

2015

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Carlos Andrés Castro

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### Recommended Citation

Castro, Carlos Andrés (2015) "How the Silent Revolution Redefined Marriage in Canada," *Historical Perspectives: Santa Clara University Undergraduate Journal of History, Series II*: Vol. 20 , Article 11.

Available at: <http://scholarcommons.scu.edu/historical-perspectives/vol20/iss1/11>

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# How the Silent Revolution Redefined Marriage in Canada

Carlos Andrés Castro

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## Introduction

When Great Britain defeated France in the Seven Years' War in 1763, it acquired Quebec—a colony inhabited by people of French descent and nearly three times<sup>1</sup> the geographical size of France. Quebec would eventually become “the largest province in Canada, as well as the second most populous.”<sup>2</sup> After ousting the French authority, the British parliament attempted to regulate their newly acquired subjects in the method they had become accustomed to. The imperial strategy to accommodate and integrate French Catholics into the rest of English Protestant Canada by the British parliament was initially based on the Irish model.<sup>3</sup> In this model, Catholics were forced to convert to Protestantism if they wanted to own land and hold other civil rights. When the British parliament ruled to uniformly impose British law in Canada in 1763, it created considerable civil unrest amongst French-speaking subjects. The British had shown hostility towards

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<sup>1</sup> Rachel Klein. "Québec at a Glance." In Fodor's Montre´al & Que´bec City, 257. 07th ed. New York, New York: Fodor's Travel Publications, 2007.

<sup>2</sup> Craig Belanger. 2009. "Quebec." *Canada's Heritage: Quebec 1. MAS Ultra - School Edition*, EBSCOhost (accessed April 22, 2015). Same question.

<sup>3</sup> Guindon, Hubert, and Roberta Hamilton. *Quebec Society: Tradition, Modernity, and Nationhood*. Toronto: University of Toronto Press, 1988, 60.

French speakers in the past. Only eight years prior, the British had expelled “thousands of French subjects from their farms” from Nova Scotia and “scattered them throughout the American colonies and beyond.”<sup>4</sup> According to Charles Yorke, the Attorney and Solicitor General in Quebec at the time, in a letter written to the Committee of Council for Plantation affairs,

“The second and great source of disorders was the Alarm taken at the Construction upon his Majesty's Proclamation of Oct. 7th 1763. As if it were his Royal Intentions by his Judges and Officers in that Country, at once to abolish all the usages and Customs of Canada, with the rough hand of a Conqueror rather than with the true Spirit of a Lawful Sovereign, and not so much to extend the protection and Benefit of his English Laws to His new subjects, by securing their Lives, Liberty's and [property's] with more certainty than in former times, as to impose new, unnecessary and arbitrary Rules, especially in the Titles to Land, and in the modes of Descent, Alienation and Settlement, which tend to confound and subvert rights, instead of supporting them.”<sup>5</sup>

Implementing British law in Quebec proved to be a

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<sup>4</sup> William Grimes. "Paradise Lost in an 'Ethnic Cleansing': The British Expulsion of the French Acadians." *The New York Times*. February 9, 2005.

<sup>5</sup> Public Archives of Canada. Documents Relating to the Constitutional History of Canada, 1759-1791. Vol. 1. Ottawa : S.E. Dawson, Printer to the King, 1907, 174.

complete disaster. The language barrier restrained French speakers from participating in their own legal affairs. To avoid discrimination, French Canadians demanded a civil code of their own that could ensure their culture and way of life was preserved. To gain loyalty to the crown, the British parliament recanted their efforts to forcefully implement assimilation and passed the *Quebec Act of 1774*. The *Quebec Act*<sup>6</sup> granted the province of Quebec the authority to retain a civil code separate from the federal government of Canada. While the British Parliament successfully subdued protests, this was only a temporary appeasement and not a permanent solution to dealing with French speaking Canada. Over two centuries later, the sovereign federal government of Canada is still mitigating the implications of Quebec's own civil code.

