ONTARIO

SEAL

Superior Court of Justice
(Name of Court)

at 393 University Ave., 10th Floor, Toronto, ON M5G 1E6
(Court office address)

Court File Number
FS-11-367893

Form 8A: Application
AMENDED **(Divorce)**

☒ **Simple (divorce only)**

☒ **Joint**

Amended pursuant to R. 11(3) of the Family Law Rules on September 19, 2011

Applicant(s)

Full legal name & address for service — street & number, municipality, postal code, telephone & fax numbers and e-mail address (if any).	*Lawyer's name & address — street & number, municipality, postal code, telephone & fax numbers and e-mail address (if any).*
[redacted]	**Martha McCarthy** **Martha McCarthy & Company** **146 Davenport Road** **Toronto, ON M5R 1J2** **Tel: 416-862-6226** **Fax: 416-862-9001** **martha@mccarthyco.ca**

Respondent(s)

Full legal name & address for service — street & number, municipality, postal code, telephone & fax numbers and e-mail address (if any).	*Lawyer's name & address — street & number, municipality, postal code, telephone & fax numbers and e-mail address (if any).*
Attorney General of Canada	**Attorney General of Canada** **Suite 3400 Exchange Tower** **Box 36, First Canadian Place** **Toronto, Ontario** **M5X 1K6** **Fax: 416-973-3004**
	And
Attorney General of Ontario	**The Attorney General of Ontario** **Constitutional Law Branch** **4th Floor, 720 Bay Street** **Toronto, Ontario** **M5G 2K1** **Fax: 416-326-4015**

☐ **IN THIS CASE, THE APPLICANT IS CLAIMING DIVORCE ONLY.**

TO THE RESPONDENT(S): A COURT CASE FOR DIVORCE HAS BEEN STARTED AGAINST YOU IN THIS COURT. THE DETAILS ARE SET OUT ON THE ATTACHED PAGES.

THIS CASE IS ON THE STANDARD TRACK OF THE CASE MANAGEMENT SYSTEM. No court date has been set for this case but, if you have been served with a notice of motion, it has a court date and you or your lawyer should come to court for the motion. A case management judge will not be assigned until one of the parties asks the clerk of the court to schedule a case conference or until a motion is scheduled, whichever comes first.

IF, AFTER 365 DAYS, THE CASE HAS NOT BEEN SCHEDULED FOR TRIAL, the clerk of the court will send out a warning that the case will be dismissed within 60 days unless the parties file proof that the case has been settled or one of the parties asks for a case or a settlement conference.

IF YOU WANT TO OPPOSE ANY CLAIM IN THIS CASE, you or your lawyer must prepare an *Answer* (Form 10 — a blank copy should be attached), serve a copy on the applicant and file a copy in the court office with an *Affidavit of Service* (Form 6B). **YOU HAVE ONLY 30 DAYS AFTER THIS APPLICATION IS SERVED ON YOU (60 DAYS IF THIS APPLICATION IS SERVED ON YOU OUTSIDE CANADA OR THE UNITED STATES) TO SERVE AND FILE AN ANSWER. IF YOU DO**

AGAINST YOU.

IF YOU WANT TO MAKE A CLAIM OF YOUR OWN, you or your lawyer must fill out the claim portion in the Answer, serve a copy on the applicant(s) and file a copy in the court office with an Affidavit of Service.

- If you want to make a claim for support but do not want to make a claim for property or exclusive possession of the matrimonial home and its contents, you **MUST** fill out a Financial Statement (Form 13), serve a copy on the applicant(s) and file a copy in the court office.
- However, if your only claim for support is for child support in the table amount specified under the Child Support Guidelines, you do not need to fill out, serve or file a Financial Statement.
- If you want to make a claim for property or exclusive possession of the matrimonial home and its contents, whether or not it includes a claim for support, you **MUST** fill out a Financial Statement (Form 13.1, not Form 13), serve a copy on the applicant(s), and file a copy in the court office.

YOU SHOULD GET LEGAL ADVICE ABOUT THIS CASE RIGHT AWAY. If you cannot afford a lawyer, you may be able to get help from your local Legal Aid office. *(See your telephone directory under LEGAL AID.)*

[x] **THIS CASE IS A JOINT APPLICATION FOR DIVORCE. THE DETAILS ARE SET OUT ON THE ATTACHED PAGES.** The application and affidavits in support of the application will be presented to a judge when the materials have been checked for completeness.

If you are requesting anything other than a simple divorce, such as support or property or exclusive possession of the matrimonial home and its contents, then refer to page 1 for instructions regarding the Financial Statement you should file.

APR 0 5 2011

Date of issue

Clerk of the court

Michelle Taddeo

FAMILY HISTORY

APPLICANT: Age: 29 Birthdate: *(d, m, y)* [redacted]

Resident in *(municipality & province)* Florida, United States

since *(date)* [redacted]

Surname at birth: [redacted]

Surname just before marriage: n/a

Divorced before? [X] No [ ] Yes *(Place and date of previous divorce)*

JOINT APPLICANT:

Age: 32 Birthdate: *(d, m, y)* [redacted]

Resident in *(municipality & province)* London, England

since *(date)*

Surname at birth: [redacted]

Surname just before marriage: n/a

Divorced before? [X] No [ ] Yes *(Place and date of previous divorce)*

RELATIONSHIP DATES

[X] Married on *(date)* December 30, 2005 [ ] Started living together on *(date)*

[X] Separated on *(date)* March 1, 2009 [ ] Never lived together

THE CHILD(REN)

List all children involved in this case, even if no claim is made for these children.

