



Canada: Same-Sex Marriages: Developing Issues

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CANADA

SAME-SEX MARRIAGES: DEVELOPING ISSUES

Seven Canadian provinces & territories currently allow same-sex marriages. All of these jurisdictions permit nonresidents to apply for marriage licenses. Only the province of Alberta is currently opposing the mandatory granting of marriage licenses to same-sex couples. The federal Government has announced that it will enact legislation to allow for same-sex marriage throughout Canada following the submission of several reference questions to the Supreme Court. Arguments have been presented, but the Supreme Court has not ruled on the issue. In the meantime, same-sex marriages are going forward. It has been reported that nearly 750 marriage licenses have been granted to same-sex applicants from the United States by the City of Toronto.

Introduction

Under Canada's Constitution, jurisdiction to enact matrimonial laws is divided between the federal Parliament and the provincial legislative assemblies. Parliament has jurisdiction over "marriage and divorce" while the legislative assemblies have jurisdiction over the "solemnization of marriage."¹ Prior to the recent advent of same-sex marriages, the question of what constitutes a matter respecting marriage and what constitutes a matter respecting the solemnization of marriage had become largely academic. In practice, Parliament has left virtually all questions respecting capacity to marry to be addressed by the provinces, with the exception of marriages between related persons. Under the Marriage (Prohibited Degrees) Act, persons related lineally by consanguinity and brothers and sisters are prohibited from entering into a marriage.² The Marriage (Prohibited Degrees) Act does not prohibit marriages between first cousins and does not expressly allow for marriages between persons of the same sex.

Provincial laws

Provincial laws also place restrictions on marriage. For example, Ontario's Marriage Act places prohibitions on the granting of licenses to mentally ill persons and to divorced persons who have not obtained a divorce decree that is absolute.³ Ontario's Marriage Act does not expressly prohibit the granting of marriage licenses to same-sex couples, but provincial authorities long refused to do so on the ground that, at common law, a marriage is a union of one man and one woman. In recent years, a number of organizations and individuals have sued the province to allow same-sex marriages, and in 2003 the highest court in Ontario declared that the common law rule limiting marriage to opposite-sex couples violated the Canadian Charter of Rights and Freedoms' equality rights provision.⁴ The equality rights

¹ Constitution Act, 1867, 30 & 31 Vict. ch. 3, ss. 91-92 (U.K.); R.S.C. No. 5, ss. 91-92 (Appendix 1985).

² Marriage (Prohibited Degrees) Act, 1990, S.C., ch. 46.

³ Marriage Act, R.S.O., ch. M3 (1990), as amended.

⁴ Halperin v. Toronto (City), 36 R.F.L. (5th) 127 (Ont. C.A.).

provision of the Charter states that “every individual is equal before and under the law and has the right to the equal protection and benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental disability.”⁵ Discrimination based upon sexual orientation is not expressly prohibited by the Charter, but the Supreme Court of Canada has ruled that sexual orientation is to be read into the Charter as an “analogous ground.”⁶ Consequently, the Ontario Court of Appeal ruled that the common law definition of marriage should be amended to be “the union of two persons to the exclusion of others.”

Since same-sex marriages were approved in Ontario, six other Canadian jurisdictions have followed suit. The most recent jurisdiction to join this list was the province of Saskatchewan. In November 2004, a court in that province adopted the reasoning of Ontario’s Court of Appeal.⁷ Another case that is proceeding in the province of Newfoundland is unopposed by the Government. In fact, only the government of the province of Alberta is actively opposing applications to require marriage officers to issue licenses to same-sex couples.

Federal legislation; reference to Supreme Court

The federal government responded to the Ontario Court of Appeal’s decision by announcing that it would draft legislation to recognize same-sex marriages throughout Canada, but that before it enacted such legislation, it would submit a series of questions to the Supreme Court concerning the draft legislation’s legality.⁸ In essence, these questions are as follows:

1. Can Parliament define marriage to include same-sex unions?
2. Are same-sex unions legal under the Charter of Rights and Freedoms?
3. Can Parliament protect religious officials from being compelled to perform a same-sex marriage?

After these questions were submitted to the Supreme Court, a fourth question was added. This question asks whether marriage can be limited to opposite-sex couples.

The reference questions were argued before the Supreme Court in October 2004. The Government’s position was that Parliament has the power to define marriage and that the exclusion of same-sex couples from marriage is discriminatory. During the questioning of the lawyers representing the Government, several Supreme Court justices seemed to suggest that the Government should have appealed the lower courts’ decisions recognizing same-sex marriages if it wanted the Supreme Court to decide the issue. This suggests that the court may decline to answer the reference.⁹ If the court were to so refuse, the issue could come back to it on a challenge to the constitutionality of the legislation enacted

⁵ Canadian Charter of Rights and Freedoms, Part I, s. 15 of the Constitution Act, 1982, being Schedule B to the Canada Act 1982, ch. 11 (U.K.).

⁶ *Vriend v. Alberta*, [1998] 1 S.C.R. 493.

⁷ *N.W. v. Canada (Attorney General)*, [2004] S.J. No. 669 (S.Q.B.).

⁸ Canada, Department of Justice. Reference to the Supreme Court of Canada. http://canada.justice.gc.ca/en/news/nr/2003/doc_30946.html. See Appendix I.

⁹ Same-Sex Marriage Issues Before High Court, *THE RECORD* (Kitchener-Waterloo), Oct. 7, 2004, at A4.

by Parliament. As mentioned above, the only province that appears willing to mount such a challenge is Alberta.

During the course of the hearing on the reference, several justices also seemed to indicate that the question respecting the rights of clergy to refuse to perform same-sex marriages was too vague to allow for an answer. The lawyer representing the Government agreed that there were many difficult questions respecting protection of the clergy but indicated that a general recognition of religious freedom in the area would be helpful to Parliament in enacting same-sex legislation.

The Supreme Court has not yet ruled on the reference respecting same-sex marriages. Nevertheless, most experts expect that it will recognize the right of Parliament to define marriage to include same-sex couples. These experts also expect that the Supreme Court will either agree that excluding same-sex couples from marriage is discriminatory or hold that the government should have appealed the lower courts' decisions if it wanted an answer to this question. The issue that will most likely be sidestepped or addressed in vague terms concerns protection for the clergy.¹⁰

Marriage of nonresidents

Canada's provincial marriage laws allow for nonresidents to apply for marriage licenses. There are no national statistics available on the number of same-sex marriages that have been performed in Canada or on the number of same-sex marriages that have involved United States citizens. It was recently reported that the City of Toronto has granted 1,937 marriages to same-sex couples and that 739 of these were granted to United States citizens.¹¹ Although this is only one city, Toronto has been a magnet for same-sex couples, and it is located in the province that was the first to allow same-sex marriages. The second most popular destination appears to be Vancouver, British Columbia, but statistics from that city are not currently available.

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¹⁰ Janice Tibbetts, High-Court Judges Balk on Gay Marriage Issue: Role Questioned Because They Say Ottawa Plans to Legalize It, VANCOUVER SUN, Oct. 7, 2004, at A5.

¹¹ Sarah Green, *Same-Sex Showdown: A Bush Victory Could Fuel a Divisive Gay Marriage Debate in Canada*, EDMONTON SUN, Oct. 30, 2004, at 29.