

## The Canadian Government's Litigation Strategy in Sexual Orientation Cases

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### Abstract

Canadian politics was thrown into turmoil this summer when the highest courts of two provinces, British Columbia and Ontario, declared the traditional heterosexual definition of marriage unconstitutional under the *Canadian Charter of Rights and Freedoms*. The ensuing praise and condemnation of the courts was as expected given the highly-contentious subject matter, but what was *not* expected was that the Canadian federal government, which has jurisdiction over marriage (s.91.26, *Constitution Act, 1867*) would appeal *neither* ruling to the Supreme Court of Canada. The paper argues that the Attorney General of Canada's decision is consistent with a pattern of avoiding the SCC when rights claims are based on sexual orientation. While there is ample evidence that the government is ideologically sympathetic to rights claims by gays and lesbians, this does not explain the repeated decisions to concede losses sustained in the lower courts, rather than challenge them via appeals to the SCC. Rather, analysis of the SCC's jurisprudence in this area, and of the broader institutional factors motivating government appeals, supports the more nuanced conclusion that the AGs Canada acted strategically to minimize losses and, accordingly, to protect the government's discretion to craft a response.

In its ruling last summer in *Halpern v. Canada (Attorney General)*,<sup>1</sup> the Ontario Court of Appeal's ordered the federal government to extend the legal and social-economic benefits and responsibilities of marriage to gays and lesbians. *Halpern*, along with a similar ruling by the British Columbia Court of Appeal a month earlier in *EGALE Canada v. Canada (Attorney General)*,<sup>2</sup> sent a shock wave through Canadian politics, sparking renewed criticisms of judicial activism, and demands for the Canadian federal government to appeal the rulings to the Supreme Court of Canada. However, after hinting publicly that it would appeal, the federal government reversed its position and allowed the rulings to stand. As such, gay marriages are legally recognized in some parts of the country but not in others.

This paper examines and attempts to explain the federal government's decision not to appeal the gay marriage cases. In so doing, I advance two arguments. First, that the government's concessions in these cases are part of a broader strategy of avoiding the Supreme Court of Canada on equality rights claims based on sexual orientation. Second, that this strategy of avoidance reflects the Attorney General of Canada's institutional position—as the federal government legal representative before the courts—at the nexus of law and politics. I reject Morton and Knopff's "Court Party" thesis,<sup>3</sup> the only alternative argument yet offered for Ottawa's concessions in gay rights cases, as overly simplistic, as it does not appreciate adequately that political actors who share a particular ideological or policy preference may nevertheless act at cross-purposes due to their different institutional contexts, which, in the Attorney General's case, can be conceptualized as a set of "nested games." Specifically, although federal government lawyers are sympathetic to the gay rights movement, their litigation decisions suggest a strategy of minimizing losses to the government's policymaking authority.

The argument proceeds in four parts. The first reviews the recent gay marriage decisions rendered by the Ontario and B.C. Courts of Appeal, while also providing some background on equality rights claims based on sexual orientation in the Canadian context. In the second section I outline the appeal decision-making process within the Canadian federal government. The third section examines other "gay rights" cases involving the federal government, to establish the government's pattern of conceding losses in the lower courts rather than appealing to the Supreme Court of Canada (hereafter SCC). In this section, I also elaborate Morton and Knopff's argument that these concessions can be explained by their Court Party thesis (CPT). I explain the shortcomings of the CPT on this issue in the fourth section, and offer my alternative argument, that understanding the AG's appeal decisions in gay rights cases requires appreciating that the AG's unique institutional position at the nexus of the executive, legislative and judicial branches engenders a complex set of overlapping, and at times conflicting, preferences.

## **I. The Gay Marriage Cases: *EGALE v. Canada* and *Halpern v. Canada***

On May 1, 2003, the British Columbia Court of Appeal (hereafter BCCA) became the highest-ranking court in Canada to rule that the common-law definition of marriage as "the voluntary union for life of one man and one woman, to the exclusion of all others" violated the equality rights provisions of the *Canadian Charter of Rights and Freedoms*.<sup>4</sup> While the institution of monogamous heterosexual marriage has existed for several centuries, the existing common-law definition dates to the 1866 case *Hyde v. Hyde and Woodmansee*.<sup>5</sup> There was no statutory definition of marriage until 2000, most likely because the common-law definition was widely taken for granted; as the BCCA noted in *EGALE Canada*, "same-sex conduct constituted a criminal offence in Canada until 1969. Thus, the prospect of same-sex marriages did not

realistically arise in Canada until some time thereafter.”<sup>6</sup> Moreover, legislative jurisdiction over marriage is somewhat unclear in Canada, due to the wording of Canada’s founding document, the *Constitution Act, 1867*. Under section 91(26) of that Act, relating to “Marriage and Divorce,” the federal government has jurisdiction over marriage, including the capacity to marry. However, section 92(12) grants the provinces jurisdiction to legislate with respect to the conditions governing the celebration of marriage, under the heading, “The Solemnization of Marriage in the Province,” as well as authority over “Property and Civil Rights in the Province” via section 92(13).

The only federal statutory references to marriage appear in the *Modernization of Benefits and Obligations Act (MBOA)*,<sup>7</sup> and the *Federal Law-Civil Law Harmonization Act No. 1 (FCHA)*.<sup>8</sup> The *MBOA* is an omnibus bill amending 68 federal statutes to extend benefits and obligations available to heterosexual common-law spouses to same-sex couples, in response to the SCC’s ruling in *M. v. H.*<sup>9</sup> declaring the opposite-sex definition of “spouse” unconstitutional. However, section 1.1 of the *MBOA* states: “For greater certainty, the amendments made by the 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.” Similarly, section 5 of the *FCHA*—which harmonizes the federal law with the civil law of Quebec—states that “Marriage requires the free and enlightened consent of a man and a woman to be the spouse of the other.”

Given the explicitly heterosexual wording of the *MBOA*, it is surprising that it was not challenged in either *EGALE Canada* and *Halpern* (as the *FCHA* only applies to Quebec, it was not applicable in either case). As the BCCA noted in *EGALE*, all of the parties to the case agreed that the *MBOA* simply “states Parliament’s view as to what marriage is,” and “does not purport to be an exercise of Parliament’s power to legislate in relation to marriage under s. 91(26) of the *Constitution Act, 1867*.”<sup>10</sup> Similarly, in *Halpern*, the parties concurred that “s. 1.1 [of the *MBOA*] does not purport to be a federal statutory definition of marriage. Rather, s. 1.1 simply affirms that the Act does not change the common law definition of marriage.”<sup>11</sup> The cases focused instead on the 1866 common-law definition, but, as the preceding statement makes clear, there would be obvious and immediate implications for these federal statutes.

### *Section 15(1) of the Charter of Rights and Freedoms*

Both *EGALE Canada* and *Halpern* turned on the question of whether the common-law definition of marriage violated the *Charter*’s s.15 right to equality, which reads as follows:

S.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 racism, national or ethnic origin, colour, religion, sex, age, or mental or physical disability.

Sexual orientation is conspicuous by its absence from the enumerated grounds in s.15, and its exclusion was indeed deliberate, reflecting the opposition of many of the *Charter*’s drafters to recognizing gays and lesbians in Canada’s supreme law. However, then-Federal Justice Minister Jean Chrétien testified before the Special Joint Committee on the Constitution of Canada that s.15’s wording was sufficiently open-ended to allow future *courts* to include sexual orientation.<sup>12</sup> The SCC eventually agreed, 14 years later in *Egan v. Canada*,<sup>13</sup> that sexual orientation required constitutional protection. In *Egan*, the Court considered whether the federal *Old Age Security Act*

was unconstitutional because it limited spousal benefits to heterosexual couples. Interestingly, the Court upheld the Act, concluding that it was intended to benefit female widows who, because many of them had left the workforce to raise children, were financially dependent on their husbands—a situation not faced by most homosexual couples, including Egan and his partner. However, the Supreme Court *did* rule that equality rights protected sexual orientation.

The SCC had set the stage for *Egan* in its first decision regarding s.15, *Andrews v. Law Society of British Columbia*,<sup>14</sup> by ruling, as Chrétien had suggested, that the enumerated grounds of s.15 were not exhaustive. This was largely common sense—there is nothing in the wording of s.15 to suggest that *only* people belonging to the enumerated groups should be protected; rather, it reads “every individual is equal.” But which individuals, and when? Laws treat people differently all the time: rich people pay a larger proportion of their income in income tax than poorer people; agricultural subsidies only go to farmers; we don’t let children drive cars, and so forth. In short, when is differential treatment “discrimination,” and prohibited by s.15? The Court’s answer in *Andrews* was that s.15 protection can be extended when a legal distinction causes harm to (or evidences prejudice against) an “analogous ground”—a characteristic similar to an enumerated ground. This means that the group must be clearly defined—such as a “discrete and insular minority”—and be “historically disadvantaged.” As Chrétien’s comments indicate, sexual orientation was recognized as a probable analogous ground even at the time of the *Charter*’s drafting in 1981. The SCC has refined the analogous ground concept since *Andrews*, most notably in *Law v. Canada (Minister of Employment and Immigration)*,<sup>15</sup> placing greater emphasis on the adverse effects of legal distinctions on human dignity, rather than just material harm. These refinements have only bolstered the claims of gays and lesbians for constitutional protection.

