Should the definition of marriage change to include same-sex unions? This issue has prompted more controversy than any other area of social policy affected by Canada’s decision in 1982 to adopt the Canadian Charter of Rights and Freedoms. Lesbians and gay men argue that no principled reason exists to deny them the opportunity to marry, and they are confident that the Supreme Court of Canada will soon rule that a legal prohibition on same-sex marriage is unconstitutional. Yet a sizeable and increasingly vocal segment of the Canadian population remains staunchly opposed to the idea of gay marriage. Many believe that the moral and social norms for Canadian society are, and should remain, the heterosexual family and repudiate claims that equality under the Charter must embrace the legal recognition of same-sex relationships. Other critics accept that same-sex partners should be permitted to legally register their relationships if they so wish, but oppose same-sex marriage, preferring instead the idea of a civil union.

Not only does the prospect of same-sex marriage represent what many critics consider to be a moral crisis of deep proportions, it also raises important questions about the respective roles of, and relationship between, Parliament and the courts. Should Parliament lead or follow judicial pronouncements when the Charter affects important matters of social policy? If the Supreme Court of Canada declares that the prohibition on same-sex marriage is unconstitutional, can parliament establish civil unions as an alternative to marriage? How should the federal government proceed if it encounters, as it well might, a conflict between judicial judgment and the will of a majority of parliament? Is use of the notwithstanding clause an acceptable means to resolve this disagreement?

At the time the Charter was included in the Canadian Constitution, few could have anticipated that within a period of scarcely more than 20 years, courts would outlaw social policy distinctions that deny same-sex partners benefits given to heterosexual couples and would determine whether the definition of marriage must change to embrace same-sex unions. In the lead-up to the Charter, lesbian and gay activists in Canada had little reason to look either to...
From equality rights to same-sex marriage — Parliament and the courts in the age of the Charter

Parliament or to the judiciary as allies in their quest for social reforms. At the time the pattern of political behaviour was steadfast refusal to acknowledge or redress claims that discrimination occurs not only from blatant prejudicial treatment of lesbians and gay men, but also from an exclusive reliance on heterosexuality as the basis for determining the legal recognition of spouses and families, benefits and responsibilities. Legislation was not the only source of discrimination. Employers and landlords could discriminate against lesbians and gay men with relative impunity. Judicial relief was rarely forthcoming. Courts and tribunals regularly ruled that since legislation did not conceive of lesbians and gay men as constituting families or spouses, and since human rights codes did not identify sexual orientation as a prohibited ground of discrimination, they had no reason to conclude that differential treatment based on sexual orientation was discriminatory.

W hen the Charter was first drafted it was extremely difficult to anticipate whether and how it would offer lesbians and gay men protection from discrimination. The equality rights in the Charter do not specifically mention sexual orientation as a prohibited ground of discrimination, because the Charter's political drafters were not prepared to include it. Jean Chrétien, who was justice minister at the time, made it clear that although the federal Liberal government was not willing to include sexual orientation as a prohibited ground for discrimination, it was aware that courts might one day interpret equality as if the Charter did preclude this form of discrimination. The equality rights in section 15 (1) of the Charter stipulate: 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. Lesbian and gay activists did not initially see the Charter as a likely tool for their liberation from social, political, and legal discrimination. It is hardly surprising that many at the time doubted the prudence of relying on a legal rights tradition that previously had not questioned the legitimacy of discriminatory treatment of lesbians and gay men. Moreover, many lesbians and gay men had, and continue to have, misgivings about reliance on the Charter’s paradigm of liberal rights, particularly those who have no desire to construe their relationships in terms that are analogous to heterosexual families. Nevertheless, many lesbian and gay activists are relying on Charter equality claims as an important component in their strategies for legislative and social reforms.

