



No. L002698
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

EGALE CANADA INC.,
DAVID SHORTT AND SHANE McCLOSKEY,
MELINDA ROY AND TANYA CHAMBERS,
LLOYD THORNHILL AND ROBERT PEACOCK,
ROBIN ROBERTS AND DIANA DENNY,
WENDY YOUNG AND MARY THERESA HEALY

Petitioners

- and -

THE ATTORNEY GENERAL OF CANADA,
THE ATTORNEY GENERAL OF BRITISH COLUMBIA, and
THE DIRECTOR OF VITAL STATISTICS FOR BRITISH COLUMBIA

Respondents

AFFIDAVIT OF PROFESSOR BETTINA BRADBURY

I, Bettina Bradbury, professor, of the City of Toronto in the Province of Ontario, **MAKE OATH AND SAY:**

1. I am an Associate Professor at York University in the Departments of History and Women's Studies, and I retain links with the graduate programme at the Université of Montreal where I taught between 1985 and 1992. I received my Ph.D. in History from Concordia University in 1984. My research interests and publications are in the history of marriage, widowhood and families. My major areas of research have been the history of working-class families during Canada's industrial revolution and the history of marriage and widowhood during the 19th century. I have also written several broad survey articles on Canadian family history and edited a collection of essays on the topic. I have taught graduate and undergraduate courses at the Université de Montreal and York in the history of Canadian women, the history of Canadian families and comparative issues surrounding women and their rights. My *curriculum vitae* is attached hereto as Exhibit A.

INTRODUCTION AND OVERVIEW

2. An historical look at marriage in Canada reveals three main themes or trends. First, the nature and functions of marriage in Canada have not only changed dramatically over time, but have also shown significant variation at any given point in time, based upon a variety of cultural, social and economic factors. Similarly, laws governing marriage, ideas about marriage and peoples' lived realities have varied culturally and have changed over time, as Canadians' ideas and beliefs and the ways in which they make their livings have evolved. At no time in the past have all members of Canadian society agreed about what marriage or family means, nor have all Canadians lived their family lives in the same way.

3. The second long term trend has seen marriage evolve into a more equal institution in which gender does not dictate specific roles or legal privilege. The gender differences in power, work obligations and legal capacity that once distinguished husbands from wives have been transformed. Changing understandings of who should do what kind of work, changing laws about the rights and obligations of spouses, and changing expectations as to the function marriage serves have all contributed to this transformation. At the broadest of levels, marriage has evolved from a social and economic arrangement based on a sexual division of labour in which women were subordinate to their husbands, to a more equal union of two people united by love and sexual intimacy, in which both partners are frequently responsible for wage earning as well as domestic labour. Furthermore, while in earlier times, parents had significant control over their offspring's choice of who to marry, given the important economic and social consequences that flowed from the marriage arrangement, the long term movement in Canada, as in most western countries, has been to recognize that individual choice is the major basis for marriage.

4. Third, a recurring feature in the history of marriage in Canada is the serious debate and considerable alarm which has often accompanied proposals for any change to existing legal arrangements governing marriage. For example, proposals to give wives the right to retain control of their own property were presented by some politicians as promoting a

revolution and potential destruction of marriage and Canadian society. This debate took place at a time when many couples had already found ways to make more equitable property arrangements which worked extremely well for them. This illustrates another fundamental feature underlying each of these three main themes, namely, that changing practices have often preceded legal changes.

5. Individual choice, legal and social equality, partnerships freely made, a good loving relationship, a good sex relationship, new possibilities of bearing or adopting children - these are the characteristics that make marriage in the early 21st century so different from the understandings of marriage in the past. The characteristics of marriage that were historically gender-based, depending on separate and different tasks, roles and responsibilities for husband and wife, have been drastically modified or eliminated over time.

6. In this affidavit, I first provide an overview of the historical transformations in the institution of marriage which have made gender irrelevant as a necessary basis for marriage. These changes may be summarized as follows:

- A. Historically, marriage and family life were typically based on a division of labour by sex. Women were usually responsible for one set of tasks and men for another. With the industrial revolution, the predominant responsibility of women for the provision of meals, care of children and other tasks we would now call housework took place increasingly separate from men's work as breadwinners. Each kind of work was critical to the functioning of the marriage and of the family. As is so often the case, this division of labour was socially determined but frequently considered "natural." In the 20th century and increasingly since World War II, growing numbers of women have taken on paid labour. More recently, changing expectations have seen men increasingly take on a greater share of housework. As a result, these two types of work, so critical to the functioning of marriage and family, are no longer based on the sex of the partners.**
- B. In the nineteenth century and earlier, marriage entailed the transfer of control over the wife's body, her labour power and most of her goods to the husband. Husbands automatically became the owners of most**

of their wives' property, were legally entitled to their wives physically, were granted sole legal custody in the event of marriage dissolution, and the possibility of rape within marriage was not legally recognized. Since then, marriage and property legal reforms have eliminated gender based distinctions relating to claims on property within marriage and have recognized both the individual right to hold property, and the contribution of both spouses to family property, including their respective rights to an equal claim to property. Criminal law now recognizes the reality of spousal assault. Legislation and judicial decisions have recognized the equal status of both parents in relation to custody decisions, and support obligations. With all these legal changes, equality of the spouses, and not gender, is now the legal basis for defining and determining spousal rights and obligations.

