Same-Sex Marriage

In 2005, the *Marriage for Civil Purposes Act,*[i] also known as Bill C-38*, became law.* This Act gives same-sex couples the legal right to marry, making Canada only the fourth country in the world to legalize same-sex marriages.[ii] Prior to this enactment, the courts in eight provinces[iii] struck down the traditional definition of marriage as a violation of section 15 of the *Canadian Charter of Rights and Freedoms*.[iv]

Traditional Definition of Marriage

The traditional definition of marriage was "the lawful union of one man and one woman to the exclusion of all others." In other words, only two people of different sexes could legally marry.[v]

Evolution of the Right to Same-Sex Marriage: A Brief History

(a) *Halpern v. Canada*

The first landmark case was *Halpern v. Canada*[vi]. In this case, two same-sex couples were married in a religious ceremony at a Christian Church. The Ontario government, however, refused to register the marriages, arguing that the legal definition of marriage did not include same-sex marriages. The couples took the issue to court.

The Ontario Court of Appeal concluded that the traditional definition of marriage was a violation of the couples' equality rights under section 15 of the *Charter*. The "one man and one woman" requirement in the definition created a formal distinction between opposite-sex and same-sex couples on the basis of sexual orientation, a prohibited ground of discrimination under section 15. Furthermore, exclusion from the institution of marriage sends the message that same-sex couples are not capable of forming loving and lasting relations, and that same-sex relationships are not worthy of the same respect and recognition as opposite-sex relationships. As such, it offends the dignity of persons in same-sex relationships.

The Court of Appeal went on to say that the violation was not reasonable or justified under Section 1 of the*Charter*. The federal government argued the exclusion of same-sex couples from marriage was necessary to encourage procreation and child-rearing. The Ontario Court of Appeal disagreed and concluded that even if the encouragement of procreation and child-rearing was an important public objective, it was not necessary to exclude same-sex couples from marriage in order to achieve this goal. Heterosexual couples would not stop having children because same-sex couples were permitted to marry. Another argument for same-sex marriage was that heterosexual couples often do not procreate, while many same-sex couples have and raise children. Finally, the exclusion of same-sex couples from marriage was regarded as a very severe violation of the couples' equality rights, as the couples were excluded from a fundamental societal institution. Finally, as same-sex couples were excluded from a fundamental societal institution (marriage), this exclusion was regarded as

a very severe violation of their section 15 equality rights.

The Court of Appeal declared the traditional definition of marriage to be invalid and changed the definition to "the voluntary union for life of two *persons* to the exclusion of all others." (emphasis added)

Then Prime Minister Jean Chrétien announced that the federal government would not appeal the Ontario Court of Appeal ruling. Instead, the Liberal government would introduce new legislation to change the definition of marriage to include same-sex couples. According to the proposed legislation, marriage was to be the lawful union of two persons to the exclusion of all others, and nothing in the legislation would interfere with the freedom of officials of religious groups to refuse to perform marriages that were not in accordance with religious beliefs.

(b) ***Reference Re Same-Sex Marriage***[vii]

The Liberal government referred the new legislation to the Supreme Court of Canada (SCC), asking the Court three questions:

1. Did the federal government have the authority to change the definition of marriage without the permission of the provinces?
2. Was the inclusion of same-sex couples within the definition of marriage consistent with the *Charter*?
3. Did the freedom of religion guaranteed by the *Charter* protect religious officials from being compelled to perform a marriage between same-sex couples that was contrary to the religious beliefs of those officials?

In 2004, the Liberal government, led by Paul Martin, added a fourth question to the reference:

4. Is the traditional definition of marriage consistent with the *Charter*?

In December 2004, the SCC ruled that the federal government could change the legal definition of marriage without the permission of the provinces. The Court also found that the new definition of marriage did not violate the *Charter*. This did not mean that the *Charter* required the new definition, but simply that in legalizing same-sex marriage the government was not violating any constitutional rights under the *Charter*.