Within a few years of equality rights coming into force (this was delayed three years to give governments an opportunity to review and redress existing discrimination in legislation), a steady stream of lower court decisions revealed sympathy for the position that section 15 of the Charter should be interpreted to protect against discrimination on the basis of sexual orientation. In 1993 the Supreme Court of Canada indicated for the first time that it might also be receptive to this idea. Two years later the Supreme Court unanimously declared in Egan and Nesbit v. Canada that section 15 prohibits discrimination on the basis of sexual orientation, despite the absence of any explicit reference to sexual orientation in the Charter. In the Court’s view, sexual orientation is analogous to the prohibited forms of discrimination that the equality rights in the Charter address. At issue in Egan was the legitimacy of the federal Old Age Security Act, which provided an allowance for the spouse of a pensioner who was already receiving a guaranteed income supplement. Both entitlements were based on need. Spouse was defined and interpreted by administrators as meaning persons of the opposite sex. Consequently when James Egan applied for the monthly spousal allowance on behalf of his same-sex partner, his application was denied because his partner did not satisfy the definition of spouse.

A lthough the Court ruled that in principle the Charter’s equality rights prohibit discrimination on the basis of sexual orientation, not all judges believed that the denial of benefits in this case constituted discrimination. Four judges ruled that the denial did not violate equality, arguing that the policy distinction between heterosexual and same-sex partners is “firmly anchored in the biological and social realities that heterosexual couples have the unique ability to procreate.” Five judges disagreed, ruling that the “opposite-sex” restriction in the definition of spouse in the Old Age Security Act violates equality, emphasizing the importance of protecting human dignity by according equal concern, respect and consideration to all. But one of the five concluded that this infringement should be upheld under section 1 of the Charter as a reasonable limit on equality, suggesting that parliament should be given time to determine how to extend social benefits within the context of newly recognized social relationships. This
view, when combined with the four judges who did not think equality had been violated, constituted a narrow majority that upheld the constitutional validity of the legislation.

Thus the decision conveyed mixed messages about whether and when governments must extend social policy benefits to same-sex partners. On the one hand, it confirmed that discrimination on the basis of sexual orientation violates equality rights in the Charter. Yet, on the other hand, it held out the possibility that some judges were willing to accept the denial of benefits to same-sex partners, either because they did not believe this denial constituted discrimination, or because parliament should be given more time to redress the problem. The Egan decision was interpreted by federal and provincial departments and ministers as removing the immediacy for legislative reforms and therefore reinforcing the status quo.

The turning points for compelling governments to change legislation so as not to deny lesbians or gay men protection or benefits given to heterosexual spouses were the back-to-back decisions of Vriend v. Alberta in 1998 and M v. H. At issue was the failure of Ontario’s Family Law Act to recognize same-sex relationships in its processes for resolving property and other issues arising from the dissolution of family relationships. The act utilized a heterosexual definition of spouse. The Supreme Court ruled 8-1 that this definition of spouse violated equality in a manner that could not be justified as a reasonable limit on equality.

The importance of M v. H for prompting significant and far-reaching legislative reforms stemmed from the Court’s unambiguous statement that same-sex partners must be treated with the same degree of respect and recognition given to heterosexual spouses. The majority emphasized that the purpose of equality rights in the Charter is to “prevent the violation of essential human dignity and freedom through the imposition of disadvantage, stereotyping, or political or social prejudice” and to promote a society where all persons are recognized as “equally capable and equally deserving of concern, respect and consideration.” Although the decision applied specifically to Ontario, Justice Iacobucci provided a warning, applicable to all governments, that the Court’s ruling “may well affect numerous other statutes that rely upon a similar definition of the term ‘spouse.’” At the time of this decision, more than 360 federal and substantial numbers of provincial legislative provisions recognized relationships or conferred benefits where eligibility was based on a heterosexual definition of spouse.