- C. Marriage was previously based on economic and status considerations which were intertwined with gender-based property rules and structures. Parents could and often did choose their children's spouses, or vetoed their choices. However, Canadians, like members of other western nations, have increasingly stressed mutual affection and love as the proper basis of marriage, and asserted an individuals' right to choose his or her own spouse. Today, marriage has evolved so that individual choice, personal autonomy, love and commitment, and the desire that the partners' commitment to a long-term relationship be publicly sanctioned and recognized are among the major reasons that people marry.
- D. The choice to leave a marriage through separation or divorce was complicated, expensive and limited in most Canadian provinces prior to 1968. Divorce was dependent on a gender based double standard which made it easier for husbands to secure a divorce than for wives. Violence against a wife was not a legitimate basis for divorce in most Canadian provinces. The rules of divorce have changed. Gender no longer plays a role in determining the grounds for or access to divorce.
- E. Understandings about the role sex should play in marriage have been dramatically transformed since Europeans first arrived in what is now Canada. In the absence of reliable contraception, sex led to pregnancy and child-birth for most women prior to the late 19th century. Marriage served to contain sexuality so that the paternity of children eligible to inherit property was clear. While sex was regarded as an obligation for wives, early feminists promoted the idea that saying no to sex in marriage was a reasonable way to give women some power and to prevent them having more babies than they wished. In the early decades of the 20th century, the ideas of sex reformers who argued that

sex for pleasure was an important part of married life began to have more impact. Family experts began to promote good sex as a fundamental characteristic of a good marriage. Since then, the growing use of and efficiency of contraceptive knowledge and technology has made sex, rather than procreation, an important component of a good marriage.

7. I then review the extent to which the history of marriage and the family has been characterized by significant diversity and constant change, focusing in particular on the raising of children, the rules about who can and cannot marry, and our own changing definitions of marriage and family households as reflected in the census. These observations may be summarized as follows:

- F. Family life, and in particular the raising of children, has exhibited significant diversity in the past and will continue to do so. The notion of the nuclear family, composed solely of a two biological parents and their offspring, has not been historically, and is not today, the sole or preferred form in which children have been raised. Who raises - and who should raise - babies, children and youth, has varied across time and, as with so many other aspects of marriage and family, been the subject of major debate at various times. Economic well-being, sufficient food, good clothing and education, together with a loving and caring environment, have been the most important factors in determining the quality of children's upbringing.**
- G. Who could marry whom has historically been determined by a range of laws, religious rules and customs. As with all other characteristics of marriage, there have been major changes over time. Today Canadians might well be shocked at the early age girls were allowed to marry in the past and mystified by the 19th century debate about whether a man should be able to marry his deceased wife's sister or the rules setting out the wide range of relatives who were not meant to marry each other. Catholic and Protestant rules about which relatives could marry each other diverged dramatically. In some countries, marriage between partners of different races was officially outlawed. In Canada custom rather than law made such marriages difficult. Rules and customs about who should marry whom have been repeatedly transformed as Canadians have changed their ideas and the law has responded. To change them again is to remain within a historical tradition.**

- H. **Historians and contemporary commentators analyze the Canadian census to seek to gain an accurate picture of the Canadian population and of its practices. Since the early decades of the 20th century, successive Canadian censuses have attempted to describe the nature of family life and the composition of households. However, enumerators have consistently encountered a wide array of family forms that made it extremely difficult for the tabulators to categorize readily. Their decisions and the criteria they used frequently hid less usual family forms. In the past this included many single parent families. The census definitions of family have changed at least every twenty years in order to reflect the changing structures and practices of Canadian families. The 2001 census will include gay and lesbian couples (two people of the same sex who live together as a couple) within the definition of common law couples, reflecting the extent to which we now recognize the reality of the diversity of Canadians' choices about marriage and family.**

EXTENDED ANALYSIS

A. Marriage and Gender-Based Division Of Labour

8. In the past, one of the primary elements of marriage in Canada was a gender based division of labour, under which one set of tasks was assigned primarily to the husband and another to the wife. The exact nature of this division has varied depending on the time period, prevailing cultural norms and how family members made their living. Among the earliest Europeans and the First Nations peoples whose land they came to occupy, women were responsible for food and clothing preparation and child care, while men were more likely to be involved in fighting, hunting and political activities. Such sexual divisions of labour were never immutable. They were shaped by peoples' culture and their needs.

9. There were times when the divisions hardened. The most important of these occurred from the middle of the nineteenth-century. Changing ideas and Canada's industrial revolution combined to increase the identification of husbands with waged work and wives with the home. Among the people who became the working-class, men were

more and more likely to support their families by earning wages outside the home, in factories and workshops. Wives' work of cleaning, shopping, preparing meals, caring for children was increasingly separate and hidden in their homes. This separation of home and work was similar in middle class families and was overlaid with a strong ideology of domesticity that stressed the importance of the home as a haven from the world outside. The ideal working-class family included the husband as breadwinner and the wife at home stretching his wage to feed and nurture the children. However, the vast majority of men could not earn enough to support a large family. As a result, older and sometimes very young children became the second and third earners much more frequently than did wives. Some wives took on some kind of waged labour, but a factory job, working eleven or twelve hours a day, was impossible to combine with caring for children, shopping and meal preparation. More found ways to save money or to scrounge for what they needed.

