



Courtesy of the Mullens

I Would

Same-sex marriage in Alberta

by Sandy Kalef

*O*n a cold, snowy Valentine's Day last winter, an appropriate day for matters of love and marriage, Keith Purdy and Rick Kennedy applied for a marriage licence. They approached a clerk at a registry office in Calgary and made their request. They were denied the licence, because according to the Alberta Marriage Act, a licence may be issued only to a man and a woman.

As it happens, Purdy and Kennedy have no particular desire to get married. They are happy with their 13-year arrangement and with the commitment ceremony they had at Calgary's Metropolitan Community Church, in 1992. But, like many other gay couples, they want the choice. More importantly, they want others, who *do* want to get married, to have the choice. And given recent decisions of the Ontario and British Columbia Courts of Appeal, and the federal draft legislation and reference to the Supreme Court of Canada, they are beginning to wonder when that choice will be available in Alberta.

Tanya and Ana Paula Mullen *are* married. In their United Church ceremony, which many said was the most traditional wedding they'd ever attended, the brides wore white. The two women don't feel any less married because they lack a state-sanctioned marriage certificate, but they would take advantage of a legal marriage, given the choice. They, too,

wonder when that choice will be available in their home province.

While the question of who can marry is constitutionally within federal jurisdiction, the provinces control marriage licences and ceremonies. Although Alberta has new, far-reaching legislation granting rights to same-sex couples, it does not grant the one right that, to many, matters most: the right to be joined in a legal marriage. Today it seems that every province except Alberta is willing to follow the courts' and federal government's lead in legalizing same-sex marriage. If our government has its way, our province might be the only one that won't.

THE LONG ROAD OF CHANGES to homosexual rights began with Canada's adoption of the Charter of Rights and Freedoms, in 1982. Section 15, the "equality" section, came into force in 1985, and barely four years later the Supreme Court began hearing equality-based challenges to existing legislation. The Charter's guarantee of the right to equal protection and benefit of the law without discrimination is general, but a provision in section 15 lists specific prohibited grounds of discrimination: "race, national or ethnic origin, colour, religion, sex, age or mental or physical disability." In 1989, the Supreme Court determined that section 15 applied to discrimination on the basis not only of the

Opposite: Ana Paula and Tanya Mullen, who have been together for 11 years and wedded for seven, are still hoping to be legally married.

listed grounds but also analogous grounds. By 1995, the court had determined that marital status and sexual orientation were analogous grounds.

These rulings led the way to the *Vriend* decision in 1998, the first time Alberta was forced to deal with the Charter's protection of gay rights. Delwin Vriend was fired from a teaching job at a religious college in Edmonton

The Ontario Court defined marriage as “the voluntary union for life of two persons to the exclusion of all others,” and ordered authorities to grant licences to same-sex couples.

because he was gay. Vriend's complaint to the Alberta Human Rights Commission ended up in Alberta's Court of Queen's Bench, where his lawyers challenged the province's Individual's Rights Protection Act for not including sexual orientation as a prohibited ground of discrimination. The court ruled that the omission violated section 15 of the Charter and ordered that sexual orientation be read into the act. The Alberta Court of Appeal overturned this decision. It was satisfied that the legislature had *considered* sexual orientation as a prohibited ground in drafting the act. The Supreme Court, however, agreeing with the Queen's Bench decision, found that the legislature should have included, and not merely considered, sexual orientation, and ordered that it be read into the act.

The Supreme Court decision led to an anti-gay backlash, fuelling the perception of Alberta as a redneck, homophobic province. Indeed, the response from the Klein government seemed predictable, with expostulations on the use of the notwithstanding clause to opt out of this reading of the Charter. “Initially, the right-wing politicians talked big, building fences with the right wing of the party,” says Stephen Jenuth, Calgary lawyer and president

of the Alberta Civil Liberties Association, “but when it came right down to it, they backed off.”

