Saskatchewan Refers Same-Sex Marriage Question to Courts

The Saskatchewan government announced on July 3, 2009 that it will ask the provincial Court of Appeal for its opinion on draft legislation to allow marriage commissioners to opt out of performing same-sex marriages based on their religious beliefs, while ensuring there would still be enough commissioners available to perform same-sex marriages.[1] Attorney General Don Morgan said that two legislative options would be referred to the court. It would be asked to decide whether either or both would comply with the Canadian Charter of Rights and Freedoms.[2]

Section 2(a) of the *Charter* guarantees Canadians' fundamental freedoms of religion and conscience. Section 15(1) of the *Charter* guarantees equal treatment under the law, including protection from discrimination based on sexual orientation.[3] In the *Same-Sex Marriage Reference*,[4] the Supreme Court of Canada found that Parliament's power over "marriage" in section 91(26) of the *Constitution Act, 1867* extended to legalizing same-sex marriage.

Parliament passed the *Civil Marriage Act* in 2005. It states:

> *(2) Marriage, for civil purposes, is the lawful union of two persons to the exclusion of all others.*
> *(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.*
> *(3.1) For greater certainty, no person or organization shall be deprived of any benefit, or be subject to any obligation or sanction, under any law of the Parliament of Canada solely by reason of their exercise, in respect of marriage between persons of the same sex, of the freedom of conscience and religion guaranteed under the Canadian Charter of Rights and Freedoms or the expression of their beliefs in respect of marriage as the union of a man and woman to the exclusion of all others based on that guaranteed freedom.[5]*

In 2006, Alberta MLA Ted Morton introduced a private member's bill which died on the order paper after passing second reading in the Alberta legislature.[6] Morton's bill would have amended the provincial *Marriage Act* to allow marriage commissioners to opt out of performing same-sex marriages based on their religious beliefs.[7]

In issuing its advisory opinion on the proposed Saskatchewan legislation, the Court of Appeal will need to address the balance between two separate *Charter* rights. In *Trinity Western University v. B.C. College of Teachers*,

a majority of the Supreme Court stated that there is no hierarchy of *Charter* rights. The Court concluded that if two or more rights are in conflict, the conflict must be resolved in a way that respects the importance of each right.[8]

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[1] "Saskatchewan government to ask courts for ruling on same-sex marriage" *Globe and Mail* (3 July 2009).
[2] "Marriage Commissioner Legislation Referred to Court of Appeal" *Saskatchewan Justice and Attorney General* (News Release, 3 July 2009).
[3] In *Egan v. Canada*, [1995] 2 S.C.R. 513, the Supreme Court of Canada held that "sexual orientation" was analogous to grounds already explicitly protected in the *Constitution Act, 1982*, s. 15.
[4] *Reference re Same-Sex Marriage*, 2004 SCC 79.
[5] S.C. 2005, c. 33.
[6] "Bill Status Report for 2006" *Legislative Assembly of Alberta* (8 Sept 2006).
[7] Bill 208, *Protection of Fundamental Freedoms (Marriage) Statutes Amendment Act, 2006*, 2nd Sess., 26thLeg., Alberta, 2006, s. 2.
[8] 2001 SCC 31.