 1969, the federal Liberal government instituted sweeping reforms of Canada's criminal law, which included decriminalizing homosexuality. In discussing the amendment, Pierre Trudeau, Justice Minister at the time, stressed the importance of individual freedom in the context of sexuality.

Trudeau stated: "It's bringing the laws of the land up to contemporary society I think. Take this thing on homosexuality. I think the view we take here is that there's no place for the state in the bedrooms of the nation. I think that what's done in private between adults

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doesn't concern the Criminal Code. When it becomes public this is a different matter, or when it relates to minors this is a different matter."

Mr. Klippert was later released from prison in 1971.

Gay & Lesbian Equality Rights

Following the decriminalization of homosexuality, focus shifted to issues of sexual orientation and equality. Beginning in the 1970s, several legislative reforms were instituted in an attempt to end discrimination against gay and lesbian persons. Some important examples include:

- In 1977, Quebec became the first province in Canada to include "sexual orientation" in its human rights legislation. Today, all provinces and territories in Canada prohibit discrimination on the basis of sexual orientation.
- In 1978, the federal government amended Canada's *Immigration Act*, removing a ban on homosexuals as immigrants.
- In 1982, the *Canadian Charter of Rights and Freedoms* was added to the *Constitution*. The *Charter* did not explicitly grant equality rights to gays and lesbians. However, in 1995 the Supreme Court of Canada ruled, in *Egan v. Canada*, that the *Charter* would be interpreted in a manner that prohibited discrimination on the basis of "sexual orientation."
- In 1992, the federal government lifted its ban on homosexuals in the military, allowing gays and lesbians to serve openly and live with their partners on military bases.
- In 1999, the Supreme Court of Canada ruled that gay and lesbian couples should enjoy the same rights and benefits as common-law couples with regard to pensions, income taxes, and other such matters. The federal government recognized such rights in 2000.
- In 2004, the federal government extended protection against hate propaganda to gays and lesbians, making it an offence to spread hatred against others based on their sexual orientation. Clergymen were excluded from the new offence.

Right to Same-Sex Marriage

By 2000, the legal status of gays and lesbians in Canada had changed significantly. Homosexuality had been decriminalized, and discrimination on the basis of sexual orientation had been prohibited in areas such as immigration, employment, military service, pensions, and income tax.

The next debate to arise focused on the institution of marriage and the question of whether same-sex couples should be given the right to marry. Organizations such as [Equality for Gays and Lesbians](#) (EGALE) argued that any legal recognition of same-sex unions to fall short of marriage, including 'civil unions' or 'domestic registered partnerships,' would be insufficient. Further, it was argued that in extending marriage to same-sex couples, gays and lesbians would be able to claim benefits that were immediately available to newly married heterosexual couples.

The federal government was much more hesitant in extending the right to marriage to gays and lesbians than with other equality rights. In 1999, the Reform Party of Canada (which later became the Canadian Alliance Party, and then merged into the Conservative Party of Canada) introduced a resolution in the House of Commons to reaffirm the traditional definition of marriage as "the union of one man and one woman to the exclusion of all others." This resolution was overwhelmingly passed, with support from members of all political parties, including the governing Liberal Party. In 2000, the federal Liberal government introduced Bill C-23, which made changes to spousal and common-law benefits and obligations. This legislation included the traditional definition of marriage and continued to exclude same-sex couples from full marriage rights.

In 2003, two events altered the position of the federal Liberal government on the same-sex marriage issue:

- The Ontario Court of Appeal in [Halpern v. Canada](#) ruled that the exclusion of same-sex couples from the definition of marriage violated equality rights under the [Canadian Charter of Rights and Freedoms](#). (See the *Charter, Equality and Same-Sex Marriage* section of this article for more information on the Ontario Court of Appeal decision.)
- In early 2003, the [House of Commons Standing Committee on Justice and Human Rights](#) began a formal study of same-sex marriage. Involving expert testimony and cross-country public hearings, the Standing Committee would ultimately recommend to the federal government that it should accept the decision of the Ontario Court of Appeal and

change the definition of marriage to include same-sex couples.

Legalization of Same-sex Marriage

In June 2003, the Chrétien Liberal government announced it would not appeal the Ontario Court of Appeal ruling. Instead, the Liberal government would introduce new legislation to change the definition of marriage to include same-sex couples. According to the proposed legislation's key tenets, marriage (for civil purposes) was to be the lawful union of two persons to the exclusion of all others, and nothing in the legislation would interfere with the freedom of officials of religious groups to refuse to perform marriages that were not in accordance with their religious beliefs.

