

Same-Sex Marriage in Canada

Implications of Inactivity

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Currently in Canada, we are facing ever-increasing government pressure to deal with the issue of recognition of same-sex unions. Advocacy groups such as EGALE (Equality for Gays and Lesbians) have organized challenges to legislation throughout Canada, and court cases are pending in British Columbia, Ontario and Quebec. The whole political and social system in Canada is facing a crisis of justice and legislation under the weight of this new pressure; there's no clear, decisive route where rights for gays and lesbians to marry would be secured, and whether or not they should even *be* secured. Application of these rights to different elements of society such as to private business, government obligations, and religious groups have provided interesting consequences. For years same-sex marital rights have been characterized by confusion with jurisdiction, passive legislations (in the areas of common-law spouses and government benefits) and increasing litigation. A lack of definitive codification has led to court decisions incongruent with constitutional legislation and has put pressure on the legal representatives of Canadians (namely, the parliament) to render a decision. Gays and lesbians have been extended almost all of the legal and economic rights that are afforded to opposite-sex unions throughout the latter half of this century, but still lack the official status many would like. They claim that this lack of official status undermines "their human dignity, diminishes their families and discriminates against them in violation of their right to equality guaranteed by the Canadian Charter of Rights and Freedoms" (<http://www.egale.ca/marriagebrief.asp>). The federal government is thus facing a major decision on whether or not to put the official stamp of approval on same-sex unions (Bourassa 2002, 135). This decision made by the government, in the opinion of many

leading publications such as the *Globe and Mail* state that “The legalization of gay marriage is inevitable. Everything that has happened over the past decade points to it...the question for government is: Do we get ahead of the change, or do we stand in the way” (*January 16th, 2001*) (Bourassa 2002, 145). Many of the institutions and agreements that exist in Canada depend on an overriding government definition of terms such as “couple”, “family” and “marriage”. The meaning of collective agreements would be altered, court cases rethought and judged differently, and benefits and obligations altered. The situation that we are currently facing has two major areas of discussion which should be addressed with respect to the government’s position on same-sex marriage legislation, and the implications of such laws. The first is the impact that any such legislation would have on the market, and the effect on the way that public and private corporations alike conduct their business. With this said it is tempting to champion that legislation would profoundly change the way business in Canada functions, but it must also be acknowledged that legislation would have little impact on the structure and character of Canadian business and benefits. Upon careful examination, we find ourselves in a situation where government legislation and recognition is playing a ‘catch-up’ game with corporate Canada (Bourassa 2002, 126). Rather than pioneering social change in Canada, the government is responding to changes in the private realm of Canadian society (Bourassa 2002, 129). The second area that should be considered is the real implications of the policy of inactivity when it comes to government decision-making regarding this issue, and the ethical morass that is being generated. Canada’s justice minister Anne McLellan stated, “If Parliament does not address this issue, the courts will continue to hand down decisions in a piecemeal fashion, interpreting narrow points of law on specific questions before them. This guarantees confusion and continuing costly litigation.” (Bourassa 2002, 120). Unfortunately, the utilitarianist litigation costs that she fears are not

the only ethical implications should be considered. Inconsistencies between civil law and common law creates ethical disarray which can be much more damaging.

When coming to the subject of same-sex marriage the inclination is to believe that its recognition would extend the benefits that heterosexual couples enjoy to their homosexual counterparts. An inequity between the rights of same-sex couples and opposite-sex couples did in the past permeate Canadian society as seen in the case *Canada (attorney General) v. Mossop*, in which the appellant had cohabitated with his partner for a period of ten years. Under the collective agreement, bereavement leave upon the death of a member of an employee's immediate family was permitted. The appellant took this leave upon the death of his partner's father. The term "immediate family" in the collective agreement remained undefined, referring rather to extrinsic statutes (both federal and provincial). The ruling was made on February 25th, 1993 and at the time the Supreme Court of Canada found that the Canadian Human Rights Act did not prohibit discrimination on the basis of sexual orientation. The discrimination was not on the basis of "family status" within the meaning of the Canadian Human Rights Act. This issue of definition, when it comes to the terms 'spouse' and 'immediate family', was often left undefined in collective agreements which covered a large proportion of employees in both the public and private sector. Any federal decision on expanding the aforementioned definitions to cover same-sex partners would have had a great impact on the grievance process and the representation rights of bargaining members. In fact, this is exactly what happened in a more indirect sense. On the influence of this case, and others the Canadian Human Rights act was amended to include sexual orientation as a basis for discrimination. This gradual improvement in the civil status of homosexual couples culminated in the passing of Bill C-23 on February 15th, 2000. The exercise of these rights can clearly be seen in such cases as *Egan vs. Canada*, in which the

appellant claimed pension benefits from his same-sex common law spouse. In 1992, the human rights board of inquiry ruled that the Ministry of the Attorney General of Ontario must pay benefits to civil service employees' spouses, regardless of sexual orientation (Bourassa 2002, 23). We see the permeation of such legislation through other decisions made throughout the court system. A more local example of this is the case of *Chamberlain v. Surrey School District No. 36*, in which James Chamberlain, a Kindergarten teacher appealed a decision by the school board not to feature books illustrating same-sex couples in Surrey classrooms. The Supreme Court allowed the appeal since the school board's decision violated the principles of secularism and tolerance in the Canadian Human Rights Act. The fight for equal rights in terms of business when it pertains to the benefits individuals receive, the recognition that they enjoy in the workplace, and the way business is handled throughout Canada was ultimately amended by Bill C-23. Irrespective of this legislation, the business environment in Canada often extended equal rights to same-sex individuals. This can clearly be seen throughout a number of Collective Agreements. A good example of this is the collective agreement between *The Nurses' Bargaining Association & The Health Employers Association of British Columbia*. Article 31, the non-discrimination article states:

- (A) The Employer and the Union subscribe to the principles of the Canadian Human Rights Act.
- (C) The Employer and the Union agree that there shall be no discrimination, interference, restriction or coercion exercised or practiced with respect to any employee on the basis of sexual orientation.