Full legal name	Age	Birthday *(d, m, y)*	Resident in *(municipality & province)*	Now Living with *(name of person and relationship to child)*
n/a				

PREVIOUS CASES OR AGREEMENTS

Have the parties or the children been in a court case before?

[X] No [ ] Yes

Have the parties made a written agreement dealing with any matter involved in this case?

[X] No [ ] Yes *(Give date of agreement. Indicate which of its items are in dispute.)*

CLAIMS

USE THIS FRAME ONLY IF THIS CASE IS A JOINT APPLICATION FOR DIVORCE.

WE JOINTLY ASK THE COURT FOR THE FOLLOWING:

Claims under the *Divorce Act*

- 00 [X] a divorce
- 01 [ ] spousal support
- 02 [ ] support for child(ren) – table amount
- 03 [ ] support for child(ren) - other than table amount
- 04 [ ] custody of child(ren)
- 05 [ ] access to child(ren)

Claims under the *Family Law Act* or *Children's Law Reform Act*

- 10 [ ] spousal support
- 11 [ ] support for child(ren) – table amount
- 12 [ ] support for child(ren) - other than table amount
- 13 [ ] custody of child(ren)
- 14 [ ] access to child(ren)
- 15 [ ] restraining/non-harassment order
- 16 [ ] indexing spousal support
- 17 [ ] declaration of parentage
- 18 [ ] guardianship over child's property

Claims relating to property

- 20 [ ] equalization of net family properties
- 21 [ ] exclusive possession of matrimonial home
- 22 [ ] exclusive possession of contents of matrimonial home
- 23 [ ] freezing assets
- 24 [ ] sale of family property

Other Claims

- 30 [X] costs
- 31 [ ] annulment of marriage
- 32 [ ] prejudgment interest
- 50 [ ] other *(Specify.)*

USE THIS FRAME ONLY IF THE APPLICANT'S ONLY CLAIM IN THIS CASE IS FOR DIVORCE.

I ASK THE COURT FOR:

(Check if applicable.)

00 [ ] a divorce 30 [ ] costs

IMPORTANT FACTS SUPPORTING THE CLAIM FOR DIVORCE

[ ] **Separation:** The spouses have lived separate and apart since *(date)* March 1, 2009 and

[X] have not lived together again since that date in an unsuccessful attempt to reconcile.

[ ] *have lived together again during the following period(s) in an unsuccessful attempt to reconcile:*
(Give dates.)

[ ] **Adultery:** *(Name of spouse)*
has committed adultery. *(Give details. It is not necessary to name any other person involved but if you do name the other person, then you must serve this application on the other person.)*

[ ] **Cruelty:** *(Name of spouse)*
has treated *(name of spouse)*
with physical or mental cruelty of such a kind as to make continued cohabitation intolerable. *(Give details.)*

USE THIS FRAME ONLY IF THIS CASE IS A JOINT APPLICATION FOR DIVORCE.

The details of the other order(s) that we jointly ask the court to make are as follows: *(include any amounts of support and the names of the children for whom support, custody or access is to be ordered.)*

1. An order for divorce, pursuant to the *parens patriae* jurisdiction inherent to the Ontario Superior Court of Justice and the *Divorce Act*, 1985, c. 3;

2. In the alternative to 1, a declaration that the one year residency requirement to obtain a divorce in Canada, pursuant to the definition of "divorce proceeding" in ss. 2(1) and 3(1) of the *Divorce Act*, S.C. 1985, c. 3, is constitutionally invalid only with respect to the Joint Applicants, because it discriminates against them in its application on the basis of sex, sexual orientation, and residency contrary to s. 15(1) of the *Canadian Charter of Rights and Freedoms* in a manner not justified in a free and democratic society pursuant to s. 1 of the *Charter*; **or**

3. A declaration that the one year residency requirement to obtain a divorce in Canada, pursuant to the definition of "divorce proceeding" in ss. 2(1) and 3(1) of the *Divorce Act*, S.C. 1985, c. 3, is constitutionally invalid only with respect to the Joint Applicants, because it violates the Joint Applicants' rights to life, liberty and security of the person in a manner that is unfair and disproportionate to any government interest, contrary to s. 7 of the *Charter* and not justified by s. 1 of the *Charter*; **and**

4. A constitutional exemption granting the Joint Applicants leave to apply for a divorce in the Ontario Superior Court of Justice immediately so that the violation does not persist; **or**

5. In the alternative, a declaration that the one year residency requirement to obtain a divorce in Canada, pursuant to the definition of "divorce proceeding" in ss. 2(1) and 3(1) of the *Divorce Act*, S.C. 1985, c. 3, is of no force and effect as it infringes the equality rights of the Joint Applicants in its application, by discriminating against them on the basis of sex, sexual orientation, and residency contrary to s. 15(1) of the *Canadian Charter of Rights and Freedoms* in a manner not justified in a free and democratic society pursuant to s. 1 of the *Charter*;

6. In the further alternative, a declaration that the one year residency requirement to obtain a divorce in Canada, pursuant to the definition of "divorce proceeding" in section 2(1) and section 3(1) of the *Divorce Act*, S.C. 1985, c. 3, is of no force and effect as it is arbitrary, unfair and disproportionate to any government interest, and violates the Joint Applicant spouses' right to life, liberty, and security of the person, contrary to s. 7 of the *Canadian Charter of Rights and Freedoms* in a manner not justified in a

Amended pursuant to R. 11(1)8 of the Family Law Rules on September 15, 2011

free and democratic society pursuant to s. 1 of the *Charter*;

7. In the event of a suspension of the declaration of invalidity as sought in paragraphs 5 and/or 6 above, the Joint Applicants seek a constitutional exemption with an order granting them leave to file an application for divorce in the Ontario Superior Court of Justice immediately; **and**

8. An order bifurcating the issues in this matter, such that the relief sought in paragraph 1 proceeds first by motion, and the balance of the relief proceeds only if that motion does not succeed; **and** **see attached page 6A**

9. Costs on a full recovery basis; **and**

10. Such further and other relief as this Honourable Court deems just.

IMPORTANT FACTS SUPPORTING OUR CLAIM(S)

(Set out the facts that form the legal basis for your claim(s)).

