Halpern v. Toronto (City): Same-Sex Marriages: Who Should Make the Decision in a "Free and Democratic Society"?

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I. OVERVIEW

In August 2000, the Clerk of the City of Toronto suspended the applications of seven same-sex couples who sought civil marriage licenses.[1] The following January, two same-sex couples wed at the Metropolitan Community Church of Toronto (MCCT), but the Registrar General refused to register the marriages.[2] The couples and MCCT sought redress in the Divisional Court of Ontario, claiming violations of their rights as guaranteed under the Canadian Charter of Rights and Freedoms (Charter).[3]

A three-justice panel of the Divisional Court of Ontario unanimously agreed that exclusion from the institution of marriage violated the couples' Charter guarantee of equality rights.[4] The justices disagreed, however, as to the appropriate remedy.[5] Justice Smith would have given Parliament and the provincial legislatures two years to revise

1. Halpern v. Toronto (City), [2003] 172 O.A.C. 276, para. 10 (*Halpern II*). Eight couples originally applied for the marriage licenses; however, one of the couples separated during the interim between the Divisional Court proceeding and the hearing before the Court of Appeal, and no longer wished to be part of the suit. *Id.* para. 9 n.1.

2. *Id.* paras. 13-14.

3. *See* Halpern v. Toronto (City), [2002] 60 O.R.3d 321, paras. 3-8 (LaForme, J.), rev'd by [2003] 172 O.A.C. 276 (*Halpern I*). The couples and MCCT filed separately, but their actions were consolidated for a joint hearing before the Divisional Court. *Halpern II*, 172 O.A.C., para. 15.

4. *Halpern II*, 172 O.A.C., para. 16.

5. *Id.* para. 17.

the laws in a manner that would not conflict with the Charter, at which time the couples could reinstate the suit if the legislative branch failed to provide an appropriate remedy.[6] Justice Blair would have given the legislatures the same goal and time period, after which the definition of marriage would have to encompass same-sex marriages.[7] Justice LaForme would have immediately redefined marriage to include same-sex unions, affording no deference to Parliament.[8] Given the variance in remedies, the formal judgment of the court reflected Justice Blair's middle-ground remedy.[9]

The Attorney General of Canada appealed the Divisional Court's decision on the issue of equality,[10] while the couples and MCCT cross-appealed as to the remedy.[11] The Ontario Court of Appeal, in a per curiam opinion, *held* that the common law definition of marriage, which restricted that institution to partnerships between "one man and one woman", unjustifiably violated the couples' equality rights as guaranteed by the Charter and that the only appropriate remedy was an immediate reformulation of the definition of marriage. *Halpern v. Toronto (City)*, [2003] 172 O.A.C. 276, paras. 155-56.

II. BACKGROUND

A. Charter Jurisprudence

The Charter guarantees certain egalitarian, legal, and political civil liberties,[12] subject only to such limitations as can be "demonstrably justified in a free and democratic society."[13] Among those liberties is a guarantee of equality under the law.[14] Section 15(1) of the Charter provides that "[e]very 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

6. *Id.*
7. *See id.*
8. *See id.*
9. *Id.*
10. *Id.* para. 18.
11. *Id.* paras. 19-20. MCCT also cross-appealed as to the Divisional Court's decision that the exclusion of same-sex couples from marriage did not infringe religious rights and freedoms guaranteed by the Charter. *See id.* para. 20.
12. GERALD L. GALL, THE CANADIAN LEGAL SYSTEM 77 (4th ed. 1995).
13. Canadian Charter of Rights and Freedoms, Part I.1 of the Constitution Act, 1982 being Schedule B to the Canada Act 1982 (U.K.), c. 11 (Can.).
14. *Id.* Part I.15(1).

disability."[15] In drafting this provision, the federal government intended to guarantee both procedural and substantive equality.[16] Therefore, although seemingly redundant in text, Section 15(1)'s wording effectively provides a safeguard against restrictive interpretations by the courts.[17]

In *Andrews v. Law Society of British Columbia*,[18] the seminal case on Section 15(1),[19] the Canadian Supreme Court remained true to legislative intent, finding that the equality clause applies to both the "formulation and application" of the laws.[20] The Court further held that discrimination is the antithesis of that concept,[21] and defined discrimination as follows:

> [A] distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society.[22]

Importantly, the Court also adopted the "enumerated or analogous grounds" approach to Section 15(1) analysis, where courts are not limited to discrimination grounds specifically listed in the clause, but may find discrimination based on any analogous grounds.[23]

In *Egan v. Canada*, building upon the work of the *Andrews* decision, the Court announced a three-step analysis for discrimination under Section 15(1).[24] A court must first determine whether the law in question distinguishes the claimant from others.[25] Second, the court must determine whether the distinction disadvantages the claimant, or fails to provide the claimant with a benefit granted to others.[26] Third, the court

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15. *Id.*

16. EQUALITY RIGHTS AND THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS 12 (Anne F. Bayefsky & Mary Eberts eds., 1985).