The Liberal government referred the new legislation to the Supreme Court of Canada, asking the Court to affirm the power of the federal government to change the definition of marriage, and to assess whether the new legislation was consistent with the *Charter of Rights and Freedoms*.

See the *Charter, Equality and Same-Sex Marriage* section of this article for more information on the Supreme Court of Canada decision.

In September 2003, the Canadian Alliance introduced a motion in the House of Commons to reaffirm the traditional definition of marriage as a union between one man and one woman. Unlike the vote in 1999, however, this motion was narrowly defeated by a margin of 137-132, with Prime Minister Chrétien and many Liberals, including his successor-to-be Paul Martin, voting against the motion. More than 30 Members of Parliament did not attend the vote, the majority being Liberals who had voted for the traditional definition of marriage in 1999.

In December 2004, following the Supreme Court of Canada's ruling in the same-sex marriage reference, the new Liberal Prime Minister, Paul Martin, announced his government would move forward on the issue. In February 2005, the government introduced Bill C-38, the *Civil Marriage Act*, which extended the right of marriage to same-sex couples. A vote on the proposed legislation took place on June 28, 2005, and the *Act* was passed by a margin of 158 to 133. The majority of Liberal, NDP, and Bloc MPs voted in favour of the legislation, while the majority of Conservative MPs voted against it. Following the vote in the House, Bill C-38 was sent to the Senate, where it passed by a vote of 47 to 21 on July 19th. The legislation received Royal Assent from the Governor General (thus becoming law) on July 20th.

The vote revealed some strong divisions within parties on the issue. No party was unanimous in voting either for or against the legislation, and there were a few instances of high-profile dissent. While the Liberal Party allowed backbenchers to vote freely on the *Act*, it required all members of Cabinet to support the government legislation. On the day of the vote, Liberal minister Joe Comuzzi resigned his Cabinet post in order to vote against same-sex marriage. In the NDP, Bev Desjarlais was stripped of her position in the Party's shadow cabinet for failing to vote in favour of the *Act*. She was the only NDP MP to vote against same-sex marriage.

The following table provides a breakdown of how the federal parties voted in the House of Commons:

Party	For	Against	Absentees	Total
Liberals	95	32	4	131
Conservatives	3	93	2	98
Bloc	43	5	6	54
NDP	17	1	1	19
Independents	0	2	2	4

In 2007, Prime Minister Stephen Harper's new Conservative government introduced a motion to restore the traditional definition of marriage; the motion was defeated in the House of Commons by a margin of 175-123. Prime Minister Harper publicly stated that the vote was decisive and that his government would not return to the issue.

The *Charter*, Equality and Same-Sex Marriage

Why does the traditional definition of marriage violate the Charter?

A majority of elected politicians in the House of Commons voted in favour of legislation that changed the definition of marriage to include gays and lesbians. However, the democratic process was motivated in large part by forces outside of Parliament, specifically, the judiciary and the *Canadian Charter of Rights and Freedoms*. Several courts ruled that the traditional definition of marriage violated the *Charter* right to equality. The federal government did not oppose this decision, deciding instead to draft and pass new legislation that extended the right to marriage to gays and lesbians.

An important issue, then, is the relationship between the *Charter*, equality rights and the definition of marriage. What equality rights are provided for under the *Charter*? Why did the traditional definition of marriage violate these rights?

[Full Text of the Canadian Charter of Rights and Freedoms](#)

Traditional Definition of Marriage

Same-sex marriages were not traditionally recognized under Canadian law. The definition of marriage, based on the British common law definition, was “the lawful union of one man and one woman to the exclusion of all others.” In other words, only two people of different sexes could legally marry. In June 1999, Canada’s Parliament reaffirmed this definition when it passed the motion (mentioned earlier) defining marriage as being between a man and a woman.

The *Charter* and Equality

Judicial rulings on same-sex marriage have focused on equality rights under Section 15 of the *Canadian Charter of Rights and Freedoms*. What is Section 15?

Section 15 states:

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

Section 15 does not explicitly prohibit discrimination on the basis of sexuality (whether someone is gay or lesbian). However, the Supreme Court of Canada has held that discrimination based on sexuality is analogous to discrimination based on race, national or ethnic origin, or colour, and, as such, is prohibited under Section 15 of Canada's *Charter*.

