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ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:	)	
	)	
M.M.	)	Martha A. McCarthy, for the Petitioner
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	)	
Petitioner	)	
	)	
- and -	)	
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	)	
J.H.	)	Julie Hannaford, for the Respondent
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	)	
	)	
Respondent	)	
	)	
-and-	)	
ATTORNEY GENERAL OF CANADA		
	)	Gail Sinclair and Andrea Horton for Attorney General of Canada
		HEARD: September 13, 2004

MESBUR J

Nature of the Application:

[1] In this action, the petitioner sought a divorce. The petitioner and respondent had resolved all corollary issues between them in a separation agreement. However, because both parties are of the same sex, they could not

obtain a divorce, since they did not fall within the *Divorce Act's* [1] definition of "spouse" as "either of a man or a woman who are married to each other." [2] As a result, the Attorney General of Canada was added as a party to the proceedings, for the purpose of addressing a constitutional question. Simply put, the question is whether the *Divorce Act's* definition of spouse infringes the s. 15(1) equality guarantee of the *Canadian Charter of Rights and Freedoms* (the *Charter*), and cannot be justified under s. 1. [3] If that is the case, section 52(1) of the *Constitution Act, 1982* becomes engaged. It provides:

> The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

[2] Thus, a corollary issue in the case of a *Charter* breach is to determine "the extent of the inconsistency" with the Charter's guaranteed rights, and to decide what the appropriate remedy should be, if there has been a *Charter* infringement.

[3] The petitioner and respondent (whom I will refer to as "the parties") and the Attorney General of Canada ("Canada"), all agree that the issue here is the same as the one that was before the Ontario Court of Appeal in *Halpern v. Canada (Attorney General).*[4] The question in *Halpern* was whether the opposite-sex requirement for marriage in the common law was constitutional. The Court of Appeal held it was not, and could not be saved under s.1 of the *Charter*. The Attorney General of Canada did not appeal that ruling to the Supreme Court of Canada. The Court of Appeal's finding binds this court. The parties and Canada agree it therefore follows that the definition of "spouse" in the *Divorce Act* must also infringe s. 15(1) of the *Charter*, and also cannot be justified under s. 1, since the definition of "spouse" is essentially a definition of marriage that requires the parties to be of opposite sexes.

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[1] R.S.C. 1985 (2nd Supp.) c.3

[2] Section 2(1), *Divorce Act*

[3] *Canadian Charter of Rights and Freedoms,* Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act, 1982 (U.K.)*, c. 11, ss. 1 and 15

[4] (2003) 65 O.R. (3rd) 161 (C.A.) ["*Halpern*"] It should be noted that the courts of British Columbia, Quebec, the Yukon, Manitoba, Nova Scotia and Saskatchewan have all come to the same conclusion. See *EGALE Canada Inc. v. Canada (Attorney General)*, [2003] B.C.J. No 994 (B.C.C.A.); *Hendricks v. Quebec (Procureur General),* (2002) J.Q. No. 3816; *Dunbar v. Yukon,* [2004] YKSC 54, and most recently, on September 16, 2004, the decisions of Yard J in *Vogel et al v. The Attorney General of Canada, The Attorney General of Manitoba and Director of Vital Statistics Agency* (Man. Q.B.) Winnipeg Centre FD04-01-74476, of Robertson J on September 25, 2004 in *Boutilier v. Nova Scotia (Attorney General)*, [2004] N.S.J. No. 357 (S.C.), and of Wilson J on November 5, 2004 in *N.W. v. Canada (Attorney General)*, [2004] S.J. No.669 (Q.B.). The history of the "marriage litigation" to early 2004 is helpfully reviewed in *Hendricks c. Quebec (Procureur General)* (19 March 2004), Montreal 500-09-012719-027, J.E. 2004-724 (Que.C.A.)

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[4] Regardless of their agreement concerning the *Charter* breach, agreement alone is insufficient to support the finding.[5] The court must embark on its own analysis, and reach its own conclusion. Unlike the situation in *Schachter*, I have been provided with comprehensive evidence concerning both the s. 15 issue on its merits, the question of a s.1 justification, and the question of legislative objectives to assist with the consideration of a remedy.

[5] At the end of the hearing, I indicated that I was in agreement with the constitutional analysis presented, and would make a finding that the definition of spouse was unconstitutional, inoperative, and of no force and effect, with my reasons for doing so to follow. I also indicated that I would address the issue of the appropriate remedy for the *Charter* breach.

[6] Having declared the section unconstitutional and of no force and effect, I was then able to grant a divorce to the parties on the basis of the breakdown of their marriage, evidenced by more than one year of separation. The offending definition of "spouse" no longer operated to stand in the way of their divorce.