It is written into the Collective Agreement in plain language that sexual orientation is not to be a basis for any discrimination. This interpretation has been applied in many grievance arbitrations from everything to claims in scope of benefits, to hiring and firing.

Article 33 of this collective agreement include stipulations for leaves of absences stating:

Compassionate leave of absence with pay shall be granted, upon request, to regular employees in the event of death of a spouse (including common law), child, parent, brother, sister, mother-in-law, father-in-law, grandparents, grandchild and a relative permanently residing in the employee's household or with whom the employee permanently resides.

This innocuous inclusion of 'spouse' and the 'permanently residing' sub-clause clearly illustrate the representation of same-sex couples in the application for leave. Through these collective agreements and the court cases, the inference is that same-sex orientation has been included in the common law spouse definition. Other than this, there is little more recognition that could be afforded same-sex couples upon federal recognition of the right of same-sex couples to marry; the gay-rights movement has made considerable headway the rights same-sex couples enjoy. CPP "survivor" legislation promised pension benefits to same-sex couples, and Parliament enacted the Modernization of Benefits and Obligations Act, extending benefits and obligations under 68 federal statutes to common-law heterosexual and homosexual couples. These rights are the fruits of these groups hard, legislative action, rather than flippant political recognition.

The real implications of the policy of inactivity when it comes to government decision-making are causing serious ethical problems within the system. Currently we are facing a political divide; the government continues to resist parliamentary legislation of same-sex marriage, while the common law system within Canada continues to foster its promotion. From a utilitarian standpoint, this divide is costing us in terms of litigation, human resources, and the satisfaction offered to our citizens. Although legal precedents have been moulded by leading cases, their findings in the true history of common law will undoubtedly be challenged. Having no firm directive from Parliament, there will always be challenges to these precedents. This maintenance of the status quo, which is characteristic of politics in Canada, is costing the government and business alike. Many collective agreements provide provisions for non-discrimination and the extension of benefits, but these clauses do not come without a price. Meticulous planning goes into the writing of

collective agreements, therefore, a more centralized definition would allow unions and employers to omit certain amounts of definition. Potential arbitration expenses over inconclusive collective agreements could be reduced or eliminated. A prime example of the costs of this inconclusiveness is seen in the controversy surrounding former Governor General Adrienne Clarke and her congratulatory letter to Mr. Bourassa and Mr. Varnell regarding their wedding. Activation of the “notwithstanding clause” was suggested by Alliance MPs and huge amounts of resources were tied up in this rather innocent congratulatory letter (Bourassa 2002, 257). Until the Canadian parliament, and more importantly, the Prime Minister, steps up and closes this political gap between statutory legislation and the courts, Canadians will continue to suffer from ambiguity. It is also important to really consider the ethical implications of the government’s inactivity. Canada is a country that has been a pioneer and champion of equal rights and multiculturalism in a turbulent global setting, and its legislation has often stood up to scrutiny in the face of both teleological and deontological ethics. Non-recognition of same-sex marriage violates Rawls’s principals of equal liberty, opportunity, and difference. Public opinion, although currently borderline has been shown to favour same-sex marriage, and the quality, as well as the quantity, of this opinion should be considered. Business in Canada has been shown to respond such legal precedents, and is far ahead of any governmental legislation regarding same-sex marriage. On this assumption, it is tempting to assume that this inactivity on the part of the government has little impact on the business of our country. This, however, could not be further from the truth. The impacts of an unethical governmental decision making, no matter how liberal the legal precedents, always has the ability to affect business in the long run. An extreme example of this can be seen through the impact on business in the formerly very liberal climate of the Weimar Republic and the influence of its governments’

unethical policies. This conciliation of ethical distress in our present situation may not have a blatantly apparent expense; corporate Canada is far ahead of any government legislation providing for the rights of same-sex marriages. What this calculation does not take into consideration is the serious impact of a government steering a country's politics in an unethical course. Those critics who say civil registries like those in France are suffice, and guarantee the rights of same-sex couples in terms of monetary benefits and civil rights are correct, but they do not factor in the costs of denying fundamental rights to individuals. They are rather skirting a potentially political issue by providing a Band-Aid solution. In eluding this issue, there has been the creation of a second-rate citizen, a citizen who is denied the right to marry, denied the right of equal liberty and equal opportunity.

Marriage, an institution dating back before biblical times is slowly being redefined, as it has been numerous times in the past. In the past, our government provided a framework for marriage, a blueprint, and business and institutions tended to fill this blueprint in, colouring it with idiosyncratic characteristics of how the markets treat government sanctioned couples. In same-sex marriage, this blueprint has been absent for some time. The result was a capable, adapting business environment that recognized that the same-sex unit existed and so, a blueprint absent a design was coloured. A full-fledged design emerged, comparable to that of opposite-sex couples; homosexual couples enjoy virtually all the benefits, business activities, and contracts that heterosexual couples do. Thus, the structure stands without the blueprints that governments so often offer. We are now faced with a situation where the government is under pressure to retroactively fill in the plans. In the case that they refrain from doing this, we still have what's already been established in common law, for now. The real crisis may still be to come, as history has shown us in so many other situations. The right thing to do, from an ethical standpoint, and the final step

in a long battle is the government recognition of same-sex marriages on level ground with opposite-sex unions. Only then do we secure the ethical basis on which society, culture, and business ride in Canada, only then do we truly fulfill the lofty ideals that embody what it means to be Canadian.