

# FOCUS ON

## LITIGATION

# Gay divorce litigation on hold pending federal bill

## But lawyers worry new legislation will cause more problems than it solves

BY JUDY VAN RHIJN

For Law Times

**W**hile the federal Conservative government has repeatedly stated it won't reopen the gay marriage debate, it recently did so by filing a defence in a divorce case that questioned the validity of Canadian marriages where the country of residence of the now-unhappy couple doesn't recognize same-sex marriage. But while there's new legislation on the table that purports to resolve the matter, lawyers fear it'll close one can of worms only to open another.

Ever since the federal government's Civil Marriage Act provided that no two people should be denied the right to marry because of their sexual orientation, Canada has been touted as a leader in human rights relating to same-sex marriage and people have been flocking here to tie the knot ever since.

However, as Stephany Mandin of Goldman Hine LLP points out, no one paid attention to the provision in the Divorce Act that allows a Canadian divorce subject to the jurisdiction section. "It provides that parties must be ordinarily resident in a Canadian province for at least a year before a divorce can be granted. This is an issue that was overlooked until the recent family law case of *L. versus M.*"

Martha McCarthy, who represents the parties at the centre of the controversy, points to the one-year residency requirement in the Divorce Act as the cause of all the trouble. "The residency requirement that applies to everyone had an adverse affect on one particular group of people who can't divorce in their own coun-



'The residency requirement that applies to everyone had an adverse affect on one particular group of people who can't divorce in their own countries,' says Martha McCarthy.

tries. There have been cases in the U.S. where the court has said we don't recognize the marriage so we can't divorce you."

The parties in the case hail from Florida and England. They had never actually lived in Canada but came here to marry. McCarthy notes the clients aren't fighting about anything else. "There is no suggestion that they would have other things dealt with in our courts."

McCarthy brought a challenge under the Charter of Rights and Freedoms to the residency requirement. In response, a government lawyer filed a dissent pleading that suggested the parties weren't validly married because they were unable to divorce. This was purportedly a statement of the

government's view that caused a great uproar around the world.

Within 24 hours, McCarthy was swamped with phone calls and requests for interviews from Ireland, India, France, and Britain, as well as numerous American media outlets. "We've been so open about gay marriage and then we made a gaffe like that," she notes.

Shortly after, the federal government stood up and said it didn't endorse the view in the defence. It has now tabled a bill aiming to close the loophole. However, it hasn't withdrawn the defence in the case involving *L. and M.* McCarthy has been asked to hold the litigation until the government enacts the legislation, but there are rumblings that the bill as tabled may cause more

trouble than it needs to.

Mandin raises the question of which act is best to amend and how to do it. "When the crisis occurred and the possibility of eliminating the residency requirement was raised, there was a lot of concern amongst family lawyers over what would happen. Canada is already attracting tourist marriages. If people then come for tourist divorces at Canadian taxpayers' expense, it will open a whole other set of problems for resident divorces."

In fact, the civil marriage of non-residents act, introduced on Feb. 17, 2012, aims to amend the Civil Marriage Act to establish a new divorce process that will allow Canadian courts to divorce non-residents whose jurisdiction

doesn't recognize their marriage.

Kelly Jordan, chairwoman of the national family law section of the Canadian Bar Association, questions whether a distinct process is the appropriate way to treat the matter. "The bill sets up a very different kind of divorce from the usual process available to other couples. There is no possibility of appeal under this bill. The divorce has to be on the consent of both spouses in most circumstances and separation is the only ground for divorce, not adultery or cruelty. Also, the provisions that encourage reconciliation don't apply. We welcome amendments that help couples in this situation but we want it done in a fair and consistent manner."

Jordan suggests it might be simpler to simply amend the Divorce Act. Mandin agrees. She's concerned about whether the approach to amend the Civil Marriage Act will preserve the rights of each province to retain jurisdiction over other aspects of marriage. "It would seem to me easier to amend the jurisdictional provision of the Divorce Act with a sub-clause A for residents and a sub-clause B for residents in a jurisdiction that does not recognize their marriage. That covers the loopholes without needing to amend the Civil Marriage Act and risk overstepping federal/provincial jurisdiction."

The current uncertainty has lawyers reviewing their advice to couples. "It is a confusing time for couples just getting married now," says Mandin.

"But there is some positive hope on the horizon that the problem is being addressed in a manner that preserves Charter rights of same-sex couples rather than undermining them." **LT**