[7] In the Attorney General of Canada's view, simply severing or striking down the offending section, and portions of other sections that refer to it,[6] is a sufficient remedy to cure the breach of section 15 of the *Charter* as required by section 52. The parties take a different position. They say that the appropriate remedy for the *Charter* breach is for the court to sever or strike down the words "a man and a woman" in the definition of "spouse", and "read in" either the words "two persons" or "two individuals", so that the section would read either:

> "spouse" means either of two persons who are married to each other
>
> *or*
>
> "spouse" means either of two individuals who are married to each other

[8] As indicated, Canada states that the appropriate course is to sever the definition of "spouse" altogether, so that references in the *Divorce Act* to "spouse" would simply reflect the current common law definition of "spouse", in the context of the *Halpern* definition of marriage. In addition, this would necessitate also severing or striking down the references to the s. 2(1) definition of "spouse" in both sections 15 and 21.1(1) of the *Divorce Act* so that each of those sections would read: "'spouse' includes 'former spouse'".

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[5] see *Schachter v. Canada* [1992] 2 S.C.R. 679 at p.695

[6] sections 15 and 21.1(1)

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[9] These reasons will deal with both my analysis of the *Charter* breach, and the issue of the appropriate remedy.

Does the *Divorce Act* definition of "spouse" offend the Charter?

[10] Section 15(1) of the *Charter* is often referred to as the equality rights section. It grants all individuals equality before and under the law, and equal protection and benefit of the law. Section 15(1) reads as follows:

> 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.

[11] Section 1 of the *Charter* guarantees the rights and freedoms set out in the *Charter*, subject only "to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society". Simply put, the rights are guaranteed, unless discrimination can somehow be justified under the narrow limits set out in section 1. As McLachlin J (as she then was) put it in *RJR MacDonald Inc. v. Canada (Attorney General)*[7]:

> The bottom line is this ... the courts must ... insist that before the state can override constitutional rights there be a reasoned demonstration of the good which the law may achieve in relation to the seriousness of the infringement ... if the state has not demonstrated that the means by which it seeks to achieve its goal are reasonable and proportionate to the infringement of rights, then the law must perforce fail.

[12] In order to determine if the definition of "spouse" in the *Divorce Act* offends the equality provisions of section 15 of the *Charter*, the court must consider the following:

(a) Is the parties' marriage a valid marriage?

(b) If the parties are validly married, is their exclusion from the protections or benefits of the *Divorce Act* discrimination that breaches their equality rights under s. 15(1) of the *Charter*?

(c) If there is discrimination, is it justified in a free and democratic society; that is, can the discrimination be justified under section 1?

[7] [1995] 3 S.C.R. 199 at paragraph 129

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Then, if the court determines there has been a *Charter* breach that cannot be justified under section 1, it must go on to decide on an appropriate remedy.

[13] Therefore, the first question to be asked is whether the parties are validly married to one another. Without that determination, the *Divorce Act* can have no application, since its primary purpose is the to provide the mechanism to dissolve marriages.

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Validity of the marriage:

[14] The Ontario Court of Appeal in *Halpern* addressed the issue of the definition of marriage squarely, and held that the former common law definition of marriage as "the voluntary union for life of one man and one woman" was unconstitutional. The Court found that excluding same sex couples from the common law definition of marriage violated section 15(1) of the *Charter*, holding:

> In this case, same-sex couples are excluded from a fundamental societal institution – marriage ... Exclusion 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. [8]

[15] Having found a violation of section 15(1), the Court went on to consider whether the breach was justified under section 1. It concluded it was not. The Court held at paragraph 142:

> Accordingly, we conclude that the violation of the Couples' equality rights under s. 5(1) of the *Charter* is not justified under s. 1 of the *Charter*. The AGC [Attorney General of Canada] has not demonstrated that the objectives of excluding same-sex couples from marriage are pressing and substantial. The AGC has also failed to show that the means chosen to achieve its objectives are reasonable and justified in a free and democratic society.

[16] The former common law definition of marriage was declared invalid, and was reformulated as "the voluntary union for life of two persons to the exclusion of all others." The Court of Appeal refused the Attorney General of Canada's request to suspend the declaration of invalidity to allow the legislature to amend the law. Thus, the declaration of invalidity and reformulation of the definition had immediate effect with the release of the judgment on June 10,

[8] *Halpern,* at paragraph 107

2003. Canada did not seek to appeal the decision to the Supreme Court of Canada, nor did the Province of Ontario.

[17] Thus, as of June 10, 2003, marriage in Ontario was no longer restricted to persons of the opposite sex. The parties here were married in Toronto, Ontario on June 18, 2003. By virtue of the *Halpern* decision, I conclude that they were validly married.

