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Crusader racks up legal victories for the cause

Toronto veteran of key gay-equality cases set to make her big pitch to Supreme Court

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JUSTICE REPORTER

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When Toronto lawyer Martha McCarthy learned that a test case involving same-sex marriage was about to be argued in a Yukon courtroom last summer, she was unable to restrain herself.

Courts in Ontario, British Columbia and Quebec had already struck down common-law prohibitions against such unions. Ms. McCarthy, a veteran of several key gay-equality cases, believed it vital to keep the string of successes intact, lest religious opponents seize on an adverse ruling as a rallying point.

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Fully aware of how touchy some lawyers can be about interlopers horning in on their turf, Ms. McCarthy nonetheless made a determined pitch to bring her national perspective to the case. The Yukon litigants' lawyer, James Tucker, readily agreed. A couple of all-nighters and a last-minute flight later, a bleary-eyed Ms. McCarthy took her place beside him in the courtroom.

"I argued half the case, bossing him around like crazy from the counsel table," chuckled Ms. McCarthy, 38. "He was an absolute gem, with no sense of territoriality. His heart was in the right place -- the case wasn't about him, it was about winning."

And win they did, as gay litigants usually do when in the courtroom. The Yukon judge made history by following the lead of the three provincial appellate courts that had already struck down a common-law prohibition on same-sex marriage.

As the joyful litigants headed straight to the altar, Ms. McCarthy flew home and racked up another triumph for the cause, the latest in a series of steppingstones in a 15-year litigation strategy by gay activists and a determined band of crusading lawyers. "Every litigant since the Charter began is a hero," Ms. McCarthy said in an interview. "Every one of those cases is a step on the staircase that has brought us to where we are today."

The Supreme Court will sit down on Wednesday to hear a historic reference case precipitated by the string of provincial rulings. It has been asked by Ottawa to review a draft bill proposed to amend the legal definition of marriage to include gay and lesbian couples.

While it is expected the court will come down on the side of same-sex marriage, opponents, many in the Christian churches, say the decision will marginalize the church. Their concerns include a fear that they will face persecution and discrimination for holding on to the belief that God, according to holy Scripture, ordained marriage only for heterosexual couples.

Should the top court put its imprimatur on federal proposals to legalize same-sex marriage, gays will have used the legal system to move out of an era of scant rights into one of full equality.

"Gay rights have been winning most of the time, but marriage is the biggest point of access for equality," said Professor Jamie Cameron, of York University's Osgoode Hall Law School.

She said success seems all but certain considering the Supreme Court's track record on gay-equality cases, a line of victories that range from the inclusion of gays under the Charter of Rights and Freedom's equality protections to the right to spousal support.

"I think it is a virtual certainty that the court will say that same-sex marriage is protected under the Charter." Going further, she predicted that the Supreme Court will render a unanimous decision that will be more a thought-provoking civics lesson than a legal ruling. The ruling will probably be permeated by discussion of "the Charter's noble purpose, Canadian values and our history of respect for minorities," Prof. Cameron said.

"At the same time, I expect the court to provide reassurances that the Charter protects freedom of religion, and that no religious organization will be forced to perform same-sex marriages."

The Supreme Court is unlikely to give its ruling until the spring, meaning that it could easily be the fall of 2005 before any legislation clears Parliament.

Prof. Cameron said the judges may mildly resent being again placed on the social firing line by the government, but they will probably warm to the opportunity to influence public opinion and political events. Such judicial receptivity provides a lesson in how litigation can be used to further social goals, she added. Aided by a sympathetic press, she said, the gay-rights movement has followed a steady path to changing the law.

"If you push too far, too fast, you can ruin your chances for a generation," Prof. Cameron said. "It wouldn't have been very smart to start out with gay marriage. Whether they consciously adopted a litigation strategy or it just evolved that way, it has produced good results for them."

Ms. McCarthy said Canadian legal activists have always looked to the U.S. gay-equality movement for lessons about what does and doesn't work. She also believes strongly in the tactic of personalizing cases and encourages her clients to describe in detail how acts of discrimination or inclusion have affected their lives.

A devout Roman Catholic with a husband and three children, Ms. McCarthy said she never dreamed her career would end up revolving around gay-equality rights. But while a veritable rookie, she found herself caught up in the whirlwind of the so-called M v H case, as it reached the Supreme Court in a major test of the exclusion of gays from spousal-support provisions.

"There I was, the gay and lesbian equality movement on my shoulders -- a little, straight girl who hadn't known anything about Charter litigation eight years earlier," she recalled.

On Wednesday, she will again present the case for gay litigants, both from Ontario and Quebec, this time in an even bigger case.

The proposed federal legislation at stake is a dramatic reversal for a government that had vigorously opposed same-sex marriage in the Ontario, Quebec and B.C. cases.

In legal briefs filed with the Supreme Court, the federal government now argues that it is time to complete the long march to gay equality. It flatly rejects arguments from some religious groups and the Alberta government that allowing same-sex marriage would open the door to polygamy, or might compel unwilling religious groups to perform marriages for same-sex couples.

Federal lawyers also dismiss the notion that marriage is all about heterosexual procreation, or that opening the institution to same-sex partners will dilute its cultural significance. "Marriage is widely understood as an institution that is monogamous in nature, based on intimacy, companionship, recognition, economic benefits and obligations," the federal brief states. "It also has the goal of being permanent and providing a stable foundation for the raising of children.

"In 21st-century Canada, the unions of same-sex couples fall within this current understanding of the essence of marriage. Gay and lesbian families and their children are as deserving of access to foundational societal institutions, legal protection and support as married families."

In light of the government's support for gay-marriage rights, then, was a reference to the Supreme Court necessary? Skeptics and many gay activists see it is a thin ruse by a government that lacked the spine to simply bring in legislation and brave the cries of those hostile to it.

By not enacting legislation, Ms. McCarthy said, Ottawa made it impossible for gays across the country to benefit immediately from the rulings. Again, the politicians failed to lead the way, she said: "It is always the courts that do the heavy lifting."

However, Prof. Cameron noted that gaining the Supreme Court's endorsement for the legislation could help reduce the acrimony of a profoundly divisive topic. That, she said, might be the best outcome of all.

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