10. Both kinds of work - what we would now call housework and earning an income were critical in a marriage. The importance of each kind of work was revealed when one spouse died. When wives died, men remarried quickly unless they had a daughter to help because it was so difficult to combine domestic labour with breadwinning. When husbands died some women were well provided for through their husband's will. Others relied on their children's earning capacity or sought paying jobs themselves. However, wages for working-class women were so low that few could earn enough to support a family. They slipped into poverty, or became dependent on charity or other family members. The understanding that women were primarily responsible for domestic labour and were generally supported by men (whether their fathers or husbands) contributed to their lower earning power in the labour market, perpetuating women's inequality in and outside marriage.

11. Although this division of labour was socially and historically determined, it was considered "natural." However, since World War II, growing numbers of women, both married and unmarried, have taken on paid labour, and since the 1970s, husbands have increasingly taken on a greater share of housework. Child rearing is not exclusively the province of the home but includes a range of institutions including day care and community

centres and public schools. Consequently, these two types of work, so critical to the functioning of marriage and family, are no longer understood to be based on sex. Even though differences remain - for example, in the amount of housework that men perform in heterosexual marriage - there is generally an expectation that men and women share in housework and responsibilities in connection with child rearing. Husbands and wives both expect to find work and earn an income. In the majority of Canadian families today, both spouses are part of the paid workforce, though women continue to earn less on average. As a result of these fundamental changes, the roles that spouses play in a marriage are increasingly based on their particular skills and interests, rather than dictated by gender.

B. Marriage and Gender-based Legal Privilege

12. Historically marriage began a process of family formation in which the husband was the legally recognized head of the family. The husband had extensive powers over his wife and children, his dependents. In return he was obliged to support them. The English common law determined the rules regarding the rights, obligations and property claims of husbands and wives in all the colonies that became part of Canada, except Quebec where the Custom of Paris and later the *Civil Code* determined spouses' claims on property. In common law jurisdictions, when a woman married, all of her property except land became the property of her husband. "Husband and wife are one and the one is the husband," as the British Lord Blackstone explained it in 1765, five years after the English took over New France. Thus, a husband could use all the property he received from his wife, as well as anything she earned or accumulated, as he wished. He could even will it to whomever he wished. Only if she became a widow did the wife have a claim to her dower - i.e., a claim to support from a third of her husband's estate during her widowhood. Inheritance law gave her no claim on the rest of the resources that were accumulated during a marriage (Chambers, 1997).

13. Men's control over their wives included control over the fruits of their labour - whether this was the domestic labour performed on family farms and in homes, or money

they earned through wage labour, in a business or in any other way. Their control over their wives' bodies included not only the right to mete out corporal punishment, but unlimited access to their bodies. Wives' subordination was central to the marriage contract. Legally it was ensured by "coverture", the common law set of rules that stripped wives of their legal capacity in myriad other ways. They could not testify in court, they could not sign contracts, and rape within marriage was impossible since husband and wife were deemed to be one.

14. During the 19th century, growing numbers of Canadians fought to have these rules changed. However, the very idea that wives should retain control over their own property was seen as revolutionary by opponents to change. For example, the future Premier of British Columbia, John Robson, argued in 1873 that there were dangers in having "two authorities in the same household." Giving wives the right to own property "was calculated to revolutionize the marriage state"; it was thought that if wives could retain their own money, earnings and property, they would leave their husbands and children and set up on their own (Clarkson, citing the *Daily Standard*, 15 January 1873). Supporters of reform, like Robert Beaven in British Columbia, argued that the rules of marriage could and should be changed: "Many laws, customs and usages of a bygone age, that may have answered their purpose very well when first introduced, have outgrown their day of usefulness, and are now ill adapted to the purposes for which they were originally instituted...Among these is the law which gives the husband an absolute proprietary right to the property of the wife."(*Daily Standard*, 9 June 1871).

15. Over time, generations of Canadians have reshaped the rules concerning property in marriage making it a much more equal institution. Legislative changes began with the married women's property rights acts passed between the 1850s and 1890s in all the common law provinces. These allowed wives to separately retain their own property upon marriage and to control any wages they earned.

16. Laws governing custody also evolved. During the first part of the 19th century, children were considered to be their fathers' property and his claim to custody was treated by the legal system as absolute. However, during the course of the 19th century, "mothering" came to be seen as a more and more important aspect of women's roles and "character" and patterns of custody began to shift. Initially, wives were awarded custody in cases where their husbands were drunkards or had other obvious failings that would make them bad fathers. By the end of the 19th century, courts were also looking more closely at the interests of the child, and this trend accelerated during the 20th century (Backhouse, 1981; Boyd, 1989). The 20th century has also witnessed fundamental revisions in criminal law, family law and custody rulings in all Canadian provinces as a result of feminist demands and the challenges of dealing with property and children in cases of divorce. Legal reforms in the 1970s gave spouses identical rights and obligations during a marriage and equal claims on family property upon divorce. As a result of all these legal changes, the sex of partners no longer has legal relevance in terms of claims for property, support or child custody.