17. *See* DALE GIBSON, THE LAW OF THE CHARTER: EQUALITY RIGHTS 96-99 (1990) (discussing "the four equalities" guaranteed by the Charter in response to the Canadian Supreme Court's previously restrictive interpretation of the equality clause within the Canadian Bill of Rights).

18. Andrews v. Law Society of British Columbia, [1989] 1 S.C.R. 143.

19. GALL, *supra* note 12, at 86.

20. *Andrews*, 1 S.C.R. at 171, para. 16 (McIntyre, J.) (discussing the application of the law to the circumstances of the case, but not as to interpretation of the law, generally).

21. *See id.* at 172, para. 17 (McIntyre, J.).

22. *Id.* at 175, para. 19 (McIntyre, J.).

23. *Id.* at 179-81, para. 25 (McIntyre, J.).

24. Egan v. Canada, [1995] 2 S.C.R. 513, 530-31, para. 9 (La Forest, J.) (quoting Miron v. Trudel, [1995] 2 S.C.R. 418, 435, para. 13 (Gonthier, J., dissenting)).

25. *Id.* (quoting *Miron*, 2 S.C.R. at 435, para. 13 (Gonthier, J., dissenting)).

26. *Id.* (quoting *Miron*, 2 S.C.R. at 435, para. 13 (Gonthier, J., dissenting)).

must determine whether the law distinguishes the claimant from others by relying on irrelevant personal characteristics either enumerated in Section 15(1) or analogous to those enumerated.[27] Using this analysis, the Court specifically held that sexual orientation was an analogous ground upon which a Section 15(1) claim could be based.[28]

The Canadian Supreme Court rearticulated the three-step analysis in the cases that followed, finally landing upon a more detailed version in *Law v. Canada (Minister of Employment & Immigration)*.[29] In that case, the Court outlined the steps of inquiry as follows:

> First, does the impugned law (a) draw a formal distinction between the claimant and others on the basis of one or more personal characteristics, or (b) fail to take into account the claimant's already disadvantaged position within Canadian society resulting in substantively differential treatment between the claimant and others on the basis of one or more personal characteristics? . . . Second, was the claimant subject to differential treatment on the basis of one or more of the enumerated and analogous grounds? And third, does the differential treatment discriminate in a substantive sense, bringing into play the *purpose* of s. 15(1) of the Charter in remedying such ills as prejudice, stereotyping, and historical disadvantage?[30]

The analysis must always be guided by the underlying purpose of Section 15(1), which the Court identified as the protection of human dignity and equated with personal autonomy.[31] The analysis must be conducted both subjectively (from the claimant's point of view) and objectively (from the viewpoint of a reasonable person in the claimant's position); however, the "reasonable person" standard must not be used to subvert the purpose of the Charter provision.[32]

Once a claimant proves a violation of a Charter right, the burden shifts to the government to prove the infringement is both "reasonable"

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27. *Id.* (quoting *Miron*, 2 S.C.R. at 435, para. 13 (Gonthier, J., dissenting)).

28. *Id.* at 528, para. 5. The court stated:

> I have no difficulty accepting the appellants' contention that whether or not sexual orientation is based on biological or physiological factors, which may be a matter of some controversy, it 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.

Id.

29. *See* Law v. Canada (Minister of Employment & Immigration), [1999] 1 S.C.R. 497, 520-24 paras. 31-39.

30. *Id.* at 524, para. 39.

31. *Id.* at 529-30, paras. 51, 53 (citing Rodriquez v. British Columbia (Attorney-Gen.), [1993] 3 S.C.R. 519, 544).

32. *See id.* at 532-33, paras. 59-61.

and "demonstrably justified" under Section 1 of the Charter.[33] In *R. v. Oakes*, the Canadian Supreme Court devised a two-prong test for determining whether discriminatory laws might survive under Section 1.[34] Under that two-prong test: (1) The limiting measures must be "'of sufficient importance to warrant overriding a constitutionally protected right or freedom,'"[35] and (2) the means of achieving that sufficiently important objective must be "reasonable" and "demonstrably justified."[36] The Court further divided the second prong into a three-part proportionality test, requiring: (1) a rational connection between the law's objective and its means; (2) a minimal impairment of the rights and freedoms involved; and (3) a proportionality between the *effects* of the measures imposed and the objective for which they are imposed.[37] As one commentator stated, "a limit is reasonable and demonstrably justified in a free and democratic society if the limit is a rational, non-disproportionate, minimally intrusive means of achieving a pressing and substantial state objective."[38]

