

Canada's Court-Led Journey to Same-Sex Marriage

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During the thirty years from Canada's first legal case against the definition of marriage to that definition's amendment in 2005, the Provincial and Supreme Courts have been at the forefront of making same-sex marriage a legal reality. This essay chronicles the numerous legal battles Canadians have undergone in pursuit of marriage equality, and submits that those court cases were the driving force behind changing government policy; in every province as well as at the federal level, amendments to marriage acts were made in response to court decisions rather than by proactive government action. While this can be attributed to the different nature of judicial and legislative bodies, the latter having to answer to a large portion of voters opposing same-sex marriage, in several instances, government action actually slowed changes advocated by the courts. Canada's ability to claim being the fourth country in the world to legalize same-sex marriage is thus owed to the many Canadians who took their grievances to court and the many more who supported them, rather than the governments that accepted those court decisions after the fact.

Canada's legal definition of marriage met its first official challenge in 1974 when Chris Vogel and Richard North applied for a marriage license.¹ Their attempt marked the beginning of thirty years of growth in legal equality and protection from discrimination for same-sex couples. The bulk of that development took place in the 1990s with a number of landmark cases that saw "sexual orientation" placed on equal ground with the other descriptors of section 15(1) of the *Charter of Rights and Freedoms*, and numerous amendments to existing

¹ Pamela Dickey Young, *Religion, Sex, and Politics: Christian Churches and Same-Sex Marriage in Canada* (Winnipeg: Hignell, 2012), 10.

discriminatory laws. By 2002, the right of same-sex couples to marry was being debated at both the provincial and federal levels of government. Finally in 2003 the first definite breakthroughs were made in a series of Provincial Court of Appeal cases: the *Marriage Act*'s definition of marriage was found to violate rights protected under section 15(1) of the *Charter of Rights and Freedoms* and would therefore be revised. In the next two years nearly every province corrected their act's definition, and on 19 July 2005, same-sex civil marriage was legalized by Canadian Parliament. This essay tracks the numerous cases that led to the 2005 legislation and Canadians' reactions to the marriage debate to illustrate that, in this instance, the higher courts were the true advocates for equality while elected governments typically slowed its progress.

Before the legalization of same-sex marriage could be discussed in court, the discrimination of Canadians based on sexual orientation had to be legally eliminated. The first steps toward this came in December of 1967, with Prime Minister Pierre Trudeau's Omnibus Bill, and December of 1977, with Quebec's inclusion of sexual orientation "as a prohibited ground of discrimination in the Quebec Human Rights Code."² Fifteen years later, the 1992 Ontario Court of Appeal case *Haig v. Canada* ruled, "that the absence of sexual orientation from the list of proscribed grounds of discrimination in s. 3 of the Canadian Human Rights Act was unconstitutional and in violation" of section 15(1) of the *Charter*.³ Though sexual orientation was not explicitly listed under s. 15, it was found to be an "analogous ground for discrimination."⁴ Three years later,

² Jane Adolphe, "The Case Against Same-Sex Marriage in Canada: Law and Policy Considerations," *BYU Journal of Public Law* 18, no.10 (2004): 488.

³ Adolphe, "The Case Against Same-Sex Marriage in Canada," 488.

⁴ *Haig v. Canada*, [1992] C.H.R.R.D., 226.

in the 1995 Supreme Court Case *Egan v. Canada*, that decision was upheld.⁵ In the *Egan* case, a homosexual couple in their sixties fought the limitations the term “spouse” imposed upon their ability to collect benefits under the *Old Age Security Act*. While the Court agreed that sexual orientation was protected under s. 15(1) they divided over the issue of whether the term “spouse” was discriminatory as it stood. Justice L’Heureux-Dubé offered up a definition of discrimination in her dissenting opinion, stating:

“when members of that group have been made to feel, by virtue of the impugned legislative distinction, that they are less capable, or less worthy of recognition or value as human beings or as members of Canadian society, equally deserving of concern, respect, and consideration.”⁶

Her definition, now well accepted, advocated a fairly broad understanding of discrimination and demonstrated many Canadians’ growing acceptance of each other regardless of difference. In 1996 with the passing of Bill C-33, “discrimination was prohibited on the ground of ‘sexual orientation’ under the federal Human Rights Act.”⁷ Acceptance of same-sex partnerships had grown to the point where they were being legally protected. Equality for such couples was still a long way off however, and it would take several court battles in the first years of the next century to secure them the legal ability to marry.