Supporters of the legalization of same-sex marriage argued that the traditional definition of marriage, as the “union of one man and one woman,” violates equality rights under Section 15 of the *Charter* because it excludes gay and lesbian couples from the same protection and benefits under the law as heterosexual couples are afforded. The issue eventually made its way through the Canadian court system. The following overviews two important cases: the Ontario Court of Appeal decision in *Halpern v. Canada* and the Supreme Court of Canada decision in [Reference Re: Same-Sex Marriage](#).

Ontario Court of Appeal: *Halpern v. Canada*

In *Halpern v. Canada*, two same-sex couples decided to be married in a religious ceremony at the Metropolitan Community Church of Toronto (MCCT), a Christian Church that conducts marriages for its homosexual members. The Ontario government, however, refused to register the marriages, arguing that the federal definition of marriage excluded same-sex marriages. The couples took the issue to court; the case was ultimately heard by the Ontario Court of Appeal (the highest provincial court in Ontario).

In its decision, the Ontario Court of Appeal concluded that the traditional definition of marriage unconstitutionally violated persons' *Charter* right to equality. As such, the Court declared the traditional definition of marriage to be invalid and reformulated the definition as “the voluntary union for life of two persons to the exclusion of all others.”

In making its decision, the Court gave the following reasons:

- The “one man and one woman” requirement in the definition of marriage creates a formal distinction between opposite-sex and same-sex couples on the basis of sexual

orientation. Furthermore, exclusion from the institution of marriage perpetuates the view that same-sex couples are not capable of forming loving and lasting relations, and that same-sex relationships are not worthy of the same respect and recognition as opposite-sex relationships. As such, it offends the dignity of persons in same-sex relationships.

- The federal government has argued the exclusion of same-sex couples from marriage was necessary to encourage procreation and child-rearing. The Court disagreed, concluding that heterosexual couples would not stop having or raising children because same-sex couples were permitted to marry. Moreover, the Court noted that many heterosexual couples often do not procreate or rear children, while many same-sex couples have and raise children.

Read the [Full Text of the Ontario Court of Appeal Decision in Halpern v. Canada](#)

Supreme Court of Canada: *Reference Re. Same-Sex Marriage*

The Chrétien government did not appeal the decision of the Ontario Court of Appeal, instead deciding to draft a bill that would change the definition of marriage in Canada to include same-sex couples. In 2003, the federal government referred the proposed bill to the Supreme Court of Canada for constitutional review. This reference, as originally posed by the Chrétien government, asked three questions:

(1) Was the definition of marriage within the exclusive legislative authority of the federal Parliament of Canada? In other words, did the federal government have the authority to change the definition without the permission of the provinces?

(2) Was the inclusion of same-sex couples within the definition of marriage consistent with the Charter of Rights and Freedoms?

(3) Did the freedom of religion guaranteed by the Charter of Rights and Freedoms protect religious officials from being compelled to perform a marriage between same-sex couples that was contrary to the religious beliefs of those officials?

In 2004, the new Liberal government, led by Paul Martin, added a fourth question to the reference:

(4) Is the traditional definition of marriage (between one man and one woman) consistent with the Charter of Rights and Freedoms?

In its ruling, later in 2004, the Supreme Court found the following:

- **Federal Powers:** The federal government did have the exclusive authority to amend the definition of marriage. In other words, the federal government could change the legal definition of marriage without the permission of the provinces.
- **Same-Sex Marriage and the *Charter*:** The Supreme Court concluded that the new definition of marriage, which included same-sex couples, did not violate the *Charter*. This did not mean that the *Charter* required the new definition (see below), but simply that in legalizing same-sex marriage the government was not violating any constitutional rights under the *Charter*.
- **Freedom of Churches:** The Supreme Court also held that religious institutions could not be forced to perform same-sex marriage ceremonies that went against the beliefs espoused by their religious faith.
- **Traditional Definition and the *Charter*:** The Court exercised its discretion and chose not to answer the fourth question referred to it; namely, whether the traditional definition of marriage violated the *Charter*. The Court held that this issue had already been addressed by provincial lower courts and accepted by the federal government.

Read the [Full Text of the Supreme Court of Canada Decision](#)

Impact of the Judicial Decisions

These judicial decisions had two important impacts on the politics of same-sex marriage in Canada.

First, the ruling by the Ontario Court of Appeal, and the decision of the federal government not to appeal that ruling, effectively broadened equality rights in Canada to include the right to same-sex marriage. While the Supreme Court of Canada did not explicitly uphold the right to same-sex marriage, neither did it assert that no right existed. In the end, the decision of the Ontario Court of Appeal has been left to stand.