The repercussions of forced-assimilation versus self-determination on the identity of an individual are still being discussed among politicians and scholars alike. As a nation, how do you best address a group of people that are different from the rest of the population? Not answering the question leaves the minority group vulnerable to prejudice by the masses, as often it is in human nature to reject what is different. Proponents of assimilation argue that forcing harmonization through legislation ensures fewer disputes in the long-term, as the group is forced to shed their identity to adopt the norms, culture, language, and values of the larger population. However, this process is often unsettling for both groups, with the smaller

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<sup>6</sup> Great Britain, and Danby Pickering. 1762. *The statutes at large ... [from 1225 to 1867]*. Cambridge: Printed by Bentham, for C. Bathhurst.

group often expressing reluctance to the point of revolt. Advocates of self-determination argue that the strength of a nation lies in its ability to embrace the differences among its population and provide equality under the law to all. Canadians attempted to answer the question of protecting minorities when dealing with French Canadians in the province of Quebec and the nationwide legal status of the LGBT community. Reviewing how Canadians dealt with this question will go beyond any political interest group, set of people, and piece of legislation to examine the social movements that intersect them all. Nowhere are the stakes higher than in the drafting of family law, which regulates the private domain of individuals. Drafting limitations and dictating an individual's behavior within the perimeter of their home, consequentially contests their ability to craft their own identity. Institutionally, the harmonization of family law through legislation by the federal government with the province of Quebec bridged the nationalist movement of the Quebecois with gay rights advocates pleading the legalization of same-sex marriage.

At the height of the nationalist movement in the 1960's, referred to as the Silent Revolution, the French-speaking province of Quebec redefined its identity by dismissing the Roman Catholic Church from their institutions and drafting legislation in family law to further distinguish the provincial population from the rest of Canada. To counteract the legislation being made in Quebec, the federal government proceeded with legislation to ensure that the law remained coherent nationwide, thus, engaging in an action-reaction dynamic with the Quebec legislature. In removing the Church's influence from their institu-

tions and forcing the federal government to address same-sex marriage, the legislature of Quebec set the stage for advocates of same-sex marriage to succeed in their legal battle for same-sex marriage rights nationwide.

### **The Silent Revolution**

To Quebec nationalists, the *Quebec Act* stands as evidence that they were never meant to be part of English Canada. For them, the *Quebec Act* is equivalent to the United States' *Bill of Rights*,<sup>7</sup> in the sense that it is legislation seeking to protect the rights of citizens and restrain government interference in their affairs. The Quebecois identity was largely defined by the French language and close relationship to the Catholic Church. In a famous speech titled *La Langue, gardienne de la foi*, Henri Bourassa the leader of the Nationalist party in 1919 elaborated on the importance of the bond between the Quebecois and the Church. In *Nationalism and the politics of culture in Quebec* author Richard Handler explains, "Bourassa began by asking, 'Are we more French than Catholic?' and answered himself with what seems to be a categorical assertion of the priority of religion over nationality and language: 'man belongs to God before he belongs to himself; he must serve the Church before serving his fatherland.'"<sup>8</sup> In addition, "Bourassa argued that language and nationality were 'natural' bases of sociability; as such,

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<sup>7</sup> Founding Fathers. "The Bill of Rights." N.d. MS. *National Archives*. The Charters of Freedom, 1789. Web. 8 June 2015.

<sup>8</sup> Richard Handler. *Nationalism and the Politics of Culture in Quebec*. Madison, Wis.: University of Wisconsin Press, 1988, 160.

they were acceptable to the Church as long as people understood them to be subordinate to ‘the only universal and complete society...the Church.’”<sup>9</sup> The Church’s involvement in state affairs would prove to be a challenge for the nationalist agenda.

At the peak of turmoil in Quebec during the 1960s, French-speaking citizens demanded sovereignty from Canada. This period, coined the Silent Revolution due to the nature of the protests, was “marked by speeches, not violence—by editorials, not gunfire—but, in whatever form, it is truly a revolution, a shock treatment for both English and French Canada.”<sup>10</sup> The Quebecois desired to develop an identity away from both the Church and English Canada.

In Europe, “the Church identified itself with the conservative forces that resisted modernization; as a result the whole society became divided into two camps, Catholics on the one hand and liberals on the other.”<sup>11</sup> The way the Church had approached the province of Quebec was no different. The governing body in the province of Quebec and nationalists had come to the conclusion that the only way to ensure prosperity of French Canada was to reject the influence of the Church.

According to Guindon and Hamilton, the 1960s represented the climax to the separatist movement, largely due to modernization as: “It can all be ex-

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<sup>9</sup> *Ibid.*

<sup>10</sup> Jane Banfield. "Silent Revolution in Canada." *Transition* 22 (1965): 44-47. Accessed June 8, 2015. JSTOR.

