Legalization of Same-Sex Marriage in Canada: A Success Story

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- To my adoptive father, Françoys Larue-Langlois.
May his unique and precious soul rest in peace.

Abstract

This paper describes and comments the major steps that have been taken from a judicial point of view as well as the political and legal evolution that took place towards the recognition of same-sex marriage in Canada, which is a pioneer in that field.

Keywords: same-sex marriage, legalization, Canada.

Introduction

In November 2017, the Canadian Prime Minister apologized on behalf of Canadians for the discrimination suffered in the past by the LGBTQ[1] community in the federal public service and in the Canadian Armed Forces. Even though same-sex marriage has been legalized in twenty-nine countries so far, it still remains mostly banned around the world and one country even does not have a word for 'gays'[2], then Canada's official apologies contrast with that. Canada is the fourth country in the world, after the Netherlands (2001), Belgium (2003) and Spain (2005), to have legalized same-sex marriage in 2005. Although it was the fourth country in the world to allow same-sex couples to marry, an author claims that "it is Canada that has had the most impact in the international debate on the issue"[3] since, for example, Canada was the first country in the world to allow gay and lesbian marriages on its territory for people coming from abroad. Unlike in the Netherlands, Belgium and Spain, the recognition of same-sex marriage was first and foremost a legal victory in Canada. Therefore, we will examine in this paper some of the most important

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[1] This acronym means lesbian, gay, bisexual, transgender and queer.

[2] See Voice of North Korea by Yeonmi Park, 'Shocking Facts About North Korea's Sexuality', see online: https://www.youtube.com/watch?v=25h0sE_IK-o.

[3] Sylvain Larocque, 'Reconnaissance du mariage gai: quand l'affirmation d'une communauté mène à une révolution juridique' (2008) 16 Bulletin d'histoire politique 3, 56 [translated in English by Sébastien Lafrance].

Canadian court's decisions that are illustrative of the major steps that have been taken as well as the political and legal evolution that also took place towards that recognition.

Quebec, one of the ten Canadian provinces, is also one of the first places in the world to prohibit discrimination based on sexual orientation, i.e. as early as 1977 in the *Quebec Charter of Human Rights and Freedoms*[4], but because of the division of powers within Canada, Quebec itself could not change the definition of marriage and then could not extend it to same-sex couples. Between the federal government, the provinces and territories, the responsibility (and jurisdiction) for enacting the rules relating to marriage falls to the federal (national) government. The definition of marriage is a prerogative of the federal government in Canada. The provinces and territories only have jurisdiction for the celebration of marriage.

Some authors argue that the few countries "that have legalized gay marriage ... have done so *as a result of political, not judicial, decisions*. In other words, no national or international court, no national or international human rights court has ever considered same-sex marriage as a fundamental right."[5] But in Canada the legislative change that institutionalized the marriage for *all* "was the result of a long process, in which the judiciary ***and*** the political power took turns in the dialogue [on same-sex marriage] that was punctuated, on the one hand, by considerations linked to the protection of fundamental rights guaranteed by the Constitution (equality, freedom of religion) and, on the other hand, political calculations with ethical and moral overtones."[6]

1. United Nations Human Rights Committee and Same-Sex Marriage

The claims for same-sex marriage is generally understood in Canada as a matter of fundamental rights.[7] However, some contend that the possibility of having access to marriage for same-sex couples is not a fundamental right. The United Nations Human Rights Committee (hereinafter 'HRC') considered at a certain point in time that it did not fall under human rights.[8] For example, in the decision *Joslin v. New Zealand* rendered in 2002, the HRC stated:[9]

> Marriage is at present universally understood as open only to individuals of opposite sexes, and is so recognized in the civil law of all other States parties to the Covenant. While in recent years some States parties have instituted forms of official recognition for homosexual relationships, *none of these have been described as marriage or possesses identical legal effect*. As such, the clear understanding of marriage, as underscored by the meaning of article 23, paragraph 2 [of the International Covenant on Civil and Political Rights], is of individuals of opposite sexes.

However, this reality changed quite dramatically after this HRC decision was rendered, i.e. several States, including Canada, extended the possibility for same-sex couples to marry, which marriage then possesses the same legal effects as for heterosexual couples. Therefore, as argued by Roos

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[4] C.Q.L.R., c. C-12. It was amended to prohibit discrimination based on sexual orientation, making Quebec the first place in the world to go this far.