C. Marriage and Individual Choice

17. Marriages among Europeans in the early years of New France and later in the colonies of British North America were usually based on pragmatic grounds that varied with the wealth and status of a couples' families and decisions were made in the context of the gender-based property and other rules canvassed earlier in this affidavit.

18. Marriage was so critical to the establishment of the colony of New France that between 1663 and 1673 the French state arranged to send nearly 800 young women as future brides for the men of the colony. They were known as the *filles du roi* because their transport, keep and dowries were paid for by the King of France. Most were married within 5 months, which is longer than popular history has suggested but quickly enough to suggest they may not have had time to get to know their future husbands well. "Even allowing that marriage was not endowed with the psychological and emotional refinements

it has today, the marriages of these young immigrant women seem to have occurred rather hastily" (Clio, 1987:43-4). Mostly orphans who did not have relatives in the colony, the *filles du roi* actually had more freedom in choosing a spouse than later generations of women in New France or early colonial British North America.

19. In the wealthier classes, parents attempted to control their children's marriages to ensure that their status or their family fortune were upheld or improved in society. This could mean engineering marriages or vetoing them as well as allowing children to marry when they courted members of suitable families. Louise Dechêne, an historian of 17th century Montreal, cites the example of Philippe Carion who prior to his death in 1683 wrote a will in which he "bequeathed his entire fortune to his eleven-year-old daughter and the husband he had chosen for her", while leaving her in the care of her future father-in-law. There was no provision allowing her to avoid father's will, which aimed not to secure her individual happiness but to ensure that she was cared for economically. The couple were married a year later. While mutual affection may have sparked some such marriages, and may have developed over time in others, Dechêne argues that these upper class marriages were "not merely affairs of the heart" (Dechêne, 1992: 251). Rather, they united an elite through links of kinship and property.

20. Well into the 19th century, wealthy parents continued to exercise control over their children's choice of a spouse. "Social, economic, and kinship criteria underlay the choice of marriage partner far more than the prospect of romantic attraction or emotional satisfaction" (Backhouse, 1991:31). Peter Ward recounts what readers today would see as the heart rending experience of George Stephen Jones, a Quebec City Protestant clerk who fell in love with Honorine Tanswell, the daughter of a Catholic family of some standing in the City. Honorine's father refused to allow them to marry, in large part because George was too young and not yet established in a business. Honorine married her other suitor, a man already established in business (Ward, 1990:9-14). The pragmatic economics of family formation outweighed love in his decision about his daughter's future.

21. The law was on the side of Honorine's father. In Lower Canada and later Quebec, the Civil Code stipulated that children under 21 had to have the permission of their mother and father before contracting marriage. When parents disagreed, as was the case with Honorine's parents, the consent of the father sufficed (Civil Code, article 119). Rules were similar in the common law provinces, though in 1894 Ontario lowered the age at which parental consent was required from 21 to 18 (*Marriage Amendment Act*, S.O., 1984, c.40).

22. Phillipe Carion and the Tanswells are representative of generations of Canadian parents who either determined outright whom their offspring would marry or who insisted that their daughters marry someone who could adequately support them and that their sons marry young women who would bring significant property or skills into the marriage. Nevertheless, between the arranged marriage of Philippe Caron's eleven-year-old daughter in 1683 and Mr. Tanswell's refusal to allow Honorine to marry 19-year-old George in 1845, dominant ideas about how a spouse should be selected had begun to change.

23. By the 19th century in Canada, as in most of the Western world, a growing number of people had come to believe that mutual affection and love should be the basis of marriage. Historian Peter Ward may downplay the continued importance of pragmatic decisions, but his argument that "from the late eighteenth century onward, love has been the principle motive for marriage in English Canada" rightly highlights this long term, fundamental shift in what was commonly understood as the proper basis for marriage. As growing numbers of Canadians came to accept the idea that men and women should choose freely, and as "as young women gained more freedoms toward the end of the nineteenth century, parental control over courtship began to weaken" (Ward, 1990:167, 124).

24. During the second half of the 19th century, the gospel of romantic love was spread throughout Canada in stories told in newspapers and fiction. In the 20th century, the new mass media of magazines, movies and eventually television spread the understanding that love and individual choice should be the basis of marriage. Of course, the love that was

most widely promoted was love between a man and a woman, though by the middle of the 20th century some magazines and novels featured same sex romance. Gay men and lesbians who wanted permanent relationships also chose life long relationships based on love. But most felt they had to hide both their love and their relationship from public view, however strong their commitment. Not until the last quarter century or so have growing numbers of same-sex couples felt they could make their relationships known publicly. Love, individual choice, personal autonomy, commitment and the desire that the partners' commitment to a long-term relationship be publicly sanctioned and recognized are the main reasons for marriage today. In this context the sex of the partners is no longer relevant.

D. Elimination of Gender Based Rules Surrounding Divorce

25. The laws governing divorce in Canada and Canadians views about what should happen when marriages break down have always varied. Historically, marriage was easier to break in some jurisdictions than others. In Nova Scotia and New Brunswick, it was possible to get a divorce in local divorce courts in the 18th century, as it was in Prince Edward Island in the early 19th century. When British Columbia entered Confederation and the western territories became provinces, divorce was governed by the English *Divorce Act* of 1857, which had loosened some of the earlier barriers to divorce. In the other provinces, couples seeking a formal divorce had to present a private statute through the federal parliament.

