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Landmark Case

Same Sex Marriage Rights
Halpern et al v. Attorney General of Canada et al
Synopsis prepared by the Ontario Court of Appeal

Overview:

From April 22 to 25, 2003, a panel of the Court of Appeal for Ontario, composed of Chief Justice McMurtry and Justices MacPherson and Gillese, heard a constitutional challenge to the definition of marriage. The definition of marriage, which is found only in the common law, requires that marriage be between "one man and one woman". This opposite-sex requirement was challenged by eight same-sex couples ("the Couples") as offending their right to equality as guaranteed by s. 15(1) of the *Canadian Charter of Rights and Freedoms* ("the *Charter*") on the basis of sexual orientation. The opposite-sex requirement was also challenged by the Metropolitan Community Church of Toronto ("MCCT") as violating its right to freedom of religion under s. 2(a) of the *Charter* and its equality rights under s. 15(1) of the *Charter* on the basis of religion.

On July 12, 2002, the Divisional Court (Associate Chief Justice Smith, Regional Senior Justice Blair and Justice LaForme) unanimously held that the opposite-sex requirement of marriage infringed the Couples' equality rights under s. 15(1) of the *Charter* and was not saved as a justifiable limit in a free and democratic society under s. 1 of the *Charter*. The Divisional Court was also unanimous in ruling that the rights of MCCT as a religious institution were not violated. The Court was divided on the issue of remedy. The formal judgment of the Court declared the common law definition to be inoperative. The declaration was suspended for two years to enable Parliament to fashion an appropriate remedy. If Parliament failed to act within two years, then the common law definition of marriage would be automatically reformulated by substituting the words "two persons" for "one man and one woman".

In a unanimous judgment, the Court of Appeal upholds the decision of the Divisional Court that the common law definition of marriage offends the Couples' equality rights under s. 15(1) of the *Charter* in a manner that cannot be justified in a free and democratic society. The Court further agrees that MCCT's rights as a religious institution are not violated. On remedy, the Court declares the current definition of marriage to be invalid, reformulates the definition of marriage to be "the voluntary union for life of two persons to the exclusion of all others", and orders the declaration of invalidity and the reformulated definition to have immediate effect.

Violation of Equality Rights under s. 15(1) of the *Charter*:

The Court holds that the dignity of persons in same-sex relationships is violated by the exclusion of same-sex couples from the institution of marriage.

The opposite-sex requirement in the definition of marriage creates a formal distinction between opposite-sex and same-sex couples on the basis of sexual orientation, an analogous ground of discrimination under s. 15(1) of the *Charter*.

A law that prohibits same-sex couples from marrying does not accord with the needs, capacities and circumstances of same-sex couples. Same-sex couples are capable of forming long, lasting, loving and intimate relationships. Denying same-sex couples the right to marry perpetuates the contrary view, namely, that same-sex couples are not capable of forming loving and lasting relationships, and thus same-sex relationships are not worthy of the same respect and recognition as opposite-sex relationships. Moreover, same-sex couples can choose to have children through adoption, surrogacy and donor insemination. Importantly, procreation and child-rearing are not the only purposes of marriage, or the only reason why couples choose to marry.

The Court does not accept that, given recent amendments to federal law extending benefits to same-sex couples; same-sex couples are afforded equal treatment under the law. In many instances, statutory rights and obligations do not attach until the same-sex couple has been cohabiting for a specified period of time. Married couples, on the other hand, have instant access to all attendant rights and obligations. Additionally, not all marital rights and obligations have been extended to cohabiting couples. Further, s. 15(1) of the *Charter* guarantees more than equal access to economic benefits; it requires a consideration of whether persons and groups have been excluded from fundamental societal institutions. Exclusion from marriage – a fundamental societal institution – perpetuates the view that same-sex relationships are less worthy of recognition than opposite-sex relationships. In doing so, it offends the dignity of persons in same-sex relationships.

Violation of s. 15(1) of the *Charter* is not justified under s. 1 of the *Charter*:

The Court holds that the Attorney General of Canada has failed to demonstrate that the violation of the equality rights of the Couples is justified in a free and democratic society under s. 1 of the *Charter*.