The provincial government did, however, use the notwithstanding clause to make clear their stance on same-sex marriage: they announced their support of the existing federal law restricting marriage to opposite-sex couples and amended the Marriage Act, which governs the solemnization of wedding vows in the province. Declaring that the act “operates notwithstanding [certain provisions of] the Canadian Charter of Rights and Freedoms, and...the Alberta Bill of Rights,” the legislation defined marriage as a union “between a man and a woman.”

In 1999, the year after the *Vriend* decision, the Supreme Court ruled that Ontario's definition of “spouse,” in legislation that dealt with adoption, discriminated against same-sex couples and contravened the Charter. The federal government and the governments of Ontario, British Columbia, Saskatchewan, Nova Scotia, Quebec, Manitoba, New Brunswick and Newfoundland all responded by bringing in new legislation or amending existing legislation to redefine the legal status of relationships—same-sex partnerships, common-law partnerships, marriage-like relationships. Nova Scotia established the legal status of “domestic partnership,” Quebec the legal status of “civil union.” Couples in these relationships were granted rights and obligations similar to married persons and, in most cases, the same as those of opposite-sex common-law partners. Omnibus legislation by the federal government included equal treatment for same-sex couples under income tax laws as well as survivor benefits under the Canada Pension Plan.

It was then Alberta's turn to face the definition of “spouse” in its legislation. Prior to 1999, a person could not adopt a same-sex partner's child. Two lesbian couples challenged the province's Child Welfare Act, which provided for adoption of a child by the spouse of the child's parent but did not define the term “spouse.” If “spouse” did not include a same-sex partner, the argument went, the act would be discriminatory under the Charter, just as the Supreme Court had decided in the Ontario case. A week before trial, according to Calgary lawyer Sandra Sebree, who frequently deals with these cases, the government “gave in.” But rather

than deal with the issue of same-sex couples, the government amended the act by deleting the reference to “spouse” and replacing it with “step-parent,” without defining that term. Subsequently, “step-parent” was interpreted by the Court of Queen's Bench to include a same-sex partner of the child's parent. “So the government did not have to face the Charter argument,” says Sebree, “although we had done all the work and were prepared to argue it.”

In 2000, the province's definition of “spouse” was again challenged, this time with regard to the Intestate Succession Act, which governs estates. A gay man's partner died without leaving a will, and under the act his estate would go to his former wife and children. The Alberta Surrogate Court found that the act's limitation of benefits to only married persons contravened the Charter. In April 2002, a year after the court's decision, the province amended the Act to extend benefits to an “adult interdependent partner,” while reinforcing the meaning of “spouse” as a married person.

Next came the challenge regarding health-care premiums and benefits. The Alberta Human Rights and Citizenship Commission ruled in December 2002 that the government had discriminated against same-sex couples by forcing them to pay individual premiums, denying them family coverage. On the very same day, the government passed the Adult Interdependent Relationships Act. (“They thought that by introducing the new legislation, the case would go away,” says Purdy, “but they didn't do it fast enough. If they had, we might have dropped our case.”) This new act would not only replace the amended Intestate Succession Act but also extend benefits and obligations to same-sex relationships in other provincial legislation. The critical difference between this new act and the older legislation, as explained by Edmonton lawyer Douglas Stollery in a paper he prepared for the Legal Education Society of Alberta, is that the new act no longer requires the relationship “to be conjugal in nature.” Under the new act, “conjugal would be a relevant but not a necessary factor.” And this, Stollery said, goes well beyond legislation found anywhere else in Canada. Same-sex partners, opposite-sex partners, roommates, family members—

any of these could be determined to constitute an adult interdependent relationship, as long as criteria of duration, emotional commitment, economic and domestic interdependence and so on are met. The relationship can exist by written agreement, as provided in the act, or by ascription, which is similar to a court's determination that, due to certain behaviours and the passage of time, a common-law

How far will the Alberta government go in its stated intention of using the notwithstanding clause to prevent same-sex marriage in the province?

relationship exists. In essence, Stollery explained, the legislation “extends rights and obligations traditionally limited to marriage-like relationships not only to conjugal common-law relationships but also to a much wider range of non-conjugal relationships.”