Ottawa and a majority of the provinces have now passed legislation that extends most of the social policy benefits given to heterosexual couples to same-sex partners. In most jurisdictions, changes have come about only after courts have ruled that existing legislation is unconstitutional, and often have been attended by substantial controversy. Consider, for example, the federal government’s response to the M v. H ruling, which was the Modernization of Benefits and Obligations Act (Bill C-23), introduced in February 2000. This omnibus legislation amended 68 statutes and covered 20 federal departments and agencies. The federal Liberal government tried to sidestep a previous controversy that had emerged: should the term “spouse” be used to depict same-sex relationships? It did so by introducing a new term — “common-law partner” — that would include same-sex partners. The government also argued that it could respect the Charter by eliminating discrimination against same-sex partners and yet still preserve marriage as the privileged and exclusive domain of heterosexual spouses. Some critics argued that the legislation was deficient because it did not redefine marriage to include same-sex partners. But others, including many in Parliament, had the opposite reaction and argued that the legislation would alter the definition of marriage, a claim repeatedly denied by then justice minis-
ter Anne McLellan. The government eventually bowed to political pressure from the Canadian Alliance party and also from some Liberal members by agreeing to include a legislative preamble indicating that the legislative changes did not affect the traditional definition of marriage. This was not the first time the government has given into pressure to identify marriage as an exclusively heterosexual relationship. In 1999 the government supported a Reform Party motion that stated that marriage would remain the lawful union of one man and one woman to the exclusion of all others. That motion easily passed by a vote of 216-55. The overwhelming majority of Liberal MPs, including Jean Chrétien and Paul Martin, voted in favour.

When Parliament reconvened in September 2003, the Alliance Party tried unsuccessfully to obtain parliamentary approval for a motion that not only reaffirmed the traditional heterosexual understanding of marriage but also committed parliament to take "all necessary steps" to preserve this definition, which implied use of the unpopular notwithstanding clause. At the time of the motion, the federal government had promised to redefine marriage so as to include same-sex partners. This time the vote was extremely close, 137-132. It came moments after an earlier, failed attempt to amend the motion by removing the reference to "all necessary steps." The intent of this proposed amendment was to make it easier for more MPs to vote in favour of this definition. Prime Minister Chrétien, who voted against the motion to retain a traditional, heterosexual definition of marriage, attributed his reversal on this issue to recognition that "society has evolved."

The question of whether the law on marriage must change remains the most significant issue yet to be resolved in terms of legislative treatment of lesbians and gay men. Under the constitutional division of powers, the federal parliament has authority over the legal capacity to marry while the provincial and territorial legislatures have authority over solemnization, which includes issuing licences. But the federal parliament has never enacted legislation that defines eligibility for marriage. Its only statements on this issue have come in the form of agreements to the motions discussed above. Thus, what has prevented same-sex partners from marrying has been a common law definition...
of marriage that is more than one century old and utilizes a heterosexual criterion for eligibility.

But as of the summer 2003, lesbians and gay men have been able to marry in two provinces — Ontario and British Columbia. This ability has arisen because the courts of appeal in these two provinces have ruled that the current prohibition on same-sex marriage is unconstitutional. A Quebec court agrees, and at the time of writing the case was before the province’s Court of Appeal. The B.C. case, Barbeau v. British Columbia (Attorney General), did not immediately allow for same-sex marriages because the court suspended the effects of its judgment until July 2004 so that Parliament could legislate on this issue. But in June 2003 the Ontario Court of Appeal in Halpern v. Canada (Attorney General) declared a new definition of marriage, to take effect immediately in the province, which allows same-sex partners to marry. The B.C. court subsequently lifted its suspension, allowing same-sex partners in B.C. to also marry. In the remaining provinces, the earlier common law rule prevails, which prohibits same-sex marriage.