Theory of the Case

11. The Joint Applicants are a same-sex couple who were married in Canada (the "Canadian Marriage") but reside separately in the Unites States and the United Kingdom. The Joint Applicants seek to legally dissolve their marriage on consent so that each Applicant may move forward with her life.

12. The Canadian Marriage is not recognized by the state of Florida. In the United Kingdom, civil partnerships are granted to same-sex couples, but the Canadian marriage is not recognized.

13. The Joint Applicants are unable to obtain a divorce in their home jurisdictions. Further, they are barred from seeking a divorce in Ontario because they do not meet the one year residency requirement mandated by the joint operation of ss. 2(1) and 3(1) of the *Divorce Act*, S.C. 1985, c. 3.

14. As the Supreme Court of Canada has noted, the freedom to live life with the mate of one's choice and in the manner of one's choice is a matter of defining importance to individuals. Marriage is an intensely personal decision that engages a complex set of social, political, religious and financial considerations. It is a basic element of social organizations around the world. Its relevance flows, in large part, from the incalculable value placed on public recognition of the marital relationship.

Miron v. Trudel, [1995] 2 S.C.R. 418 at para. 161

Walsh v. Bona, [2002] 4 S.C.R. 326 at para. 43

Halpern v. Canada (Attorney General) (2003), 65 O.R. (3d) 161 at para. 5 (C.A.)

USE THIS FRAME ONLY IF THIS CASE IS A JOINT APPLICATION FOR DIVORCE.

8A. A declaration that the Joint Applicants' Marriage Certificate bearing registration number [redacted] issued by the Province of Ontario for the marriage dated December 30, 2005, is a legally valid and binding document; **and**

8B. A temporary or interim Order requiring the Attorney General of Ontario to produce the following:

(a) The Marriage Licence Application form submitted by the Joint Applicants;

(b) The entire file relating to the Marriage License and Marriage Certificate bearing registration number [redacted] issued to the Joint Applicants by the Province of Ontario;

(c) All documents, including electronic records, kept or prepared by the Province of Ontario regarding policies and procedures with respect to applications for Marriage Licences by non-resident same-sex couples, and any information provided to such couples explaining the practice and policies of the Province of Ontario;

(d) All statistical information obtained, received by, or in the possession of the Province of Ontario relating to the number of non-residents who have entered into same-sex marriages in Ontario and/or Canada since June 10, 2003; and

8C. A temporary or interim Order requiring the Attorney General of Canada to produce the following:

(a) All statistical information obtained, received by or in the possession of the Government of Canada relating to the number of non-residents who have entered into same-sex marriages in Ontario and/or Canada since June 10, 2003; **and**

8D. An Order for Questioning of the Attorney General of Canada, or his representative; **and**

8E. An Order for Questioning of the Attorney General of Ontario, or his representative; **and**

8F. In the event that the Joint Applicants' marriage is determined to be invalid at law, general and specific damages in the amount of $30,000 for negligent misrepresentation by the Province of Ontario, as more specifically described in this Application; **and**

Amended pursuant to R. 11(2) of the Family Law Rules on September 15, 2011

Amended pursuant to Rule 11(13) of the Family Law Rules on September 15, 2011

15. The same is true with respect to the institution of divorce. It, too, is a central component of the freedom to live life with the mate of one's choice. It, too, is an intensely personal decision that engages a complex set of social, political, religious and financial considerations. It, too, is now considered a basic element of social organizations around the world. Its relevance, too, flows from the incalculable value placed on public recognition of the marital relationship.

16. The Joint Applicants cannot get divorced in any jurisdiction. They are prevented from severing the legal and psychological bonds of marriage in a way that other couples routinely take for granted.

17. The Joint Applicants ask the court to invoke its *parens patriae* jurisdiction and order that they be allowed to seek a divorce in the province of Ontario.

18. In the alternative, the Joint Applicants seek a declaration that their Marriage Certificate bearing registration number [redacted] is a valid and binding legal document, and that the one year residency requirement to obtain a divorce in Canada, pursuant to the definition of "divorce proceeding" in ss. 2(1) and 3(1) of the *Divorce Act*, S.C. 1985, c. 3, is constitutionally invalid only with respect to them as a discreet group, because it discriminates against them in its application on the basis of sex, sexual orientation, and residency contrary to s. 15(1) of the *Charter* and violates their rights to life, liberty and security of the person contrary to s. 7 of the *Charter*. The Joint Applicants submit that these violations are felt exclusively by them as non-resident same-sex couples married in Canada, and that they cannot be saved by s. 1 of the *Charter*. They seek a constitutional exemption granting them leave to file a joint application for divorce in the Ontario Superior Court of Justice immediately.

Essential Facts about the Joint Applicants

19. A. V[redacted] M[redacted] and I[redacted] W[redacted] began dating in 2001 and were married in Toronto, Ontario on December 30, 2005. **See page 7A.**

20. V[redacted] lives and works in [redacted] Florida in the area of early childhood education. I[redacted] works in business development for a large company in London, England, where she also lives. V[redacted] and I[redacted] separated on or about March 1, 2009 and have no children or outstanding corollary issues resulting from the breakdown of their marriage.

