

MARRIAGE LAW DIGEST

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FOURIE V. MINISTER OF HOME AFFAIRS
No. 232/2003
Supreme Court of Appeal of South Africa
November 30, 2004

In this case, one same-sex couple asked the court to “develop the common law” to redefine marriage. In his opinion, Judge Edwin Cameron spent significant time reviewing South African case law, flowing from the country’s constitutional provision prohibiting discrimination on the basis of “sexual orientation,” providing legal recognition to same-sex couples. The court held that “the equality and dignity provisions of the Bill of Rights require us to develop the common law.” Thus, the court created a new definition of marriage: “the union of two persons to the exclusion of all others for life.” The court gave its ruling immediate effect.

In an extremely lengthy concurring ruling, one judge suggested that the court should have given the legislative branch two years to respond to its ruling, rather than making its effect immediate.

SAMUELS V. NEW YORK STATE DEPARTMENT
OF HEALTH
No. 1967-04
Supreme Court Albany County
December 7, 2004

Thirteen same-sex couples sued the state of New York alleging a constitutional infirmity in the state marriage law which defines marriage as the union of a man and a woman. They put forward four specific theories for recovery: (1) violation of equal protection as to “sexual orientation,” (2) violation of equal protection as to gender, (3) violation of due process and (4) violation of the freedom of speech.

At the outset, the court summarily rejected the claim of gender discrimination, noting that the marriage law treated men and women in exactly the same way. In regards to “sexual orientation” the court held that New York case law requires that laws which classify on the basis of “sexual

orientation” are subject to rational basis review. The court concluded that the state had shown rational bases for the marriage law, specifically the need for consistency among state laws and the need to “preserv[e] the historic, legal, and cultural understanding of marriage” (which it notes was identified as a legitimate state interest by Justice O’Connor in her *Lawrence v. Texas* concurrence).

As to due process, the court held that it was bound by *Matter of Cooper* to find that there is no fundamental right to same-sex marriage under either the state or federal constitutions. Since the court had already noted rational bases supporting the marriage law, there was no due process violation. In regards to the last claim, the court held that even if marriage was form of speech, the government interest in the marriage law was not related to the suppression of speech.

The court thus granted summary judgment in favor of the state.

REFERENCE RE SAME-SEX MARRIAGE
2004 SCC 79
Supreme Court of Canada
December 9, 2004

This opinion was sought by Parliament as a way of obtaining the approval of the Supreme Court of Canada for legislation proposed by the government that would redefine marriage.

The government had sent four questions to the court: (1) whether the national Parliament had sole authority to enact a redefinition of marriage (as opposed to the Provincial legislatures), (2) whether redefining marriage would violate Canada’s Charter of Rights and Freedoms, (3) whether the protection of religious freedom in the Charter prevented religious officials from being forced to perform same-sex marriages and (4) whether a redefinition of marriage was mandated by the Charter.

On the first question, the Court decided that the national Parliament had sole authority to define marriage but could not legislate on who may (or must) perform the marriages. On the second question, the Court ruled that the Charter did not prevent a redefinition of marriage (rejecting arguments that the definition of marriage was settled at the time the Charter was created and thus could not be changed) so Parliament could go ahead with its proposed legislation. On the third question, the Court held that “absent unique circumstances” the Charter prevents compulsion of religious officials to solemnize same-sex marriages or requiring religious facilities to be used for such marriages. Somewhat surprisingly, the Court did not answer the fourth question saying that since many Provincial courts have already redefined marriages and the government has not appealed those decisions, the answer is probably settled. This refusal, however, preempts any use by Members of Parliament that they were forced to enact legislation by the Court.

In theory, then, Parliament could reject the government bill to redefine marriage. So, the debate now shifts to the Parliament with news reports suggesting the bill will be formally introduced early next year.