Once a court finds a Charter violation that does not withstand scrutiny under Section 1, there are several remedy options.[39] Section 52 of the Constitution Act of 1982 insists upon the supremacy of the Constitution of Canada.[40] To that end, any law conflicting with the Constitution of Canada must be declared "of no force or effect," but only "to the extent of the inconsistency."[41]

In *Schachter v. Canada*, the definitive case on constitutional remedies, the Court discussed remedial options at length.[42] Under *Schachter*, the first step in determining the appropriate remedy to a Charter violation "is defining the extent of the inconsistency."[43] Conclusions reached during the Section 1 *Oakes* analysis should guide the Court by demonstrating whether it is the law's purpose, means, or

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33. GALL, *supra* note 12, at 101; *cf.* Canadian Charter of Rights and Freedoms, Part I.1 of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11 (Can.) (stating the circumstances in which a right or freedom guaranteed by the Charter might be limited).

34. *See* R. v. Oakes, [1986] 1 S.C.R. 103, 138-40, paras. 73-75 (Dickson, C.J.C.).

35. *Oakes*, 1 S.C.R. at 138, para. 73 (Dickson, C.J.C.) (quoting R. v. Big M Drug Mart Ltd., [1985] 1 S.C.R. 295, 352).

36. *Id.* at 139, para. 74 (Dickson, C.J.C.).

37. *Id.*

38. GALL, *supra* note 12, at 78-79.

39. Schachter v. Canada, [1992] 2 S.C.R. 679, 695, para. 25.

40. Constitution Act, 1982, Part IV.52, being Schedule B to the Canada Act 1982 (U.K.), c. 11 (Can.).

41. *Id.*

42. *See Schachter*, 2 S.C.R. at 702-19, paras. 44-89.

43. *Id.* at 702, para. 42.

effects that most directly caused the rights violation.[44] These determinations lead to the second step, where the Court determines the appropriate remedy based upon the type and extent of the inconsistency.[45] For example, where the purpose of the law is not pressing and substantial, the Court might choose to strike down the entire law.[46] On the other hand, if the purpose is pressing and substantial, but the means are not rationally connected, the portions of the law that fail the *rational connection* test might be severed.[47] Where the law fails either the *minimal impairment* or *proportional effects* tests, the Court has more discretion to choose a remedy: instead of severing part of the law, the court may choose to read in provisions that would bring the law into compliance with the Charter.[48] The third step, then, is for the Court to determine the necessity of temporarily suspending its remedy.[49]

The *Schachter* Court made a few further stipulations regarding remedies.[50] First, severance more readily lends itself to precision than does the reading in of provisions.[51] Therefore, when the latter is deemed the appropriate remedy and the Court cannot know, with sufficient precision, what should be read into the existing law, the legislature should fill in the gaps.[52] This was the outcome in *Hunter v. Southam, Inc.*[53] In that case, the Canadian Supreme Court found that the lack of safeguards in the legislation authorizing searches violated the Charter.[54] While the Court could declare the *lack* of safeguards to be of no force or effect, it could not read in an appropriate scheme of measures with sufficient precision.[55] In such a case, the Court found, "[i]t should not fall to the courts to fill in the details that will render legislative lacunae constitutional."[56] Otherwise, the Court would be making *ad hoc* policy choices that are more appropriately left to the legislatures.[57]

The *Schachter* Court's second stipulation was that, in reading in a remedy to a Charter violation, courts should be careful not to interfere

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44. *See id.* at 702-705, paras. 45-51.
45. *See id.*
46. *See id.* at 703, para. 46.
47. *Id.* at 703, para. 47.
48. *See id.* at 704-705, para. 50.
49. *Id.* at 715, para. 79.
50. *See id.* at 705, 715, paras. 53, 77.
51. *Id.* at 705, para. 53.
52. *Id.*
53. *See* Hunter v. Southam, Inc., [1984] 2 S.C.R. 145, 168-69, para. 56.
54. *See id.* at 167-68, para. 55.
55. *See id.* at 167-69, para. 56.
56. *Id.* at 169, para. 56.
57. Schachter v. Canada, [1992] 2 S.C.R. 679, 707, para. 57.

too much with the legislative objective.[58] In *R. v. Swain*, the Court held that legislation allowing automatic detention of an insanity acquitee violated the Charter's guarantees of liberty and fair process.[59] The Court further held that Parliament, as a matter of preference, had specifically chosen the means which failed the *minimal impairment* test.[60] Therefore, reading in the appropriate safeguards would have unduly intruded into the legislative sphere.[61]