First, the Attorney General of Canada did not demonstrate any pressing and substantial objective for maintaining marriage as an exclusively heterosexual institution. A law whose purpose is uniting the two opposite sexes has the result of favouring one form of relationship over another, and suggests that uniting two persons of the same sex is of lesser importance. The encouragement of procreation and child-rearing does not require the exclusion of same-sex couples from marriage. Heterosexual couples will not stop having or raising children because same-sex couples are permitted to marry. An increasing percentage of children are born to and raised by same-sex couples. Although a union of two persons of the opposite sex is the only union that can "naturally" procreate, it is not a sufficiently pressing and substantial objective to justify infringing the equality rights of same-sex couples.

Second, the Attorney General of Canada did not demonstrate that the means chosen to achieve its objectives are reasonable and justified in a free and democratic society. The opposite-sex requirement in marriage is not rationally connected to the encouragement of procreation and child-rearing. The law is over inclusive because the ability to naturally procreate and the willingness to raise children are not prerequisites of marriage for opposite-sex couples. The law is under inclusive because it excludes same-sex couples that have and raise children. Companionship also is not rationally connected to the exclusion of same-sex couples. Gay men and lesbians are as capable of providing companionship to their partners as persons in opposite-sex relationships. Additionally, the opposite-sex requirement in the definition of marriage does not minimally impair the rights of the Couples. Same-sex couples have been completely excluded from a fundamental societal institution. Complete exclusion cannot constitute minimal impairment.

Remedy:

The common law definition of marriage is inconsistent with the *Charter* to the extent that it excludes same-sex couples. The remedy that best corrects the inconsistency is to declare invalid the existing definition of marriage to the extent that it refers to "one man and one woman" and to reformulate the definition of marriage as "the voluntary union for life of two persons to the exclusion of all others". This remedy achieves the equality required by s. 15(1) of the *Charter* but ensures that the legal state of marriage is not left in a state of uncertainty.

The Court does not accept that the only remedy that should be ordered is a declaration of invalidity and that the declaration should be suspended to permit Parliament to respond. A declaration of invalidity alone fails to meet the Court's obligation to reformulate a common law rule that breaches a *Charter* right. A temporary suspension allows a state of affairs that has been found to violate standards embodied in the *Charter* to persist for a time despite the violation. A temporary suspension is warranted only in limited circumstances, such as where striking down the law poses a potential danger to the public, threatens the rule of law, or would have the effect of denying benefits under the law to deserving persons. There is no evidence that these limited circumstances exist here.

Timeline of Events

Halpern et al v. Attorney General of Canada et al

Summer 2000	Over the summer of 2000, eight same-sex couples applied for civil marriage licences from the City of Toronto. The City Clerk of Toronto did not grant the marriage licences as she was unsure of the legal implications of issuing licenses for same-sex marriages. The licences were "held in abeyance" pending clarification from the courts.
Summer 2000	Applications seeking review of the Clerk's decision are filed by applicant couples. The City of Toronto Clerk applies to the Superior Court for clarification of her obligations.
Fall & Winter 2001	Procedural steps are taken to consolidate and streamline the applications in order they can proceed to a single hearing before the Ontario Superior Court of Justice (Divisional Court). The applications filed by applicant couples are transferred to the Divisional Court at Toronto and the City of Toronto Clerk's application is stayed.
November 5,2001	The case is heard by the Divisional Court. Presiding over the case are Associate Chief Justice Smith, Regional Senior Justice Blair, and Justice LaForme.
July 12, 2002	The Divisional Court rules unanimously that prohibiting same-sex couples from marrying is discriminatory and unconstitutional as it violates the *Charter of Rights and Freedoms*. The Court gives the province of Ontario two years to comply with the decision by extending the right to marry to same-sex couples.
July 29, 2002	The Federal Justice Minister announces that the federal government will seek leave (i.e. permission from the Court of Appeal) to appeal the Divisional Court ruling on same-sex marriage.
July 31, 2002	The motion for Leave to Appeal is filed.
November 6, 2002	Leave to appeal the decision of the Divisional Court is granted.

April 22-25, 2003

The appeal is heard by the Court of Appeal for Ontario. Presiding over the case are Chief Justice McMurtry, and Justices MacPherson and Gillese.

June 10, 2003

The Court of Appeal rules unanimously that the existing definition of marriage is unconstitutional as it goes against the equality rights set out in s.15 of the *Charter*. This judgment upholds the previous ruling of the Divisional Court. As a remedy, the Court declares the existing definition of marriage, that refers to "one man and one woman", to be invalid. In its place, the Court provides a new definition of marriage as "the voluntary union for life of two persons to the exclusion of all others", effective immediately.