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The Foreign Marriages Act (UK) and The *Civil Marriage Act* (Canada) Implications for Equal Marriage in the United Kingdom

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Introduction

This memorandum serves as a brief review or backgrounder on the implications of equal marriage in Canada and its interplay with international conflict of laws doctrine and the *Foreign Marriages Act*, a U.K. statute that allows for the recognition of foreign marriages.

Equal marriage for same-gendered couples have been available for a number of years in Canada pursuant to the common law; this equality became enshrined in statutory law with the signification of Royal Assent to Bill C-38, the *Civil Marriage Act.*[1]

In the United Kingdom, same-gendered marriage is not recognised. Gay and lesbian couples must, instead, be content with second-class "civil partnerships."[2]

This is a preliminary discussion only and is not intended to constitute legal advice.

Foreign Marriages Act

People from around the world have come to Canada in order to get married but most, if not all, come knowing that the marriage will never be recognised in their home country.

British couples, however, may be slightly better odds; there is a very weak wedge, if you will, in a rather old statute known as the *Foreign Marriages Act, 1892*.[3] For the most part, this statute deals with how a British national may have a British marriage conducted outside the jurisdiction of the United Kingdom through the solemnisation of marriages by, among other persons, British consular officials.

One particularly interesting provision exists that might prove useful in the fight for equal marriage in the United Kingdom. This section reads:

> Subject to the marriage regulations, a British consul, or person authorised to act as British consul, on being satisfied by personal

[1] 1st Sess., 38th Parl., 2005.

[2] *Civil Partnership Act 2004* (U.K.), 2004, c. 13.

[3] (U.K.), 55 & 56 Vict, c. 23.

> attendance that a marriage between parties, of whom one at least is a British subject, has been duly solemnised in a foreign country, in accordance with the local law of the country, and on payment of the proper fee, may register the marriage in accordance with the marriage regulations as having been so solemnised, and thereupon this Act shall apply as if the marriage had been registered in pursuance of this Act, except that nothing in this Act shall affect the validity of the marriage so solemnised.[4]

I have reviewed *The Foreign Marriages Act, 1947*[5], as well as the *Foreign Marriage (Amendment) Act 1988*[6] as well as *The Foreign Marriage Order*[7] and have found no repeal of this section nor any provision negatively impacting on the interpretation of this section. Section 7(1) of the *Foreign Marriage Order* provides that, where two parties have been married according to the local form, where one of the parties is a British subject, the said couple may present to the consular official a certified copy of the entry in the marriage register, duly authenticated by the appropriate authority in that country and request that it be filed with the Registrar General. The consular official must send the certificate to the Registrar-General provided that the appropriate fee is paid.

On its face, then, it appears that a same-gendered couple, where at least one of those persons is a British national, can be married in Canada and so long as it is properly solemnised according to the laws of Ontario (as an example), the couple may present proof of that marriage to the British counsel in Toronto who must then submit that proof for registration in England.

It is then open to the Registrar-General for England to accept or reject the marriage certificate on the grounds of lack of capacity (which is discussed below) but would provide the appropriate trigger for a human rights complaint against the Registrar General for failing to register the marriage that conforms with the statutory law.

International Law

Unfortunately, the analysis does not end with the plain reading of the *Foreign Marriages Act*.

The English courts have adopted certain conflict of laws doctrines regarding marriage located in other fora. The formalities of marriage, as in how one goes about getting married, are governed by the *lex loci celebrationis* (*i.e.* the law where the marriage is

[4] *Ibid*., at s. 18.

[5] (U.K.), 10 & 11 Geo 6, c. 33.

[6] (U.K.), 1988, c. 44.

[7] (U.K.) S.I. 1970/1539.

celebrated). This merely reflects classic Anglo-Canadian contract law: a contract is governed by the rules where the contract is formed. Capacity to marry is governed by the antenuptial domicile of the parties to the marriage. The gender of the couple is generally considered to be a question of capacity.

In other words, a hypothetical same-gendered couple could validly marry in Canada, and it would automatically comply with the formalities of marriage in England as if the marriage was conducted there by operation of statute. The Registrar General in England would then, no doubt, refuse to register the marriage owing to a perceived lack of capacity according to the laws of England.

Yet, all is not lost. There does appear to be several weaknesses in such a position.

The *Foreign Marriages Act* and the rules of international conflict of laws doctrine allow for gay marriage to be valid in the U.K. as to form but not for capacity and this last barrier may well collapse given a cogent U.K.-based human rights challenge.

Firstly, the hypothetical same-gendered couple would not be seeking to strike down a legislative or constitutional provision. In England, marriage is defined at common law as the marriage of a man and a woman to the exclusion of all others, just as it was in Canada until that common law definition was struck down as unconstitutional; indeed, it is the same law. Secondly, the principles of international law are not derived from statute either but come from the common law. Judges made these laws and they can unmake them if they are unconstitutional and/or conflict with human rights legislation. There has already been some advancement in this area with respect to couples where one party is transsexual.

The barrier as to capacity may well conflict with the European Convention for the Protection of Human Rights and Fundamental Freedoms, which has been interpreted by the European Court of Human Rights as protecting gay and lesbian people although fulsome analysis of European human rights law is beyond the scope of this general review.

It should also be noted that the leading text on the subject enumerates one particularly useful exception to the rule regarding domicile. It reads "A marriage is not invalid on account of any incapacity which, though imposed by the law of the domicile of both or of either of the parties, is penal, discriminatory, or otherwise contrary to public policy."[8] Obviously, blocking marriage for lack of capacity solely on the basis of sexual orientation is discriminatory and would conflict with the European Convention for the Protection of Human Rights and Fundamental Freedoms.

[8] Lawrence Collins, ed, et al, *Dicey and Morris on the Conflict of Laws,* 13th ed., (London: Sweet & Maxwell, 2000) at 688.

Concluding Comments

Strictly speaking, this discussion has no bearing on the advancement of equality rights in Canada. However, the victory won with the passage of the *Civil Marriage Act* is an opportunity not only for Canada and Canadians but is a beacon to same-gendered couples all over the world.

The passage of the *Civil Marriage Act* in conjunction with the British *Foreign Marriages Act* is a unique opportunity for concerned Canadians to leverage this advancement in human rights and assist British same-gendered couples, although Canadian involvement would be, at best, minimal.

The bulk of any work in this regard does, and indeed, must, rest with interested British couples and/or organisations seeking equal marriage in the U.K. Further research by English counsel, familiar with matrimonial and human rights law is required.