[5] Sylvain Larocque, *Mariage gai: Les coulisses d'une révolution sociale*, Montréal, Flammarion, 2005, 279 (italics added).

[6] Dave Guénette and Patrick Taillon, 'La légalisation du mariage pour tous au Canada - À la jonction du fédéralisme canadien et des droits et libertés de la personne' in *Annuaire international de justice constitutionnelle*, 30-2014, 2015, 43. (emphasis and italics added) [translated in English by Sébastien Lafrance].

[7] Marie-France Bureau and Kim Désilets, 'Du mariage gai à la polygamie: triomphe du droit à l'égalité?' (2011) 89-1 Can. B. Rev. 39, 41.

[8] *Ibid.*, 278-279.

[9] *Joslin v. New Zealand*, Comm. 902/1999, U.N. Doc. A/57/40, Vol. II (HRC 2002), para 4.11 (italics added).

and Mackay in 2019, "a departure from *Joslin v New Zealand* is more likely to be seen as both legal *and* legitimate – and is thus more likely to occur"[10] at the international level.

2. Canada's Historical Background on Same-Sex Marriage

The condemnation of homosexuality in the West lasted for some time, too much time. In 1965, in Canada, George Klippert was arrested following his admission to have had sexual intercourse with four men, for which he was charged with gross indecency. His appeal of his sentence was dismissed by the Court of Appeal for the Northwest Territories, then by the Supreme Court of Canada[11], and Klippert had to spend some time in jail. In that case, "[t]he evidence of the two psychiatrists was to the effect that the appellant was likely to commit further sexual offences of the same kind with other consenting adult males."[12] This gives us the occasion to recall that until 1973 the American Psychiatric Association defined being gay as having a mental illness. Canada had not always been friendly to homosexuality. Between 1959 and 1968, more than nine thousand men and women were investigated for their homosexual activities, and at least 295 people were fired because of that.[13]

The gay and lesbian communities of Canada, after many decades of struggles against a system considered heteronormative, segregationist and discriminating against them, succeeded, in 1969, to obtain from the federal government the abolition of standards condemning all physical relations between persons of the same sex. The removal of homosexual behavior from the criminal code through what is famously known as the Omnibus Bill[14] seemed, at the time, to put an end to the difficulties they faced. But decriminalizing homosexuality neither meant nor guaranteed economic parity between same-sex and heterosexual couples. The rights of gays as citizens were not respected insofar as same-sex unions did not enjoy the same rights as those of heterosexual couples.

A few years later, the limits of decriminalizing homosexuality become evident when it was not possible for many same-sex couples to benefit, because of their legal status, from many government programs and services during the AIDS crisis. In more general terms, the legal vacuum surrounding the status of same-sex couples did not allow spouses to benefit from each other in the event of death. The objective of being able to get married was then instrumentalized as a means of protecting and guaranteeing their financial and material assets. Marriage has many advantages, including the possibility for a taxpayer to transfer an asset to his or her spouse upon death or marriage breakdown. The AIDS crisis brought to light the need to change Canadian federal, provincial and territorial laws to the new category of same-sex couples. The fight for same-sex marriage then became a quest for the protection of the rights for the partners of these couples. When these couples were neither recognized nor eligible for marriage, they were not protected by legal standards.

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[10] Oscar I. Roos and Anita Mackay, 'A Shift in the United Nations Human Rights Committee's Jurisprudence on Marriage Equality? An Analysis of Two Recent Communications from Australia' (February 08, 2019), University of New South Wales Law Journal, Vol. 42, 2019, Deakin Law School Research Paper No. 19-07, 7.

[11] *Klippert v. R.*, [1967] S.C.R. 822.

[12] *Ibid.*

[13] Laura Reidel, 'Religious Opposition to Same-Sex Marriage in Canada: Limits to Multiculturalism' (2009) Human Rights Review, 269.

[14] Bill C-150,1st Sess., 28th Parl. 1969.

3. Canada's Legal and Judicial Background on Same-Sex Marriage

Identifying the principles and values of Canadian society as well as giving the possibility to citizens of Canada to challenge the disadvantages and limitations of the legislation, the *Canadian Charter of Rights and Freedoms*[15] (hereinafter 'Charter') played a major role in the cause of same-sex marriage. Several of its articles may and did come into play to argue for its legalization. The legal standards set out in the Charter provide that all Canadian citizens enjoy the same rights and freedoms and, therefore, they should be treated equally in their dealings with state institutions. Section 15(1) of the *Charter* reads, "Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability." It must be specified that section 15 does not expressly provide for sexual orientation as a prohibited ground of discrimination.

