Then & Now: Decisions by the BC Court of Appeal

1914: KOMAGATA MARU INCIDENT

In 1914, a shipload of people from India set sail on the *Komagata Maru* to come to Canada. They did so by way of Hong Kong and Yokahama. When they reached Vancouver and anchored in Burrard Inlet they were refused the right to land. The passengers were kept on board and deprived of food and water in an attempt to send them back. Many became sick and one passenger died.

There were approximately 375 people on the ship. The reason the *Komagata Maru* incident has become so famous is because these people were British subjects but they were refused the right to land in Canada, which was part of the British Empire.

A passenger called Munshi Singh took a test case to the courts. An Immigration Board of Inquiry had denied Munshi Singh's application to enter Canada owing to a regulation that said immigrants had to come by continuous journey from their country of birth. Munshi Singh started his journey from Hong Kong which, although a British Dominion, was not his country of birth. The BC Supreme Court dismissed Munshi Singh's case. He then appealed to the Court of Appeal.

Decision at the Court of Appeal

At the Court of Appeal a panel of five judges heard the case. All five dismissed Munshi Singh's appeal. In giving reasons for the Court of Appeal's decision, the Chief Justice said that the regulation was racially discriminatory, but found that the relevant Act of Parliament clearly authorized discrimination based on race. The Chief Justice concluded:

- Parliament had jurisdiction over immigration,
- the regulation stopping Munshi Singh from entering Canada was authorized by the Immigration Act,
- it was appropriate for the Board of Inquiry to hear the matter, and
- judges could not review the Board's decision because the Immigration Act expressly forbade judges from reviewing decisions of Boards of Inquiry.

Writing in support of the decision, Mr. Justice Irving said that it was not the duty of the Court "to determine whether or not Munshi Singh ought to be admitted". The judge said: "We are not a Court of Appeal from the decision of the Board of Inquiry". He added: "With the policy of the statute we are not concerned. That is for Parliament". In other words, it was not proper for judges to comment on the racially discriminatory policy underlying the immigration legislation

One of the five judges, Mr. Justice MacPhillips, expressing his own views, explicitly approved of the discriminatory policy. He said, "Those who become immigrants are, without disparagement to them, undesirables in Canada, where a very different civilization exists. The laws of this country are unsuited to them, and their ways and ideas may well be a menace to the well-being of the Canadian people."

1914: Values and attitudes

In the first decades of the 1900s a series of laws were passed in response to slowly increasing immigration from India, which was referred to as "the Indian invasion" and "the Hindu invasion." Treating people differently on the basis of race, ethnic origin and place of origin was government policy. It was widely believed by the white population of Canada that non-white people could not adjust to Canada's climate or its social, educational and labour traditions. The rationale was that the customs of their country of origin made it improbable that they could assimilate into Canada.

In British Columbia in 1914 no women could vote. In addition, Aboriginal, Chinese, Japanese and "Hindu" men could not vote. All of these groups were also prohibited from running for public office, or becoming accountants, pharmacists, or lawyers – professions which used the provincial voters' lists as a qualification. (White women won the right to vote in 1914. The prohibition against Chinese and "Hindus" was removed in 1947 and the prohibition against Aboriginal people and Japanese was removed in 1949.)

Curbing immigration from India

To be admitted to Canada, immigrants from India had to enter with at least $200 cash on their persons. The average wage in India was 10 cents a day. They also had to come to Canada "by continuous journey." At the time there were no passenger ships that traveled directly from India to Canada. Canadian Pacific had run a shipping line between Vancouver and Calcutta but the Canadian government had forced the company to stop this service.

2008: Apology to the Sikh community

In 2008 the federal and provincial government apologized for *Komagata Maru* incident.

2003: SAME SEX COUPLES MAY MARRY

Excerpts from the Egale news release of May 1, 2003 are shown below...

> **BC Court of Appeal Releases Unanimous Decision**
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> [A] three-judge panel of the BC Court of Appeal [has] unanimously held that the common-law rule restricting marriage to opposite-sex couples is unconstitutional as it is discriminatory and not justifiable. The Court went on to change the common-law rule to remove the restriction and permit same-sex couples to marry. This change was suspended until July 12, 2004 to permit the federal and provincial governments to amend related laws.
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> One of the two petitions was brought by the BC Partners, three couples denied marriage licences in the province. The other was begun by Egale Canada and five couples whose applications for marriage licences had also been refused.
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> "This is a historic day for equality," commented Robin Roberts, who, with her partner Diana Denny is one of the couples in the Egale petition. Added Jane Hamilton, one of the BC partners, "We are overjoyed that the Court agrees with us that our relationships are just as loving and committed as opposite-sex relationships, and just as worthy of public affirmation" . . .

> Madame Justice Prowse wrote that: "the equality rights of same-sex couples do not displace the rights of religious groups to refuse to solemnize same-sex marriages which do not accord with their religious beliefs. Similarly, the rights of religious groups to freely practise their religion cannot oust the rights of same-sex couples seeking equality, by insisting on maintaining the barriers in the way of that equality" . . .
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> Justice Prowse wrote that the "common law bar against same-sex marriage is of no force or effect because it violates rights and freedoms guaranteed by s. 15 of the Charter and does not constitute a reasonable and demonstrably justified limit on those rights and freedoms within the meaning of s. 1 of the Charter. I would also reformulate the common law definition of marriage to mean 'the lawful union of two persons to the exclusion of all others' ". . .
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> Justice Prowse stated clearly that any alternative registry scheme would not be acceptable, stating: "The obvious remedy is . . . the redefinition of marriage to include same-sex couples. In my view, this is the only road to true equality for same-sex couples. Any other form of recognition of same-sex relationships . . . falls short of true equality. This Court should not be asked to grant a remedy which makes same-sex couples 'almost equal,' or to leave it to governments to choose amongst less-than-equal solutions" . . .

In 2003, similar challenges were underway in Ontario and Quebec. In both of those provinces, courts ruled that the exclusion of same-sex couples from marriage was unconstitutional. The Ontario Court of Appeal decided that the new definition of marriage to include same-sex partners was to be effective immediately.

Following Ontario's decision, the BC Court of Appeal in a subsequent case, *Barbeau v. British Columbia (Attorney General),* also declared the new definition of marriage to be effective immediately. The result was that same sex couples were able to get married in British Columbia. The federal *Civil Marriage Act* legalizing same-sex marriage throughout Canada was passed by Parliament in 2005.

Equality before and under law and equal protection and benefit of law

After the Charter was introduced in 1982, Canadians began to bring cases challenging the bar to same-sex marriage. Most of these challenges were brought under s.15 of the Charter. While sexual orientation is not specifically mentioned in s.15 the courts found it to be analogous to the prohibited grounds listed in s.15. People who feel that a law discriminates against them on the basis of their sexual orientation can challenge the validity of that law under s.15.

Section 15 (1) of the Charter

Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Find out more

If you'd like to find out more about the same-sex marriage appeals, read about the BC Court of Appeal decision in *Barbeau v. British Columbia (Attorney General),* 2003 BCCA 251. Online: www.courts.gov.bc.ca/Jdb-txt/CA/03/04/2003BCCA0406.htm.