[18] Although the parties had been living together for some years prior to their marriage they separated just five days after the marriage, on June 23, 2003. The Petition for Divorce was issued on June 15, 2004. The only claim was for the dissolution of the marriage, based on the breakdown of the marriage, as evidenced by a year of separation. At the time of the hearing, the parties had indeed been living apart for over a year, with no reasonable prospect of reconciliation, and thus had evidence of marriage breakdown as defined by the *Divorce Act.*

[19] However, since section 8(1) of the *Act* provides that a court can grant a divorce only to a spouse, or to the spouses on their joint application, the parties could only be divorced if they fell within the definition of "spouse". Since section 2(1) defined "spouse" as "either of a man or a woman who are married to each other", the parties were in a position where, by virtue of the amendment of the common law, they were validly married, but, by virtue of this statutory definition, they could not apply for the dissolution of their marriage. Thus, unlike other married spouses, they were denied the remedy of seeking a divorce on the breakdown of their marriage. This leads to the next question, of whether this type of discrimination is in breach of the equality rights guaranteed by the *Charter.*

Is the definition of spouse discriminatory under s. 15?

[20] In *Law v. Canada (Minister of Employment and Immigration)* [9] Iacobucci J reviewed the history of equality jurisprudence and analyzed the *Charter's* equality guarantee in terms of protecting the "violation of human dignity and freedom through the imposition of disadvantage, stereotyping, or political or social prejudice". Simply put, the purpose of s. 15(1) is to assure human dignity by remedying discriminatory treatment.

[21] Human dignity means "individuals or groups feel self-respect and self-worth". Human dignity is concerned with "physical and psychological integrity and empowerment". Human dignity is harmed by unfair treatment that is based

[9] [1999] 1 S.C.R. 497, at paragraphs 51 and 52

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on personal traits unrelated to individual needs. Laws that are sensitive to the needs of different individuals while taking into account the context underlying their differences enhance human dignity. To the contrary, human dignity is harmed when individuals and groups are "marginalized, ignored or devalued". Human dignity concerns how a person legitimately feels when confronted with a particular law. The fundamental question is "does the law treat him or her unfairly, taking into account all of the circumstances regarding the individuals affected and excluded by the law?"[10]

[22] In *Law* the Supreme Court of Canada held that the court must engage in a comparative analysis, taking the surrounding context of both the claim and the claimant into account. *Law* holds that "a purposive and contextual approach to discrimination" is preferable to a fixed and limited formula. This permits "the realization of the strong remedial purpose of the equality guarantee, and to avoid the pitfalls of a formalistic or mechanical approach." [11] There are three main elements or points of reference or broad inquiries to the analysis to determine if there has been a breach of s. 15(1).

[23] First, the court must decide if the law in question draws a formal distinction between the claimants and others on the basis of one or more personal characteristics, or fails to take into account the claimants' already disadvantaged position within Canadian society, resulting in substantively differential treatment between the claimant and others on the basis of one or more personal grounds.

[24] Here, the law, that is the *Divorce Act,* draws a formal distinction between the claimants, as same-sex married spouses, and opposite-sex married spouses, by restricting the definition of spouse, and thus the application of the *Divorce Act* only to opposite-sex married spouses. Same-sex married spouses share the personal characteristic of being homosexual, rather than heterosexual.

[25] In terms of the second part of the inquiry, one need look no further than the comments of the court in *Halpern* quoted in paragraph 14, above. There, the court makes reference to the claimants' already disadvantaged position in commenting that the exclusion of same sex relationships from marriage perpetuates the view that same-sex relationships are less worthy of recognition than opposite-sex relationships. There is no question that here the law excludes the claimants from the benefits of divorce. It fails to take their already disadvantaged position into account, and this results in substantially differential treatment based on the personal ground of being in a same-sex relationship. In

[10] *Law,* note 9 above, at paragraph 53
[11] *Law,* note 9 above, at paragraph 88

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doing so, the *Divorce Act* offends the dignity of persons in same-sex marriages. Clearly, the claimants have met the onus of this branch of the enquiry.

[26] Second, the court must consider whether the claimant is subject to differential treatment based on one or more enumerated and analogous grounds. *Egan v. Canada*[12] held that sexual orientation is a "deeply personal characteristic that is either unchangeable or changeable only at unacceptable personal costs, and so falls within the ambit of s.15 protection as being analogous to the enumerated grounds." [13] Once the Supreme Court has determined that a ground of discrimination is analogous, that ground will always be a marker of discrimination. It is clear, then, that the distinction is based on a ground analogous to the grounds set out in s.15 (1).

[27] Third, does the differential treatment discriminate by imposing a burden upon, or withholding a benefit from the claimant in a manner which reflects the stereotypical application of presumed group or personal characteristics, or which otherwise has the effect of perpetuating or promotion the view that the individual is less capable or worthy of recognition or value as a human being or as a member of Canadian society, equally deserving of concern, respect and consideration. Does the law discriminate in a way that demeans the claimants' dignity?