In light of these developments, and in particular the afore-mentioned ruling in *M. v. H.* on the definition of “spouse,” the rulings on marriage were not entirely surprising. Both the B.C. and Ontario Courts of Appeal found that the marriage law makes a distinction on the basis of sexual orientation, a prohibited ground under s.15. Moreover, this distinction is discriminatory, following *Andrews* and *Law*, because it perpetuates the view that same-sex couples are not capable of forming loving and lasting relationships, and thus same-sex relationships are not worthy of the same respect and recognition as opposite-sex relationships. The Courts rejected the Attorney General (AG) of Canada’s argument that “marriage relates to the capacities, needs and circumstances of opposite-sex couples. The concept of marriage—across time, societies and legal cultures—is that of an institution to facilitate, shelter and nurture the unique union of a man and woman who, together, have the possibility to bear children from their relationship and shelter them within it”<sup>16</sup>; in other words, a core purpose of marriage is procreation, which the government argued cannot be achieved by gays and lesbians. Both Courts observed that same-sex couples can in fact choose to have children through adoption, surrogacy and donor insemination, and, as the AG Canada itself had acknowledged in its facts, procreation and child-rearing are not the only purposes of marriage or the only reason why couples choose to marry. Both Courts of Appeal also rejected the AG Canada’s second line of argument, that the heterosexual definition marriage was not discriminatory because of the convergence, since *M. v. H.* and the *MBOA*, of the legal treatment of same-sex and opposite-sex common-law couples, with the attendant benefits and responsibilities. However, common-law spouses must cohabit for a specified period of time, unlike married couples, and not all marital rights and obligations have been extended to cohabiting couples (a distinction upheld in 2002 by the SCC in *Nova Scotia (Attorney General) v. Walsh*<sup>17</sup>).

Notably, the AG Canada advanced an additional argument in the Ontario Court of Appeal, that “marriage is not simply a shopping list of functional attributes but a unique opposite-sex bond” that “is not truly a common-law concept, but one that predates our legal framework, through its long existence outside of it.”<sup>18</sup> The OCA categorically rejected this argument, stating bluntly that “the fact that the common law adopted, rather than invented, the opposite-sex feature of marriage is irrelevant”; rather, the legal distinction is the crux of the matter.<sup>19</sup> Furthermore, the Court criticized the AG Canada’s “argument that marriage is heterosexual because it ‘just is’” as circular reasoning which sidesteps the entire s. 15(1) analysis.<sup>20</sup>

### *Section 1 of the Charter of Rights and Freedoms*

Having found a violation of s.15, the Courts next needed to address whether the violation was “reasonable” under section 1 of the *Charter*. Section 1 states:

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

The leading formulation of how to apply section 1 was laid down by the SCC in *R. v. Oakes*<sup>21</sup>:

1. Was the violation prescribed by law? (this excludes from section 1 protection “policies embedded in administrative practice, rather than explicit legislation” or “vague enabling legislation” where “the actual standards used by the law’s administrators are *their* standards, not the law’s.”)<sup>22</sup>
2. Is the violation justified by a “pressing and substantial objective”?
3. Are the legal means “proportional” to the objective?: are they (i) “rationally connected”?; (ii) is there a “minimal impairment” of the rights, that is, are the “least drastic means” used?; and (iii) does the benefit to general welfare outweigh the cost to the individual’s rights?

Both Courts of Appeal concluded that the common-law definition of marriage fails the second and third parts of the *Oakes* test and could not be upheld. They argued that the AG Canada did not demonstrate any pressing and substantial objective for maintaining marriage as an exclusively heterosexual institution, since encouraging procreation does not require excluding same-sex couples from marriage: heterosexual couples will not stop having or raising children because same-sex couples are permitted to marry, and an increasing percentage of children are born to and raised by same-sex couples. By the same token—namely, the absence of a rational connection—the means are not proportional. Similarly, the exclusion of same-sex couples is not rationally connected to the companionship dimension of marriage, since “gay men and lesbians are as capable of providing companionship to their partners as persons in opposite-sex relationships.”<sup>23</sup> Furthermore, the common-law bar to same-sex marriage is not a “minimal impairment,” most importantly because “same-sex couples are completely excluded from a fundamental societal institution,” and “complete exclusion cannot constitute minimal

impairment.”<sup>24</sup> The Courts also found the law both overinclusive and underinclusive: “The ability to ‘naturally’ procreate and the willingness to raise children are not prerequisites of marriage for opposite-sex couples. Indeed, many opposite-sex couples that marry are unable to have children or choose not to do so. Simultaneously, the law is underinclusive because it excludes same-sex couples that have and raise children.”<sup>25</sup>

### *Remedy*

The only disagreement between the B.C. and Ontario Courts of Appeal was over the appropriate remedy. Section 24(1) of the *Charter* empowers judges to issue “such remedy as the court considers appropriate and just in the circumstances.” In *Schachter v. Canada*,<sup>26</sup> the SCC identified the remedies open to judges under s.24(1):

Section 52 of the *Constitution Act, 1982* mandates the striking down of any law that is inconsistent with the provisions of the Constitution, but only ‘to the extent of the inconsistency.’ Depending upon the circumstances, a court may simply strike down, it may strike down and temporarily suspend the declaration of invalidity, or it may resort to the techniques of reading down or reading in.<sup>27</sup>

Both Courts opted for “reading in,” which Chief Justice Lamer characterized in *Schachter* as applicable when a rights violation is rooted in “what the statute wrongly *excludes* rather than what it wrongly *includes*.”<sup>28</sup> Lamer continued, “Where the inconsistency [with the constitution] is defined as what the statute excludes, the logical result of declaring inoperative that inconsistency may be to include the excluded group within the statutory scheme. The reach of the statute is effectively extended by way of reading in.”<sup>29</sup> In this instance, the Courts reformulated the common law definition of marriage as “the lawful union of *two persons* to the exclusion of all others”<sup>30</sup> (in B.C.), and “the voluntary union for life of *two persons* to the exclusion of all others”<sup>31</sup> (in Ontario). However, the B.C. court initially suspended this remedy for a period of 24 months, to allow Parliament time to devise a response. In contrast (and as usual), the Ontario Court of Appeal took the more activist route, declaring the new definition of marriage effective immediately, and instructing that marriage licences be issued to those same-sex couples who had been denied them. Prompted by the Ontario court, *and with the consent of the Attorney General of Canada*, the B.C. Court of Appeal revised its remedy so as to take immediate effect.<sup>32</sup>

### *The Government’s (Non)Response*

After the BCCA’s ruling in *EGALE Canada*, the AG Canada hinted that it would appeal to the SCC. However, it did not file immediately, although there is a 60-day window of opportunity for appeals to the highest Court.<sup>33</sup> During this period, the OCA rendered its decision in *Halpern*, and the government announced it would not appeal either decision. Instead, the Liberal government drafted a bill (which will not be tabled—if at all—until September 2004) legalizing same-sex marriage, and on July 17, 2003, referred its constitutionality to the SCC (see Appendix).<sup>34</sup> The reference posed three questions: (i) is the statutory definition of marriage solely within federal jurisdiction?; (ii) is the proposed legislation consistent with the *Charter*?; and (iii) does the *Charter*’s freedom of religion protect religious officials from being compelled

to perform a marriage between two persons of the same sex that is contrary to their religious beliefs? Notably, the second issue is a foregone conclusion—it is inconceivable that *including* same-sex couples would violate the *Charter*. The more pertinent question, which the reference neatly avoided, is whether *barring* same-sex couples from marrying is permissible under the *Charter*'s equality rights or section 1 “reasonable limits” provision. In September 2003, the government narrowly defeated (by one vote!) an Opposition Motion by the Canadian Alliance to reaffirm the traditional heterosexual definition of marriage, as committed to by the Liberal government only two years ago in section 1.1 of the *MBOA*; an identical Opposition motion in 1999 had been overwhelmingly approved by the Liberal government.<sup>35</sup> This show of opposition to the government's draft bill recognizing gay marriage forced the leadership to alter the reference, and on January 28, 2004, Justice Minister Irwin Cotler included a question explicitly asking whether the heterosexual definition of marriage violates the *Charter*.

## II. Deciding to Appeal: The AG Canada's Process

Before examining the federal government's appeal decisions in other sexual orientation cases, it is necessary to first review the appeal decision-making process within the Government of Canada. According to the first *Department of Justice Act*, passed in 1868, the Attorney General of Canada (who is also the Minister of Justice) “shall have the regulation and conduct of all litigation for or against the Crown or any Public Department, in respect of any subjects within the authority or jurisdiction of the Dominion.”<sup>36</sup> With minor exceptions, the AG Canada does currently exercise this monopoly over legal services, including “regulating or conducting litigation for all departments and agencies.”<sup>37</sup> This expansive authority explains the Department of Justice Canada's reputation as “Canada's largest law firm.”