<sup>11</sup> Jeffrey Metcalfe. "The Quiet Revolution and the Church." *Catholic Commons*. December 15, 2012. Accessed June 6, 2015.

plained in terms of the nature of Quebec's political economy. Quebec is the only province in Canada that has a double economy, in labour-force terms, neatly segregated along language lines."<sup>12</sup> Industrialization did not wait for the two cultures and languages to find a middle ground. Beginning with WWII, people had begun migrating into Quebec. During the war it had been used for its strategic location near water to station soldiers, and people who did not live in big cities became accustomed to an urban lifestyle.<sup>13</sup> Quebec quickly developed into the center of trade in Canada, extensively importing and exporting goods across the Atlantic. The economic development called for new legislation to vest power in the rising middle class in Quebec that now wished for further say in the political sphere. However, they would have to confront the Church in the process. The province of Quebec began by disentangling the Church from their institutions particularly the public sector of education.

One way to unravel their interests from the Church was by removing its control over state institutions. They first began with deinstitutionalizing the Church during the 1960s, which included some reforms:

Education, financed by the state, was to expand rapidly, welfare was to be professionalized, health services were to be secularized, the Church was to retreat from its secular roles into matters of private rather than public concern.<sup>14</sup>

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<sup>12</sup> Guindon and Hamilton. *Quebec Society*, 64.

<sup>13</sup> C.P Stacey. "Second World War (WWII)." *The Canadian Encyclopedia*. July 13, 2013. Accessed June 8, 2015.

<sup>14</sup> Guindon and Hamilton. *Quebec Society*, 62.



While many Quebecois kept their faith, the majority began to oppose the Church's influence in the public sector. As a result of their opposition to the federal government, "liberation ranged from long hair and blue jeans to unblushing acceptance of premarital sex and unmarried cohabitation. Homosexuals emerged to defy the 'straight' majority for the sake of "gay rights."<sup>15</sup> During the 1960s, the nationalist movement in Quebec created a platform for those marginalized by the Canadian government to stand for their rights. With the unique ability to enforce its own civil law, the province of Quebec began extending civil rights to the LGBT community, for example on December 16, 1977:

Quebec includes sexual orientation in its Human Rights Code, making it the first province in Canada to pass a gay civil rights law. The law makes it illegal to discriminate against gays in housing, public accommodation and employment.<sup>16</sup>

The decision to extend civil rights to the LGBT community upheld the different approach the Quebec government had to addressing a group in society as, "a viable society must consider the contributions from its own diversity to be essentially enriching. Primarily a French society, Quebec must also discover a sort of vitality in its minorities."<sup>17</sup> Essentially, the intention was to

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<sup>15</sup> Desmond Morton. *A Short History of Canada*. Edmonton: Hurtig Publishers, 1983, 174.

<sup>16</sup> CBC News. "TIMELINE | Same-sex Rights in Canada." CBCnews. May 25, 2015. Accessed June 6, 2015.

<sup>17</sup> Handler. *Nationalism and the Politics*, 177.

integrate the group into Quebec society through accommodation, rather than attempting assimilation.<sup>18</sup>

### **Separation of Church and State**

The French roots of Quebec inherently gave the Catholic Church a major stake in their public affairs and as long as French Canadians preserved their faith, the Church would have a platform from which to dictate Canadian affairs. However, the Church's agenda would continue to deviate from the interests of the people of Quebec, whose greatest fear was losing their culture and language. According to Guindon their fears were of no relevance for, "the church, however, was more concerned with preserving Roman Catholics than with maintaining the French language, and when insistence on French instruction imperiled public funding of parochial schools then language might be sacrificed."<sup>19</sup> The Church did not foresee the divergence the economic development in Quebec would create between their agenda and the French people of Quebec. The Church had previously acted against the better interests of the French community in Quebec yet their motives or methods were never questioned.

Since the 19th century, the Church had demonstrated a separate agenda from French Canadians. According to sociologists Guindon and Hamilton this first became evident,

When, in the mid-1830's, national sentiment fed by doctrines of responsible government and

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<sup>18</sup> *Ibid.*

<sup>19</sup> Peter N. Moogk. *La Nouvelle France: The Making of French Canada, A Cultural History*. East Lansing: Michigan State University Press, 2000, 276.

emerging concepts of democracy erupted in an armed attempt to change the structure of the state, the Catholic hierarchy sided with the Crown, not with the rebels it proceeded to excommunicate. This loyalty to the Crown did not mean that the Church was antinational but that it was against democracy as a political principle, the very principle that was underlying the national uprising.<sup>20</sup>

While the authority of the Church remained institutionalized across all aspects of life in Quebec it was free to push its own agenda, occasionally at the cost of sacrificing rights of French Canadians. This was exemplified in the Church's rejection of the LGBT community, as it remained the most outspoken opponent to granting them the right to marry. The populist national movement was a response to the marginalization of the people in Quebec by both the Church and the federal government.