The third stipulation was that courts should be wary of severing when the remaining portions of the legislation would significantly change in meaning.[62] *Devine v. Quebec* offers the most illustrative example.[63] In that case, the Court found portions of legislation regarding the use of the French language to be too stringent.[64] To sever those portions, however, would have had the odd effect of completely reversing legislative intent: the more lenient, and hence constitutional, portions were designed to be exceptions to the general rule, but if only those portions remained, they would effectively *become* the rule.[65] The Court thus deemed the constitutional parts of the legislation "necessarily connected" to the rest.[66]

The *Schachter* Court's fourth and final stipulation was that courts should examine the portions remaining after severance for intrinsic or historical value.[67] This aids the court in determining whether the legislature would have enacted the non-offending portion of the legislation with or without the severed portion.[68] Where a legislative provision is constitutionally encouraged, courts will have more discretion to sever offending portions, even where that involves interference with the intention of Parliament.[69]

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58. *See id.* at 707, para. 58.

59. *See* R. v. Swain, [1991] 1 S.C.R. 933, 1013, para. 132.

60. *Id.* at 1011, para. 125.

61. *Id.* para. 123; *see also Schachter*, 2 S.C.R. at 708-09, para. 62 ("Where the choice of means is unequivocal, to further the objective of the legislative scheme through different means would constitute an unwarranted intrusion into the legislative domain."). The *Schachter* Court also warned against reading in where the means chosen would involve budgetary decisions. *Id.* at 709-10, paras. 63-64.

62. *Schachter*, 2 S.C.R. at 710, para. 65.

63. Devine v. Quebec, [1988] 2 S.C.R. 790.

64. *Id.* at 813, para. 23.

65. *See id.* at 815, para. 25.

66. *Id.* at 816, para. 26.

67. *See Schachter*, 2 S.C.R. at 712, para. 71 (citing Russow v. British Columbia (Attorney-Gen.), [1989] 35 B.C.L.R.2d 29).

68. *See id.* at 713, para. 73.

69. *See id.* at 713-14, paras. 74-75 (citing R. v. Hebb, [1989] 69 C.R.3d 1, 21 ("Where the result is the removing of a protection that is constitutionally encouraged . . . as opposed to the

The Canadian Supreme Court has also given some guidelines for determining when courts should suspend a remedy.[70] The *Schachter* Court listed three situations, in particular, in which a suspension of remedy might be warranted: (1) when striking the law would pose public danger; (2) when striking the law would threaten the rule of law; and (3) when the underinclusiveness of the law, and not the law itself, is the problem.[71] However, the Court also cautioned that delayed declarations are "a serious matter from the point of view of the enforcement of the Charter" because they allow the violations to continue for a period of time despite their infringement upon Charter rights and freedoms.[72]

B. Marriage Laws and the Legal Status of Same-Sex Partners in Canada

Under the Constitution Act of 1867, Parliament has exclusive jurisdiction over marriage and divorce.[73] This jurisdictional power includes the authority to define marriage and determine the elements of capacity.[74] However, the only federal statutory provisions that approach the task of defining marriage are found within interpretation clauses of legislation such as the Modernization of Benefits and Obligations Act (MBOA).[75] The MBOA's interpretation clause states: "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."[76] However, the definition of marriage to which the clause refers is found not in federal legislation, but in the English case of *Hyde v. Hyde*, which held that marriage was "the voluntary union for life of one man and one woman, to the exclusion of all others."[77]

Indeed, the MBOA's purpose was not to define marriage but, instead, to amend dozens of statutes in order to include same-sex partners

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enlarging of such a protection, it is submitted that the court should favor a result that would expand the group of persons protected rather than remove the protection completely.")).

70. *See id.* at 715-17, paras. 79-84.

71. *See id.* at 715, para. 80 (noting that the legislature should be afforded deference in deciding whether to make a law more inclusive or strike it altogether).

72. *Id.* at 716, para. 82.

73. Constitution Act, 1867 (U.K.), 30 & 31 Vict., c. 3, *reprinted in* R.S.C. 1985, s. 91, App. II, No. J (Can.).

74. *See* Halpern v. Toronto (City), [2002] 60 O.R.3d 321, para. 53 (LaForme, J.), *rev'd by* [2003] 172 O.A.C. 276 (*Halpern I*).

75. *See id. Cf.* Modernization of Benefits and Obligations Act, S.C. 2000, c. 12 (Can.) (granting rights to unmarried and same-sex partners).