26. Prior to 1968, divorce for most Canadians was unlikely, expensive, complicated. In most jurisdictions, access to divorce was based on a double standard until 1925. Men could divorce their wives if their wives were unfaithful. In contrast, wives could not seek a divorce on the basis of their husbands' infidelity unless it was combined with cruelty or other misconduct. The first significant change made to federal divorce law was in 1925, when the grounds for divorce were made the same for men and women (Snell, 1991).

27. Nonetheless, Canadians separated from each other formally and informally,

obtained divorces by going to the United States and debated whether Canadian laws were fair long before any major legal changes were actually made. Every debate raised fears about the impact easier divorce would have, not just on Canadian families but on the state of the nation. For over one hundred years, most Canadian members of parliament adamantly refused to follow the American example of relatively easy divorce. "Divorce", argued one politician in 1928, "strikes at the very foundations of the State" (Snell, 1991:73). Historian, James Snell, suggests that divorce law "played a vital part in establishing the hegemony of ... the ideal of the conjugal family" based on "an affectionate, emotionally supportive spouse and companion" and a male breadwinner (Snell, 1991:7, 25).

28. The 1968 *Divorce Act* simplified access to divorce and significantly broadened the grounds to include marriage breakdown. Since then divorce rates have increased. However, this is not necessarily because more marriages have failed since 1968 than in earlier years. Historians have uncovered much evidence of marriages characterized by brutality, drunkenness and other abuses of power. They have also discovered high rates of desertion and of informal separation. Even more significantly, they have demonstrated that Canadians showed so much persistence and ingenuity in circumventing the restrictive divorce law, that policy-makers were forced to rethink their ideas about divorce and the ideal family (Snell, 1991:259). Therefore, the 1968 reforms have meant that many couples who would previously have separated informally, or decided to remain married because of the difficulty, expense, or public censure of divorce, have been able to obtain a divorce.

29. Divorce legislation no longer aims at keeping women in marriages, even in the face of cruelty and abuse by husbands. It no longer requires infidelity on the part of either spouse to end a marriage. As love has been accepted as the only true basis for marriage, the end of love has become accepted as the basis for dissolving a marriage. Divorce reform reflects societies' more complex understanding of marriage and family. The rules of divorce have changed. Gender no longer plays a role in determining the basis of access to divorce.

E. Changing Understandings of the Role of Sex in Marriage

30. Reliable contraception is a very recent phenomenon. This does not mean that men and women did not attempt to control births in the past using folk medicines, abstinence or other means. It does mean that, in the past, heterosexual sex led to pregnancy and child-birth for the vast majority of women. One of the major functions that marriage served historically was to contain sexuality and the procreation that followed sex. Limiting sex to marriage also served to clarify paternity. The law distinguished between legitimate and illegitimate children, in large part to keep questions of inheritance clear. These laws were rooted in pre-industrial societies where inheritance was not just about property, but also claims on titles and status in society.

31. Of course neither sex nor procreation have ever been limited to marriage in Canada or elsewhere. As the British House of Lords recognized in 1947 in the *Baxter v. Baxter* case, "It is indisputable that the institution of marriage generally is not necessary for the procreation of children; nor does it appear to be a principle end of marriage as understood in Christendom" ([1947] 2 All E.R. 886 at 890). In fact, men raped girls and women, some of whom became pregnant. Men in humble and high places, including some prominent Canadian politicians (George-Etienne Cartier, for example), have lived fairly openly with their mistresses (Young, 1981). Many couples have conceived children before they got married. Indeed, in many rural and working class communities, sex before marriage was not a complete taboo, as long as marriage followed. Men have also resorted to prostitutes.

32. Further, sex in marriages has not always been enjoyable, particularly for women. In the absence of reliable birth control, sex was a scary prospect for many women who feared either death in child birth or having too many children to feed and raise. For many, ignorance about their own sexuality and fear of pregnancy made sex an unwelcome "wifely duty". As noted above, there could legally be no rape within marriage, for marriage had transferred control of the wife's body to the husband. First wave feminists promoted the idea that saying "no" to sex in marriage was a reasonable way to give wives some power

and to prevent them having more babies than they wanted or could care for. American feminist Elizabeth Cady Stanton, who visited Canada on several occasions, spread what were considered radical thoughts in her talks, preaching “the gospel of fewer children and a healthy, happy maternity” (Gordon, 1974:109).

33. From the middle of the 19th century on, couples either stopped having sex so often, or found ways to break the link between sex and procreation. Though there was great variation across the country, the average number of children in Canadian families fell from around six children during the 19th century to only 2.5 during the Great Depression of the 1930s. Indeed, the Depression prompted a growing number of Canadians to support the idea of birth control, particularly among the families of the unemployed. Dorothea Palmer, a nurse working in the National Capital region, was arrested in 1936 for distributing information about birth control to women desperate to control their fertility. She was charged with breaking the *Criminal Code* which it an offence to sell, advertise, or publicize any products liable to prevent conception or cause an abortion. She was acquitted because her actions were deemed to be in the public good, but the newspaper coverage and the arguments during the trial demonstrated just how deeply divided Canadians were about whether birth control within marriage was desirable (Dodd, 1983).