While the Adult Interdependent Relationships Act does grant many of the rights that same-sex couples have been fighting for, its provisions for almost every kind of relationship *except* same-sex marriage reflect the government's unwillingness to move on this issue. It also grants rights and obligations to those who don't want them. “It gives a lot of rights and obligations, which is great, but it may have gone too far,” says Sebree. Many same-sex couples have no desire to be governed by such a regime. Others may not even know they are, until it is too late. For example, if a couple decides to go their separate ways after being in a relationship for several years, and then one of them decides to apply for financial support, the other partner may then have to pay spousal-type support. (An Ontario court has recently awarded interim support to a gay man under that province's Family Law Act.) David Crosson, the editor of *Outlooks*, a Calgary-based national gay magazine, suggests that there are people who don't like the idea of all those responsibilities. “I don't think I'd want to be in a position where I would have to split my assets with some-

| 1967 | 1969 | 1982 | 1985 | 1991 | 1995 | 1999 | 2000 |
|--|--|---|--|--|---|--|---|
| December 22. Justice Minister Pierre Trudeau says, “There's no place for the state in the bedrooms of the nation,” in reference to his proposed amendments to the Criminal Code. | Homosexuality is decriminalized in Canada. | Canada adopts the Charter of Rights and Freedoms. | The “equality” section of the Charter, which guarantees equal rights and prohibits discrimination, comes into force. | Delwin Vriend, an instructor at a religious college in Edmonton, is fired for being gay. Vriend takes the provincial government to court for failing to include sexual orientation as a prohibited ground of discrimination in the Alberta Individual's Rights Protection Act. The case goes to the Supreme Court of Canada, and the court rules, in April 1998, that the act violates the Charter. Premier Klein says he will invoke the notwithstanding clause to opt out of the court's reading of the Charter, but does not do so. | The Supreme Court of Canada rules that the Charter protects against discrimination on the ground of sexual orientation. | In response to a Supreme Court ruling, federal and provincial governments make legislative changes that result in same-sex couples being granted the same rights and obligations as opposite-sex common-law couples. | March 16. The Alberta government passes Bill 202, amending the Marriage Act to define “marriage” as “between a man and a woman” and state that the act operates notwithstanding the Charter. |
| | | | | | | May. Alberta amends its Child Welfare Act to allow adoptions by step-parents. In November, an Alberta court rules that “step-parent” includes same-sex partners, and Alberta's first same-sex adoption takes place. | June 8. The House of Commons votes 216 to 55 in favour of retaining the common-law definition of marriage as the union of a man and a woman. Justice Minister Anne McLellan says the government has “no intention of changing the definition of marriage or legislating same-sex marriage.” |

Sources: CBC News, The Globe and Mail

body I had a relationship with,” he says. Still others say, “My relationship is different than a heterosexual relationship, and I don’t want to be governed by any of this.” Sebree cautions that couples should enter into a written agreement as provided by the act or a written agreement to opt out. Because the act will affect many other pieces of legislation, couples living in any domestic relationship outside of marriage should consider how they will be affected.

Alberta has the reputation of being homophobic, but according to Jenuth it is no more anti-gay than other parts of the country.

THE ALBERTA GOVERNMENT’S UNWILLINGNESS to recognize same-sex marriage may now have become irrelevant. In May, the B.C. Court of Appeal overturned a lower court decision and ruled that limiting marriage to opposite-sex couples violates the equality provisions of the Charter. It gave the federal government until July 2004 to change the laws to allow these marriages. In June, the Ontario Court of Appeal went further: defining marriage as “the voluntary union for life of two persons to the exclusion of all others,” it ordered authorities to immediately begin granting licences to same-sex couples. (The first legal same-sex marriage in Canada was performed in Toronto just hours after the ruling.) This was followed, in early July, by the B.C. court lifting its moratorium, allowing same-sex marriages to proceed immediately.