At the end of the 1990s, the governments of several Canadian provinces as well as the federal government recognized, in various laws, the rights and benefits of common-law spouses of the same sex on the same basis as partners of the opposite sex. But it was not until 1995, in the case of *Egan v. Canada*, that the Supreme Court of Canada has recognized sexual orientation as a ground of discrimination *analogous* to those enumerated in section 15 of the *Charter*: "Sexual orientation is a deeply personal characteristic that is either unchangeable or changeable only at unacceptable personal costs, and so falls within the ambit of s. 15 protection as being *analogous* to the enumerated grounds."[16] This breakthrough court decision had been made possible because the same court had previously decided, 6 years before, in 1989, in the decision *Andrews v. Law Society of British Columbia*[17], that section 15 does not prohibit all statutory distinctions, but only those based on grounds that are listed in the section or are 'analogous' to those that are listed.

Nevertheless, the majority of judges in that decision concluded in *Egan v. Canada* that the "government must be accorded some flexibility in extending social benefits and does not have to be pro-active in recognizing new social relationships"[18], namely same-sex couples. Some authors also pointed out that "the task of apprehending a wide variety of [types of relationships] appears quite complex."[19] Thus, this should not come as a surprise that in 2002, same-sex marriage was described by one prominent jurist, now judge at the Quebec court of appeal, as not foreseeable to exist in a near future.[20]

In 1998, the Supreme Court of Canada ruled in *Vriend v. Alberta*[21] that the legislation of the province of Alberta, which refused to amend its own human rights code to include sexual

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[15] *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. 1 (hereinafter 'Charter').

[16] *Egan v. Canada*, [1995] 2 S.C.R. 513, 514 (italics added). It must, however, be noted that the exact same position had been the position of the Ontario Court of Appeal three years before then, in 1992, in its decision *Haig v. Canada*, 1992 CanLII 2787 (ON CA); Christy M Glass and Nancy Kubasek, 'The Evolution of Same-Sex Marriage in Canada: Lessons the U.S. Can Learn from Their Northern Neighbor Regarding Same-Sex Marriage Rights' (2008) 15 Mich J Gender & L 143, 148: "In Canada, courts are organized at the provincial lower court and appellate level. While no provincial decision can be binding on another province's authority, all provincial courts are subject to the authority of the Canadian Supreme Court."

[17] *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143.

[18] *Ibid.*, 572.

[19] Bureau and Désilets, *supra* note 7, 54-55 [translated in English by Sébastien Lafrance].

[20] Benoît Moore, 'L'union homosexuelle et le Code civil du Québec : De l'ignorance à la reconnaissance?' *in* Jean-Louis Baudouin and Patrice Deslauriers (eds.), *Droit à l'égalité et discrimination: Aspects nouveaux*, Cowansville (Qc), Yvon Blais, 2002, 275.

[21] [1988] 1 S.C.R. 493.

orientation, was obligated to amend it. Importantly, the court stated in that decision that "[t]he notion of judicial deference to legislative choices should not ... be used to completely immunize certain kinds of legislative actions from *Charter* scrutiny."[22] That case was about the firing of an employee of a private religious college because he was gay. That employee could not challenge the college's decision under provincial human rights law in Alberta because the Alberta government explicitly excluded it from its legal instrument protecting human rights.

Since 1999, gay couples have been subject to the same tax obligations as heterosexual couples. Having the same obligations and responsibilities as heterosexual couples, some same-sex couples considered that it should be explored as an argument showing the discrimination they are subject to. For instance, heterosexual couples could get married and then have access to various types of benefits to which gay couples had no access to. Gay marriage would contribute to the protection of the civil and economic rights of same-sex couples. This instrumentalization of marriage would then bring it closer to the original principles of marriage, i.e. it was created to help protecting the most vulnerable members of society.