34. Over time, as more efficient means of birth control have been developed, effective contraception has cut the link between sex and procreation both inside and outside marriage (McLaren and McLaren, 1986). In addition, understandings about the role of sex in marriage have changed. From the early 20th century on, marriage counsellors and the media began to place much more stress on good sex as a critical element of a couples' relationship. By the 1970s, the sexual revolution spread outside the bounds of marriage. Sexual relations became part of a life style of many young people, gay and straight. Living together prior to or instead of marrying became more accepted. Gay couples and heterosexual couples alike made sex a central part of a committed relationship. Sex without procreation has not only come to be considered acceptable and healthy prior to marriage, but is also considered to be a critical element of a good marriage.

F. Child Rearing

35. Despite the common view that the “nuclear family” has always been the primary vehicle for the rearing of children, we must not be misled into believing that over time most children have actually been raised from birth to adulthood by both of their biological parents. High death rates, poverty and different ideas about childhood have meant that historically large numbers of Canadian children and youths have been raised by people other than their birth mother and father.

36. In fact, until early in the 20th century, death rates were so high that many children lost one or both of their parents between their birth and adulthood. When wives died, their husbands frequently re-married quickly often in order to provide a substitute mother for their children and a housekeeper for their household. Both men and women sometimes sent their children away after a remarriage, securing them positions as apprentices or relinquishing them permanently or temporarily to relatives or orphanages. Even remarriage did not always provide the economic security so important to the well being of a widow and her children. Family historian Peter Gossage cites the case of Malvina Desjardins who married Magloire Boyer in 1883, bringing her three children from her previous marriage into the new family. It was not a happy remarriage. In 1886, she petitioned to separate from him, then a month later pursued him in court for a pension of \$5 to cover her living expenses and those of her children. The court determined that, as a stepfather, Magloire had no legal obligation to feed, maintain, or educate his wife’s children, and ordered him to pay \$3 for Malvina’s support. Malvina moved in temporarily with her sister (Gossage, 1998: 357-8).

37. Widows in Canada were less likely to remarry than widowers. Many raised their children as single parents. How they managed depended on what resources their husbands had left them, their own resourcefulness and the age and sex of the offspring. Many faced problems of poverty and the difficulty of combining child-care and wage-earning that are familiar to single mothers today. To solve these challenges, some moved

in with other women - friends, their mothers if they were alive, siblings or other single parents. Some rented a room in the home of friends or strangers. Such strategies meant that children were raised in a variety of different kinds of households. Children with two parents might well also share their living space with a single mother and her offspring or with a widowed parent or grand-parent. For women raising children without a spouse, the critical challenge they faced was feeding and housing their offspring in the absence of a male's earning capacity.

38. The complexity of the family and households in which children were raised did not result only from the effect of a parents' death or parents sharing space with relatives and strangers. Beliefs about what a child needed to learn in life and where they should learn it also meant that many children in the past spent much of their youth in the homes of others. In pre-industrial Canada, farming families frequently sent their sons and daughters to work as hands or domestics on other people's farms. A poignant example is the apprenticeship document of 1825 for Ann Thompson, aged "Seven years, Two Months and three days." Her parents apprenticed her to a local merchant and his wife, specifying that she was to remain with them until she was 18 years old. Unlike typical apprenticeship agreements for boys, the terms of her agreement give no indication of any skills she might learn. It did make clear that she was not to play, fornicate or marry, and that she would be provided with food, washing, lodging and apparel (Light and Prentice, 1980:18). In the cities, the daughters of labourers or artisans were sent to other people's homes from as young as age 10 or 11, and even younger when their parents had died. Some historians have suggested that this stage of "semi-autonomy" was characteristic of the upbringing of as many as two-thirds of boys and three-quarters of girls in early modern England. It continued well into the 19th century in England and Canada. Historian Michael Katz charts a shift in the experiences of the children living in Hamilton, Ontario between 1851 and 1871. In 1851, under half the boys and girls in Hamilton aged between 15 and 19 were living at home. Most were living and working in the homes of others. Two decades later, over three-quarters of boys and about two-thirds of girls were living at home with one or two parents (Katz, 1975: 259-60). This represents a major shift in the life cycle of children

that by the second half of the 19th century, for the first time, a majority of children were being raised at home with one or two parents rather than working elsewhere.

39. The decline of the period in which many children lived in the homes of others coincided with industrialization and the rise of public education. Parents had once sent their children to others to be trained and, for poorer families, to have one less mouth to feed. Slightly longer education in publically funded schools offered new ways for children to acquire minimal educational skills that did not require leaving home. In Canada's industrializing cities, the expansion of possibilities of wage labour for working-class youth offered powerful incentives to parents to keep them home. Parents might still die at any point in an individual's life cycle, but children with parents were more likely to remain with one or both of them through their infancy and into their early adulthood.