The year 2003 was one of definite progress in the legal realm for same-sex marriage. On 1 May, the British Columbia Court of Appeal released the verdict on *EGALE Canada Inc. v.*

⁵ Young, *Religion, Sex, and Politics*, 11.

⁶ *Egan v. Canada*, [1995] 2 S.C.R. 513: 545.

⁷ Young, *Religion, Sex, and Politics*, 11.

Canada. This recognized barriers to same-sex marriage in both the province's definition of marriage, the "voluntary union for life of one man and one woman," and the accepted "legal definition of marriage under section 91(26) of the *Constitution Act, 1867*."⁸ It concluded that "the common law definition of marriage violated the right to equality under section 15" of the *Charter of Rights and Freedoms* and should therefore be amended.⁹ The case arose when seven couples were denied marriage licenses by British Columbia's Director of Vital Statistics and consequently petitioned the court with support from Equality for Gays and Lesbians Everywhere Canada (EGALE).¹⁰ The first verdict delivered, by BC's lower court, deemed the definition of marriage inalterable because it survived in the Canadian constitution through an 1866 case from the House of Lords: *Hyde v. Hyde and Woodmansee*.¹¹ In that case, marriage was declared to "be defined as the voluntary union for life of one man and one woman, to the exclusion of all others." This definition was offered in reaction to a case regarding polygamy and divorce, however, and precluded by the Justice's own limitation on marriage: "as understood in Christendom."¹² Though the circumstances surrounding the formulation of the definition were not directly addressed in the *EGALE* case, it is interesting to note that the 2003 definition of marriage was based on a one hundred-forty year old statement made in response to a very specific issue. The lower court argued that changing the *Hyde* definition (it being the legal definition at the creation of the *Constitution Act, 1867*) would entail the same process as making

⁸ Connie L. Mah, "The History of Marriage," *Law Now* 29, no.6 (June/July 2005).

⁹ Mah, "The History of Marriage."

¹⁰ Julie C. Lloyd, "Defining Marriage, Step One: *EGALE v. Canada*," *Alberta Law Review* 39, no.4 (April 2002): 963.

¹¹ Lloyd, "Defining Marriage, Step One," 963.

¹² Lloyd, "Defining Marriage, Step One," 967.

a constitutional amendment. Consent from multiple provinces and Parliament would be necessary, and therefore the ability to change the definition of marriage was *ultra vires* BC provincial government.¹³ When *EGALE* reached the Court of Appeal however, it was subjected to a *Charter of Rights and Freedoms* analysis, and, upon finding that the standing definition of marriage violated s. 15(1), the question of its constitutional sanctity became irrelevant. The definition of marriage would be corrected to read “the lawful union of two persons to the exclusion of all others.”¹⁴ That modification was to be suspended to allow Parliament time to comment: an action that angered all those who had so nearly won the ability to marry.

One month later, on 10 June 2003, the Ontario Court of Appeal passed judgement on *Halpern et al. v. Canada*, agreeing that the current common law definition of marriage wrongly interfered with s. 15(1) and did “not constitute a reasonable limit ... as contemplated by s. 1” of the *Charter*.¹⁵ The Court declined suspending the modification to Ontario’s *Marriage Act*, against the advice of the Attorney General, because suspension “would perpetuate the charter violation.”¹⁶ Upon the announcement of the *Halpern* decision and redefinition, British Columbia lifted its suspension as well.