### **History of LGBT Rights in Canada**

During the Silent Revolution, being gay had been a criminal offense in Canada until 1968.<sup>21</sup> However, as the nationalist movement gained momentum in the late 1960's, gay advocates capitalized on the rhetoric that was dominated by discussions advocating social change. The result was that people began to express their true identities regardless of the ramifications. Everett Klippert, an openly gay Canadian citizen, was arrested in 1965 for telling authorities he was gay and

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<sup>20</sup> Guindon and Hamilton. *Quebec Society*, 97.

<sup>21</sup> CBC News. "TIMELINE | Same-sex Rights in Canada."

had sex with men. He was charged for being a “dangerous sex offender.”<sup>22</sup> His appeal went to the Supreme Court of Canada, where the original sentence was upheld. Three years later the law had been changed to decriminalize being gay coincidentally at the peak of the Silent Revolution in Quebec.

The struggle to gain rights for the LGBT community in Canada has resembled an up and down roller coaster rather than a steady beam of progress. According to Christine Davies from University of Toronto Faculty of Law the history of gay rights can be separated into three different phases. She identifies the landmark legal cases as *North v Matheson* (1974), *Layland v Ontario* (1993) and, the most important, *Egale v Halpern* (2001).<sup>23</sup> While she does not identify the nationalist movement as a factor to their success, one cannot dispute the coincidence in timing of both movements, as they would eventually come to overlap one another in family law in the 1990’s with the passing of the *Quebec Civil Code* in 1994.

In the cases that Davies refers to, advocates for same-sex marriage deployed massive efforts to try and alter the institution of marriage, but *North v Matheson* found that the capacity to marry did not violate the Manitoba Human Rights Act, while the *Layland v Ontario* decision determined that the common law of Canada reserved the right to marry to one man and

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<sup>22</sup> *Ibid.*

<sup>23</sup> Christine Davies, “Canadian Same-sex Marriage Litigation: Individual Rights, Community Strategy,” *University of Toronto Faculty of Law Review*, Volume 66, Number 2, Spring 2008, 101.

one woman.<sup>24</sup> It was not until the second wave of court cases where gay advocates found success in the courts. However, not all advocates agreed with the timing of their efforts. According to Davies,

Many felt this was simply too huge a battle, too draining on community resources, while other practical areas, such as custody, required more attention. Some concerns had to do with the dangers of assimilation, of losing both a unique culture and the sense of solidarity and identity that came with membership in that community.<sup>25</sup>

Some advocates did not place any priority towards getting the right to marry because they saw it as a heterosexual institution. Furthermore, Davies elaborated:

While the Coalition for Gay and Lesbian Rights in Ontario argues that same-sex couples should receive the same legal recognition and incur the same obligations as heterosexual couples, others argue that same-sex relationships are fundamentally different from heterosexual relationships... Partners may not perform traditional gender roles and they may not accept sexual monogamy and emotional exclusivity as ideals. Some commentators argue that

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<sup>24</sup> Kathleen Lahey. *Are We 'Persons' Yet?: Law and Sexuality in Canada*. Toronto: University of Toronto Press, 1999. 410.

<sup>25</sup> Davies, "Canadian Same-sex Marriage Litigation: Individual Rights, Community Strategy," 101.

inclusion of same-sex couples ignores real differences between couples and may create a division in the gay and lesbian community between those couples whose relationships conform to a heterosexual model and receive recognition, and other couples whose relationships do not fit this model.<sup>26</sup>

The fear of many advocates was that extending the right to marry to same-sex couples could compromise the bond between LGBT persons. Expanding the right to marry to the LGBT community would create a rupture among those who elected to participate in the model. The federal government consistently referred to the entire LGBT community as “gay” or of “same-sex” while in reality gender identities are not that simple. Advocates believed that the inherently heterosexual model of marriage would bar groups from the LGBT community that did not fit the mold. Particularly when considering the gender roles that are present within marriage, it was gender and not sex that mattered. By accepting marriage as the norm, advocates feared they may also be upholding the male and female roles required in a relationship and in society. Their biggest fear however, according to Jennifer Nedelsky, a law professor at the University of Toronto, the term “‘same-sex,’ rather than incorporating all of the various groups such as lesbian, gay, bisexual, and transsexual, has a simplifying and homogenizing effect.”<sup>27</sup> Like the Quebecois, the LGBT community wanted to protect their own identity.