In stark contrast to the U.S. federal government, where Department of Justice lawyers are replaced by counsel from the Office of the Solicitor General for Supreme Court appeals,<sup>38</sup> the same Justice Department Canada counsel frequently shepherd a case from the lower courts to the Supreme Court. Indeed, the Department's guidelines for appointing Supreme Court counsel explicitly accept “the principle that regional counsel...involved in the appeal before the appeal court below should continue to participate in the case before the Supreme Court, whether as lead counsel, co-counsel or junior counsel.”<sup>39</sup> My study of the Department's appeals to the SCC in *Charter* cases reveals that the counsel from the lower court of appeal was replaced on appeal to the high court only 26 percent of the time.<sup>40</sup> This fact, in conjunction with the dispersion of Justice Department counsel, gives the appearance of a decentralized appeal decision process; however, this appearance is misleading.

While the conduct of the government's Supreme Court litigation is decentralized—although specialization along the lines of the U.S. Solicitor General's Office is being considered<sup>41</sup>—the decision whether to appeal and the authoring of *facta* are far more centralized. As a senior Justice Department official puts it,

[T]he decision making about whether to seek leave is tied up in a lot of bureaucratic process because we don't want lone rangers running off to the Supreme Court with unmeritorious leave applications. When someone gets the approval of the Ministry to take one up [to the Supreme Court], their written argument...has to be processed and it's the same thing with *facta* on appeal. There's a real process of review and commentary, and ... we've sent *facta* back to be entirely rewritten because they're just not up to what we feel our standard is and

what the Court expects of us. It's something that plays right through the process, from proposal to seek leave to the end of filing a factum.<sup>42</sup>

Appeals to the Supreme Court of Canada require formal Ministry approval, a process with at least three stages: Regional Office recommendation; National Litigation Committee (NLC) recommendation; and final decision by the Minister of Justice. Since almost all lower-level litigation is handled by Regional Office counsel, the first stage in the appeal process is for the Regional Office to make a recommendation to Justice Department Headquarters in Ottawa. The sheer volume of cases handled by the Regional Offices precludes the NLC and the Minister from reviewing every case, but Department officials insist that “important” cases—one presumes gay marriage would qualify—invariably come to the attention of central officials.<sup>43</sup> Proposals to appeal from the Regional Office are next reviewed by the NLC, which makes recommendations to the Deputy Attorney General and ultimately to the Minister of Justice. The NLC is composed of eighteen “core” members (senior litigation managers in issue-specific portfolios at Headquarters) and several “invited” members who “have a strong interest in specific areas covered in the Committee's agenda,” including senior Regional Directors and the counsel litigating the case.<sup>44</sup> According to Justice Department guidelines, the NLC is responsible for “reviewing all recommendations to appeal or not to appeal significant cases,” where “significant cases” typically involve:

- (1) cases likely to attract public attention and require the Attorney General (or other member of the government) to act or make some public statement. For instance, *every case in the Supreme Court of Canada falls into this category*;
- (2) cases involving significant *constitutional questions*;
- (3) cases involving federal-provincial or international relations;
- (4) cases where it is important to ensure that positions being taken in court on behalf of the Attorney General are consistent across the country.<sup>45</sup>

The final stage in the appeal decision process rests with the Minister of Justice/AG Canada. Ministerial approval for (or rejection of) appeals to the Supreme Court is no mere formality. As a current member of the NLC stated, “the [National Litigation] Committee always treats its work as a recommendation to the Deputy and to the Minister.... There is further review, and the committee is very cognizant that the Minister has the last word.”<sup>46</sup> Similarly, another member of the NLC recalled instances where the Committee concluded there was an issue of public importance, but left the decision entirely with the Minister due to the presence of “other, more political concerns where we have no expertise.”<sup>47</sup> Among the political concerns the Minister of Justice must consider is the wishes of the “client,” who is frequently another Minister/Department, and in any case, the Prime Minister. In short, the decision whether to appeal to the SCC in politically important cases resides at the highest levels of the government.

### III. A Pattern of Avoidance: The “Court Party” Thesis

I am not the first person to notice the federal government’s tendency to avoid the issue of discrimination on the basis of sexual orientation. Janet Hiebert’s study of Parliament and the Charter contends that “the tendency of political actors to wait for judicial rulings before

acknowledging that the Charter's principles do or should prohibit discrimination on the basis of sexual orientation has become a pattern of political behaviour."<sup>48</sup> More specifically, and more germane to this paper, Morton and Knopff document how two Attorneys General of Canada from different parties—Progressive Conservative Kim Campbell in 1992, and Liberal Anne McLellan in 1998—refused to appeal losses in sexual orientation cases from the Ontario Court of Appeal to the SCC.<sup>49</sup>

Campbell's opportunity came in *Haig v. Canada*,<sup>50</sup> when the OCA ruled that section 3(1) of the *Canadian Human Rights Act* was inconsistent with the Charter's equality rights, as it did not list sexual orientation as a protected ground. This was the first time a court of this rank had explicitly identified sexual orientation as an analogous ground under s.15. The federal government actually conceded this important novel interpretation, but contended that there was no s.15 violation in this case: "in failing to include [sexual orientation] as a proscribed basis of discrimination in s. 3(1) of the *Canadian Human Rights Act*, Parliament has not itself acted in a discriminatory fashion."<sup>51</sup> Furthermore, Ottawa argued that it "could have chosen not to have a Human Rights Act and, having chosen to enact one, was free to legislate in respect of some social problems and not others."<sup>52</sup> The OCA rejected these arguments, and because the federal government had, curiously, offered no section 1 defense, the court turned immediately to the question of remedy. Rather than striking down the law, the court "read in" sexual orientation to s.3(1). They did so with the encouragement of the Canadian Human Rights Commission, which intervened to ask the court to *order* the Commission to deal with complaints on the basis of sexual orientation.

McLellan's case, *Rosenberg v. Canada*,<sup>53</sup> involved an equality rights challenge to the *Income Tax Act's* heterosexual definition of "spouse." A trade union registered its pension plan with Revenue Canada to qualify for significant tax deferral advantages under the *ITA*, but when the union sought to change the plan's definition of "spouse" to include same-sex couples, Revenue Canada refused, citing a conflict with the *ITA's* definition. On behalf of two lesbian employees (Rosenberg among them), the union filed a section 15 challenge against the *ITA*. At trial, as in *Haig*, the government conceded the violation, but persuaded the judge that the law was reasonable under section 1. The Ontario Court of Appeal reversed the trial judge, and "read in" a same-sex definition of spouse, rather than nullify the law and deprive heterosexual couples of their tax benefit. The government refused to appeal to the Supreme Court, going so far as to fight off an extraordinary attempt by the Official Opposition to force a vote on the decision.<sup>54</sup>

Morton and Knopff attempt to explain the AG Canada's concessions via their "Court Party" thesis, that the Department of Justice generally, and the recent Ministers of Justice specifically, are part of an alliance of post-materialist interest groups, judges, and government bureaucrats who have shifted policymaking authority away from elected officials toward the courts, under the aegis of the "rights revolution." Their thesis is a more critical version of Charles's Epp's argument that Canada's "rights revolution" is explained primarily by a "support structure for legal mobilization, consisting of rights-advocacy organizations" and government patrons.<sup>55</sup> Provocatively, Morton and Knopff openly accuse Campbell and McLellan of intentionally losing the cases in the lower courts—mostly by conceding the rights violation—and then refusing to appeal, to advance the Justice Ministers' pro-gay rights agenda, over the objections of caucus.<sup>56</sup>

There is considerable support for the accusation, particularly in Campbell's case. Support within the Justice Department for sexual orientation claims during this period is evident from the government's factum in *Veysey v. Canada (Commissioner of Correctional Services)*,<sup>57</sup> which

stated: “it is the position of the Attorney-General of Canada that sexual orientation is a ground covered by section 15 of the Charter.”<sup>58</sup> As well, Judge Krever of the Ontario Court of Appeal supported his decision in *Haig* to “read in” by citing “the commitment of successive Ministers of Justice on behalf of their governments to amend the legislation to add sexual orientation to the list of prohibited grounds of discrimination.”<sup>59</sup> Perhaps most significantly, as noted above, Campbell did not contest the expansion of s.15 to include sexual orientation as an “analogous ground,” and offered no s.1 defense—a highly questionable strategy, given that the Court has routinely conducted s.1 analysis ever since *Oakes* (similarly, McLellan conceded the s.15 violation in *Rosenberg*, but did offer a s.1 defense. Notably, however, the AG Canada did not concede the violation in the same-sex marriage cases, and did offer a s.1 defense, albeit an arguably weak one). Dissent within the Conservative caucus on the issue is also well-documented. As Duclos observes, Krever’s comments ignored, significantly, the fact that successive governments were unable to pass such legislation.<sup>60</sup> In his autobiography, John Crosbie, former Minister of Justice in the Mulroney government, recalled that the attempt in 1986 to amend the *Canadian Human Rights Act* to protect sexual orientation “caused an unholy row in the Conservative caucus,” with one back-bench MP publicly announcing that a majority of caucus opposed the reforms.<sup>61</sup> Similarly, McLellan faced considerable resistance within the Liberal caucus, as the overwhelming support among government members for the 1999 Opposition motion affirming the traditional definition of marriage attests. This resistance also helped produce the caveat regarding marriage in section 1.1 of the *MBOA*. It is noteworthy that this resistance continues today, as a third of the government caucus (52 MPs) supported the recent Opposition motion on the definition of marriage, identical to the 1999 motion, and another 31 abstained.<sup>62</sup>

In summary, the CPT suggests that the refusal to appeal the decisions legalizing gay marriage is simply a continuation of the AG Canada’s strategy of supporting the gay rights movement by “end-running” around the objections of elected representatives.