76. Modernization of Benefits and Obligations Act, S.C. 2000, c. 12, s. 1.1 (Can.).

77. Hyde v. Hyde, 14 L.T.R. 188, 189 (P & D 1866).

within the ambit of the term "common-law partners,"[78] in response to the Canadian Supreme Court's decision in *M. v. H.*[79] In that case, the Court examined the definition of "spouse," as found in the Family Law Act,[80] under Section 15(1) of the Charter.[81] The Family Law Act was a legislative scheme under which married or cohabitating conjugal partners became eligible for spousal support under certain conditions upon the dissolution of the partnership.[82] To the extent that the Act defined "spouse" as "either of a man and woman" in reference to cohabitating conjugal partners, the Court found that the definition violated same-sex couples' equality rights, and that the violation could not be justified under Section 1 of the Charter.[83] However, the Court found reading in to be an inappropriate remedy because "it would unduly recast the legislation," while striking the law altogether would be "excessive."[84] Therefore, the Court declared the definition at issue to be invalid and suspended its declaration for a period of six months to allow the legislatures time to devise an appropriate scheme of legislation.[85]

The Supreme Court's decision in *M. v. H.* led to a multitude of provincial legislation, which afforded same-sex couples many of the same rights and obligations as heterosexual couples.[86] For example, Nova Scotia passed legislation in 2000, one year after *M. v. H.*, that set up a domestic partnership regime granting all domestic partners "generally the same rights and obligations" as heterosexual spouses.[87] The following year, Manitoba enacted the Act to Comply with the Supreme Court of Canada Decision in *M. v. H.*,[88] which granted cohabitating same-sex couples spousal rights "in areas such as superannuation, dependant's relief, family maintenance, survivor's

78. *See Halpern I*, 60 O.R.3d 321, para. 54 (LaForme, J.).

79. M. v. H., [1999] 2 S.C.R. 3.

80. Family Law Act, R.S.O. 1990, c. F-3, s. 29 (Can.).

81. *M. v. H.*, 2 S.C.R. para. 1 (Cory and Iacobucci, JJ.).

82. *See* Family Law Act, R.S.O. 1990, c. F-3, pmbl. (Can.).

83. *See M. v. H.*, 2 S.C.R. paras. 2-3 (Cory and Iacobucci, JJ.). The Court examined the definition of "spouse" as it applied to cohabitating conjugal couples, but not as it applied to married couples, leaving the issue of same-sex marriage untouched. *Id.* para. 2 ("We emphasize that the definition of 'spouse' found in s. 1(1) of the *FLA*, and which applies to other parts of the *FLA*, includes only married persons and is not at issue in this appeal.").

84. *Id.* para. 5 (Cory and Iacobucci, JJ.).

85. *See id.*

86. *See* Halpern v. Toronto (City), [2002] 60 O.R.3d 321, paras. 76-85, *rev'd by* [2003] 172 O.A.C. 276 (*Halpern II*).

87. *Id.* para. 85; *see also* Vital Statistics Act, R.S.N.S. 1989, ch. 494, § 5412 (Can.) (granting domestic partners in Nova Scotia same rights and obligations as a spouse under various Acts).

88. An Act to Comply with the Supreme Court of Canada Decision in *M. v. H.*, S.M. 2001, ch. 37.

benefits, pension benefits, and workers' compensation benefits."[89] In mid-2002, Quebec's National Assembly adopted a bill that extended to same-sex couples a variety of legal benefits, including "division of assets after a breakup, the right to see a partner's medical records and automatic status as a beneficiary when a partner dies," as well as inheritance and parental rights.[90] Ontario also passed legislation extending legal protections and benefits to same-sex couples to afford them equality under the law.[91]

Despite the progress made in extending various legal rights to same-sex couples, the law continued to deny those couples access to the institution of marriage.[92] In 1993, in *Layland v. Ontario (Minister of Consumer & Commercial Relations)*, the Ontario Divisional Court relied on the definition of marriage found in *Hyde* and held that "under the common law of Canada applicable to Ontario a valid marriage can take place only between a man and a woman, and that persons of the same sex do not have the capacity to marry one another."[93] However, the dissent maintained that the majority's definition of marriage unjustifiably violated the couples' equality rights under Section 15(1) of the Charter.[94]

The British Columbia and Quebec courts later took the same stance as the *Layland* dissent, in *EGALE v. Canada (Attorney General)*[95] and *Hendricks v. Quebec*, respectively.[96] In both cases, the courts found that the common law definition of marriage violated same-sex couples' rights to equal protection and benefit of the law without justification under Section 1 of the Charter.[97] However, both courts chose to suspend their declarations of invalidity to give the federal and provincial governments time to bring the laws into compliance with the Charter, after which the common law definition would be reformulated automatically to include same-sex unions.[98]

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89. *Halpern I*, 60 O.R.3d 321, para. 84.