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<sup>26</sup> *Ibid.*, 101.

<sup>27</sup> *Ibid.*

### **Family Law- Marriage**

Family law would turn out to be the battlefield that the federal government, the Quebecois, the Catholic Church and the LGBT community fought on for the right to dictate the everyday life inside the household. According to Robert Leckey, a Canadian adopted by a same-sex couple, objectives behind family law include “protection of vulnerable individuals, organization of relations between individuals, and definition of the state’s relation to individuals.”<sup>28</sup> For the LGBT community and the Quebecois, having to conform to the rigid laws of the federal government meant forcefully engaging into assimilation. For the Church, the household domain was sacred and it worked to preserve the sanctity of the home, which meant no to same-sex marriage. For the federal government, redefining family law potentially meant the “harmonization” of the people in the province of Quebec who evidently, are disconnected from the rest of the country. It also meant taking the reins again from a provincial state and imposing federal jurisdiction to restrain provinces from overly expanding their power. Leckey feared that the politics driving legislation governing family law “turns from considering how family law is constituted to what family law itself helps constitute, namely the personal identities of the legal subjects it regulates.”<sup>29</sup> This would also be true in cases regarding women’s

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<sup>28</sup> Robert Leckey, “Harmonizing Family Law’s Identities (2002),” *Queen’s Law Journal*, Vol. 28, No. 1, 2002, 221.

<sup>29</sup> *Ibid.*, 225.

rights, as extending more favorable family law to women could lead them astray from their responsibilities as “mothers and wives.”<sup>30</sup>

### **Defining What Constitutes Marriage**

In the reformed *Quebec Civil Code* passed into law in 1994, the province of Quebec overstepped its authority and undermined the federal government’s jurisdiction to define marriage. The legislation defined marriage to be between a man and a woman. However, under Civil Code section 365,

Marriage itself is subject to more explicit constitutional treatment. Subsection 91(26) of the *Constitution Act, 1867* authorizes Parliament to legislate in relation to ‘Marriage and Divorce,’ while subsection 92(12) gives provincial legislatures the power to enact laws in respect of ‘The Solemnization of Marriage in the Province.’<sup>31</sup>

Under the Canadian constitution the federal government reserved the ability to define marriage and the provinces were only provided the right to the administration of marriage and issuing marriage licenses. When Quebec passed the *Quebec Civil Code* with language defining marriage to only include a man and a woman, the LGBT community saw it as an opportu-

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<sup>30</sup> Dorothy E. McBride. *Women's Rights in the U.S.A.: Policy Debates and Gender Roles*, 3rd ed. New York: Routledge, 2004, 156.

<sup>31</sup> Mary C. Hurley, Law and Government Division. "Bill C-38: The Civil Marriage Act." February 2, 2005. Revised September 14, 2005. Accessed June 6, 2015.



nity to file a grievance with the court. They argued that a province does not hold the jurisdiction to define marriage, and that the *Quebec Civil Code* was therefore unconstitutional.

In 2001, the Canadian Federal government responded by passing the *Federal Law–Civil Law Harmonization Act, No. 1 2001*. At first glance, this lengthy piece of legislation seemed to be doing the necessary reconciliation of civil law that had previously differentiated between the province of Quebec and the federal government. The *Harmonization Act* passed in 2001 was phase one of a nine-step process in which the Canadian government was to adjoin the civil code of Quebec with that of the federal government. While the “harmonizing” of civil law was undertaken in collaboration with representatives of the province of Quebec, it was meant to benefit the federal government. In the new collective civil law, the federal government dictated that, “Marriage requires the free and informed consent of a man and a woman to be the spouse of the other.”<sup>32</sup> This legislation was passed in light of *Hendricks v Quebec*, where two men were suing the state over the Quebec law that prohibited same-sex marriage. The case, was supposed to be simple enough according to the couple’s attorney Anne-France Goldwater, who stated, “By prohibiting unions between homosexuals, the Quebec government oversteps its authority.”<sup>33</sup> *Hendricks v Quebec* brought into ques-

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<sup>32</sup> Elizabeth II. "48-49 Chapitre 4." *Projet De Loi S-4 (Sanction Royale)*. May 10, 2001. Accessed June 10, 2015.