[28] S. 15(1) is about equality. As the court stated in *Halpern,* this stage of the analysis is concerned with substantive equality, not formal equality. The emphasis is on human dignity. This assessment should be undertaken from a subjective-objective perspective. In *Law,* Iacobucci J. identified four contextual factors to consider in determining whether the impugned law demeans a claimant's dignity. I will attempt to deal with each in turn.

Pre-existing disadvantage, stereotyping or vulnerability of the claimants

[29] In considering this factor, I adopt the reasoning of the court in *Halpern*, at paragraphs 82 to 87. There, the court pointed out the disadvantages and vulnerability experienced by gay men, lesbians and same sex couples described by the Supreme Court of Canada in *Law, Egan, Vriend* [14] and *M. v.H.*[15] While historical disadvantage is not in and of itself sufficient to support a presumption of discrimination, it is a strong indicator. In *Halpern,* the court found that the former common law definition of marriage restricting it to persons of the opposite sex, denied same sex couples a fundamental choice; namely, whether or

[12] [1995] 2 S.C.R. 513
[13] *Egan,* at page 528
[14] *Vriend v. Alberta* [1998] 1 S.C.R. 493
[15] M.v.H. [1999] 2 S.C.R. 3

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not to marry their partner. Here, applying the same reasoning, same sex married couples are denied the fundamental choice available to opposite sex married couples; namely, whether or not to divorce their partner. I therefore conclude the parties, as a same-sex married couple, have established a pre-existing disadvantage, stereotyping or vulnerability. This supports a finding of discrimination.

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Relationship between the grounds and the claimant's characteristics or circumstances

[30] *Law* requires the court to consider whether the impugned legislation takes into account the claimants' (and others with similar traits) actual needs, capacity or circumstances in a way that respects their value as human beings and members of Canadian society. If it does, then the legislation will be less likely to have a negative effect on human dignity. The legislation must be viewed from the claimants' point of view. [16]

[31] Here, the legislation fails to take the claimants' actual situation into account as a married couple. Divorce is made available to opposite-sex married couples, but not to them. The legislation completely ignores the claimants' actual situation, and others like them, in failing to recognize them as persons entitled to a divorce. They are marginalized, rather than accommodated.

[32] I therefore conclude that limiting the availability of divorce to opposite-sex married couples does not accord with the needs, capacities and circumstances of same-sex couples. This supports a finding of discrimination.

Ameliorative purpose or effects on more disadvantaged individuals or groups in society

[33] The court must consider whether the impugned legislation has the purpose of improving the situation of a more disadvantaged group in society than the group the claimants belong to. It may be permissible to exclude more advantaged individuals from the benefit of the legislation, if its purpose is to benefit less advantaged individuals. As Sopinka J stated in *Eaton v. Brant County Board of Education* "the purpose of s. 15(1) of the *Charter* is not only to prevent discrimination by the attribution of stereotypical characteristics to individuals, but also to ameliorate the position of groups within Canadian society who have suffered disadvantage by exclusion from mainstream society."[17] Therefore, the critical question to be asked in relation to this contextual factor is whether

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[16] *Law*, note 9 above, at paragraph 70

[17] *Eaton v. Brant County Board of Education,* [1997] 1 S.C.R. 241 at paragraph 66

opposite-sex married couples, who have the benefits of the *Divorce Act* are in a more disadvantaged position than same–sex married couples.

[34] There was no suggestion, nor any evidence to support the notion that opposite-sex married couples are in a disadvantaged position that requires same-sex married couples to be excluded from the operation of the *Divorce Act.* This brings into play the question of whether the impugned law is underinclusive. Here, the claimants are members of the group of persons made up of same-sex married spouses. Because they do not fall within the definition of "spouse" under the *Divorce Act,* they are obliged to remain married to one another, notwithstanding the breakdown of their marriage. Opposite-sex married spouses, that is, persons who are not members of this group, do not have this burden, and are free to sever their legal relationship as married spouses. Put another way, opposite-sex married spouses have the benefit of divorce, which, under the current wording of the *Divorce Act,* is denied to the group of same-sex married spouses. Thus, I conclude the legislation is underinclusive.

[35] There is no question that same-sex couples, denied the opportunity to divorce, and to remarry are the disadvantaged group. The parties have satisfied the onus concerning this contextual factor. It supports a finding of discrimination.

Nature of the interest affected

[36] Both *Egan* and *Law* stated that the more severe and localized the effect of the law on the affected group, the more likely it will be that the law is discriminatory. Here, it is helpful to consider the purpose of divorce legislation, in order to discern the true effect of denying its benefits to the claimants.