21. V[redacted] has been with the same employer for nearly 11 years working as a pre-school teacher, and she has deep roots in the Clearwater community. I[redacted] has worked for the same company since 2002. Unfortunately, her company does not have any international offices and so transferring to a Canadian location is not possible. Given the difficult economic times, both parties are sceptical that they could

Amended pursuant to Rule 11(1)B of the Family Law Rules on September 15, 2011

19B. The Joint Applicants travelled to Toronto in 2005 for the specific purpose of getting married. They were issued a Marriage License by the Province of Ontario and, subsequent to the marriage, a Marriage Certificate bearing the registration number [redacted] Before, at and after the marriage, the Joint Applicants relied on the words and actions of the provincial government that the Marriage License and Marriage Certificate issued to them were valid. At no time were they advised by either the provincial or federal governments that their marriage was not valid. In addition to the emotional distress caused to the Joint Applicants, they specifically incurred legal and travel costs associated with a marriage that was promoted by the provincial and federal governments and which is now being denied.

find adequate employment in Canada.

21. The state of Florida does not recognize the Joint Applicants' marriage, and will not grant them a divorce. Although the United Kingdom grants civil partnerships to same-sex couples, it will not recognize the Canadian marriage and thus will not grant a divorce.

22. V[redacted]and L[redacted]are married. They want, and are entitled to, a divorce. Even if the United Kingdom was prepared to dissolve the union as a civil partnership, it is unfair to place all of the responsibility with L[redacted]. Either party should be able to initiate and participate in her own divorce proceedings.

23. Neither V[redacted]nor L[redacted]el able to move to a new country, alone and isolated, to engage in the already lonely and isolating process of obtaining a divorce. V[redacted]as a close relationship with her family, all of whom reside close to her Clearwater home. [redacted]parents live within fifteen minutes of her home; this is especially important as her father's health is currently deteriorating and she has no siblings to assist her with his care.

24. V[redacted]nd [redacted]oped and believed that Canada, the country that married them, would afford them the respect and dignity to legally end their marriage. Without this, they cannot move on from this chapter in their lives. The fact that they continue to be connected by the legal institution of marriage impinges their ability to pursue new relationships and to feel comfortable doing so. For instance, although the United Kingdom will not grant L[redacted]divorce, her marriage to V[redacted]oes prevent her from entering into a civil partnership in England.

25. While V[redacted]and L[redacted]re cooperating on this Joint Application, the breakdown of their marriage has been painful and will continue to be until they are able to be formally released by divorce.

The Importance of this Case

26. The Joint Applicants, individually and as a couple, made the intensely personal decision to get married. They chose to be married in Canada because it is one of the only countries in the world that recognizes the importance of this decision for same-sex couples, irrespective of where they live.

27. The Joint Applicants, individually and as a couple, made the intensely personal decision to get divorced. Unfortunately, no country in the world recognizes the importance of this decision for same-sex couples, irrespective of where they live.

28. Simply, the Joint Applicants are without remedy.

Statutory Framework

29. The *Divorce Act* governs the institution of divorce in Canada and is the source of the court's jurisdiction to grant orders for divorce and/or corollary relief.

30. A divorce proceeding is a proceeding in a court in which either or both spouses seek a divorce alone or together with a child support order, a spousal support order or a custody order. A corollary relief proceeding in a court in which either or both former spouses seek a child support order, a spousal support order or a custody order.

Divorce Act, S.C. 1985, c. 3, s. 2(1)

31. A court in a province has jurisdiction to hear and determine a divorce proceeding if either spouse has been ordinarily resident in the province for at least one year immediately preceding the commencement of the proceeding.

Divorce Act, S.C. 1985, c. 3, s. 3(1)

32. A court may also hear and determine a corollary relief proceeding if the former spouses were divorced in Canada and if: (a) either former spouse is ordinarily resident in the province at the commencement of the proceeding; or (b) both former spouses accept the jurisdiction of the court.

Divorce Act, S.C. 1985, c. 3, s. 4(1)
Okmyansky v. Okmyansky, 2007 ONCA 427 at para. 41

33. A person is considered "ordinarily resident" in a province if he or she moves to, or lives in, a province with an intention of making it his or her home for an indefinite period. Generally speaking, temporary absences do not create gaps in ordinary residency.

MacPherson v. MacPherson (1976), 13 O.R. (2d) 233 at paras. 11 and 18

Historical Context

34. The residency requirement mandated by ss. 2(1) and 3 of the *Divorce Act* stems from the English common law rule that a court could only grant a divorce to parties who were domiciled within its jurisdiction. Generally speaking, a person was domiciled in a country if he had a permanent home to which he intended to return. This rule had a devastating effect on a married woman who, by virtue of her marriage, was deemed to have the same domicile as her husband. This held true even if her husband deserted her and moved out of the jurisdiction, thus making it impossible for her to seek a divorce.

Le Mesurier v. Le Mesurier, [1895] A.C. 517 (P.C.)
See also: Bernard Green, "The Divorce Act of 1968", (1969) 19 U. Toronto L.J. 627 at 628

35. In 1930, Canada relaxed the restrictions with respect to domicile. *The Divorce Jurisdiction Act, 1930 (Can)*, c. 15, allowed a deserted wife to file a petition for divorce in (1) the province in which her husband was domiciled immediately preceding the petition; or (2) in the province in which he was currently domiciled. The Act, however, did not assist women who were new to Canada and had been deserted, or women who had moved to another province after having been deserted. While women could, in theory, travel to the domicile of their deserted husbands for the purpose of obtaining a divorce, practical realities precluded most from doing so.