#### **IV. An Alternative Explanation for Avoidance: Institutional Context and Nested Games**

##### *Government Lawyers as Rational Actors*

The first step in advancing my account of the AG Canada’s behaviour is to recast the CPT’s explanation as an application of rational choice theory. According to Morton and Knopff, successive Ministers of Justice and senior government lawyers have as their *sincere* preference the advancement of gay/lesbian rights. However, due to opposition within their own government, they are unable to express that preference openly in court; that is, they must act *strategically*, by defending (weakly) the status quo, and then refusing to appeal when they lose. Put in these terms, we can further understand the CPT as an example of the neo-institutional variant of rational choice theory: institutions, by this account, provide incentives and disincentives to some types of political behaviour, forming a context within which rational agents act strategically to achieve their goals as fully as possible.<sup>63</sup>

I concur with Morton and Knopff that that the decision to appeal is a rational one, made by government lawyers weighing the costs and benefits of appealing, and the competing interests of those parties directly involved, within a context of institutionally-bounded choice. As well, officials and documents from the Justice Department Canada speak of considering a variety of factors in their decision making, including the likelihood the Supreme Court will grant leave,

maintaining the government's reputation with the Court, and resolving jurisprudential conflict in the lower courts.<sup>64</sup> My detailed study elsewhere<sup>65</sup> confirmed that the federal government was “procedurally rational”<sup>66</sup> when determining whether to appeal to the SCC in *Charter* cases (during the 1982-2000 period), as government lawyers and their political superiors appeared to weigh the costs and benefits of appealing based on factors including: financial and policy costs associated with the lower court loss, the case's importance, the likelihood the Supreme Court will agree to hear the case (“reviewability”), and the prospect of winning on appeal (“winnability”). This hypothesis was confirmed by both quantitative and qualitative analysis, with all categories of factors supported by the data, albeit to varying degrees.

However, my findings also revealed three categories of what can be characterized as statistically “perverse” or unexpected outcomes: “lost causes” (appeal unexpected because there is virtually no chance of winning); “why bother?” appeals (unexpected because none of the significant explanatory factors are present); and unexpected concessions (where the government does not appeal in spite of strong incentives to challenge the lower court ruling). There are only two cases in the last category, between the years 1982 and 2000: *Haig* and *Rosenberg*. These cases—and by extension, the gay marriage cases last summer—suggest that a thicker account of litigation decision making is required. This account can be derived through a greater understanding of the AG's unique institutional position.

My argument towards that conclusion proceeds in several steps. The first is demonstrating that Morton and Knopff's argument regarding government concessions in *Haig* and *Rosenberg* is based on faulty logic: that if the AG holds the pro-gay rights preference the CPT suggests, the AG's decision *not* to appeal to the SCC was illogical. After explaining why this is so, I employ Tsebelis's concept of “nested games” to demonstrate that the AG's decision is in fact a rational strategy, which, in turn, requires examining the AG's unique institutional context. Using this information, I hypothesize on the “games” in which the AG is simultaneously involved. I close by discussing the developments in the gay marriage reference to the SCC, and how they may point to the existence of another, highly idiosyncratic game.

### *The CPT's Faulty Logic Regarding Appeals*

As noted earlier, Morton and Knopff are correct in concluding that the federal Department of Justice has a long record of supporting equality rights for gays and lesbians. If promoting gay rights is their primary goal, however, the AG Canada should have *appealed* the rulings in *Haig*, *Rosenberg*, *EGALE* and *Halpern* to the SCC. The reason lies in the “unified” structure of Canada's judicial system. Provincial “section 96” courts (referring to the section of the 1867 Constitution establishing these courts), such as the Ontario and B.C. Courts of Appeal, have unlimited jurisdiction; that is, they can hear disputes arising under both provincial and federal law. Similarly, when the Supreme Court of Canada was created in 1875 as a “General Court of Appeal” pursuant to section 101 of the Constitution, it was given appellate jurisdiction over all types of legal disputes. However, rulings by provincial appeal courts apply only in the jurisdiction of that court (for example, Ontario for the Ontario Court of Appeal), *even when ruling on a federal law*. In contrast, the Supreme Court of Canada's decisions are binding in all jurisdictions. If the AG Canada's primary goal was to extend legal protections and benefits to lesbians, gays and same-sex couples, then we should have expected the AG to appeal to the SCC, in the hopes of producing pro-gay rights rulings with national application.

This argument assumes, of course, that the SCC would have produced such a ruling—an assumption Morton and Knopff reject. They observe that in 1992, when *Haig* was decided, no other penultimate court of appeal, let alone the Supreme Court, had endorsed the extension of s.15 protection to sexual orientation.<sup>67</sup> Moreover, a year earlier, in *Canada (Attorney General) v. Mossop*,<sup>68</sup> the Federal Court of Appeal (FCA) had ruled against a sexual orientation claim. In *Mossop*, the appeal court refused to extend the *Canadian Human Rights Act*'s protection of “family status” to same-sex couples, a decision upheld by the Supreme Court in 1993.<sup>69</sup> In the case of *Rosenberg*, Morton and Knopff argue that “until this case the government had never lost a Charter appeal involving a discrimination claim against the *ITA*.”<sup>70</sup> An important case in point was the SCC's 1995 ruling in *Egan*, discussed above, that the *Old Age Security Act*'s heterosexual definition of spouse did not violate the Charter's equality rights. The government thus had a favourable, recent precedent directly on the issue in *Rosenberg*—namely, spousal recognition of same-sex couples—and an overt case of noncompliance by the Ontario Court of Appeal with said ruling.<sup>71</sup> As with *Haig*, the incentives to appeal seem obvious.

However, appearances can be deceiving. With respect to *Haig*, the Justice Department believed that the prospect of winning was low, regardless of the FCA's *Mossop* precedent. When speaking briefly about *Haig*, a senior department official allowed, “You don't continue beating away at something if you feel the judgment was probably right and *probably would be sustained*.”<sup>72</sup> Indeed, when rejecting Mossop's equality rights claim based on “family status” only a year after the *Haig* ruling, the SCC strongly encouraged him to challenge the *Canadian Human Rights Act* in its entirety for failing to list sexual orientation as a protected ground—in short, the same issue an appeal from *Haig* would have raised. Moreover, the majority in *Mossop* hinted that such a challenge would not only be successful, it would be remedied through “reading in” sexual orientation to the *CHRA*, just as the Ontario Court of Appeal had done in *Haig*. Finally, it bears noting that Mossop's actual claim, that “family status” should include same-sex couples, was almost successful—the SCC split 4-3—and two members of the Court did not participate in the case. While hindsight is admittedly 20/20, it seems that the Justice Department's hunch was correct.

The odds of “losing” before the SCC in *Rosenberg* were even higher, for several reasons. The first was an unfavourable precedent on sexual orientation that was even more recent in 1998 than *Egan: Vriend v. Alberta*.<sup>73</sup> The Supreme Court's high-profile decision in *Vriend*, issued only weeks before *Rosenberg*, amended Alberta's human rights code (the *Individual's Rights Protection Act*) to include sexual orientation, just as the Ontario Court of Appeal had rewritten the *CHRA* in *Haig*. Although spousal recognition was not explicitly addressed by the Court, the decision represented a strong endorsement of sexual orientation claims under section 15, in contrast to its 1993 decision in *Mossop*. Similarly, the SCC's rulings in *Vriend* and *M. v. H.* are fairly strong indicators that the Court would have resolved *EGALE* and *Halpern* in a manner favourable to advocates of same-sex marriage (and will, in the reference case).