[37] Unlike the Ontario *Family Law Act,*[18] the *Divorce Act* does not contain a preamble that sets out its general philosophy and purpose. For an indication of the purpose of the *Divorce Act* Canada has provided me with a comprehensive legislative history of divorce law in Canada, beginning with pre-Confederation Divorce legislation, followed by Federal legislation, House of Commons and Senate debates dealing with divorce in Canada in its various iterations up until the passage of the 1968 *Divorce Act,*[19] and concluding with House of Commons Debates and draft Bills leading up to the passage of the current *Divorce Act.*

[18] R.S.O. 1990, c. F-3
[19] S.C. 1967-68, c. 24

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[38] What is most instructive in the House of Commons debates are the statements of the Minister of Justice and Attorney General of Canada, Mr. Crosbie, on introducing the draft of the current *Divorce Act* for second reading in the House of Commons on May 21, 1985. Amongst other things, he said the proposed new legislation was "based on the view that once a marriage relationship has broken down irretrievably that we should sever the legal relationship with as little stress and acrimony as possible ... Therefore, legislation is required to settle the issues that arise once a marriage has broken down." He spoke of the need to modernize the legislation, and public pressure to do so in light of what he described as "conditions that have changed since the law was last reformed 17 years ago." He commented that although people were divorcing in greater numbers in Canada, they were also forming new relationships. He said: "The family is not disappearing in Canada; it is taking on new forms. People who get divorced usually wish to be remarried, to form families and carry on the family relationships."

[39] From the Minister's comments, I infer that among the purposes of the *Divorce Act* are to permit people to divorce, so that they can sever their legal relationship, and also to be free to remarry and to form new families. The Minister explicitly commented as well that the face of the family was changing in Canada, and the statute needed to be alive to this fact. From all of this, I conclude that the current definition prohibits same-sex married couple from achieving the primary purpose under that *Divorce Act,* namely severing their legal relationship, and being free to remarry, form new families and carry on family relationships. These are fundamental values of our society, denied only to this affected group.

[40] In *Halpern,* the court also approached the issue of discrimination from the point of view of excluding persons and groups from fundamental societal institutions. Divorce as a societal institution has been available in Canada since 1791.[20] The New Brunswick statute of 1791 contains the following preamble:

> Whereas, it is necessary, in order to the keeping up a decent and regular society, that the Matrimonial union be settled and limited by certain rules and restraints; and the state of this Province, requires some provisions in this behalf, as also, for the cases of divorce and alimony.

[41] The causes, or grounds for divorce, were set out in section IX of the *Act* as "frigidity, or impotence, adultery, and consanguinity within the degrees

[20] see *An Act for regulating Marriage and Divorce, and for preventing and punishing Incest, Adultery and Fornication*, S.N.B. 1791 (32 Geo. III), c. 5

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prohibited, in and by an Act of Parliament, made in the Thirty-second year of the reign of King Henry the Eighth". While the history of divorce legislation in Canada has shown an expansion of the grounds for divorce to the current ground of marriage breakdown, it is clear that divorce as an important societal institution has been extant for centuries.

[42] Excluding the claimants from fundamental institutions of society, and denying them the ability to participate in fundamental values of society impose a severe and localized burden on them, which is not shared by opposite-sex married couples. The claimants have met the onus imposed by this factor as well. It, too, supports a finding of discrimination.

Conclusion concerning discrimination

[43] For all these reasons I conclude that the definition of "spouse" in the *Divorce Act* is discriminatory, and breaches s. 15(1) of the *Charter.* This then leads to the next question; that is, can this breach of section 15(1) be justified under s. 1 of the Charter as being "demonstrably justified in a free and democratic society"?

Can the s.15 breach be justified under s. 1?

[44] Chief Justice Dickson set out the test for determining whether a law is a reasonable limit on a *Charter* right or freedom in a free and democratic society in *R. v. Oakes*.[21] The *Oakes* test imposes a burden on the party seeking to uphold the law. That party must prove, on the balance of probabilities, that:

(a) the objective of the law is pressing and substantial; and

(b) the means chosen to achieve the objective are reasonable and demonstrably justifiable in a free and democratic society. This requires:

  (i) the rights violation to be rationally connected to the objective of the law;

  (ii) the impugned law to minimally impair the *Charter* guarantee; and

  (iii) proportionality between the effect of the law and its objective so that the attainment of the objective is not outweighed by the abridgement of the right.

[21] *R. v. Oakes* [1986] 1 S.C.R. 103

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[45] The parties actively take the position the s.15(1) breach cannot be justified. I therefore infer that the burden to justify the breach falls on Canada. Canada did not seek to justify it. That is sufficient for Canada to have failed to meet its burden, and for the court to conclude the breach is not justified under s.1. In particular, since Canada did not suggest any objective for the impugned law, it is difficult to pursue the s.1 analysis unless I determine on my own what the legislative objective is. However, since Canada did provide the court with extensive legislative history in order to address this issue, (albeit without comment), I will briefly consider the question of justification under s.1.