36. As such, many women who were deserted by their husbands received no child or spousal maintenance and were prevented from re-marrying and creating a new, legal family unit.

37. Parliament again attempted to address the restrictive nature of the domicile requirement when it passed sweeping divorce reform legislation in 1968. Under s. 5 of the *Divorce Act, 1968*, S.C. 1968, c.24, a court could hear and determine a petition for divorce if the petitioner was domiciled in Canada and if either spouse had been ordinarily resident in the province for 12 months and actually resident in the province for 10 months. Under the Act, a woman could acquire a domicile independent from her husband.

38. The questions of domicile and residency were confusing and unwieldy for the courts. In 1985, Parliament stripped the domicile requirement altogether, leaving the one year residency requirement as it appears today.

39. The ongoing residency requirement is said to be necessary in order to prevent Canada from becoming a divorce haven. In the United States, it has been considered a legitimate requirement on the basis that the State has an interest in ensuring a connection between it and its divorce applicants, as well as an interest in insulating its divorce orders from collateral attack.

Green, *supra*

Sosna v. Iowa (1975), 419 U.S. 393 at 404-410 (U.S. Supreme Court)

40. Section 22(1) of the *Divorce Act* specifically lists residency as a ground upon which Canadian courts must recognize a foreign divorce order. Section 22(1) states as follows:

Recognition of foreign divorce

(1) A divorce granted, on or after the coming into force of this Act, pursuant to a law of a country or subdivision of a country other than Canada by a tribunal or other authority having jurisdiction to do so shall be recognized for all purposes of determining the marital status in Canada of any person, if either former spouse was ordinarily resident in that country or subdivision for at least one year immediately preceding the commencement of proceedings for the divorce.

Idem

(2) A divorce granted, after July 1, 1968, pursuant to a law of a country or subdivision of a country other than Canada by a tribunal or other authority having jurisdiction to do so, on the basis of the domicile of the wife in that country or subdivision determined as if she were unmarried and, if she was a minor, as if she had attained the age of majority, shall be recognized for all purposes of determining the marital status in Canada of any person.

41. However, residency is not the *only* legitimate basis upon which to recognize a foreign divorce order. Section 22(3) of the Act preserves "any other rule of law respecting the recognition of divorces granted otherwise than under this Act". Specifically:

> Section 22(3) of the Divorce Act expressly preserves pre-existing judge made rules of law pertaining to the recognition of foreign divorces. It may be appropriate to summarize these rules. Canadian courts will recognize a foreign divorce: (i) where jurisdiction was assumed on the basis of the domicile of the spouses; (ii) where the foreign divorce, though granted on a non-domiciliary jurisdictional basis, is recognized by the law of the domicile of the parties; (iii) where the foreign jurisdictional rule corresponds to the Canadian jurisdictional rule in divorce proceedings; (iv) where the circumstances in the foreign jurisdiction would have conferred jurisdiction on a Canadian court had they occurred in Canada; (v) where either the petitioner or respondent had a real and substantial connection with the foreign jurisdiction wherein the divorce was granted; and (vi) where the foreign divorce is recognized in another foreign jurisdiction with which the petitioner or respondent has a real and substantial connection.
>
> Although the aforementioned rules were established by decisions of the English courts, they have generally been followed by Canadian courts, at least in those provinces that adhere to the common law tradition.

Julien Payne, *Payne on Divorce*, 4th ed., at p. 111

See also: *Indyka v. Indyka*, [1967] 2 All E.R. 689 (U.K. H.L.) and *El Qaoud v. Orabi*, 2005 NSCA 28 at para. 14 (N.S.C.A.).

42. Although intended to weed out artificial bases for divorce, the real and substantial connection test must look at the significance of the link between the subject matter and the proposed jurisdiction, not just between the parties and the jurisdiction.

H (T.M.A.) v. G(J.J.), 2010 NBCA 4 at para. 25

43. It is conceded that there may be no real and substantial connection where an application for divorce is made to a foreign court for the sole purpose of obtaining a divorce, where that purpose is found to be "fraudulent or improper".

Jean-Gabriel Castel & Janet Walker, *Canadian Conflict of Laws*, 6th ed., loose-leaf (Markham: LexisNexis Canada Inc., 2007 at s. 17.2.c

44. However, the real and substantial connection test must be considered in the context of the claim. In this case, the Joint Applicants are connected to Canada by virtue of having been legally married here. As their Canadian marriages are not recognized in the jurisdictions in which they reside, not only do the Joint Applicants have a real and substantial connection with Canada, their only real and substantial connection is with this jurisdiction.

45. Three things are clear: (1) the domicile/residency requirement for obtaining a divorce in Canada has long had discriminatory effects against historically disadvantaged persons, mainly women; (2) it is by no means a necessary requirement for protecting Canadian divorce orders from attack, particularly where most states refuse to recognize the Canadian marriage subject of the divorce order; and (3) it is a concept that Parliament has continued to review and modify in an effort to address its negative impacts.

***Parens Patriae* and Legislative Gap**

46. The court's *parens patriae* jurisdiction is not limited to the protection of children. Rather, it is founded "on the need to act for the protection of those who cannot care for themselves…it is to be exercised in the 'best interest' of the protected person, or again, for his or her 'benefit' or 'welfare'."