Another, less well-known, aspect of the *Vriend* decision also weakened the government's case in *Rosenberg*. *Vriend* saw the Supreme Court alter the rules of analysis under the section 1 “reasonable limits” tests. Recall that the second stage of the original *Oakes* test asked whether the rights violation was justified by a “pressing and substantial objective.” Importantly, the “pressing and substantial objective” referred to the objective of the impugned law. Subsequent to the *Oakes* ruling, the Court demonstrated considerable deference to legislative objectives, and focused its attention on the proportionality component, leading Knopff and Morton to observe that “the courts will rarely invalidate legislation because its objective is not important enough.”<sup>74</sup>

In *Vriend*, the Court rewrote this second step, so that the question was not whether the legislative objective was pressing and substantial, but whether the *violation* was, a significantly more difficult criterion for the government to satisfy. Notably, the Ontario Court of Appeal cited this amended section 1 test in *Rosenberg*, finding that while supporting dependent widowed women was a valid legislative objective, violating the rights of gay and lesbian couples was not. In light of *Vriend*, the government's decision to concede the rights violation in *Rosenberg*—a not unreasonable concession, since a majority in *Egan* (5-4) had found a *prima facie* violation of s.15—meant that Ottawa had given up the strategically most important issue, as a section 1 defense would be virtually impossible.

A third factor suggesting Morton and Knopff misread the SCC's probable ruling in *Rosenberg* concerns the Supreme Court's composition, which changed between *Egan* and the *Rosenberg* period. The *Egan* decision was sharply divided 5-4, with Justices Lamer, LaForest, Sopinka, Gonthier and Major ruling in Ottawa's favour, and with Justices L'Heureux-Dubé, Cory, McLachlin and Iacobucci in dissent. By April 1998, when *Rosenberg* was decided by the OCA, two members of the *Egan* majority were gone: Justice LaForest had retired, and Justice Sopinka had passed away. LaForest had been replaced by Justice Bastarache—who had ruled with the majority in *Vriend*—while Sopinka's seat had been filled by Justice Binnie, who, while not a completely unknown quantity (he had been a former Associate Deputy Minister of Justice for Canada who subsequently represented the government on several occasions), had been appointed directly from private practice, with no previous bench experience. The government should not, therefore, have assumed that the Court would have followed *Egan*, especially if fewer than nine Justices heard the case.

### *Nested Games and the AG Canada's Unique Institutional Context*

In view of these factors, the AG's decision not to appeal *Haig*, *Rosenberg*, *EGALE* and *Halpern* to the SCC appears suboptimal, especially if the AG's defense of the policy status quo was half-hearted to begin with. As such, Tsebelis's concept of "nested games"<sup>75</sup> provides a useful heuristic device for analyzing the AG's appellate behaviour. Tsebelis "analyzes cases in which an actor confronted with a series of choices does not pick the alternative that appears to be the best."<sup>76</sup> According to Tsebelis, "if, with adequate information, an actor's choices appear to be suboptimal, it is because the observer's perspective is incomplete. The observer focuses attention on only one game, but the actor is involved in a whole network of games—what I call *nested games*. What appears suboptimal from the perspective of only one game is in fact optimal when the whole network of games is considered."<sup>77</sup> As I elaborate below, the AG Canada's unique institutional position, with different associated roles and responsibilities, engage him in a number of simultaneous "games" or arenas.

Institutions matter to rational actors in at least two ways. The first, as Morton and Knopff argue, is that "institutions shape the political process in ways that enhance the prospects of certain outcomes and diminish the prospects of others."<sup>78</sup> That is, institutions are the "rules of the game," and constrain action by providing incentives for some behaviour and disincentives for others. The institutions of the Charter and judicial review themselves are excellent examples of this point, which underlie the very concept of constitutionalism. In the case of the CPT, the AG/Justice Minister is constrained by his responsibility to Cabinet and caucus. The second, and more profound, way in which institutions matter is that they help *determine* actor preferences. As Hall and Taylor<sup>79</sup> and Immergut<sup>80</sup> observe in their surveys of the "new" institutionalist

approaches, rational choice theory typically brackets the issue of preference formation; as Hall and Taylor put it, in this “calculus approach...the actor’s goals or preferences are given exogenously to the institutional analysis.”<sup>81</sup> In contrast, “cultural approaches,” such as organization theory<sup>82</sup> and historical institutionalism,<sup>83</sup> contend that actor preferences are shaped by institutional roles and responsibilities.

While the calculus approach to institutional influence is consistent with the CPT, the latter cultural account is not. The crux of the CPT is that, “while the agendas of Court Party interests differ and sometimes even conflict, what unites these groups [including rights advocacy organizations, judges, lawyers, and some state officials] is a shared commitment to the project of empowering the courts.”<sup>84</sup> A fuller appreciation of the AG Canada’s institutional roles and responsibilities reveals, however, not only that his preferences are much thicker and more diverse than those of other alleged members of the Court Party, but that they may include *opposition* to empowering the courts, on behalf of the AG’s “political” colleagues and superiors.

The AG Canada (like his or her provincial counterparts), occupies the nexus between politics and law, or more accurately (since the law-politics dichotomy is usually a false one), between the executive, legislative, and judicial branches. The AG’s most explicit role is the lawyer for the government, which is to say, the executive branch. According to the *Department of Justice Act*, the AG “shall have the regulation and conduct of all litigation for or against the Crown or any department, in respect of any subject within the authority or jurisdiction of Canada.”<sup>85</sup> The AG is therefore the government’s official representative in litigation before the courts, or what Edwards terms the Chief Law Officer of the Crown.<sup>86</sup> In my interviews with several government lawyers, they often made reference to other Ministers and departments as their “clients,” and emphasized that the client’s wishes were actively solicited and acted upon. The AG and his department are further charged with providing legal advice to other departments, particularly as regards potential conflicts between proposed policies and the Constitution.<sup>87</sup> In a somewhat unusual situation, the AG is also a full political member of the executive, through his joint appointment as Minister of Justice, a senior member of Cabinet subject to the Prime Minister and the convention of Cabinet solidarity (and, even more unusually, an elected member of Parliament). This is in contrast to the United States, where the government’s chief litigator, the Solicitor-General, does not sit in the President’s Cabinet, unlike his political superior, the Attorney General. Similarly, some Commonwealth systems assign the conduct of litigation to a Director of Public Prosecutions, who does not sit in Cabinet. The AG Canada is therefore responsible, as the Minister of Justice, for not only the conduct of litigation, but often the *subject* of litigation—that is, the content of laws, most notably, the *Criminal Code*. The Department appears fully cognizant of this aspect of their role. The *Federal Prosecution Service Deskbook* states, “Since the arrival of the Charter, appeal courts have become an important forum for establishing social policy. Counsel must be able (a) to articulate persuasive policy justifications for the position adopted on behalf of the Crown; and (b) to sensitize the Court to the ramifications of the other parties’ urgings.”<sup>88</sup> Similarly, when outlining the “factors which may be considered when deciding whether the public interest requires an appeal,” the *Deskbook* includes, “Could the trial decision impair the enforcement or administration of a significant government policy initiative?”<sup>89</sup> Finally, the Minister of Justice is responsible for aspects of judicial administration, including staffing and budgets, although the rise of judicial councils (such as the Canadian Judicial Council) have steadily lessened the Minister’s direct involvement, which was widely seen as a conflict of interest.<sup>90</sup>

Huscroft argues that the AG is also *Parliament's* legal counsel, as he or she helps draft private members' bills, and provides advice to the House and parliamentary committees about proposed legislation.<sup>91</sup> Senior lawyers in the AG's office seem to concur; consider the following statements:

- "...the AG's role, I think, as most of us conceive it, is to be Parliament's lawyer, to say what can be said on behalf of that legislation, regardless of who passed it."
- "Invalidation of statutes always reduces Parliament's room to manoeuvre, so we'll always be concerned about that."
- "I think the overriding concern in the non-criminal area, is, if not actually winning the case, minimizing the loss, so that Parliament can have a range of policy options."
- "Usually reading in or reading down is going to be one of the most intrusive remedies. When you just strike down, usually you're giving Parliament a little leeway to devise a solution. You may be saying this one solution is bad, but you've still got all the others to choose from, whereas when they read in they're saying this is what the law shall be henceforth. It may not be legally impossible...to come along with a different solution, but it's going to be politically very difficult."

The irony is that, with the rare exception provided by periods of minority government, "Parliament" does not "devise solutions"—the government does, thanks to our Westminster system of fused executive and legislature, in tandem with by our single-member-plurality electoral system's tendency to produce majority governments. Nonetheless, the comments provide an interesting insight into the way Justice Department lawyers perceive their own role; most notably, that they have a responsibility to protect the policy-making authority of the elected branches.