90. *Id.* paras. 81-82.

91. *Id.* para. 76. However, the bill did not change the definitions of "spouse" or "marital status." *Id.*

92. *See id.* paras. 76-85 (noting that Quebec, Manitoba, and Nova Scotia each set up a parallel regime, either through civil unions or domestic partnerships, while Ontario made it clear through legislation that "[m]arriage is not affected" by the extension of spousal benefits to same-sex couples).

93. Layland v. Ontario (Minister of Consumer & Commercial Relations), [1993] 14 O.R.3d 658, 663.

94. *See id.* para. 42 (Greer, J., dissenting).

95. EGALE v. Canada (Attorney-Gen.), [2003] 13 B.C.L.R.4th 1.

96. Hendricks v. Quebec, [2002] R.J.Q. 2506.

97. *EGALE*, 13 B.C.L.R.4th 1, paras. 95, 135; *Hendricks*, R.J.Q. 2506, paras. 155, 184.

98. *See EGALE*, 13 B.C.L.R.4th 1, para. 182; *Hendricks*, R.J.Q. 2506, paras. 207-10. The Quebec Court of Appeal has upheld the *Hendricks* decision. *See* Associated Press, *Quebec's*

III. THE COURT'S DECISION

In the noted case, the Ontario Court of Appeal applied the *Law* and *Oakes* tests and found that the exclusion of same-sex couples from the institution of marriage violated their Charter equality rights in a manner that could not be justified in a free and democratic society.[99] Specifically, the Court held that the common law definition of marriage unjustifiably violated the Charter by excluding same-sex couples and that the Court had jurisdiction to amend that definition.[100] As to the remedy, the Court declared the definition of marriage "invalid to the extent that it refers to 'one man and one woman'" and ordered an immediate reformulation of the definition, striking the offending portion and replacing it with "'two persons.'"[101] The Court further ordered the Clerk of the City of Toronto to issue marriage licenses to the applicant couples and required the Registrar General of the Province of Ontario to register the marriages of the two couples wed at MCCT.[102]

The Court of Appeal began by discussing the legal basis for the definition of marriage and that institution's significance in society.[103] According to the Court, the definition of marriage in Canada was rooted in the English case of *Hyde v. Hyde*, wherein Lord Penzance defined that institution as "the voluntary union for life of one man and one woman, to the exclusion of all others."[104] The Court acknowledged marriage as "one of the most significant forms of personal relationships," through which couples can publicly declare their love and commitment to one another.[105] The Court further noted that marriage serves as a method of achieving societal approbation, which "can only enhance an individual's sense of self-worth and dignity."[106] This, according to the court, formed the heart of the case.[107]

Top Court Backs Gay Marriage, BOSTON GLOBE, Mar. 20, 2004. At the time of publication, both British Columbia and Quebec had lifted the delay and therefore same-sex couples were already legally allowed to marry.

99. Halpern v. Toronto (City), [2003] 172 O.A.C. 276, paras. 1-8, 155 (*Halpern II*).

100. *See id.* para. 155. The court also held that the common law definition of marriage did not infringe upon any religious rights or freedoms guaranteed by the Charter, thus dismissing MCCT's cross-appeal on that issue. *Id.* paras. 155-56.

101. *Id.* para. 156 (internal citations omitted).

102. *See id.*

103. *See id.* paras. 1, 5.

104. Hyde v. Hyde, 14 L.T.R. 188, 189 (P & D 1866).

105. *Halpern II*, 172 O.A.C. 276, para. 5.

106. *Id.*

107. *Id.* para. 8.

The Court then laid down the analytical framework for the opinion.[108] Noting that Parliament had acknowledged the definition of marriage accepted at common law, the Court found that this acknowledgment did not amount to a statutory definition.[109] Therefore, the Court concluded the definition to examine was a common law definition.[110] The Court also noted that common law rules are subject to the same scrutiny under the Charter as legislation because the common law also amounts to government action.[111] Furthermore, the Court pointed out that it was not the first to deal with the constitutionality of this definition of marriage.[112]

The Court next delved into Section 15(1) analysis, identifying the appropriate approach as the purposive-contextual approach enunciated in *Law*.[113] Following *Law*'s three-step inquiry, the Court first rejected the government's argument that the common law definition of marriage did not create a distinction between same-sex and opposite-sex couples, but instead internalized a historical preference for opposite-sex couples.[114] The Court stated that the common law's adoption, as opposed to invention, of the opposite-sex nature of marriage was irrelevant; a distinction existed nonetheless.[115] Moreover, the legislatures' bestowal of rights and benefits based upon that distinction constituted a formal distinction for the purposes of Section 15(1).[116] Moving to the second step of the *Law* inquiry, the Court noted that *Egan* held that sexual orientation constituted a type of discrimination analogous to those enumerated in Section 15(1).[117] For the third step, the Court assumed the subjective-objective perspective required under *Law*, noting that the emphasis should be on human dignity.[118] The Court further reasoned that

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108. *See id.* paras. 26-34.