Finally, the federal government stepped in. It did not consider the parliamentary justice committee’s report of its recently completed cross-Canada hearings on various options for marriage. It did not appeal the B.C. and Ontario rulings to the Supreme Court. Instead, in mid-July it drafted new legislation and sent it to the Supreme Court for review, by way of a “reference.” The legislation defines marriage “for civil purposes” as being the lawful union of two persons, and it specifies that religious groups can refuse to perform marriages that are not in accordance with their

religious beliefs. The federal government asked the Supreme Court to answer 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 marriages? The Supreme Court is not expected to respond for several months. When it does, the legislation will be presented to the House of Commons for a free vote.

(Before the government decided to draft legislation and refer it to the Supreme Court, legal experts had thought the court would eventually hear and rule on same-sex marriage, and would rule in its favour. “The court finds the equality logic of the Charter very compelling,” says Miriam Smith, a political science professor at Carleton University. The “separate but equal” status of civil unions and interdependent relationships would be unlikely to satisfy the Supreme Court. In a recent case on property rights, the court ruled that it is *not* discriminatory to deny common-law partners the same rights as married people regarding equal division of property after a relationship breaks down. The decision to marry is personal, said the court, and couples have the freedom to marry or not. That gay couples do not have that freedom would be another argument in favour of same-sex marriage.)

The question now is how far the Alberta government will go in its stated intention of using the notwithstanding clause to prevent same-sex marriage in the province—and how far it *can* go. David Hancock, the provincial justice minister, has stated the government will “try” to use the notwithstanding clause in attempting to refuse marriage licences to same-sex couples, regardless of the new federal definition of marriage. Whether this can be done may depend on the Supreme Court’s response to the reference. Today, the Alberta government could refuse to issue marriage licences and certificates and refuse to perform a marriage ceremony for a same-sex couple, but it could not refuse to recognize such a marriage lawfully performed in another jurisdiction. “A marriage performed in Saskatchewan or B.C. would be as valid in Alberta as it would be there,” says Jenuth. Patrick Monahan, a constitu-

tional expert at Toronto’s Osgoode Hall Law School, has said, “You cannot use a province’s right to issue marriage licences to frustrate the operation of federal law.”

Will Premier Klein really persist in his attempt to invoke the notwithstanding clause? Will the Alberta government refuse to register same-sex marriages, and take the issue to court if challenged, as Hancock has suggested? Alberta often has the reputation of being a homophobic place, but according to Jenuth, it is no more anti-gay or homophobic than other parts of the country. He suggests there is a small constituency in Alberta, perhaps 10 to 15 per cent of voters, who support the anti-gay view and who are pandered to by certain politicians, “until the going gets tough.” He says this percentage is no different in other provinces, except that the 10 to 15 per cent in Alberta is a core support of these politicians and they can’t be seen to alienate those voters. Even Purdy, who has had his own legal encounters with government, does not believe that Alberta is any more anti-gay than other provinces. “In any area of the country, you have pockets of what I call ‘the redneck attitude,’” he says. “In Alberta, it’s primarily the rural areas, where there is a higher concentration of the religious aspect of society.” Purdy suggests that the cabinet and premier behave as though they agree with that vocal minority—until the point comes where they can say, “We tried.”

TANYA AND ANA PAULA MULLEN, who have been together for 11 years and wedded for seven, are still hoping to be legally married. Their church wedding included communion and Tanya being walked down the aisle by her father. They have a six-year-old daughter, of whom Tanya is the biological mother and a gay friend is the biological sperm-donor father. Ana Paula is expecting their second child in January; the sperm-donor father is a childhood friend.