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Pressing and substantial objective:

[46] As the court put it in *Halpern*, the first step of the *Oakes* test first requires the court to determine the objectives of the impugned law, and then to evaluate those objectives to see if they are capable of justifying limitations on *Charter* rights. The court went on to say that when a law violates the *Charter* because of underinclusion, both the objective of the law as a whole and the objective of the exclusion must be considered. [22]

[47] The objective of the *Divorce Act* as a whole can be seen to provide a mechanism for dissolving marriages, allowing people to remarry and to form new families, and also for providing corollary relief to divorcing couples concerning the custody of and access to their children, and support for both themselves and their children. The objective of the exclusion of same-sex married spouses from the benefit of the *Divorce Act* has not been articulated in any way by Canada. Nothing in the record before me suggests in any way that this issue was adverted to deliberately by the legislature. Only its lack of action, in the face of the results of the marriage litigation in redefining marriage to include same-sex couples, can be seen as any kind of deliberate objective on the part of the legislature. I conclude there is no overriding objective to excluding same-sex married spouses from the benefits of the *Divorce Act.* Their exclusion has simply resulted from the redefinition of marriage at common law, and not by any express or overt act on the part of the legislature.

[48] Thus, while the objective of the law as a whole is pressing and substantial, the exclusion of same-sex married spouses cannot be seen as either pressing or substantial. It is inadvertent, at best. There is thus no pressing and substantial objective for excluding same-sex married couples from the benefits of the *Divorce Act.* The violation under section 15(1) is not justified under section 1.

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[22] see *Vriend v. Alberta* [1998] 1 S.C.R. 493 and *M. v. H.* [1999] 2 S.C.R. 3

Proportionality analysis:

[49] Unlike the case in *Halpern*, Canada has not identified any objective of the impugned legislation that it suggests is legitimate. That being the case, I have no basis upon which, or any need to consider the proportionality analysis set out in the *Oakes* test.

Conclusion concerning s.1 justification

[50] It is for these reasons the definition of "spouse" is not justified under s. 1, and is therefore unconstitutional, inoperative and of no force and effect, as I declared on September 13, 2004. This leads to the next question, namely, what is the most appropriate way to remedy this constitutional breach?

The appropriate remedy:

[51] The leading case on the question of fashioning a remedy for a *Charter* breach is *Schachter v. Canada*.[23] There, then Chief Justice Lamer held:

> Section 52 of the *Constitution Act, 1982* mandates the striking down of any law that is inconsistent with the provisions of the *Constitution*, but only "to the extent of the inconsistency". Depending upon the circumstances, a court may simply strike down, it may strike down and temporarily suspend the declaration of invalidity, or it may resort to the techniques of reading down or reading in.

[52] Canada says that the court should simply sever the definition of spouse in section 2. This would also require severing the words "as defined in section 2(8)" in sections 15 and 17 of the *Act,* so the provisions in sections 15 and 17 would simply read "'spouse' includes former spouse". The parties suggest that the appropriate remedy is severing and reading in, that is, replacing the unconstitutional terms with terms that comply with the *Charter.* Using this analysis would require that the definition of "spouse" in the *Act* would be rewritten to delete the reference to "a man and a woman" who are married to each other, and read in "two persons" instead.

[53] These then, are the potential remedies. However, as Chief Justice Lamer pointed out at page 715 of *Schachter,* there is no easy formula for the court to decide whether severance or reading in is appropriate in any particular case. The twin guiding principles are respect for the role of the legislature and respect for the *Charter.* There are a variety of considerations that require careful

[23] see note 5, above

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attention in each case. The court must follow three steps in determining the appropriate remedy.

[54] First, the court is to define the extent of the impugned law's inconsistency with the *Charter.* Second, it should select the remedy that best corrects the inconsistency. Third, it should assess whether the remedy should be temporarily suspended. Since the Attorney General of Canada does not seek a suspension of the remedy, I need only consider the first two steps. I will attempt to deal with each in turn.

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The extent of the inconsistency:

[55] The impugned law is the definition of "spouse" that limits it to married persons of the opposite sex.

[56] The court must select the remedy that best corrects the inconsistency. Here, the choice is between severance alone, or severance and reading in.

Selecting a remedy – severance alone or severance and reading in:

[57] In deciding whether to simply sever the definition of spouse altogether, or whether to sever the words "a man and a woman" and read in the words "two persons", requires the court to strike a balance between respect for the constitution, and respect for the legislature.

[58] The Attorney General of Canada says that there are numerous ways to redefine "spouse" in order to make the definition consistent with the *Charter*. Canada says that this ultimate choice should be left to Parliament, and, that in the meantime the new common law definition of marriage created by *Halpern* and the other marriage cases[24] is sufficient to give meaning to the term "spouse" as it is used in the *Divorce Act.*

[59] To support this view, Canada relies on the proposition outlined on page 707 of *Schachter* where the court stated:

> ...the court should not read in in cases where there is no manner of extension which flows with sufficient precision from the requirements of the Constitution. In such cases, to read in would amount to making *ad hoc* choices from a variety of options, none of which was pointed to with sufficient precision by the interaction between the

[24] see note 4, above

> statute in question and requirements of the Constitution. This is the task of the legislature, not the courts.