<sup>33</sup> Brian Myles. "Une Pension Alimentaire à La Fin De L'union Libre." *Le Devoir*. November 4, 2010. Accessed June 10, 2015.

tion the *Civil Code of Lower Canada 1866*, gay rights, and the repercussions to cultural unity. While federal officers denied claims that they did not pass the *Harmonization Act No. 1* to undermine Hendricks' and LaBoeuf's lawsuit being heard by the Superior Court of Quebec, their attorney disagreed: "it was reasonable to conclude that the imminence of Hendricks' and LeBoeuf's lawsuit encouraged the government to speed up a process of harmonization that had been dragging on for years."<sup>34</sup> Hendricks; and LeBoeuf were greatly discouraged because the new legislation was detrimental to their case.

The Harmonization project was just as harmful to gay rights advocates as it was for the Quebecois because it addressed family law. According to Robert Leckey, "Harmonization is a general process of mutual engagement between systems aiming at greater conceptual compatibility and coherence."<sup>35</sup> The problem with harmonizing the civil codes of two very different groups of people is that you may intrude in their ability to create or maintain their own identities. Under the *Quebec Act*, the people in the province of Quebec reserved the right to draft its own civil law and the federal government to enact the criminal code. Family law, however, was far more elusive and undoubtedly the most critical law in shaping the identity of an individual. The listed objective in the *Harmonization Act* was to, "repeal the pre-Confederation provisions of the 1866 Civil Code of Lower Canada [hereinafter

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<sup>34</sup> Sylvain Larocque. *Gay Marriage: The Story of a Canadian Social Revolution*. Toronto: James Lorimer & Company, 2006, 41.

<sup>35</sup> Leckey, "Harmonizing Family", 225.

C.C.L.C.] that now fall within the legislative jurisdiction of the federal government.”<sup>36</sup> Identity for the most part is circumstantial and relative. Changing the circumstances by which one is regulated and the laws that one must abide by drastically influences the ability of an individual to pursue one’s true ambitions. Identity is relative, because persons are sculpted by experiences and those with whom they interact.

Prime Minister Jean Chrétien explained why the Quebecois, as well as the rest of Canada, needed to support the LGBT community:

It is problematic to subject the fate of a minority to the will of the majority. This is to protect minorities that we have a Constitution and a Bill of Rights. “You know, we had to fight, we Francophones, to keep our language. If it had been a decision of the majority of the population, perhaps there would be more French in Canada.”<sup>37</sup>

The Quebecois sympathized with gay rights advocates because they recognized they were fighting for a similar cause. When Nationalists wished to create civil unrest they pointed to the marginalization of the LGBT community as evidence of English Canada’s oppressive landscape. On the other hand, for the LGBT community to rally support for their cause they needed the Quebecois to resist the Church. While some Quebecois

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<sup>36</sup> Elizabeth II. "48-49 Chapitre 4."

<sup>37</sup> "Gay Marriage - No Possible Compromise in the Eyes of Jean Chrétien." *Le Devoir*, August 21, 2003. Accessed June 8, 2015.

remained Catholic, most agreed that the Church should not have the authority to dictate the affairs of citizens, including the rights of the LGBT community.

After the monumental decision in the Supreme Court of Canada's *M v H* case,<sup>38</sup> the political discourse in the Canadian parliament greatly revolved around gay rights. In *M v H*, the court ruled that the term "spouse" had to include same-sex partners, extending family law rights to same-sex couples. These rights included benefits and the spousal support the plaintiff was asking for. In compliance with the Supreme Court's decision, Prime Minister and leader of the Liberalist party Jean Chrétien introduced Bill C-23, also known as the *Modernization of Benefits and Obligations Act*. This bill ultimately affirmed the court's decision to extend spousal benefits to same-sex couples. While the victory in *M v H* provided some legal protections for same-sex couples, opposition in the Canadian legislature mobilized to strike down any further progress. In light of the Court's decision, the legislative branch decided that, "Although many laws will have to be revised to comply with the Supreme Court's ruling in May, the federal government votes 216 to 55 in [favour] of preserving the definition of 'marriage' as the union of a man and a woman."<sup>39</sup> Furthermore, "Justice Minister Anne McLellan said the definition of marriage is already clear in law and the federal government has 'no intention of changing the definition of marriage or legislating same-sex mar-

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<sup>38</sup> Lamer C.J., L'Heureux-Dubé, Gonthier, et al. "M. v. H." Judgments of the Supreme Court of Canada. May 20, 1999. Accessed June 10, 2015.