The Mullens have never doubted that same-sex marriage would happen, either by a Supreme Court of Canada decision or by the federal government redefining marriage. When it does, the first thing they will do is apply to have each other declared the third legal parent of their children. As it is, they are concerned that only the father would be

considered a legal parent, should the mother die. Everything is fine and agreeable today, they say, with the father of Tanya’s child recognizing that Ana Paula has been the day-to-day parent for all of the child’s life. But if Tanya should die? “You never really know what would happen,” Ana Paula says. “We had our ceremony, and that’s our marriage, but that legal document gives you security. You don’t have to fight for your rights.”

Some gay couples have been looking for the “social authenticity” that marriage confers. “Gay marriage is a societal recognition of equality,” Crosson says. “More and more people are supportive of the idea because it’s one last fence

Lesbian couples often look at the historical underpinnings of marriage as “property, patriarchy, God,” and they don’t want to embrace that.

to hurdle in terms of being accepted the same as everyone else.” Others, of course, have no interest in marriage, seeing it as an institution that belongs to the heterosexual community. Lesbian couples often look at the historical underpinnings of marriage as “property, patriarchy, God,” and they don’t want to embrace that. “The gay community doesn’t want to lose the things that make us unique and different,” says Crosson. When Sebree held an information session on the new act, and asked those present who would get married if they could, no one responded. “Nobody wants to get married,” she says. “It’s a dying institution!”

The Mullens disagree. They will marry as soon as it is possible “without a hassle”; they want to marry in Alberta rather than travel to B.C. or Ontario. Others are prepared for the hassle. Shortly after the Ontario decision, Purdy and Kennedy marched back to the registry office. Again denied a marriage licence, they crossed the street and filed a complaint with the Alberta Human Rights Commission.

Sandy Kalef is a freelance writer and a legal and policy analyst. She lives in Calgary.

2001

April. The Alberta Court of Queen’s Bench rules that the Intestate Succession Act, Alberta’s estate law, violates the Charter because it doesn’t grant equal rights to same-sex partners. Premier Klein says this ruling doesn’t mean same-sex marriage will be allowed in Alberta. In April 2002, the province amends the act to include “adult interdependent partners,” while reinforcing the meaning of “spouse” as a married person.

2002

May. The Alberta government amends its laws to give same-sex partners of public-sector workers the same pension benefits as married spouses.

July. The Ontario Superior Court rules that prohibiting same-sex couples from marrying violates the Charter. The court gives the Ontario government two years to change its legislation. Alberta Premier Ralph Klein announces that his government will invoke the notwithstanding clause to opt out of any legislation allowing same-sex marriage.

December. The Alberta Human Rights Commission rules that the government discriminated against same-sex couples by forcing them to pay individual, rather than family, health-care premiums.

December. Alberta’s Adult Interdependent Relationships Act is passed. The act amends 68 Alberta laws relating to financial and property benefits and responsibilities for people in same-sex and other unmarried relationships, while reiterating that “spouse” means a married partner.

2003

May. The B.C. Court of Appeal rules that limiting marriage to opposite-sex couples violates the Charter, and it gives the federal government until July 2004 to change its legislation.

June 10. The Ontario Court of Appeal upholds the Superior Court ruling and orders Ontario authorities to immediately begin granting marriage licences to same-sex couples. The first legal same-sex marriage in Canada is performed a few hours later. Premier Klein reiterates that he will invoke the notwithstanding clause. The next day, his government formally asks the federal government to appeal the Ontario decision.

June 17. Prime Minister Jean Chrétien announces that his government will not appeal the B.C. and Ontario rulings and will instead draft legislation to legalize same-sex marriage.

July 8. The B.C. Court of Appeal lifts its temporary ban on same-sex marriages, giving couples in the province the right to marry immediately.

July 17. The federal government unveils its draft legislation—which defines marriage as a “lawful union of two persons” and permits religious organizations not to perform same-sex marriages—and refers it to the Supreme Court.