Finally, the AG is also an officer of the Court who is learned in law. Justice Department counsel clearly take their responsibilities in this regard seriously. The senior counsel for criminal law stated:

We do not want to be seen as bringing frivolous leave applications, so if you look at our material we're employing the same test that they [the Justices] employ and we think it's the role of the AG to sort the wheat from the chaff, and only take cases where we legitimately think we have a national issue that they ought to decide. They don't always agree with us, but...we pride ourselves on taking a rigorous look at these cases before launching a leave application.<sup>92</sup>

The senior counsel for civil litigation echoed this concern:

They [the SCC] grant leave on average in about 100 cases a year.... Something in the order of 15 to 20 per cent is going to be our share, and if we're there 40 and 50% of the time, I think we're going to create an impression in their minds that we're not looking at these things critically. ...[T]he decision making about whether to seek leave is tied up in a lot of bureaucratic process because we don't want lone rangers running off to the Supreme Court

with unmeritorious leave applications. When someone gets the approval of the Litigation Committee or Ministry to take one up, ...[t]here's a real process of review and commentary, and maybe we're having a peak season for it, but in the last six weeks or so we've sent facta back to be entirely rewritten because they're just not up to what we feel our standard is and what the Court expects of us.<sup>93</sup>

The AG also assumes responsibility for helping resolve jurisprudential inconsistencies among the lower courts, as evidenced by the Department's internal guidelines listing this as a factor in favour of appealing to the SCC.<sup>94</sup>

### *The AG Canada's Nested Games: Some Hypotheses*

Based on the foregoing, we can hypothesize that the AG is simultaneously involved in the following games, with the following preferences, without suggesting that this is an exhaustive list. I have also included the implications of the government's decision not to appeal in the gay rights cases for each game, that is, whether the course of action was "optimal" (achieved the goal) or "suboptimal" (did not achieve goal).

1. Sexual Orientation Equality Game – the AG's primary goal here is to extend legal protections, benefits, and responsibilities to gay and lesbian individuals and couples, in short, to promote equality on the basis of sexual orientation.  
*Outcome:* suboptimal; not appealing keeps the issue from reaching a sympathetic SCC and obtaining a favourable ruling with national application.
2. Partisan/Electoral Game – as a member of the government, the AG seeks to maximize his or her party's appeal to voters. This includes avoiding issues—or responsibility for policies—which will divide existing supporters, or turn away voters the party is targeting: for the Liberals, Westerners (especially in Alberta and B.C., the Alliance/Conservative stronghold), rural Quebec and Atlantic Canada.  
*Outcome:* suboptimal; an appeal could have shifted responsibility for the outcome (enhancing gay/lesbian rights) to the SCC, possibly defusing internal dissension within government caucus, and to avoid alienating target voters. More importantly (and ironically, given Game 1), by "not fighting it," the leadership looks complicit, as illustrated by aftermath of *Rosenberg* and *Halpern/EGALE*, when the Opposition was able to take control of the issue and force the Liberals into (a) not challenging the same-sex definition of spouse and (2) voting against the traditional definition of marriage.
3. Policy-making Authority (Executive Power) Game – as indicated above, the AG's goal in this game is to preserve the policy-making authority of the elected government against judicial activism.  
*Outcome:* optimal; not appealing restricted the losses to the lower courts, and allowed the government to formulate its own policy, on its own timetable. Particularly in the earliest case of *Haig*, a SCC ruling extending s.15 to sexual orientation could have been overwhelming for the federal government. Although Ottawa had conducted an internal review of its legislation for compliance with s.15's enumerated grounds, it is extremely unlikely that the government understood the full impact of adding sexual orientation, or was prepared to address

constitutional challenges on this basis.<sup>95</sup> In short, the Justice Department (and the government in general) may have been buying time. Also, although the SCC has sent mixed signals on its preferred remedy—“reading in” in *Vriend*, temporarily suspended invalidation in *M. v. H.*— there was a distinct possibility that the Court would simply rewrite the impugned legislation; where the gay marriage cases dealt with the common law, judicial revision of the law would have been a certainty.

4. Interest Group Clientele Game – drawing on Pal’s<sup>96</sup> and Brodie’s<sup>97</sup> findings that there are significant patron-client networks between the Canadian federal bureaucracy and rights advocacy organizations in civil society, we can hypothesize that the AG will seek a course of action in this game that will not alienate existing interest group allies, and/or will attract such allies. Notably, the AG’s goal in this game may (but certainly not necessarily) conflict with its goal in the Partisan Game.

*Outcome:* unclear; by “not fighting,” the government appears to agree with LGBT movement litigants in the cases, and saves rights advocacy organizations from spending resources on a SCC appeal. On other hand, as Game 1 shows, it may be contrary to the movement’s interests in the larger context.

Re-evaluating the federal government’s appeal decisions in the gay rights cases in light of these overlapping games, it appears that the Executive Power Game is dominant. The decision not to appeal is obviously suboptimal in both the Sexual Orientation Equality and Electoral/Partisan Games, while the Interest Group Clientele Game is inconclusive. One possible criticism of my argument is that I am simply giving the AG and the federal government too much credit, that their decisions not to appeal are less the product of calculated strategy than tactical errors. Perhaps, one might argue, the AGs Canada simply did not appreciate that not appealing was, in fact, counter-productive to their goal of promoting equality for gays and lesbians. It is the case that Tsebelis emphasizes that his theory assumes actors are working with “adequate information” in each game<sup>98</sup>—for example, that they did not just “guess wrong” on the SCC’s likely rulings on appeal. Such a possibility cannot be refuted with the available information, but I find it highly improbable that the AG Canada’s office—“Canada’s largest law firm”—is that politically or legally unsophisticated. The office boasts an impressive roster of highly experienced counsel in a wide range of legal specializations, an extensive consultation process surrounding appeals to the SCC, and access to the highest levels of political leadership. Moreover, it must be stressed that I do not suggest that the AG conceptualizes his or her decision explicitly in terms of these “nested games”; rather, I offer it as a conceptual tool for the observer, to help make sense of the different demands and interests shaping the AG’s behaviour.

Before closing, what are the implications for my argument of the federal government’s draft bill recognizing same-sex marriage and the initial and revised references to the SCC? On one hand, they are obviously optimal from the perspective of the Sexual Orientation Equality Game, and possibly the Interest Group Clientele Game. On the other hand, if the goal of not appealing was to protect the government’s policy-making discretion, the draft bill suggests it was a hollow victory, since it simply adopts the lower courts’ rulings in *EGALE* and *Halpern*. It seems fairly clear that at least one goal of the reference was to enhance the bill’s legitimacy, and to silence opposition both within and outside of the Liberal party. However, the initial reference question was poorly designed to achieve that goal. Recall that the initial reference (see

Appendix) did not ask the Court whether recognizing gay marriage was constitutionally *required*, only whether *allowing* gay marriages violates the Charter. This question failed to satisfy opponents of same-sex marriage, who saw the “rigged” question for what it was. Moreover, the reference evaded entirely a major argument of same-sex marriage opponents, that “civil unions” are a constitutionally-satisfactory alternative. This opposition—graphically demonstrated by Parliament’s narrow rejection of the Opposition motion affirming the traditional definition of marriage—prompted the revised reference, which explicitly asks whether same-sex marriage is constitutionally required. All of this notwithstanding, a simple question remains: why did the government go to the trouble of drafting a bill legalizing same-sex marriage and refer it to the SCC, rather than simply appealing *EGALE* or *Halpern*? They would both achieve the same goals with respect to the Sexual Orientation Equality Game, but the latter option would have been decidedly superior (even optimal) from the perspective of the Electoral/Partisan Game. After all, while the reference may help shift responsibility onto the Court, the fact remains that the government drafted the bill recognizing same-sex marriage!

What, then, can we conclude? Perhaps the criticism is correct, that the AG simply miscalculated, especially given the quick pace of events in summer 2003. Another possibility, however, is that there was another game at play, what I term the “Liberal Leadership (or Chrétien Legacy) Game.” It bears recalling that last summer witnessed the announcement of several of Jean Chrétien’s high-profile “legacy projects,” most of which had little prospect of being adopted by the House, and some of which—the same-sex marriage and marijuana “decriminalization” bills foremost among them—seemed designed to complicate the leadership of Chrétien’s successor, Paul Martin. The reference power is typically exercised in a highly politicized manner, at the behest or with the approval of the Prime Minister, so it is not unreasonable to look to the goals of the PM when trying to understand the government’s strategy on this issue. While it is an uncomfortably idiosyncratic explanation, the adoption of the draft bill and initial reference may simply have reflected Chrétien’s desire to take credit for this reform before he left office—something he could not have done via regular appeals to the SCC.

As mentioned earlier, the Martin government announced in January 2004 the expansion of the SCC reference to include a clear question about whether the traditional definition of marriage violates the Charter. Are we to conclude that this shift in governmental tactics lends support to the CPT, that the government supports legalizing gay marriages but wants to evade political responsibility for it? While that is certainly one possibility, it does not explain why the government did not pose this question in the initial reference, or simply appeal the lower court rulings in the spring, either of which would have produced the same result for the government. In short, the CPT does not explain the delay, which, I have suggested, is related to the internal party dynamics of the government and its leaders.

In addition to addressing the concerns of same-sex marriage opponents, there was a strong incentive, related to the timing of the next election, for Martin to change the reference question. Namely, the SCC was poised to render its decision on the initial reference in the Spring, when, before the current sponsorship scandal, the Martin government planned to call an election. A ruling requiring same-sex marriage could have thrown the equivalent of a hand grenade into the Liberals’ campaign, given widespread opposition to gay marriage within the Liberal Party, and in the West, rural Quebec and Atlantic Canada, where Martin is hoping to attract support. As was probably hoped, expanding the terms of the reference delayed the Court’s ruling until October 2004, in all likelihood after the next federal election (in other words, an optimal outcome in the Electoral/Partisan Game).