40. Yet, even as parents began to assume a greater role in the education and upbringing of their children, reformers engaged in heated debates about the best environment in which to raise youngsters. The rise of public education spurred the development of new experts who believed they knew what was best for children. Some, seeing the problems of children living in poverty, were convinced that children had to be saved from such environments. In England, one key such "child saver" was Dr. Barnardo. His workers scooped children off the streets of London, placed them in temporary orphanages, and then shipped them out to the colonies, including Canada. Here they were apprenticed and adopted, frequently by families who needed an extra hand or help on their farm. Some were treated extremely well, others as Joy Parr documents, were treated simply as hired help (Parr, 1980). Other experts placed increasing emphasis on home and family as the best place to raise children. By the late 19th century, Canadians interested in reshaping childhood were increasingly rejecting the older idea that discipline and hard work were all that were needed to shape children into healthy adults and began to stress more nurturing kinds of care. "Mothering" became much more important in this view and reformers outside Quebec began to argue against placing children in institutions like orphanages.

41. Over the 20th century, the number of experts claiming to know what was best in the raising of children continued to grow. Social workers, nurses, teachers, child-experts, psychologists, all promoted new and changing ideas. The impact of such experts hit an all time low when they were allowed to draw on the latest "scientific" theories in determining the way in which the Dionne quintuplets should be raised. Yet, in each decade, experts promoted vastly different ideas, so that understandings about the best way to raise children changed in each decade, as they continue to today (Comacchio. 1993, 1999).

42. The 1950s and 1960s stand out as a unique period in child-raising, not only for new ideas about child-raising, but because more children were raised at home by two-parents during this brief period of historical time than at any other period in our history. Death rates had dropped dramatically, so most children were likely to reach adulthood with two living parents. Divorce had not yet been liberalized. In this sense, children in single-parent families or same-sex families during that period would have stood out more than at any other point in Canadian history. This phenomenon however was shortlived, since with the advent of liberalized divorce and changing social values (including the shift both legally and socially towards greater gender equality) more children began to be raised in single-family households, as well as in a diversity of other living arrangements, including gay and lesbian households.

43. So, as with so many other aspects of marriage and the family, change has characterized our notions of child-rearing and the manner in which children have been raised. The lesson of history is that economic well-being, sufficient food, good clothing and education, together with a loving and caring environment, have been the most important factors in determining the quality of children's upbringing and what most children have needed to survive and flourish.

G. Changing Marriage Rules

44. Most Canadians today would be shocked at the thought of Philippe Carion's daughter marrying at the age of twelve a year after his death in 1683. Marriages at such a young age were not common, except in the early years of New France, when the predominance of men over women meant that the first generation of Canadian born girls were courted and married extremely young. Nevertheless, these types of marriages were allowed by the law of New France and reproduced in the Civil Code of Quebec of 1866, which specified that a man could not marry before 14 or a woman before the age of 12 (McCord, 1873:26).

45. While the rules regarding age at marriage seem extremely lax by modern standards, the Catholic Church's restrictions on who could marry whom may seem particularly restrictive. In medieval Europe, the Roman church struggled to obtain control over marriage and the population. One way it sought to do this was to enforce stringent consanguinity rules. In the 11th century, these rules were extended to the 7th degree of affinity, a rule that some argued would have meant no marriages would be possible in most European communities. By the time Canada was settled, Catholic marriages were prohibited to the 4th degree of consanguinity - so anyone wishing to marry a third cousin, whether by marriage, blood or god-parenthood had to seek a dispensation. For their part, Protestant groups chose a variety of ways to restrict particular unions (Ward, 1990:18-19). The wide range of religious rules reveals how contingent and socially determined such prohibitions were.

46. For instance, toward the end of the 19th century, Catholics and Protestants on both sides of the Atlantic debated whether the rules deriving from Leviticus that prevented a man from marrying his deceased wife's sister should be changed. Such marriages were forbidden among Catholics, Anglicans and Presbyterians, but were allowed and had occurred among Methodists. After much public debate in pamphlets, parlours and Parliament, the law was changed in 1882. Historian Peter Ward argues that "at the heart

of the controversy lay a challenge to the traditional incest taboos of the Christian church" and sees this reform as a step in the secularization of marriage (Ward, 1990:37) . In fact, by 1990, the removal of religious values from the law of marriage, in terms of who can marry whom, was completed when Parliament enacted the *Marriage (Prohibited Degrees) Act*, which abolished many religious based prohibitions.

47. Finally, any discussion of the Canadian history of the legal recognition of marriage must also consider the marriages of fur traders and aboriginal women which were frequently recognized by the courts as "mariages a la façon du pays" - i.e., they were legal because they followed First Nations' rules.

48. It is clear, even from this brief discussion of the flexible and changing marriage rules that have existed in Canada, that capacity to marry has historically been determined by a range of laws, religious rules and customs. As with all other characteristics of marriage, there have been major changes over time. In fact, in some countries, including the United States, marriage between persons of different races was officially outlawed. In Canada, custom rather than law made such marriages difficult. Rules and customs about who should marry whom have repeatedly been transformed as Canadians have changed their ideas and values, and the law has responded. To recognize these changes again is, therefore, to remain within a historical tradition.