In the same year, in 1999, the Supreme Court of Canada, now with few new judges, adopted a completely different approach in *M. v. H.* than in the latter case, even though "*Egan*, like [*M. v. H.*], was also concerned with the opposite-sex definition of 'spouse' in provincial legislation in the context where the appellant was seeking spousal support from her partner after the breakup of their lesbian relationship. However, the similar focus of the two cases is not sufficient to bind the Court to the *Egan* decision."[23] In *M. v. H.*, the Supreme Court extended the protection of homosexual persons against discrimination to couple relationships rather than limiting it to individuals. For the highest court, denying same-sex spouses family rights and obligations was contrary to the *Charter*.

In 2001, the battle for the extension of marriage to same-sex couples was not over, including the battles to be had before the courts. Pitfield J. of the British Columbia Supreme Court in the same-sex marriage case, *Egale Canada Inc. v. Canada*, wrote, relying on an originalist or historical interpretation of the Canadian constitution[24],[25] that he was "persuaded that same-sex relationships do not fall within the meaning of marriage" [26] contained in the Canadian constitution.[27] According to him, the common law definition of marriage was "a legal relationship between two persons of opposite-sex".[28] Although the court had the power to change the common law, such a "change would affect a deep-rooted social and legal institution".[29] He added that because "Parliament cannot amend the meaning of marriage within [the meaning given to it in the Canadian constitution] the relationship will persist as a monogamous, opposite-sex relationship... [t]hat being the nature of marriage for purposes of [the Canadian constitution], differentiation between those who can legally marry and those who cannot..."[30] Pitfield J.'s decision was, however, the latest setback suffered by same-sex couples in Canadian courts.

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[22] *Ibid.*, para 54.
[23] *M. v. H.*, [1999] 2 S.C.R. 3, para 75.
[24] Guénette and Taillon, *supra* note 5, 46-47.
[25] Jason Pierceson, 'Same-sex Marriage in Canada and the United States: The Role of Political and Legal Culture' (2014) American Review of Canadian Studies, 44(3), 326: "The norm in Canada is for judges to interpret constitutional provisions in light of social changes. This obviously contrasts with the originalism strain in American conservative jurisprudence."
[26] *EGALE Canada Inc. v. Canada (Attorney General)*, 2001 BCSC 1365, para 122.
[27] See section 91(26) of the Constitution Act, 1867, 30 & 31 Vict., c. 3.
[28] *EGALE Canada Inc. v. Canada (Attorney General)*, *supra* note 26, para 8.
[29] *Ibid.*, para 93.
[30] *Ibid.*, para 123.

As I previously noted in *The Justice in Judicial Activism: Jurisprudence of Rights and Freedoms in India and Canada*[31], "the interpretation used for the Charter is illustrated in the Court's decision in *Reference re Same-Sex Marriage*: "The "frozen concepts" reasoning runs contrary to one of the most fundamental principles of Canadian constitutional interpretation: that our Constitution is a *living tree* which, by way of *progressive* interpretation, accommodates and addresses the realities of modern life."[32] As Lord Sankey L.C. famously stated in *Edwards v. Attorney-General for Canada*, our constitution is "a living tree capable of growth and expansion within its natural limits".[33] In the early Charter case *R. v. Big M Drug Mart Ltd.*, the Court stated, "[t]he interpretation [of the Charter] should be a *generous rather than a legalistic one,* aimed at fulfilling the purpose of the guarantee and securing for individuals the full benefit of the *Charter*'s protection."[34]

In 2003, in the decision *Halpern*[35] of the Ontario Court of Appeal, the court stated, "Denying same-sex couples the right to marry perpetuates the view that they are not capable of forming loving and lasting relationships, and that same-sex relationships are not worthy of the same respect and recognition of opposite-sex relationships." That court concluded that the exclusion of same-sex spouses from civil marriage was contrary to the right to equality and that this treatment was not justified in a democratic society.[36] Two additional important courts of appeal elsewhere in the country came to the same conclusion. The federal government decided to not appeal any of these decisions to the Supreme Court of Canada confirming *de facto* the legality of marriage for *all*.[37] The federal government decided to go one step ahead by introducing a bill to legalize same-sex marriage across Canada. In order to ensure the constitutionality of its bill, the federal government is submitting it to the Supreme Court of Canada for study.[38] The Supreme Court of Canada confirmed its constitutionality in the *Reference re Same-Sex Marriage*.[39] The *Civil Marriage Act*[40] was finally officially sanctioned on July 20, 2005.