## V. Conclusion

There can be little doubt that the AG Canada has displayed a pattern of avoiding bringing sexual orientation cases to the SCC. However, the federal government's decisions not to appeal to the SCC in the gay marriage and other sexual orientation cases cannot be explained simply as ideological sympathy with the rights claimants. Government lawyers have opposed these claims in the lower courts, although some of their decisions to concede rights violations were admittedly of questionable vigor. Most importantly, there were compelling reasons, related to protecting legislative authority from likely pro-gay rights Supreme Court rulings, for the government to "cut its losses" in the lower courts. The Justice Department strongly suspected that the Court would rule in favour of the rights claimants, and, in any case, Ottawa could have conceded the violation and offered a weak section 1 defense, or contested the violation and made no section 1 argument. That the AG Canada did not opt for this strategy suggests the need for a more nuanced interpretation than that offered by the CPT, and the evidence presented supports the conclusion that the AGs Canada—while they did agree with the lower court decisions—acted strategically to minimize losses and, accordingly, to protect the government's discretion to craft a response. This finding suggests a level of co-ordination between government lawyers and their elected "clients" that some international observers may find surprising and even troubling, but which, I contend, is hardly surprising in light of the AG Canada's institutional context. Others—including, ironically, critics of judicial activism such as Morton and Knopff—might take comfort in the knowledge that the institutional actor which is the sole legal representative of the elected government does appear to act in accordance with the demands and best interests of its client.

## APPENDICES

### **Wording of Draft Bill on Marriage**

Proposal for an Act respecting certain aspects of legal capacity for marriage for civil purposes

WHEREAS marriage is a fundamental institution in Canadian society and the Parliament of Canada has a responsibility to support that institution because it strengthens commitment in relationships and represents the foundation of family life for many Canadians;

WHEREAS, in order to reflect values of tolerance, respect and equality consistent with the *Canadian Charter of Rights and Freedoms*, access to marriage for civil purposes should be extended to couples of the same sex;

AND WHEREAS everyone has the freedom of conscience and religion under the *Canadian Charter of Rights and Freedoms* and officials of religious groups are free to refuse to perform marriages that are not in accordance with their religious beliefs;

NOW, THEREFORE, Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:

1. Marriage, for civil purposes, is the lawful union of two persons to the exclusion of all others.
2. Nothing in this Act affects the freedom of officials of religious groups to refuse to perform marriages that are not in accordance with their religious beliefs.

Consequential amendments will be added in the bill that is introduced in Parliament.\*

\* Consequential amendments are changes to other federal statutes that will have to be made as a result of new legislation.

### **Initial Reference to Supreme Court of Canada on Draft Bill**

IN THE MATTER OF a Reference by the Governor in Council concerning the Proposal for an Act respecting certain aspects of legal capacity for marriage for civil purposes, as set out in Order in Council P.C. 2003-1055, dated July 16, 2003 (29866)

Pursuant to s. 53 of the Supreme Court Act, the following questions are referred to the Supreme Court of Canada for hearing and consideration:

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?
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?

**Justice Department Canada Press Release on Revised Reference  
to Supreme Court of Canada**

**GOVERNMENT OF CANADA REAFFIRMS ITS POSITION ON SUPREME COURT  
REFERENCE**

**OTTAWA, January 28, 2004** - The Minister of Justice and Attorney General of Canada, Irwin Cotler, today issued this statement:

"May I begin by saying that the Government of Canada is reaffirming its position in the marriage reference, organized around two foundational principles - support for equality - and within that the extension of civil marriage to same-sex couples - and support for religious freedom - and within that protection for religious officials from being forced to perform a marriage ceremony between two persons of the same sex where it is against their religious beliefs.

But there is a third important principle, and that is the importance of a full and informed debate before the court, in Parliament and in response to concerns of the public. It is to respect that third principle that the Government is seeking the opinion of the Supreme Court of Canada on a new question in the reference on civil marriage and the legal recognition of same-sex unions.

In particular, the Government of Canada is seeking the opinion of the Supreme Court of Canada on the question of whether the opposite-sex requirement for marriage for civil purposes is consistent with the Canadian Charter of Rights and Freedoms.

We understand that many Canadians are struggling with this question. And as a new administration, one of our key priorities is to address what some have termed "a democratic deficit".

While the Government's position on the reference has not changed, adding this question will allow for a more comprehensive opinion by the Court, and for those groups and individuals who do not agree with the Government's approach to put their case to the Court.

As you may know, the Supreme Court ruled last Friday that 18 groups and individuals can intervene. So we are sure of a full range of views before the Court.

In making this decision to add a new question, the Government was guided by three principles - equality, religious freedom, and the importance of a full and informed debate before the court, in Parliament and in response to the concerns of Canadians on this important social issue.

In summary, the Government continues to believe that the best way to fully respect the two fundamental Charter rights involved here - equality and freedom of religion - is to provide equal access to civil marriage for same-sex couples seeking that degree of commitment as other couples, while ensuring the protection of religious officials who refuse to perform marriage ceremonies where it would be against their religious beliefs.

The final decision on this question will be made by Parliament in the spirit of open debate. But before that happens, we need clear advice from the Supreme Court on the legal framework within which choices must be made."

## Endnotes

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- 1 [2003] O.J. No. 2268 (Ontario Court of Appeal).
- 2 [2003] BCCA 251 [*sub nom Barbeau v. Canada*]; EGALE (Equality for Gays and Lesbians Everywhere) is an organization which promotes civil and equality rights for gays and lesbians.
- 3 F.L. Morton and Rainer Knopff (2000) *The Charter Revolution and the Court Party* (Peterborough: Broadview Press).
- 4 Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c.11.
- 5 *Hyde v. Hyde and Woodmansee* (1866), L.R. 1 P.&D. 130 at 133 per Lord Penzance.
- 6 [2003] BCCA 251 at para. 41.
- 7 S.C. 2000, c. 12.
- 8 S.C. 2001, c. 4.
- 9 [1999] 2 S.C.R. 3.
- 10 [2003] BCCA 251 at para. 44.
- 11 [2003] O.J. No. 2268 at para. 28.
- 12 Special Joint Committee on the Constitution of Canada, November 1980, Minutes of Proceedings, Jean Chrétien, January 1981, 36: 14-15 [emphasis added].
- 13 [1995] 2 S.C.R. 513.
- 14 [1989] 1 S.C.R. 143.
- 15 [1999] 1 S.C.R. 497.
- 16 Quoted in *Halpern v. Canada (AG)*, [2003] O.J. No. 2268 (Ontario Court of Appeal) at para. 82.
- 17 [2002] SCC 83.
- 18 Roslyn Levine, Attorney General of Canada factum in *Halpern v. Canada (AG)*, cited in Shannon Kari, “Marriage exists outside Canada’s law, Ottawa argues,” *The Gazette (Montreal)*, April 19, 2003, A14.
- 19 *Halpern v. Canada (AG)*, [2003] O.J. No. 2268 (Ontario Court of Appeal) at para. 68.
- 20 *Ibid.* at para. 71.
- 21 [1986] 1 S.C.R. 103.
- 22 Rainer Knopff and F.L. Morton (1992) *Charter Politics* (Scarborough: Nelson Canada), 40 [emphasis in original].
- 23 *Halpern v. Canada (AG)*, [2003] O.J. No. 2268 (Ontario Court of Appeal) at para. 131.
- 24 *Ibid.* at para. 139.
- 25 *Ibid.* at para. 130.
- 26 [1992] 2 S.C.R. 679.
- 27 *Ibid.* at 695 per Lamer C.J.
- 28 *Ibid.* at 681 per Lamer C.J. [emphasis in original].
- 29 *Ibid.*
- 30 *EGALE Canada v. Canada (AG)*, [2003] BCCA 251 at para. 159 [emphasis added].
- 31 *Halpern v. Canada (AG)*, [2003] O.J. No. 2268 (Ontario Court of Appeal) at para. 148 [emphasis added].
- 32 *EGALE Canada v. Canada (AG)*, [2003] BCCA 406.
- 33 *Supreme Court Act*, R.S. 1985, c. S-26, section 58.
- 34 Under s.53 of the *Supreme Court Act*, the SCC can be asked to provide “advisory opinions” on legal (typically constitutional) questions submitted by the federal government; provincial legislation similarly authorizes references by provincial governments to the highest court of appeal in each respective province. This is in stark contrast to the U.S. Constitution’s prohibition on abstract review by the U.S. Supreme Court.
- 35 Kim Lunman and Drew Fagan, “Marriage divides the House,” *The Globe and Mail*, September 17, 2003, A1; A4.
- 36 J.L.I.J. Edwards (1980) *Ministerial Responsibility for National Security as it relates to the Offices of the Prime Minister, Attorney General, and Solicitor General of Canada* (Ottawa: Supply and Services Canada), 7.
- 37 Mary Ferguson, ed. (1999-2000) *Federal Guidebook: A Guide to the Canadian Federal Government and its Decision-Makers* (Ottawa: J-K Carruthers), 43-1 [emphasis added]. See also Mélanie Brunet (2000) *Out of the Shadows: The Civil Law Tradition in the Department of Justice Canada, 1868-2000* (Ottawa: Department of Justice Canada), 67.
- 38 Christopher Zorn (2002) “U.S. Government Litigation Strategies in the Federal Appellate Courts.” *Political Research Quarterly* 55(1), 145-166.
- 39 Department of Justice Canada (2000), *Federal Prosecution Service Deskbook*, V-23-9.