Eve, Re, [1986] 2 S.C.R. 388 at para. 73

47. Even where there is legislation in the area, the court may invoke its *parens patriae* jurisdiction to deal with uncontemplated situations, where it appears necessary to do so for the protection of those who fall within its ambit.

Eve, Re, *supra* at para. 42

48. The court's general inherent power is always available to fill gaps in the legislation or to supplement the powers of the local authority.

B. (D.) v. Newfoundland (Director of Child Welfare), [1982] 2 S.C.R. 716 at para. 12

49. The Ontario Court of Appeal has held that the exercise of the *parens patriae* jurisdiction is appropriate where there is a legislative gap or for the purpose of rescuing a child in danger.

B. (A.C.) v. B. (R.), 2010 ONCA 714 at para. 28
A.A. v. B B. (2007), 83 O.R. (3d) 561 (C.A.) at para. 27

50. Additionally, the court has not foreclosed the possibility that the *parens patriae* jurisdiction may be properly invoked where there is no legislative gap but where it is necessary to do so to achieve the overriding objective of the legislation.

A.A. v. B.B., supra, at para. 40
R. (C.) v. Children's Aid Society of Hamilton, [2004] O.J. No. 3301 (Ont. S.C.J.) at para. 125

51. The Joint Applicants appreciate that the *parens patriae* jurisdiction has generally been used to assist children and persons with disability. They do not suggest that they fall into either category by reason of their sexual orientation or family status. However, they are in a similar position of vulnerability in this situation.

52. The Joint Applicants belong to a group of persons in need of protection. Gays and lesbians continue to be persecuted in most countries of the world. Even in countries that recognize basic human rights, same-sex couples are afforded rights and recognition only after intense litigation during which they are fought every step of the way by their own governments. The struggle to have same-sex relationships legally recognized and respected has been long, arduous, and still continues. Further, legislation in almost every

part of the world, including Ontario, is largely unresponsive to the realities of same-sex families, devaluing their roles as spouses and parents.

53. The state of Florida, where V[redacted]resides, does not recognize her marriage to L[redacted]as amounting to anything more than a friendship. The United Kingdom's civil partnership scheme, which grants same-sex couples similar rights to married couples, clearly tells gays and lesbians that they can never be part of the marriage "club".

54. As a result of this widespread systemic discrimination and persecution, the Joint Applicants clearly belong to a group of vulnerable persons. Without the protection of the court, the Joint Applicants are legally, psychologically and emotionally bound to each other in the union of marriage against their will.

55. This is a case where the exercise of the *parens patriae* jurisdiction is appropriate, even in the absence of a legislative gap. As stated by the Supreme Court of Canada in *Miglin v. Miglin*, the overarching objectives of the *Divorce Act* are finality, certainty, and autonomy. Clearly, these objectives cannot be achieved with respect of the Joint Applicants without the assistance of the court.

Miglin v. Miglin, 2003 SCC 24 at para. 4

56. In the alternative, the Joint Applicants submit that there is a legislative gap in the *Divorce Act* with respect to their unique circumstances.

57. In *A.A. v. B.B.*, Rosenberg J.A. held that changing social conditions had created a gap in the *Children's Law Reform Act*: "Present social conditions and attitudes have changed. Advances in our appreciation of the value of other types of relationships and in the science of reproductive technology have created gaps in the *CLRA*'s legislative scheme."

A.A. v. B.B., supra at para. 35

58. As a result of the Supreme Court of Canada's decision in *M .v. H.* and, particularly, the Ontario Court of Appeal's decision in *Halpern v. Canada*, advances in our appreciation of the value of other types of relationships has created a gap in the *Divorce Act*.

M .v. H., [1999] 2 S.C.R. 3
Halpern, supra

59. This gap is certainly unintended. At the time that the 1985 version of the *Divorce Act* was drafted, it was inconceivable that the right to marry would one day extend to same-sex couples. It was even more inconceivable that, due to systemic discrimination and outright persecution, gay and lesbian couples would come to Canada as one of the only jurisdictions in which they could exercise equal rights to marry.

60. Arguably, the legislative history of the *Divorce Act* highlights a recognition on the part of Parliament that the residency requirements have disadvantaged the less powerful in our society. At the time the requirements were re-drafted in 1985, this group of powerless persons consisted solely of women. Today, as a result of our changing attitudes about marriage, it now includes non-resident same-sex couples who were married in Canada and have no ability to get divorced anywhere in the world.

61. This is clearly an unintentional gap not contemplated by the legislation that can only be rectified with the assistance of the court.

62. The Joint Applicants ask that this issue proceed to argument earlier than the balance of the issues, such that they do not have to bear the burden of advancing a *Charter* case, and the Respondents do not have to defend one, unless absolutely necessary.

Application of the Charter

63. If the court is unwilling to grant the Joint Applicants a divorce using its *parens patriae* discretion, the Joint Applicants rely on ss. 15 and 7 of the *Charter*.

64. The application of the *Charter* is governed by s. 32(1), which reads as follows:

> 32. (1) This Charter applies
>
> (a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and
>
> (b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.

65. As a general rule, Canadians abroad are subject to the law of the country in which they are located, and cannot avail themselves of their rights under the *Charter*.

Khadr v. Canada, 2010 SCC 3 at para. 14.

R. v. Hape, 2007 SCC 26, [2007] 2 S.C.R. 292 (S.C.C.), at para. 48

66. The Charter may apply to the activities of Canadian officials participating in foreign state actions, where such participation violates Canada's international obligations or fundamental human rights norms.

Khadr, supra.
Hape, supra, at para. 52.
Khadr v. Canada, [2008] 2 S.C.R. 125 at para. 18.