The Ontario ruling is controversial, both for its conclusion and its remedy. At the time of the judgment a parliamentary committee (Standing Committee on Justice and Human Rights) was about to embark on its report on whether and how the government should address the recognition of same-sex unions, after holding hearings across the country and listening to 467 witnesses. The majority of these, 59 percent (274), favoured extending equal marriage rights to same-sex couples, while 35.5 percent (166) opposed. Although the committee has garnered negative headlines that raise questions about whether some members’ critical views on same-sex marriage are too entrenched to be influenced by testimony, the judicial decision to change the law before Parliament had completed its deliberations demonstrates contempt for Parliament. What further undermined Parliament was the federal government’s attempt to secure a positive committee vote on NDP member Svend Robinson’s motion to urge the government to accept the Ontario court ruling. As the vote was about to occur, the government suddenly altered the composition of its government members of the committee, replacing two members (one of whom was Derek Lee, who has expressed disagreement with the idea of same-sex marriage) with two new members who voted in favour of the motion. The vote resulted in a tie, which was resolved by the Liberal chair in favour of the motion.

The Chrétien government has now changed its position on same-sex marriage. It has decided not to appeal the Ontario ruling and has drafted legislation to change the definition of marriage so as to read: “Marriage, for civil purposes, is the lawful union of two persons to the exclusion of all others.” The government has asked the Supreme Court to review its draft legislation. The Court is being asked to address three questions:

- Is the government’s draft bill defining marriage within the exclusive legislative authority of the Parliament of Canada?
- If the answer to the above question is yes, is the capacity to marry to persons of the same-sex, consistent with the Canadian Charter of Rights and Freedoms?
- Does the freedom of religion guaranteed by the Charter protect religious officials from being compelled to perform a marriage between two persons of the same-sex that is contrary to their religious beliefs?

What is most interesting about the reference questions is what the Court is not being asked to address. The Court is being asked whether the government’s intention to change marriage to allow for same-sex unions is consistent with the Charter. It is hard to envisage any reason why the Court wouldn’t affirm that parliament has the capacity to define marriage in these terms, since the constitutional division of powers gives the federal parliament authority over marriage. The real issue is whether a prohibition on same-sex marriage violates the Charter’s equality rights. Although not asked to address this question, the Court in all likelihood will address it, since three courts have already declared that the prohibition on same-sex marriage violates the Charter and because the B.C. and Ontario courts of appeal have already changed the law in their provinces. What is also significant about the questions is that the Supreme Court is not being asked whether a civil union is an acceptable alternative to same-sex marriage. Many members of parliament and a substantial portion of the public prefer the concept of same-sex civil union to same-sex marriage.

In addition to the Charter dimension of the reference questions, there is also an important federalism aspect. By asking the Court if the federal government has exclusive authority over marriage, the government is in effect asking the Court to address whether the provinces can do anything that would interfere with the federal government’s power to define who can marry. Three provincial governments (Alberta, Quebec and B.C.) have filed notices of intent to intervene in this reference case. Quebec has indicated it is not opposed to same-sex marriages but wants to preserve the concept of civil unions in Quebec. Alberta Premier Ralph Klein has stated publicly that his government would invoke the notwithstanding clause if necessary to prevent same-sex marriages in Alberta. This power gives Parliament and the provincial legislatures the ability to have legislation prevail for five-year renewable periods despite an inconsistency with a judicial interpretation of the Charter. But the notwithstanding clause would not give Klein power to prevent same-sex marriages in Alberta if the Supreme Court affirms that Ottawa has exclusive jurisdiction to define who can marry. This is because the notwithstanding clause does not apply to disagreements about the constitutional division of
powers, it applies only to the Charter. What remains unclear is whether a province can exercise its authority for the solemnization of marriage so as to negate or frustrate the effect of how the federal parliament has defined marriage. Patrick Monahan, a noted constitutional scholar, states emphatically that a province’s constitutional power to issue marriage licences cannot be used to frustrate federal law.

Both the government’s decision not to appeal the Halpern ruling and its intent to pass legislation that recognizes same-sex marriages have been extremely controversial. The government faces deep and vocal divisions on this issue, unattended by the declining authority Jean Chrétien wields in the dwindling days of his leadership and the ambivalence expressed on this issue by his successor, Paul Martin.