<sup>39</sup> CBC News. "TIMELINE | Same-sex Rights in Canada."

riage.”<sup>40</sup> While the Canadian legislature appeared poised to subdue the movement for marriage equality and continue passing legislation to deter any more efforts for the next decade, public opinion dramatically turned against them. By 2004<sup>41</sup> polls indicated that public opinion had shifted and for the first time in Quebec, the majority did not object to legalizing same-sex marriage.

In the month of April 2005, Pope Benedict XVI made the Vatican’s stance on same-sex marriage clear: “Marriage is holy, while homosexual acts go against the natural moral law.”<sup>42</sup> This statement from the Roman Catholic Church came at the eleventh hour of the vote on Bill C-38—*Civil Marriage Act*<sup>43</sup> introduced by Prime Minister Paul Martin’s Liberal minority party. If signed into law, Bill-C38 would uphold the Supreme Court’s ruling on *Reference re Same-Sex Marriage*<sup>44</sup> in 2004 where the Court defined marriage to be between “two persons,”<sup>45</sup> and not a man and woman, thereby validating and extending the right to marry to same-sex couples by provincial states under the Canadian

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<sup>40</sup> *Ibid.*.

<sup>41</sup> Larocque. *Gay Marriage*, 156.

<sup>42</sup> *Ibid.*

<sup>43</sup> Mary C. Hurley, Law and Government Division. "Bill C-38: The Civil Marriage Act." February 2, 2005. Revised September 14, 2005. Accessed June 6, 2015.

<sup>44</sup> McLachlin C.J. and Major, Bastarache, Binnie, LeBel, Deschamps, Fish, Abella and Charron JJ. "Reference Re Same-Sex Marriage, [2004] 3 S.C.R. 698, 2004 SCC 79." Judgments of the Supreme Court of Canada. December 9, 2004. Accessed June 10, 2015.

<sup>45</sup> *Ibid.*

Charter of Rights and Freedoms in the 1982 Constitution Act.<sup>46</sup> Raymond Saint-Gelais, president of the Assembly of Bishops in Quebec dissented from the Vatican's sharply worded opinion by asserting, "the language used does not match the current culture."<sup>47</sup> The shift in culture Saint-Gelais referred to in his letter was the rupture between the Church and French-speaking Canadian populace. The Vatican's desperate and ultimately failed attempt to influence the outcome of the vote on Bill C-38 epitomized the repercussions of the Silent Revolution that took place in the 1960's in Quebec.<sup>48</sup>

The *Law on Civil Marriage* began by declaring, "Whereas the Parliament of Canada is committed to upholding the Constitution of Canada, and section 15 of the *Canadian Charter of Rights and Freedoms* guarantees that every individual is equal before and under the law and has the right to equal protection and equal benefit of the law without discrimination,"<sup>49</sup> and this addendum to both the federal and Quebec civil code was sanctified by the *Constitution Act* of 1867, which established federal jurisdiction over divorce and granted authority to define marriage. However, the provinces retained the ability to regulate marriage and, thus, were tasked with issuing and administering

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<sup>46</sup> The Constitution Act, 1982, Schedule B to the Canada Act 1982 (UK), 1982, c 11, <<http://canlii.ca/t/ldsx>> Accessed June 6, 2015.

<sup>47</sup> Larocque. *Gay Marriage*, 156.

<sup>48</sup> Pelletier. Gérard, *Le temps des choix, 1960-1968* (Montréal : Stanké, 1983)

<sup>49</sup> Mary C. Hurley, Law and Government Division. "Bill C-38: The Civil Marriage Act." February 2, 2005..

marriage licenses. Therefore, the *Constitution Act* was drafted in response to the *Civil Code of Lower Canada* of 1866 wherein the province of Quebec had outlined its own civil code to include family law with the intention of articulating its own regulations on marriage, completely undermining the authority of the federal government.

In Quebecois publications, such as *Le Devoir's* article titled "In Short- Failed Traditionalists,"<sup>50</sup> the tone used to describe attempts to restrain the legalization of same-sex marriage implies the stand nationalists had taken. According to the article, "Conservative groups have lost yesterday a major battle in their crusade against gay marriage: the Supreme Court rejected their request to appeal a judgment of the Court of Appeal that legalized such unions in Ontario there more than four months ago."<sup>51</sup> In referencing the assaults by conservatives on same-sex marriage rights, which used language similar to words often used to describe religious conflicts like "crusade" and "battle", they made those opposing same-sex marriages appear to be as intrusive as the military campaigns undertaken by the Catholic Church against other religious groups in the past.