109. *See id.* paras. 27-28.

110. *See id.* para. 29.

111. *See id.*

112. *See id.* para. 31 (citing EGALE v. Canada (Attorney-Gen.), [2003] 13 B.C.L.R.4th 1; Hendricks v. Quebec, [2002] R.J.Q. 2506). The Ontario Court of Appeal further noted that both of these cases held that the common law definition of marriage violated same-sex couples' equality rights under Section 15(1) of the Charter. *See id.* paras. 32-33.

113. *Id.* para. 59 (citing Law v. Canada (Minister of Employment & Immigration), [1999] 1 S.C.R. 497, 525).

114. *See id.* paras. 66-68.

115. *See id.* paras. 68, 70.

116. *See id.* para. 69 (citing Eldridge v. British Columbia, [1997] 3 S.C.R. 624, 678 ("This Court has repeatedly held that once the state does provide a benefit, it is obliged to do so in a non-discriminatory manner.").

117. *See id.* paras. 74-75. Indeed, the Attorney General of Canada had conceded as much. *Id.*

118. *See id.* paras. 78-79.

the inquiry should look not just to the purpose of the law, but also to the effects.[119] To that end, the Court examined factors such as the historical disadvantage to homosexuals, the government's failure to take into account their needs and capacities, and the pernicious effect caused by the exclusion of same-sex couples from marriage.[120] Finding that this demeaned the dignity of same-sex couples, the Court concluded that the exclusion of same-sex couples from marriage violated their equality rights under Section 15(1) of the Charter.[121]

The Court then engaged in the Section 1 *Oakes* analysis.[122] Under the first prong, the Court examined the purposes of marriage, as adopted by the Attorney General of Canada: "(i) uniting the opposite sexes; (ii) encouraging the birth and raising of children of the marriage; and (iii) companionship."[123] In doing so, the Court found that a goal of uniting the opposite sexes favored those relationships over same-sex relationships and thus could not be a pressing and substantial objective.[124] As to the second purpose, encouraging procreation and childrearing, the Court found that the goal, generally stated, was a proper one.[125] However, that goal does not require the exclusion of same-sex couples from marriage because they are not precluded from having and raising children.[126] The Court also found the third purpose to fail the *pressing and substantial test*, reiterating that same-sex couples are "equally capable of providing companionship and forming lasting and loving relationships."[127] Thus, the Court held there was no "pressing and substantial" reason for maintaining the same-sex exclusion.[128]

Without a pressing and substantial objective, the Charter violations could not be saved under Section 1.[129] However, the Court still completed the *Oakes* analysis.[130] Under the second prong of *Oakes*, the Court concluded that the exclusion of same-sex couples from marriage could not be rationally connected to the stated objectives, particularly in the area of procreation and childrearing, where the definition of marriage

119. *See id.* para. 80.
120. *See id.* paras. 82-107.
121. *Id.* para. 108.
122. *See id.* para. 113.
123. *Id.* para. 118.
124. *Id.* para. 119.
125. *See id.* para. 120.
126. *See id.* paras. 121-23.
127. *Id.* para. 124.
128. *Id.* para. 125.
129. *Id.*
130. *Id.* para. 126.

was both overinclusive and underinclusive.[131] Regarding minimal impairment, the Court rejected the argument that Parliament had effectively granted same-sex couples most, if not all, of the same benefits as opposite-sex couples.[132] Same-sex couples were not only deprived of some of the economic benefits bestowed upon married couples, but they also were deprived of the "societal significance surrounding the institution of marriage."[133] In summing up its second-prong analysis, the Court held that the negative effects of the Charter violations outweighed the objectives.[134]