H. Changing Understandings of Marriage and Family

49. Many family historians and sociologists in Canada have turned to the Canadian censuses taken every 10 years since Confederation to attempt to chart the changes in marriage and family in our past. The census attempts to accurately describe the population of Canada. Since the inception of the census, enumerators who have gone from house to house seeking information about the numbers of families and the marital status and the origins and occupations of Canadians, have encountered a wide array of family forms that were not possible to capture in the tabulated results, but which are visible in the manuscript

versions they filled out. This was especially true prior to the period when the government had computers to aid in counting.

50. At least every twenty years, the Dominion Bureau of Statistics has changed its definition of family. Such changes in part reflected changing practices and in part attempted to better capture the diversity of forms that they encountered. Nineteenth and early twentieth century instructions to enumerators shared two basic delimiters of the family - shared use of space and shared consumption. These are clearly captured in the instructions given to the enumerators of the 1891 census: "A family... for the purposes of the census, may consist of one person living alone or of any number of persons living together under one roof, and having their food provided together" (Census Instructions, 1891: 3).

51. This definition clearly reflects the continued purchase of an economic sense of family and household. Neither biological links nor formal marriage play a role in this definition. The family, for census purposes, was a residential, economic and social unit where people shared space and food. It might include siblings with or without offspring, single parents who were widows, widowers or deserted wives with or without their children. And, it might include a married couple with children and a surviving widowed parent. Relatives and servants were also considered part of the family. It is unlikely that enumerators actually asked about who provided meals - had they done so they would have started to expose the unpaid work of wives, or particular housekeeping roles that single mothers may have taken on to contribute to the family. By 1931, all reference to food, shared tables and "housekeeping" communities disappeared in census definitions, eradicating the hints of women's domestic labour that such concepts carried, and further eliminating shared consumption and space as the key marker of family boundaries.

52. Providing accurate information about families has always been one of the important functions and goals of the Canadian Census. Yet, some of the decisions that were made in the past about how to tabulate what was found in fact hid a number of varied forms of

relationships and families which clearly continued to exist. For example, it is impossible to identify single parent families, whether headed by widows or separated men and women, in the published censuses of the 19th century.

53. As Canadians have changed their practices of marriage and family further since the 1960s, census takers have again changed their definitions. While prior to the 1980's no recognition of common law arrangements is present in census data, more recent censuses have recognized common law heterosexual relationships as a form of marriage. And, while previous census data ignored the reality of same sex relationships, the 2001 census will include gay and lesbian couples (two people of the same sex who live together as a couple) within their definition of common law couples. Indeed, legal recognition of marriage between persons of the same sex would mean that, in subsequent censuses, it would be possible to distinguish those same-sex couples who commit themselves formally through marriage from those who have chosen to live in common law relationships, as is now possible in the case of heterosexual couples.

CONCLUSION

54. Marriage and the family have undergone major transformations in Canadian history. Legislatures and courts frequently recognized changes only long after people themselves had changed the practices and customs surrounding marriage. Proposals to change marriage have invariably provoked doomsday scenarios from opponents, convinced that any change in marriage or the family would lead not only to the demise of the institutions themselves but to the decay of the nation.

55. Examined historically, marriage in Canada has evolved from being a highly hierarchical institution, rooted in the segregated sex roles of husband and wife, and entered into for economic and pragmatic reasons in which the individuals involved had only a minor say, into a much more equal institution, freely chosen by both partners because of their love for and commitment to each other.

56. The differences based on gender that characterized the expected roles of husbands and wives have largely been eliminated. Sex no longer determines that one partner will be considered responsible for breadwinning and the other for keeping house. The sexual division of labour in which husbands' and wives' roles were clearly demarcated (at least in much dominant discourse, if not in lived realities) has been transformed as more and more women have taken on paid jobs and men have increasingly undertaken housework and child rearing. Marriage has ceased to give husbands a privileged position over their wives' property, body, revenues, labour power and children as it did in the past. Gender differences that marked the rights and responsibilities of spouses in the 19th century have been eliminated. Both spouses now have similar rights to and claims on family property. Contraception and changing ideas about the role of sex in marriage have placed new emphasis on sex for pleasure and intimacy rather than procreation.

57. Change has also characterized ideas about raising children and the realities of where they have been raised. Historical evidence suggests that an adequate income and a loving, stable environment have, over time, been the best predictors of a child's happiness.

58. The rules about who can marry whom have also changed historically. What were once seen as impermissible degrees of consanguinity are now permissible. Older taboos about inter-faith or inter-racial marriage have largely been eliminated.


59. In this historical context, to change the rules to allow marriages between same-sex spouses would be part of the tradition of change. In my opinion, the historical changes in Canadian society outlined above have led to most marriages now being based on individual choice, romantic love, sexual enjoyment, shared responsibility for earning and housework, a mutual commitment to each other and to raising children in the relationship, and equal claims on family property and custody. In this context, the notion that the partners to a marriage today must be a man and a woman should be seen more as vestige of history than a "natural" requirement. Given the historical changes to marriage and the

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~~family, the sex of the partners can no longer be considered a reason to prohibit them from marrying.~~

60. I make this affidavit in support of a petition and for no other or improper purpose.

SWORN BEFORE ME AT
the City of Toronto, in the Province
of Ontario, this 18th day of
December, 2000

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) 
) **BETTINA BRADBURY**


A Commissioner for taking affidavits

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