[60] Canada bolsters its view that it is sufficient to rely on the common law definition of spouse, as amended by the new common law definition of marriage, by pointing to the *Modernization of Benefits and Obligations Act*. [25] That statute amended 68 federal statutes in order to give same-sex couples the same benefits and obligations as opposite-sex couples. The statute began with:

> **S 1.1** For greater certainty, the amendments made by this Act do not affect the meaning of the word "marriage", that is, the lawful union of one man and one woman to the exclusion of all others.

[61] That section has been struck as unconstitutional. Parliament has not amended the legislation to redefine the meaning of the word “marriage”, nor has it seen fit to define “spouse” in the context of a married, as opposed to a “common law partner”, the term that is used to cover individuals who are cohabiting in conjugal relationships, but are not married.

[62] Canada says that the *Modernization of Benefits and Obligations Act* amended the various statutes

> by repealing all definitions of ‘spouse’ so that the term would be defined only by reference to the common law, a “spouse” being a person who has entered into the legal relationship of marriage (although the common law defined other aspects of marriage differently at the time).[26]

[63] Canada suggests that as a result, the term “spouse” must mean the *de jure* common law definition. Canada thus concludes that this is evidence that it is unnecessary to define “spouse” in the *Divorce Act,* and that it will be sufficient to rely on the new common law definition of that term. Therefore, Canada argues that striking down the definition of spouse in the *Divorce Act* will not create any lacuna in the legislation, and will leave it open to Parliament to decide, in due course, whether a definition is needed or not. This, says Canada, would both respect the Constitution and the role of the legislature.

[64] I am not persuaded by Canada’s position. First, the suggestion that there are numerous ways to redefine “spouse” is really a matter of form, rather than substance. There are not a plethora of choices as to who should be considered to have spousal status under the *Divorce Act.* Same-sex married

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[25] S.C. 2000, c.12

[26] Factum of the Attorney General of Canada, at note 15

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spouses are either included, or they are not. Their exclusion is unconstitutional; therefore they must be included. Whether the term "spouse" defines the term as two "persons", or two "individuals" does not present such a huge policy decision or breadth of options that the choice must be left to Parliament. While there may be a narrow choice of terms to cure the wrong, there is no question that Parliament must intend to cure the wrong by including same-sex spouses in the ambit of the *Divorce Act's* benefits. There is no panoply of different remedies such that the court cannot know what Parliament's intentions might be, and should therefore leave it to Parliament.

[65] Second, the *Modernization of Benefits and Obligations Act* only repealed a definition of "spouse" in two of the sixty-eight amended statutes, namely, the *Old Age Security Act* [27] and the *Pension Benefits Division Act* [28] The *Old Age Security Act*, had defined "spouse" as:

> "spouse", in relation to a pensioner, includes a person of the opposite sex who has lived with the pensioner for three or more years where there is a bar to their marriage or at least one year where there is no such bar and the pensioner and that person have publicly represented themselves as man and wife

and in the *Pension Benefits Division Act* "spouse" was defined as:

> "spouse", in relation to a member of a pension plan, means a person of the opposite sex who
>
> (a) is married to the member,
>
> (b) is cohabiting with the member in a conjugal relationship, having so cohabited with the member for a period of not less than one year, or
>
> (c) is a party to a void marriage with the member.

[66] I was not referred to any other statute containing a definition of "spouse", in the sense of a married spouse, which the *Modernization* legislation deleted. By contrast, "spouse" is a critical defined term in the *Divorce Act,* which informs the entire statute. The *Divorce Act* itself was not amended by the *Modernization of Benefits and Obligations Act*. With the definition of "spouse" appearing in, and being repealed in only 2 out of 68 pieces of legislation, I am not

[27] R.S.C. 1985, c. O-6, s 2
[28] S.C. 1992, c. 46, Sch. II, s.2

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persuaded that the *Modernization* statute can support Canada's position that no definition of "spouse" is required under the *Divorce Act*.

[67] Finally, there is potential for further mischief if the definition is removed altogether. Without the definition of spouse in the *Divorce Act,* there is no specific requirement anywhere else in the statute that the corollary relief provisions apply only to married, or formerly married, people. With a definition of spouse, the availability of the *Act's* corollary rights and obligations hinge on a definition of spouse that limits them to married or formerly married people. Unlike the 1968 *Act,* which limited the court's jurisdiction to grant corollary relief only "upon the granting of a decree nisi of divorce" [29], there is no similar restriction in the current *Act.* This could theoretically lead to the conclusion that a "spouse" as defined in provincial legislation[30] could apply for corollary relief under the *Divorce Act*. That would be an absurd result given the history of divorce law in Canada.