67. In this case, the Joint Applicants are not asking that the *Charter* apply to them or to Canadian officials extraterritorially. Rather, the Joint Applicants are applying for a divorce in Canada, and are being denied the opportunity to do so, in Canada. They reside elsewhere but will be physically present before the court in Canada to present the application and seek relief. For the purposes of this application, the Joint Applicants are included in the terms "every individual" within the meaning of section 15 of the *Charter*, and "everyone" within the meaning of section 7 of the *Charter*.

Singh v. Canada (Minister of Employment and Immigration), [1985] 1 S.C.R. 117 at para. 81
Suresh v. Canada (Minister of Citizenship and Immigration), [2002] 1 S.C.R. 3 at para. 47

Section 15(1) of the Charter: Equality Rights

68. Section 15 of the *Charter* provides:

> (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.
>
> (2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

69. In *Kapp*, the Supreme Court of Canada reaffirmed that substantive, rather than formal, equality remains "central to the Court's approach to equality claims". The similarly situated test, which seeks to treat "likes" alike, is sterile and narrow and has no place in a substantive equality analysis.

R. v. Kapp, [2008] 2 S.C.R. 483 at paras. 14-26

70. A law of general application may violate section 15(1) of the *Charter* even if its purpose and intention

are not discriminatory. Indeed, "the fact that a discriminatory effect was unintended is not determinative of its general *Charter* analysis and certainly does not determine the available remedy".

British Columbia (Public Service Employee Relations Commission) v. B.C.G.E.U., [1999] 3 S.C.R. 3 at para. 49
Law v. Canada (Minister of Employment and Immigration), [1999] 1 S.C.R. 497 at para. 80

71. It is precisely when a law is not discriminatory on its face but causes disadvantage to a vulnerable group that the group's distinct needs must be taken into account. In such a case, there will be never be a mirror comparator group because it is the claimant group's "non-alikeness" that precipitates its disadvantage.

72. Applying a substantive equality approach to this case, the Court must stand in the shoes of the Joint Applicants. Taking this contextualized approach, it becomes clear that the Joint Applicants are married, lesbian, non-resident couples, in a global culture that rejects, denigrates, and often abuses their marital status and family life choices.

73. A claimant group may suffer disadvantage on the basis of several enumerated or analogous grounds, which are necessarily interconnected and must be understood and analyzed together.

Falkiner v. Ontario (2002), 59 O.R. (3d) 481 at para. 72 (C.A.)

74. Exclusion from a legal and social institution on the basis of sex and sexual orientation is discriminatory and violates s. 15(1) of the *Charter*. Residency may be considered an analogous ground, where it is found to be an immutable characteristic and used to differentiate between persons with discriminatory effects.

Halpern v. Canada, supra
R. v. Turpin, [1989] 1 S.C.R. 1296

75. The one year residency requirement in the *Divorce Act* has had a particularly severe and debilitating effect on the Joint Applicants, specifically because they are a married, non-resident lesbian couple. Unlike (a) married, resident same-sex couples or (b) married, non-resident opposite sex couples, the Joint Applicants have no reasonable prospect of obtaining a divorce *anywhere in the world*. Their claim must be understood with reference to the combination of factors from which the disadvantage arises.

76. When it allowed the Joint Applicants to be married in this jurisdiction, Canada chose to address and

rectify an ongoing campaign of discrimination against resident and non-resident same-sex couples across the globe. Having done so, it cannot now parse out the Joint Applicant's residency status and claim to have no responsibility to them, notwithstanding the devastating disadvantage caused to them by the one year residency requirement.

77. It is clear that the one year residency requirement in the *Divorce Act* has the effect of denying the Joint Applicants, as belonging to a discreet and localized group of people, access to the institution of divorce by failing to take into account the needs of an already vulnerable group of non-resident same-sex couples. Their choice to be married, and now divorced, is ignored or dismissed with contempt in almost every country of the world. The current Canadian statutory framework fails to address the special and distinct needs of this group of women, thereby undermining the validity of their marriages, implying that their decisions are less worthy of social recognition and value, and exacerbating the ongoing discrimination against them on a global level.

Section 7 of the *Charter*: Life, Liberty and Security of the Person

78. Section 7 of the *Charter* guarantees that everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice. Every human being who is physically present in Canada is entitled to the protection afforded by this section.

Singh v. Canada (Minister of Employment and Immigration), [1985] 1 S.C.R. 117 at para. 81
Suresh v. Canada (Minister of Citizenship and Immigration), [2002] 1 S.C.R. 3 at para. 47

79. The section 7 rights to life, liberty and security of the person are based on basic notions of human dignity, personal autonomy, privacy and choice in decisions regarding an individual's fundamental being. As a result, it has been recognized that the right to liberty and security of the person is infringed where the state's action deprives individuals of the ability to make decisions of fundamental personal importance or jeopardizes their psychological integrity. Psychological integrity is affected where the state action causes "greater than ordinary stress and anxiety."

New Brunswick (Minister of Health & Community Services) v. G. (J.), [1999] 3 S.C.R. 46 (S.C.C.), at para. 60
Chaoulli v. Quebec (Procureur General), 2005 SCC 35 at paras. 116-117

Rodriguez v. British Columbia (Attorney General), [1993] 3 S.C.R. 519 at pp. 587

80. It is a principle of fundamental justice that the state may not deprive a claimant of her section 7 rights in a manner that is "arbitrary or unfair or that is unrelated to the state's interest" in promoting its legislative objective. It is also a principle of fundamental justice that government action must not be so extreme as to be "disproportionate to any legitimate government interest".