## Conclusion

The ultimate dispute over same-sex marriage was whether or not people of the same-sex could participate in an institution that, for primarily religious reasons, was reserved for a man and a woman. Those

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<sup>50</sup> "In Short - Failure to Traditionalists." *Le Devoir*, October 10, 2003. Accessed April 21, 2015.

<sup>51</sup> *Ibid.*

opposed to extending marriage rights to same-sex couples would have you believe that a civil union allows a couple to operate similarly in the law, however this is not the case. After Judge Lemelin ruled in favor of Hendricks and LeBouef, attorney for the couple Anne-France Goldwater said,

What makes the Quebec victory important for all of Canada is that [Lemelin] had the chance to look at a civil union law and to comment herself as to whether that would be enough of a solution for gay and lesbian couples, but Justice Lemelin said in very strong terms that civil union, as wonderful as it is because of all the economic rights that it gives, is still not marriage.<sup>52</sup>

For the LGBT community and civil rights advocates the legal protections that were being denied to same-sex couples was only part of the problem. The right to marry had to be given to same-sex couples as indication that the state valued and upheld their love just as much as the love of heterosexual couples.<sup>53</sup>

Thanks in part to the conviction of nationalists from Quebec that had pressed the federal government to safeguarding the equal rights of all of their citizens; the state of Canada was forced to root out religious ideology from the legal system that opposed same-sex marriage. During Silent Revolution, the Quebecois demanded that the federal government display flexibil-

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<sup>52</sup> Sylvain Larocque. *Gay Marriage: The Story of a Canadian Social Revolution*, 89.

<sup>53</sup> *Ibid.*, 15.



ity and grant them the right to pursue their personal affairs without legal impediments. Same-sex advocates adopted this idea and demanded the same relief from the federal government. In turn, both the federal government and provincial states including Quebec responded positively. On June 28, 2005, “the Liberals’ controversial Bill C-38, titled *Law on Civil Marriage*, passed a final reading in the House of Commons by a 158-133 margin, supported by most members of the Liberal party, the Bloc Quebecois and the NDP.”<sup>54</sup> The conflict between French and English speaking Canadians facilitated the LGBT community’s ultimate success in removing overbearing laws, despite the Catholic Church’s immense opposition and resentment for same-sex marriage.

During the litigation that ensued for the right for same-sex couples to marry,

some lawyers, such as Cynthia Petersen (British Columbia and Ontario) and Martha McCarthy (Ontario and Quebec) argued in more than one jurisdiction, and there was cooperation and coordination of strategy between the equality-seeking litigators. (FN49) Their greatest success was the Ontario Court of Appeal’s ruling in 2003.<sup>55</sup>

The decision in Quebec on *Hendricks and LeBoeuf v Quebec* occurred the next year, although the lawsuit had been filed in 2001. The courts in Quebec decided

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<sup>54</sup> CBC News. “TIMELINE | Same-sex Rights in Canada.”

<sup>55</sup> Davies, “Canadian Same-sex Marriage Litigation: Individual Rights, Community Strategy,” 101.

to uphold the decision in Ontario on the basis of precedent and because they believed LGBT people were protected and included under the Canadian constitution. They also upheld another precedent—the struggle against the rigid control the federal government attempted to impose on the province of Quebec. During the Silent Revolution, the Quebecois preached sovereignty and action against oppression. LGBT advocates presented the Quebecois and the courts of Quebec an opportunity to uphold their ideology. They could do this by making their stance clear and defending the rights of individuals in the LGBT community.

According to Davies, Law Professor at the University of Toronto,

The fight for LGBT rights is not 'dead' following the achievement of same-sex marriage. Further legal battles on behalf of the LBGT community are anticipated: the ban on blood and organ donations by gay men, the rights of lesbians and gay men in reproduction and family law, and funding for gender-reassignment surgery for transgender and transsexual persons are all emerging in the legal landscape as areas ripe for litigation.<sup>56</sup>

Family law is still upholding socially constructed gender roles, and the LGBT community remains restrained from participating in activities and actions available to all other citizens in Canada. Without the contributions of the Quebecois to the legalization of same-sex marriage, their LGBT community might find

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<sup>56</sup> *Ibid.*

themselves in the same predicament as those residing in the United States today, where they hope the Supreme Court will once and for all legalize same-sex marriage throughout the country and recognize it as a right that everyone is entitled to regardless of their sexual orientation.

*Carlos Andrés Castro graduated in 2015 with a major in History. He was initiated into Phi Alpha Theta in 2015.*