[68] It should also be noted that having a definition of spouse in the *Divorce Act* is not in and of itself inconsistent with the *Charter.* Having a definition that limits spouse to married persons of the opposite sex is inconsistent with the *Charter.* What, then, is the appropriate way to right the wrong, having regard to the overriding principle in these cases of exercising judicial restraint?

[69] The legislature has the ultimate responsibility for enacting laws. These laws are subject, of course, to the *Charter.* In order to respect the role of the legislature, the court must discern the legislative objective of the impugned law. Here, the legislature felt the necessity to define the term "spouse" for the purposes of the *Divorce Act*. In looking at the genesis of this part of the legislation, it is helpful to review some of the legislative history of divorce laws in Canada.

[70] Section 2(1) of the *Divorce Act* represents the first time the term "spouse" is defined in divorce legislation in this country. While previous Acts had definition sections, none included the term "spouse" as a defined term, even though, for example, the 1968 *Act* used the term "spouse" in sections 4(1)(e), 9(3)(a) and (b), and 10(a) and(c). Clearly, in the 1968 *Act*, the legislature was content to rely on the common law definition of "spouse". However, since no definition existed before, and the current *Act* includes a definition, I infer that

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[29] s. 11(1) *Divorce Act, 1968*

[30] see, for example, the *Family Law Act* R.S.O. 1990, c. F-8, s. 29 which extends the definition of "spouse" for support purposes to include "either of a man and woman who are not married to each other and have cohabited, (a) continuously for a period of not less than three years, or (b) in a relationship of some permanence, if they are the natural or adoptive parents of a child". The section also contains a new term, "same-sex partner", which extends these additional support rights to same sex partners who have similarly cohabited, or are similarly the parents of a child.

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there was clear legislative intent in including a definition of "spouse" in the current *Act.*

[71] I am supported in this view by a review of the House of Commons debates on the introduction of the draft bill that introduced the current legislation. The Debates offer some assistance with the issue of Parliament's intent in retaining or deleting definitions from the *Act.* In the debates for January 22, 1986 there was a discussion about striking out altogether the definition of "child" in the draft bill. Mr. Nunziata commented, "you cannot simply eliminate something and not replace it with something because you will not have a definition of a child." He went on to say, "if you are going to delete it, what are you going to replace it with? I am sure all Hon. Members will agree that we must have a definition of a child." In response, Mr. Speyer, the Parliamentary Secretary to the Minister of Justice said, "in light of the ruling that has been made there would be no definition of a child whatsoever. This is totally inadequate …If there is nothing wrong, what do we have to fix?"

[72] The term "child" has remained a defined term in the *Divorce Act*. This suggests to me, that Parliament carefully considered the inclusion of all the definitions in the *Act,* and since it included a definition of "spouse", Parliament's objective would be best served by leaving in a definition of "spouse".

[73] In *Dunbar v. Yukon,*[31] the court said the critical wording is to define who can marry, in the context of the definition of marriage. Here, the critical wording is who can divorce. If same-sex couples can marry, and only married spouses can divorce, then married spouses must be redefined to include same-sex married spouses.

[74] I am therefore persuaded that simply severing the definition of spouse would interfere more with Parliament's intent than redefining it by severing the unconstitutional words and reading in constitutional words. It is more deferential to Parliament to leave the definition in, and redefine it to make it constitutional. The simplest, clearest and most elegant way to do so is to change the definition to comply with the *Charter*, just as the courts have done to the common law definition of marriage.

[75] In keeping with the general thrust of the marriage cases, and indeed with the wording chosen by Parliament in the current Marriage Reference to the Supreme Court of Canada,[32] the best way to redefine "spouse" is simply to

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[31] see note 4, above

[32] Order in Council P.C. 2003-1105, dated July 16, 2003, with Notice of Amended Reference, dated January 28, 2004, containing proposed legislation, styled *An Act respecting certain aspects of legal*

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redefine the term to mean “two persons” who are married to each other. Thus, I conclude that the best way to cure the inconsistency in the legislation is to redefine the definition of “spouse” by severing and reading in as requested by the parties.

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Disposition:

[76] These are the reasons for my decision on September 13, 2004 to declare the definition of “spouse” in section 2(1) of the *Divorce Act* unconstitutional, inoperative, and of no force and effect. In addition, the appropriate remedy for this *Charter* breach is to sever the words “a man and a woman” in the section, and read in the words “two persons” instead, so that the section will now read:

> “spouse” means either of two persons who are married to one another

[77] Since Canada did not seek any suspension of the remedy, the remedy will be effective immediately.

[78] If the parties and Canada cannot agree on the issue of costs, they may make brief written submissions to me. The parties’ submissions are to be delivered within 14 days of the release of these reasons, and Canada’s within 14 days following.

MESBUR J

Released: 20041119

capacity for marriage for civil purposes. There, the proposed definition of marriage is the “lawful union of two *persons* to exclusion of all others”. [emphasis added]