By the end of 2004, four provinces and one territory had followed suit: Quebec in *Catholic Civil Rights League v. Hendricks*, the Yukon in *Dunbar v. Yukon*, Manitoba in *Vogel v. Canada*, Nova Scotia in *Boutilier v. Nova Scotia*, and Saskatchewan in *N.W. v. Canada*. In *Dunbar*, the judgement in

¹³ Lloyd, “Defining Marriage, Step One,” 964.

¹⁴ Adolphe, “The Case Against Same-Sex Marriage in Canada,” 482.

¹⁵ Sharon Roberts and Tim Outerbridge, “Same-Sex Unions and the Law: An Introduction,” *Alberta Law Review* 41, no.2 (September 2003): 569.

¹⁶ Graham Gee and Gregoire Webber, “Same-Sex Marriage in Canada: Contributions from the Courts, the Executive and Parliament,” *The King’s College Law Journal* 16, no.1 (Winter 2005): 135.

favour of a new definition was accompanied by costs ordered against the Province for not “noting the matter should not have gone ahead given the decisions on point in other jurisdictions.”¹⁷ Evidently, some felt the question of same-sex marriage legality had already been answered, but governments were not accepting the change freely. Every amendment of a provincial marriage act before July 2005 was the result of a court case rather than proactive government intervention. In the marriage issue, the judicial system was essential for correcting the inequality: something that would be true at the federal level as well.

Parliament had first officially addressed same-sex marriage in 2002 through the Standing Committee on Justice and Human Rights.¹⁸ While the Committee opened up a discourse on the subject, it did not actively push for any changes. Critics argued that the Committee’s wide scope of issues to address ensured the marriage debate was lost amongst broader discussions.¹⁹ Notable government action on the issue did not occur until 2003, when Minister of Justice Martin Cauchon pushed for the redefinition of marriage after the *Halpern* decision’s release.²⁰ The judgment and Cauchon’s support were major issues of debate at a Liberal cabinet meeting held on 17 June 2003, at which it was decided that the government would not be appealing the redefinition decisions of the provinces.²¹ After that point, Prime Minister Jean Chrétien gave assent for granting government approval for same-sex marriage (what would eventually be Bill C-38), though his party was divided over when and how they should attempt to pass the motion. With the planned party takeover by Paul Martin

¹⁷ Mah, “The History of Marriage.”

¹⁸ Sylvain Larocque, *Gay Marriage: The Story of a Canadian Social Revolution*, trans. Robert Chodos, Louisa Blair, and Benjamin Waterhouse (Toronto: James Lorimer & Company, 2006), 91.

¹⁹ Larocque, *Gay Marriage*, 91.

²⁰ Larocque, *Gay Marriage*, 141.

²¹ Larocque, *Gay Marriage*, 145.

imminent they felt there would not be enough time to pass a bill before the change.²² Further, waiting and submitting the issue to the Supreme Court would subdue some of the protest the party was sure to face; if the court ruled in favour of same-sex marriage, the Liberals would be seen as following suit rather than as the driving force behind the idea. While this may have been a wise political move for the party, it was decided on behalf of party interests rather than those of the Canadians waiting for marriage equality.

Parliament referred the task of redefining marriage to the Supreme Court by submitting three questions: “Does Parliament have the exclusive legal authority to define marriage? Is the proposed act compatible with the Charter of Rights and Freedoms? Does the Constitution protect religious leaders who refuse to sanctify same-sex marriage?”²³ Paul Martin, after replacing Chrétien as Prime Minister on 12 December 2003, submitted a fourth question to the Supreme Court: “Is the opposite-sex requirement in the common law definition of civil marriage consistent with the *Charter*?”²⁴ The Court denied an answer to that question, however, on the principle that “it was unclear what ‘hypothetical benefit Parliament might derive from an answer.’”²⁵ It was effectively covered by the previous questions and any decision specifically regarding the issue would not have affected the overall answer or the way the charter’s notwithstanding clause might be used in the future. Here, government action was simply a hindrance.

On 9 December 2004 the Supreme Court released its *Reference re Same-Sex Marriage*, affirming that the *Charter of Rights and Freedoms* qualified all previous court decisions that

²² Larocque, *Gay Marriage*, 146.

