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The Saskatchewan Court of Appeal's Marriage Commissioners Decision – the never-ending fight for human rights of same-sex couples

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Cases and Legislation Commented On:

In the Matter of Marriage Commissioners Appointed under the Marriage Act, SS 1995, c M-4.1, 2001 SKCA 3; *Marriage Act*, RSA 2000, c M-5.

The Saskatchewan Court of Appeal considered two proposed amendments to the *Marriage Act*, S.S. 1995, c. M-4.1. The *Act* legislates on the solemnization of marriage in Saskatchewan. It provides for specific religious officials and marriage commissioners to solemnize marriages. The Lieutenant Governor in Council in Saskatchewan sought the Court's opinion on potentially amending the *Marriage Act* after complaints from marriage commissioners who said that solemnizing same-sex marriages breached their rights under s.2(a) of the *Charter*.

There were two potential amendments suggested, stated as Schedule A and Schedule B:

> *Schedule A*
> 28.1(1) Notwithstanding *The Saskatchewan Human Rights Code*, a marriage commissioner who was appointed on or before November 5, 2004 is not required to solemnize a marriage if:
>
> (a) to do so would be contrary to the marriage commissioner's religious beliefs; and
>
> (b) the marriage commissioner has filed the notice mentioned in subsection (2)
>
> within the period mentioned in that subsection.
>
> (2) A marriage commissioner who wishes to rely on the exemption mentioned in subsection (1) must file a written notice with the director, within three months after the date this section comes into force, stating that the marriage commissioner intends to rely on the exemption.
>
> (3) A marriage commissioner who does not file the notice mentioned in subsection (2) within the required period cannot rely on the exemption mentioned in subsection (1).
>
> *Schedule B*
> 28.1 Notwithstanding *The Saskatchewan Human Rights Code*, a marriage commissioner is not required to solemnize a marriage if to do so would be contrary to the marriage commissioner's religious beliefs.

The idea behind both amendments was to allow marriage commissioners the ability to deny their services to a same-sex couple in situations where same-sex marriage was contrary to the marriage commissioner's religious beliefs.

Schedule A proposed allowing those marriage commissioners who had been appointed before *Reference re Same-Sex Marriage*, 2004 SCC 79, [2004] 3 SCR 698 to opt out based on religious grounds. Schedule B provided a more wide-reaching exemption for all marriage commissioners to opt out when solemnizing a marriage would be contrary to their religious beliefs.

The Saskatchewan Court of Appeal found that both amendments offended the *Charter* and could not be justified under section 1. For an analysis of how this decision affects Section 15 jurisprudence see Denise Réaume, "Rare Bird Spotted: A Successful Adverse Effects s. 15 Equality Claim" on the Women's Court of Canada blog.

The Court of Appeal addressed both Schedule A and B in the same analysis because it did not agree that limiting the exemption only to those marriage commissioners who had been appointed before 2004 would have any less effect on same-sex couples and thereby make the amendment constitutional. The Court also noted that both options reach further than just same-sex couples, and could be used by marriage commissioners to refuse other kinds of unions such as inter-racial marriages.

In assessing Schedules A and B the court said that both would result in same-sex couples being refused the services of some marriage commissioners. This effect would be particularly difficult in rural areas where there are fewer marriage commissioners available. In addition, a couple might have to experience the refusal of not just one, but two or more marriage commissioners who will not perform a same-sex marriage. This would have a significant impact, not just a minor impact, on same-sex couples and an impact one that would not be experienced by opposite-sex couples. Therefore the Court of Appeal found that both Schedules created a negative distinction based on sexual orientation that was discriminatory and could not be saved by section 1. In making this finding the Court of Appeal noted that there are other ways of accommodating religious beliefs of marriage commissioners, such as couples being referred through the Director of the Marriage Unit to commissioners who are available for the specific date and willing to perform their marriage.

While Alberta has not had a similar case, there has been a great deal of resistance to same-sex marriage in the province. The Alberta government threatened to use the notwithstanding clause to opt out of the Supreme Court of Canada support for a definition of marriage as between "two persons" (*Reference re Same-Sex Marriage*, 2004 SCC 79, [2004] 3 S.C.R. 698). However, over time the Alberta government gave up on fighting this definition of marriage since marriage falls under federal powers. Despite this, the *Marriage Act*, R.S.A. 2000, c. M-5, which deals with the solemnization of marriage, which is within provincial jurisdiction, still defines marriage as "marriage between a man and a woman". This definition calls into question whether the Act actually technically covers the solemnization of marriage for a same-sex couple. In practice, however, it is being used for the solemnization of the marriages of same-sex couples. The Act's preamble describes the political reasons behind this homophobic definition. It says:

> WHEREAS marriage is an institution the maintenance of which in its purity the public is deeply interested in;

> WHEREAS marriage is the foundation of family and society, without which there would be neither civilization nor progress;
>
> WHEREAS marriage between a man and a woman has from time immemorial been firmly grounded in our legal tradition, one that is itself a reflection of long standing philosophical and religious traditions; and
>
> WHEREAS these principles are fundamental in considering the solemnization of marriage;

The only change that has been made to the *Act* is taking out section 2 which said that it operated *notwithstanding* the *Charter of Rights and Freedoms* and the *Alberta Bill of Rights*. This vague acknowledgement of a change allowing same-sex marriage did not show up in the *Marriage Act* until 2007, almost three years after the Supreme Court of Canada *Reference re Same-sex Marriage* decision. The fact that section 2 is no longer in effect is a reflection of the law which says that using the notwithstanding clause only lasts for five years before it has to be renewed. The *Marriage Act* originally came to be in 2002 and so by 2007 section 2 had expired.

Even in 2005, as the rest of the country celebrated same-sex marriage, Alberta's government continued to threaten the use of the notwithstanding clause to prevent same-sex couples from marrying in Alberta. Two gay men, Keith Purdy and Rick Kennedy, applied at the registry office for a marriage license but were refused. They filed a complaint with the Human Rights Commission that was eventually dropped when the Alberta Government admitted that they had no legal recourse against same-sex marriage. Alberta also reacted to the same-sex marriage decision by introducing Bill 208 the *Protection of Fundamental Freedoms (Marriage) Statutes Amendment Act, 2006*. Bill 208, which proposed certain protections for those who do not believe in same-sex marriage, was defeated.

This history of blocking, denying and resisting marriage for same-sex couples has had a lasting effect on the understanding of the average Albertan regarding the rights of gays and lesbians. Some Albertans still believe it is illegal for same-sex couples to get married in Alberta even though same-sex couples have had this right for over six years.

Federal legislation called the *Civil Marriage Act* S.C. 2005, c.33 states in section 3: "It is recognized that officials of religious groups are free to refuse to perform marriages that are not in accordance with their religious beliefs." However, marriage commissioners are not officials of religious groups; they are hired by the government to perform civil marriages. The *Civil Marriage Act* states in section 2 that "marriage, for civil purposes, is the lawful union of two persons to the exclusion of all others." What is sad is that six years after gays and lesbians gained this right to legally marry their partners, there is still confusion and debate as to whether same-sex couples are or should be able to fully access this right. The Saskatchewan Court of Appeal case takes another step toward, yet again justifying the human rights of gays and lesbians.