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- 40 Matthew A. Hennigar (2002) “Appealing to Higher Authority: Explaining the Federal Government’s Appeals to the Supreme Court of Canada in Charter Cases,” Ph.D. dissertation, McGill University.
- 41 Graham Garton, Department of Justice Canada, personal interview (July 31, 2001, Ottawa).
- 42 *Ibid.*
- 43 Robert Frater, Department of Justice Canada, personal interview (April 17, 2002, Ottawa).
- 44 Department of Justice Canada (2000), IX-46-1.
- 45 *Ibid.*, IX-46-4, fn. 4 [emphasis added].
- 46 Robert Frater, Department of Justice Canada, personal interview (April 17, 2002, Ottawa).
- 47 Graham Garton, Department of Justice Canada, personal interview (July 31, 2001, Ottawa).
- 48 Janet L. Hiebert (2002) *Charter Conflicts: What is Parliament’s Role?* (Montreal-Kingston: McGill-Queen’s University Press), 168. Notably, the AG Canada was the respondent, rather than the appellant, in all of the major SCC cases involving sexual orientation-based rights claims against the federal government (*Canada (Attorney General) v. Mossop*, [1993] 1 S.C.R. 554; *Egan*, and *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)* [2000] 2 S.C.R. 1120).
- 49 Morton and Knopff (2000), 117-118.
- 50 *Haig v. Canada* [1992] 94 D.L.R. (4th) 1 (O.C.A.).
- 51 *Ibid.* at 18 per Krever J.
- 52 *Ibid.*
- 53 [1998] 158 D.L.R. (4th) 664 (O.C.A.).
- 54 Morton and Knopff (2000), 118.
- 55 Charles R. Epp (1998) *The Rights Revolution: Lawyers, Activists, and Supreme Courts in Comparative Perspective* (Chicago: University of Chicago Press).
- 56 Morton and Knopff (2000), 117-118.
- 57 [1990] 109 N.R. 300 (F.C.A.).
- 58 *Veysey v. Canada (Commissioner of Correctional Services)*, [1990] 109 N.R. 300 at 304 (F.C.A.).
- 59 [1992] 94 D.L.R. (4th) 1 at 12 per Krever J. (O.C.A.).
- 60 Nitya Duclos (1992) “A Remedy for the Nineties: *Schachter v. R.* and *Haig & Birch v. Canada*,” *Constitutional Forum* 4, 26.
- 61 John C. Crosbie (1997) *No Holds Barred: My Life in Politics* (Toronto: McClelland & Stewart), 271; the MP in question was Dan McKenzie (Manitoba), who opposed the reforms. For details of the Justice Department’s proposed reforms, see Department of Justice Canada (1986) *Toward Equality: The Response to the Report of the Parliamentary Committee on Equality Rights* (Minister of Supply and Services).
- 62 Brian Laghi, “MPs’ debate mirrors national turmoil,” *The Globe and Mail*, September 17, 2003, A4.
- 63 See, for example, Peter A. Hall and Rosemary C.R. Taylor (1996) “Political Science and the Three New Institutionalisms,” *Political Studies* 44: 936-57; Ellen M. Immergut (1998) “The Theoretical Core of the New Institutionalism,” *Politics & Society* 26(1): 5-34; Junko Kato (1996) “Institutions and Rationality in Politics – Three Varieties of Neo-Institutionalists,” *British Journal of Political Science* 26(4): 553-82; Elinor Ostrom (1991) “Rational Choice Theory and Institutional Analysis: Toward Complementarity,” *American Political Science Review* 85(1): 237-43; Kenneth A. Shepsle (1989) “Studying Institutions: Some Lessons from the Rational Choice Approach,” *Journal of Theoretical Politics* 1: 131-47; George Tsebelis (1990) *Nested Games: Rational Choice in Comparative Politics* (Berkeley: University of California Press).
- 64 Dawson (1992); MacPherson (1986); Department of Justice Canada (2000), V-22-3-6; Graham Garton, Department of Justice Canada, personal interview (July 31, 2001, Ottawa); Robert Frater, Department of Justice Canada, personal interview (April 17, 2002, Ottawa).
- 65 Matthew A. Hennigar (2002) “Appealing to Higher Authority: Explaining the Federal Government’s Appeals to the Supreme Court of Canada in Charter Cases,” Ph.D. dissertation, McGill University.
- 66 This phrase was used to describe State AGs in the U.S.; see Eric N. Waltenburg and Bill Swinford (1999) “The Supreme Court as a Policy Arena: The Strategies and Tactics of State Attorneys General,” *Policy Studies Journal* 27, 255.
- 67 Smith (1999), 157-163.
- 68 [1991] 1 F.C. 18 (F.C.A.).
- 69 *Canada (Attorney General) v. Mossop*, [1993] 1 S.C.R. 554.
- 70 Morton and Knopff (2000), 118.
- 71 In the “Cases referred to” section at the beginning of *Rosenberg*, *Egan* is listed with the notation, “not followed.”

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- 72 Graham Garton, Department of Justice Canada, personal interview (July 31, 2001, Ottawa) [emphasis added].
- 73 [1998] 1 S.C.R. 493.
- 74 Knopff and Morton (1992), 47. The authors highlight the Court's decision in *Rocket v. Royal College of Dental Surgeons of Ontario*, [1990] 2 S.C.R. 232, where the Justices "dropped any reference to the 'pressing and substantial' standard, arguing simply that the legislative objective 'must be of sufficient importance to warrant overriding a constitutionally protected right.'" (46)
- 75 Tsebelis (1990).
- 76 *Ibid.*, 1.
- 77 *Ibid.*, 7.
- 78 Morton and Knopff (2000), 29.
- 79 Hall and Taylor (1996).
- 80 Immergut (1998).
- 81 Hall and Taylor (1996), 939.
- 82 See, for example, James March and Johan P. Olsen (1989) *Rediscovering Institutions: the Organizational Basis of Politics* (New York: Free Press).
- 83 See, for example, Sven Steinmo, Kathleen Thelen and Frank Longstreth, eds. (1992) *Structuring Politics: Historical Institutionalism in Comparative Analysis* (Cambridge: Cambridge University Press).
- 84 Morton and Knopff (2000), 86.
- 85 *Department of Justice Act*, R.S., c. J-2, s.5(d).
- 86 J. Ll. J. Edwards (1964) *The Law Officers of the Crown: a study of the offices of Attorney-General and Solicitor-General of England with an account of the office of the Director of Public Prosecutions of England* (London: Maxwell & Sweet).
- 87 See Julie Jai (1997-98) "Policy, Politics and Law: Changing Relationships in Light of the Charter," *National Journal of Constitutional Law* 9: 1-25; James B. Kelly (1999) "Bureaucratic Activism and the Charter of Rights and Freedoms: the Department of Justice and its entry into the centre of government," *Canadian Public Administration* 42: 476-511; and Janet L. Hiebert (2002) *Charter Conflicts: What is Parliament's Role?* (Montreal & Kingston: McGill-Queen's University Press).
- 88 Department of Justice Canada (2000) *Federal Prosecution Service Deskbook*: Appendix "A" - Appointment of S.C.C. Counsel.
- 89 *Ibid.*, V-22.3(e).
- 90 The SCC invoked this argument to justify shifting control over judicial salaries to a new judicial council in *Reference re Remuneration of Judges of the Provincial Court of PEI* [1997] 3 S.C.R. 3.
- 91 Grant Huscroft (1996) "The Attorney General and Charter Challenges to Legislation: Advocate or Adjudicator?" *National Journal of Constitutional Law* 5: 128. That said, although section 4.1 of the *Department of Justice Act* requires the AG to notify the House of Commons if bills, in his or her opinion, violate the *Charter of Rights and Freedoms*, no such announcement has yet been made, even for laws that were subsequently struck down by the courts. See Hiebert (2002).
- 92 Robert Frater, Department of Justice Canada, personal interview (April 17, 2002, Ottawa).
- 93 Graham Garton, Department of Justice Canada, personal interview (July 31, 2001, Ottawa).
- 94 Department of Justice Canada (2000) *Federal Prosecution Service Deskbook*: V-23.2.1.
- 95 Hiebert (2002), 169.
- 96 Leslie A. Pal (1993) *Interests of State: The Politics of Language, Multiculturalism, and Feminism in Canada*. Montreal: McGill-Queen's University Press.
- 97 Ian Brodie (2001) "Interest Group Litigation and the Embedded State: Canada's Court Challenges Program." *Canadian Journal of Political Science* 34: 357-376.
- 98 Tsebelis (1990), 7.