²³ Adolphe, “The Case Against Same-Sex Marriage in Canada,” 480.

²⁴ Gee and Webber, “Same-Sex Marriage in Canada,” 136.

²⁵ Gee and Webber, “Same-Sex Marriage in Canada,” 140.

found the definition of marriage violated s. 15(1). The Court also agreed that the definition as per the *Hyde* ruling was not inalterable; it invoked the “living tree” interpretation of the constitution, which highlighted its ability to adapt to the changing needs of Canadian government and society.²⁶ In the reference, the Court emphasized the distinction between marriage and civil unions, ensuring that their specific support of same-sex marriage as well as civil unions was clearly stated.²⁷ They made it well known that, “if ‘civil unions are a relationship short of marriage,’ they are unequal to marriage,” thereby eliminating any opportunity to deny same-sex couples the full ability to marry.²⁸ Importantly, the Court also stated that religious officials opposed to marrying same-sex couples should not be punished for denying service to such couples, as they are exercising their right to religious freedom as protected under s. 2(a) of the *Charter of Rights and Freedoms*.²⁹

The reference decision was appreciated by many Canadians, but there were also those who felt apprehensive about the new idea of marriage. By June 2005, New Brunswick and Newfoundland had joined the pro-same-sex marriage provinces, leaving only Prince Edward Island, Alberta, and the two remaining territories behind.³⁰ Of those, Alberta’s aversion to redefining marriage was the most publicized. A large concern of those opposed to redefinition was that “couples who were denied marriages might launch civil and human rights proceedings against such churches” and religious institutions that denied

²⁶ Gee and Webber, “Same-Sex Marriage in Canada,” 137.

²⁷ Gee and Webber, “Same-Sex Marriage in Canada,” 138.

²⁸ Gee and Webber, “Same-Sex Marriage in Canada,” 138.

²⁹ Gee and Webber, “Same-Sex Marriage in Canada,” 138.

³⁰ “A Primer on Bill C-38: the Path to a Same-sex Marriage Law in Canada,” *Canadian Press NewsWire* (28 June 2005).

them.³¹ Alberta has a strong Christian community that had been tied to politics during the long domination of the Social Credit Party.³² As such, the choice to support or oppose redefinition was a formidable obstacle for the Premier; either decision would anger a sizable portion of the population. This did not seem to concern Conservative Premier Ralph Klein, however, as his stance was clear. Klein announced his dissatisfaction with the *Halpern* ruling, stating, “not to say we won’t do our part to protect gay rights. But marriage is where we draw the line.”³³ The issue of same-sex marriage had actually been suspended in 2000 when the provincial government invoked the notwithstanding clause of s. 33(1) of the *Charter of Rights and Freedoms*. This meant the government could refrain from making any decisions regarding redefinition until 2005 at the earliest, and even then the amendment of the *Alberta Marriage Act* was somehow overlooked. Only in 2014 did Alberta announce it would make the change to its Act.³⁴

The Alberta government’s actions illustrate that redefining marriage was not forced upon the provinces by an external power. The Supreme Court reference did not bind any government to accepting its decision, parliament included. Further, “nothing precludes any Canadian or provincial government from invoking the notwithstanding clause of section 33 of the *Charter of Rights and Freedoms* to prohibit same-sex marriages,” as was the case in Alberta and could still occur today. The court decisions within the provinces did force the amendments of provincial marriage acts, but appeals were put

³¹ Young, *Religion, Sex and Politics*, 66.

³² Gloria Filax, “Producing Homophobia in Alberta, Canada in the 1990s,” *Journal of Historical Sociology* 17, no.1 (March 2004): 88.

³³ Larocque, *Gay Marriage*, 77.

³⁴ “Alberta to Recognize Validity of Same-Sex Marriages,” *CBC News*, 17 April 2014.

forth by groups suffering discrimination, not by government parties advocating equality. Likewise at the federal level, although the Supreme Court did not force parliament to amend marriage's definition, change was not set in motion until the provinces' widely publicized cases and Supreme Court reference had been released. Without the wave of changes enacted by courts across the country, the federal cabinet would assuredly not have proposed Bill C-38.