The SCC held that religious institutions could not be forced to perform same-sex marriage ceremonies that went against the tenets of their faith.

The Court exercised its discretion and chose not to answer the fourth question referred to it. The Court held that this issue had already been addressed by provincial lower courts and accepted by the federal government.

Impact of the Judicial Decisions

These judicial decisions had two important impacts on the politics of same-sex marriage in Canada.

First, the ruling by the Ontario Court of Appeal, and the decision of the federal government not to appeal that ruling, effectively broadened section 15 rights to include the right to same-sex marriage.

Second, the ruling by the SCC was important in that it eliminated the provinces from the picture. While many provinces were quick to adopt the new definition of marriage, some provinces protested. Alberta, in particular, indicated it might use the *notwithstanding clause* to protect the traditional definition of marriage. However, given the Supreme Court of Canada's ruling, it is generally accepted that only the federal government has the authority to make laws relating to marriage. Further, all provinces and territories in Canada must, under the *Constitution*,[viii] abide by the federal government's decisions in this area.

***Marriage for Civil Purposes Act* (Bill C-38)**
In February 2005, the Liberal government introduced Bill C-38 in the House of Commons. The *Act became law on July 20, 2005.*

This *Act* extends the definition of marriage to include same-sex couples. The legal definition of marriage is: "[m]arriage, for civil purposes, is the lawful union of two persons to the exclusion of all others."[ix]

The *Act* also gives full legal benefits and obligations of marriage to same-sex couples.[x]

Additionally, the Act says that Parliament's commitment to equality rights bars the use of the *Charter's* notwithstanding clause to deny the right of same-sex marriage.[xi]

Finally, the *Act* provides for the freedom of religion for churches and religious groups.[xii] It is recognized that officials of religious groups are free to refuse to perform marriages that are not in accordance with the religious views of their respective faiths.

2006 Election of Conservative Government

During the 2006 federal election campaign, then Conservative Leader Stephen Harper indicated he would bring the *issue of same-sex marriage* back to Parliament for another vote if elected Prime Minister. Should Members of Parliament vote to restore the traditional definition of marriage, then Harper would do so without using the notwithstanding clause.

Many Canadian constitutional law experts believe that the only way Parliament could overturn same-sex marriage is to use the notwithstanding clause, since "any law enshrining the traditional definition would inevitably be found to be discriminatory under the *Charter*."[xiii] Additionally, if the Conservatives did pass a law banning same-sex marriage without using the notwithstanding clause, the law would have no effect in the provinces and territories where courts struck down the traditional definition of marriage as a violation of the *Charter*.[xiv]

At present, we have yet to see whether this issue will once again raised in Parliament and how the Conservative government plans on dealing with same-sex marriage.

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[i] *Marriage for Civil Purposes Act*, S.C. 2005, c. 33 .
[ii] The other countries that have legalized same-sex marriage include: the Netherlands, Belgium, and Spain.
[iii] The provinces which struck down the traditional definition of marriage prior to the Supreme Court of Canada ruling were: Ontario, British Columbia, Quebec, Manitoba, Nova Scotia, Saskatchewan, Newfoundland, and New Brunswick.
[iv] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the*Canada Act 1982* (U.K.), 1982, c.11.
[v] CBC Indepth: Same Sex Rights.
[vi] *Halpern v. Canada (Attorney General)* (2003), 65 O.R. (3d) 161 (C.A.).
[vii] *Reference Re Same-Sex Marriage*, [2004] 3 S.C.R. 698.
[viii] *Constitution Act, 1982*, s.52, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.
[ix] *Marriage Act*, *supra* note 1 at s. 2.
[x] *Ibid*. at ss. 5-15.
[xi] *Ibid*. at preamble.
[xii] *Ibid*. at s. 3.
[xiii] Michael Den Tandt & Campbell Clark "Harper stirs up more debate on same-sex" *The Globe and Mail*(17 December 2005), online. CBC: Indepth: Same-Sex Rights, online..
[xiv] *Ibid*.