4. Multiculturalism and Same-Sex Marriage

Canada is "a multiethnic and multicultural country … which accentuates and advertises its modern record of respecting cultural diversity and human rights and of promoting tolerance of

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[31] Chapter 3 (co-written with Prof. (Dr.) Shruti Bedi) in Salman Khurshid, Lokendra Malik and Yogesh Pratap Singh (eds.), *The Supreme Court and the Constitution – An Indian Discourse*, Wolters Kluwer, 2020, 76-77.

[32] [2004] 3 S.C.R. 698, para 22 (italics added); see also Bradley W. Miller, 'Beguiled By Metaphors: The Living Tree and Originalist Constitutional Interpretation in Canada' (2009) 22 Can. J. L. & Jurisprudence 331, 331: 'Constitutional interpretation in Canada is dominated by the metaphor of the "living tree"; Benjamin Oliphant and Leonid Sirota, 'Has the Supreme Court of Canada Rejected Originalism' (2016) 42 Queen's L.J. 113; Leonardo Pierdominici, 'Constitutional Adjudication and the Dimensions of Judicial Activism: Comparative Legal and Institutional Heuristics' (2012) 3 Transnat'l Legal Theory 207, 235; Sébastien Lafrance, 'A Brief Overview of Quebec Civil Law and Canadian Constitutional Interpretation in Canada' (2020) Amicus Institute (Australia). Retrieved from: https://www.amicusinstitute.org/scholarship-series

[33] 1929 CanLII 438 (UK JCPC), [1930] A.C. 124, 106-107.

[34] [1985] 1 S.C.R. 295, para 117 (italics added).

[35] *Halpern v. Canada (Attorney general)*, 2003 CanLII 26403 (ON CA).

[36] Bureau and Désilets, *supra* note 7, 41.

[37] Guénette and Taillon, *supra* note 6, 48.

[38] In Canada, section 53 of the *Supreme Court Act*, R.S.C. c. S-26, allows the federal government to refer questions of law or fact to the Supreme Court of Canada. They render an opinion about those, which are, in fact, genuine decisions of the court.

[39] [2004] 3 S.C.R. 698.

[40] S.C. 2005, c. 33.

religious and ethnic minorities - and is in many ways an example thereof for other societies".[41] Section 27 of the *Charter* provides that "[t]his Charter shall be interpreted in a manner consistent with the preservation of the multicultural heritage of Canadians." In addition, the *Canadian Multiculturalism Act* also recognizes Canada's multicultural heritage and obliges the federal (national) administration to consider, and to favor multiculturalism in its decisions; its preamble also "recognizes the diversity of Canadians … as a fundamental characteristic of Canadian society".[42] The Supreme Court of Canada also confirmed the protection of minorities as one of the four foundational principles of Canadian federalism.[43]

These laudable principles, among which "the concept of multiculturalism has not", for some, "been clearly defined"[44], come "with internal limits, as evidenced by Canada's refusal to accommodate the demands of many religious groups that opposed the legalization of same-sex marriage"[45], but "the right to freedom of religion was still safeguarded by the provision that no religious officials were to be required to perform same-sex marriages if doing so would be an affront to their beliefs."[46]

Conclusion

The challenges now posed by non-monogamous unions, non-conjugal unions, trans phenomena, etc., all have in common the multiplicity and fragmentation of identities.[47] This would now bring along more legal issues to be examined. What should be kept in mind is that "until 1982 the Canadian courts did not have jurisdiction to hear cases related to human or civil rights violations [but] the *Charter* extended the role of the Canadian judiciary [and w]ithout this legislation, Canadian gays and lesbians would not have had the legal route to sue for equal treatment under the law."[48] Perhaps different countries willing to legalize same-sex marriage may decide, for various reasons, to take different routes than the one took by Canada, but the author submits that the path it took remains useful not only for the researchers to study, but also, possibly, for those who would like to see such important changes be implemented in their own country.

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[41] *Syndicat Northcrest v. Amselem*, [2004] 2 S.C.R. 551, para 87.
[42] R.S.C. 1985, c. 24 (4th Supp.).
[43] *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, para 79.
[44] Reidel, *supra* note 13, 278.
[45] *Ibid.*, 262.
[46] *Ibid.*, 263.
[47] Bureau and Désilets, *supra* note 7, 59.
[48] Glass and Kubasek, *supra* note 16, 162.

[5] Constitution Act, 1867, 30 & 31 Vict., c. 3.

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