Second, the ruling by the Supreme Court of Canada was important in that it eliminated the provinces from the picture. While many provinces were quick to adopt the new definition of marriage, some provinces had protested (Alberta, for example, even suggested that it might go as far as to invoke the *Charter's* [notwithstanding clause](#) in order to protect the traditional definition of marriage). However, with the Supreme Court of Canada's ruling that only the federal government has the authority to make laws relating to marriage, these protests became, in essence, non-consequential. The provinces have no constitutional jurisdiction over the definition of marriage and must abide by the decision of the federal government.

Civil Marriage Act: An Overview

How did the new law change the institution of marriage?

In February 2005, Paul Martin's minority Liberal government introduced new legislation in the House of Commons pertaining to same-sex marriage. The official name of the legislation, Bill C-38, also known as the *Civil Marriage Act*, became law on July 20, 2005.

What are the specifics of this legislation?

New Definition of Marriage

The *Civil Marriage Act* extends the definition of marriage to include same-sex couples. The legal definition of marriage under the *Act* is as follows:

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

In addition to expanding the definition of marriage, the *Act* also extends full legal benefits and obligations of marriage to same-sex couples; under this legislation, they receive equal treatment to that received by married heterosexual couples under Canada's business corporation and cooperatives laws, and in regard to veterans' benefits, divorce, and income taxes.

Purpose of the Civil Marriage Act

The *Civil Marriage Act* makes several statements concerning the purpose of the change in the definition of marriage:

- The *Act* recognizes that many provincial courts have found that equality rights, under Section 15 of the *Charter of Rights and Freedoms*, include the right to marriage without discrimination based on sexuality. Accordingly, the *Act* recognizes that same-sex couples should have the same access to marriage as opposite-sex couples.
- The *Act* states that only equal access to marriage, for civil purposes, would respect the equality rights of same-sex couples. Civil union, as an institution other than marriage, would not offer same-sex couples equal access and would violate their human dignity.

Notwithstanding Clause and the Civil Marriage Act

Interestingly, the *Civil Marriage Act* makes explicit reference to Section 33 of the *Charter* (also known as the [notwithstanding clause](#)). The *Act* asserts that the Parliament of Canada's commitment to uphold the right to equality, without discrimination, precludes the use of the *Charter's* notwithstanding clause to deny the right of same-sex marriage.

Freedom of Religion

Finally, the *Civil Marriage Act* explicitly provides for the freedom of religion for churches and religious groups. Under the *Act*, it is recognized that officials of religious groups are free to refuse to perform marriages that are not in accordance with the religious views of their respective faiths.

- Read the [Full Text of the Civil Marriage Act](#)
-

Links for Further Information

List of links for more information on this topic

Canadian Government Links

- [Supreme Court of Canada](#)
- [Canada Department of Justice](#)
- [Martin's Address on the Introduction of the *Civil Marriage Act*](#)

Legislation Links

- [Full Text of the Federal *Civil Marriage Act* \(2005\)](#)
- [Canadian Charter of Rights and Freedoms](#)

Links to Canadian Court Decisions on Same-Sex Marriage

- [Ontario Court of Appeal Decision in *Halpern v. Canada*](#)
- [British Columbia Court of Appeal Decision in *Barbeau v. British Columbia*](#)
- [Quebec Court of Appeal Decision \(French\)](#)
- [Quebec Court of Appeal Decision \(English\) \(Unofficial\)](#)
- [Yukon Territorial Supreme Court in *Dunbar & Edge v. Yukon*](#)
- [Supreme Court of Canada Decision in *Reference Re: Same-Sex Marriage*](#)

Advocacy Group Links

- [EGALE \(Pro-same-sex marriage\)](#)
- [Equal Marriage for Same-Sex Couples \(Pro-same-sex marriage\)](#)
- [Marriage Canada \(Pro-traditional marriage\)](#)
- [Defend Marriage, Canada \(Pro-traditional marriage\)](#)

Research Links

- Canada Department of Justice (2002): "[Marriage and Legal Recognition of Same-sex Unions](#)"
- Alberta Law Reform Institute (2002): "[Recognition of Rights and Obligations in Same Sex Relationships](#)" (PDF)
- Law Commission of Canada: "[The Legal Organization of Personal relationships](#)"
- [NFO CFgroup Poll on Same-Sex Marriage](#) (2003) (PDF)

International Links

- Massachusetts Trial Court Law Libraries: "[Massachusetts Law About Same-Sex Marriage](#)"
- [United States Department of Justice](#)
- [The President of the United States of America](#)
- [Netherlands Department of Justice](#) (English)

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