Both the government's decision not to appeal the Halpern ruling and its intent to pass legislation that recognizes same-sex marriages have been extremely controversial. The government faces deep and vocal divisions on this issue, unattended by the declining authority Jean Chrétien wields in the dwindling days of his leadership and the ambivalence expressed on this issue by his successor, Paul Martin.

That a government's decision not to appeal the Halpern ruling and its intent to pass legislation that recognizes same-sex marriages has been extremely controversial. The government faces deep and vocal divisions on this issue, unattended by the declining authority Jean Chrétien wields in the dwindling days of his leadership and the ambivalence expressed on this issue by his successor, Paul Martin.

Although many have expressed profound differences on whether equality is violated by denying same-sex partners the opportunity to marry as long as they can enter into civil unions, the Supreme Court will be skeptical of any arrangement that has separate but equal implications, particularly in light of historical injustices perpetrated on minorities and sustained by this doctrinal approach. Thus, it seems unlikely that the Supreme Court will accept the constitutional validity of a two-tier structure that recognizes marriage for heterosexual spouses and civil-unions for same-sex partners (and also those heterosexual spouses who prefer this to marriage).

Another alternative that has been floated in this debate is the idea that Parliament should abandon authority for marriage altogether, and instead establish a national registry for civil unions. Under this model, marriage would only be conducted by religious organizations according to their beliefs and criteria, and would occur in addition to a civil union. But a large percentage of the Canadian population is not deeply religious. Many who are not religious might be offended by the idea that Parliament would no longer recognize secular marriage (even if existing marriages are protected or “grandparented”), particularly if they interpret...
In the event that Parliament defeats the government’s same-sex marriage legislation and the Supreme Court makes it clear that a prohibition on same-sex marriage is unconstitutional, it may be some time before Canadians know whether the Supreme Court considers a civil union to be a constitutionally valid alternative to marriage. That is, unless the Court is willing to be subject to accusations for being too activist by answering a question the government has not asked of it.

Many worry that the Charter provides a convenient refuge for politicians to avoid controversial issues, claiming a need to wait for courts to resolve the issue and then blaming judges for forcing them to pass controversial legislative changes. This hypothesis may explain prolonged government inaction to redress many other forms of legislative discrimination against lesbians and gay men. But it does not explain why the Chrétien government has now decided to legislate to allow for same-sex marriage. Had the Chrétien government genuinely wished to minimize or avoid unnecessary controversy, at least until after the next federal election, a more plausible strategy would have been to delay any new policy initiative involving marriage until after the 2004 election. This could have been accomplished by either appealing the Halpern ruling or by asking the Supreme Court the question “Does the Charter prohibit a ban on same-sex marriage and, if so, is the concept of a civil union instead of same-sex marriage a valid constitutional alternative?” Either of these options would have carried the government through until the next federal election without obliging it to publicly contemplate such controversial and divisive legislation. At a later date, if the Supreme Court ruled that a civil union was not an acceptable alternative to same-sex marriage, federal politicians could then have tried to deflect responsibility and “blame” the need to redefine marriage on the courts. In short, this author can only conclude that Jean Chrétien accepts, either on his own or because of pressure by others within his Cabinet, including his justice minister Martin Cauchon, that the prohibition of same-sex marriage constitutes such a serious and unjust form of discrimination.

Whether or not one approves of the government’s new commitment to same-sex marriage, an unfortunate consequence is that controversy on this issue will shroud political debate until and through the next election.

Janet L. Hiebert is an Associate Professor in the Department of Political Studies at Queen’s University. This article for Policy Options expands upon arguments presented in her book Charter Conflicts: What is Parliament’s Role? Published to critical acclaim 2002 by McGill-Queen’s University Press with the IRPP, it is already considered a definitive text on the role of Parliament and the courts in the age of the Charter of Rights. We gratefully acknowledge the kind permission of McGill-Queen’s University Press, where the book can be ordered on-line at www.mqup.ca

hiebertj@qsilver.queensu.ca