Also known as the *Civil Marriage Act*, Bill C-38 redefined civil marriage as “the lawful union of two persons to the exclusion of all others.”³⁵ The act itself consisted of a considerable preamble, which many felt was necessary for “establishing a context and rationale for legislation,” and fifteen clauses.³⁶ It amended eight existing federal acts “including the *Canada Business Corporations Act*, the *Divorce Act*, and the *Income Tax Act*.”³⁷ The bill was met with fierce opposition by many in Parliament, most significantly by the Conservatives, who passed a motion to stop it before its Second Reading, though that was not successful.³⁸ As stated previously, a major concern for many was that legislating same-sex marriage would lead to the discrimination of opposing religious groups. On this point however, the Supreme Court had made it clear in their reference that “the mere recognition of the equality rights of one group cannot, in itself, constitute a violation of the rights of another.”³⁹ Bill C-38 itself clearly promised that religious institutions could deny marriage services to same-sex couples without fear of legal

³⁵ Mary C. Hurley, “Bill C-38: The Civil Marriage Act,” Parliament of Canada: Law and Government Division.

³⁶ Hurley, “Bill C-38: The Civil Marriage Act.”

³⁷ Peter Bowal and Carlee Campbell, “The Legalization of Same Sex Marriage in Canada,” *American Journal of Family Law* 21, no.2 (Summer 2007): 37.

³⁸ Gee and Webber, “Same-Sex Marriage in Canada,” 142.

³⁹ Hurley, “Bill C-38: The Civil Marriage Act.”

action, as s. 2(a) of the *Charter of Rights and Freedoms* was just as relevant and protective as s. 15(1). The bill was debated over a period of several months, during which representatives from religious and advocacy communities, as well as academics and legal advisors, delivered testimony on the issue. It survived all three readings with only one amendment from the original report, and officially passed the House of Commons on 28 June 2005 in a vote of 158 to 133.⁴⁰ On 19 July it passed the Senate and received Royal Assent the next day, making Canada the fourth country to legalize same sex-marriage.⁴¹

Parliament's legal authorization of same-sex civil marriage was a major step towards making Canada a more inclusive and indiscriminatory country because it set the standard for civil marriage legislation. Of course, most provinces had already converted to the new definition, and the ones left behind could not be forced by parliament to amend their marriage acts—solemnization of marriage falls under provincial jurisdiction in s.92 (12) of the constitution.⁴² While Bill C-38 was a major step for same-sex couples, it did not put an end to the marriage debate. Many Canadians and political parties continued to oppose the redefinition: although same-sex marriage was legally permitted in Prince Edward Island and Alberta after 2005, PEI did not amend its *Marriage Act* vocabulary until 2009, and Alberta only announced its intention to do so in April 2014.⁴³

Looking at these two provinces and the numerous court battles it took to change legislation in the rest of Canada, it is easy to condemn elected governments for so reluctantly amending marriage laws. A decade passed between the Ontario

⁴⁰ Hurley, "Bill C-38: The Civil Marriage Act."

⁴¹ Hurley, "Bill C-38: The Civil Marriage Act."

⁴² Can Const. of 1867, art. 92, s. 12.

⁴³ "P.E.I. Proclaims Same-Sex Marriage Amendments," *CBC News*, 21 December 2009.

Court's ruling in *Haig* that "sexual orientation" is analogous to the terms specified in s. 15(1) of the *Charter of Rights and Freedoms* and the first provincial Court of Appeal case won for same-sex couples, and both those gains for equality were forced upon government by the courts. It cannot be forgotten however that elected parties and judicial bodies have different roles—governments, in theory, must answer to their voters, and there were as many voices opposed to redefining marriage as voices in support of it. Only an impartial legal body, largely free from the consequences of voter opinion, had the authority and ability to assess the *Charter of Rights and Freedoms*' application to marriage law and encourage redefinition.

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