Rodriguez v. British Columbia (Attorney General), *supra* at para. 33
Suresh v. Canada (Minister of Citizenship and Immigration), [2002] 1 S.C.R. 3 at para. 47

81. The one year residency requirement in the *Divorce Act* deprives the Joint Applicants, as a specific group of persons, of the intimately personal decision to end their marriages through divorce. It does so in a manner that is unfair and discriminatory, and which is not reasonably connected to any legitimate legislative objective. The Canadian government can hardly be concerned with comity in the case of the Joint Applicants, since their Canadian Marriage is only recognized by a few countries in the world.

82. The denial of this important life choice reinforces social prejudices that the Joint Applicants are not "really married" and, indeed, prevents them from choosing to re-marry in the future. The result for the Joint Applicants is emotionally degrading and psychologically profound.

83. Further, the willingness of the Canadian government to grant the Joint Applicants' marriage but to deny them any access to a legal divorce leaves them entirely without recourse. It is legally and procedurally unfair for a government to grant the right to marry, to perform such marriages, and to then leave the Joint Applicants with absolutely no remedy.

Section 1 of the Charter

84. Under section 1 of the *Charter*, the task of defending a constitutional breach falls to the Respondents.

85. Even if the residency requirement in the *Divorce Act* is legitimate in its general application, there is no reasonable basis for preventing the Joint Applicants from filing a joint application for a divorce alone.

86. The only compelling purpose of the residency requirement is to prevent Canadian divorce orders from collateral attack in other jurisdictions. However, even if the Joint Applicants obtained a divorce after residing in a Canadian province for one year, the Canadian divorce order would still be unrecognized by

almost every country in the world. With respect to the Joint Applicants, as part of a specific and discreet group, the objective of the legislation holds no weight and cannot justify their exclusion from obtaining a divorce in Canada.

Remedy

87. The Joint Applicants are seeking a constitutional exemption from ss. 2(1) and 3(1) of the *Divorce Act*. They wish to apply for a joint divorce immediately in the Ontario Superior Court of Justice.

88. In principle, a constitutional exemption may be available where otherwise valid legislation applies in a manner that violates a particular claimant's *Charter* rights. A majority of the Supreme Court of Canada has recognized that "in certain circumstances a 'constitutional exemption' might be granted from otherwise valid legislation to particular individuals whose religious freedom was adversely affected by the legislation".

R. v. Videoflicks, [1986] 2 S.C.R. 713 at para. 147
R. v. Big M Drug Mart Ltd., [1985] 1 S.C.R. 295 at p. 315

89. The scope of the constitutional exemption is not limited to cases of freedom of religion. In concurring reasons in *Corbiere v. Canada*, L'Heureux-Dube J. stated: "The constitutional exemption may apply when it has not been proven that legislation is unconstitutional in general, but that it is unconstitutional in its application to a small subsection of those to whom the legislation applies".

Corbiere v. Canada (Minister of Indian & Northern Affairs), [1999] 2 S.C.R. 203 at para. 111
See also: *R. v. Rose*, [1998] 3 S.C.R. 262 at para. 66 (per L'Heureux-Dube, concurring)

90. For an exemption to apply where legislation is otherwise valid, "there must be an identifiable group, defined by non-*Charter* characteristics, to whom the exemption could be said to apply".

Rodriguez, *supra* at para. 230 (per Lamer C.J., in dissent)

91. The Joint Applicants recognize that, to date, a constitutional exemption has only been granted as an interim measure, to protect the interests of a party in the face of a suspended declaration of invalidity.

Corbiere, *supra* at para. 22 (per McLachlin and Bastarache JJ., for the majority)

Hislop v. Canada (Attorney General) (2004), 73 O.R. (3d) 641 (C.A.) at para. 123; [2007] 1 S.C.R. 429

92. However, the Supreme Court has recognized that the application of the constitutional exemption could be expanded along the lines suggested by the majority in *Big M Drug Mart* and *Videoflicks*, and by L'Heureux-Dube J. in *Corbiere* and *Rose*, where "there is evidence of special circumstances upon which this possibility might be raised".

Corbiere, *supra* at para. 22 (per McLachlin and Bastarache JJ., for the majority)

93. This is clearly a case of special circumstances as contemplated in *Corbiere*. The Joint Applicants form part of a discreet group of persons who were married in Canada and who, by virtue of the application of ss. 2(1) and 3(1) of the *Divorce Act*, cannot get divorced anywhere in the world because of the combined effects of their residency, sex and sexual orientation.

94. A constitutional exemption is the simplest and most purposive way to remedy the violation of the Joint Applicants' rights while maintaining the integrity of the *Divorce Act* as it applies generally.

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Complete this section if your claim is for a divorce. Your lawyer, if you are represented, must complete the Lawyer's Certificate below.

_____ _____
Date of signature *Signature of applicant*

Complete this section if you are making a joint application for divorce. Your lawyer, if you are represented, must complete the Lawyer's Certificate below.

11/3/11 [redacted]
Date of signature *Signature of joint applicant*

3/25/11 [redacted]
Date of signature *Signature of joint applicant*

LAWYER'S CERTIFICATE

My name is: MARTHA McCARTHY

and I am the lawyer for *(name)* the petitioners

in this divorce case. I certify that I have complied with the requirements of section 9 of the *Divorce Act*.

April 4/11 [signature]
Date of signature *Signature of Lawyer*

My name is:

and I am the lawyer for *(name)*
in this divorce case. I certify that I have complied with the requirements of section 9 of the *Divorce Act*.

_____ _____

Date of signature *Signature of Lawyer*