Having determined that the exclusion of same-sex couples from marriage violated Section 15(1) of the Charter and was not demonstrably justifiable under Section 1, the Court turned its attention to the appropriate remedy.[135] Following the steps outlined in *Schachter*, the Court held that the offending portion of the definition of marriage ("one man and one woman") should be reformulated to allow same-sex marriages.[136] Furthermore, the Court refused to suspend the remedy in deference to Parliament.[137] Relying upon *Swain*, the Court held that a common law rule that violated the Charter should be treated differently than legislation which violated the Charter: judicial deference to the legislature was unnecessary where the offending rule originated at common law.[138] Again relying heavily upon *Schachter*, the Court found that a suspension of remedy would create a state of affairs where the violations of rights were permitted to continue.[139] Without evidence that the law in question "poses potential danger to the public, threatens the rule of law, or would have the effect of denying deserving persons of benefits under the impugned law," the Court remained unconvinced of the need for a suspension of remedy.[140]

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131. *See id.* paras. 130-32 (reiterating that same-sex couples also have and raise children, and that not all married opposite-sex couples do so).
132. *Id.* paras. 135-39.
133. *Id.* para. 136.
134. *See id.* para. 141.
135. *Id.* para. 143.
136. *See id.* paras. 147-48.
137. *See id.* paras. 149-53.
138. *Id.* para. 149.
139. *See id.* para. 152.
140. *Id.* paras. 152-53.

IV. ANALYSIS

A. The Court's Decision in Light of Previous Jurisprudence

That the Court found the common law definition of marriage in violation of the Charter's guarantee of equal rights is not surprising. *Egan*'s declaration that sexual orientation is an analogous ground upon which a Section 15(1) claim might be based,[141] coupled with *Law*'s requirement that courts examine Charter violation claims with an eye toward protecting human dignity and self-autonomy,[142] arguably mandated this very conclusion. Indeed, as previously discussed, courts in other jurisdictions had already reached the same result.[143]

What has proven controversial, however, is the Court's decision regarding remedy. In *Hendricks* and *EGALE* the courts chose to temporarily suspend remedies to give Parliament and the provincial legislatures time to bring legislation regarding marriage and spousal rights into compliance with their rulings.[144] Two-thirds of the Divisional Court in the noted case agreed with this stance.[145] The justices in *EGALE*, *Hendricks*, and *Halpern I* cited varying reasons for their deference to the legislatures, but the common core of their reasoning centered on a desire for uniformity and certainty in the law.[146]

The Ontario Court of Appeal, however, found that the inconsistency would be preferable to a continued encroachment upon the Charter rights of the claimants.[147] Although the Canadian Supreme Court articulated this concern in *Schachter*, the Court in that case also indicated that a suspension of remedy might be warranted where the law at issue is underinclusive in order to give the legislature an opportunity to decide whether to include the new group or cancel the benefits altogether.[148] While it is extremely unlikely that Parliament would choose to cancel all benefits to married couples, the legislature might still have chosen to remove reference to "marriage" from the rights and benefits schemes and replace it with a more specific set of criteria that would be equally

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141. Egan v. Canada, [1995] 2 S.C.R. 513, para. 5.

142. Law v. Canada (Minister of Employment & Immigration), [1999] 1 S.C.R. 497, 529, para. 51.

143. *See* EGALE v. Canada (Attorney-Gen.), [2003] 13 B.C.L.R.4th 1; Hendricks v. Quebec, [2002] R.J.Q. 2506.

144. *See EGALE*, 13 B.C.L.R.4th at 1; *Hendricks*, R.J.Q. at 2506.

145. *See Halpern II*, 172 O.A.C. 276, para. 17.

146. *See EGALE*, 13 B.C.L.R.4th 1, para. 161; *Hendricks*, R.J.Q. 2506, paras. 207-10; *Halpern I*, [2002] 60 O.R.3d 321, para. 10 (Smith, A.C.J.) (Ont., S.C.J.).

147. *See Halpern II*, 172 O.A.C. 276, paras. 152-53.

148. Schachter v. Canada, [1992] 2 S.C.R. 679, paras. 80, 82.

applicable to both heterosexual and homosexual couples.[149] However, because the focus in these cases is on the claimants' dignity and sense of self-worth, any governmental backpedaling from formal endorsement of marriages would likely be deemed a further denial of true substantive equality.[150] Similarly, establishment of a parallel scheme of rights and benefits for same-sex couples, such as domestic partnerships or civil unions, is also likely to meet with skepticism and, ultimately, violate the Charter's guarantee of substantive equality rights. Given the lack of details on this point, one cannot be sure whether these options were fully explored.[151]

B. Reverberations of the Court's Decision

After the Ontario Court of Appeal's decision in June of 2003, the *EGALE* applicants requested that the British Columbia Court of Appeal lift its suspension of remedy.[152] Noting that the federal government declined to appeal either of the *Halpern* or *EGALE* decisions, and that many same-sex couples married after the *Halpern* ruling, the British Columbia Court of Appeal lifted the suspension and declared the common law definition of marriage to be restated as "'the lawful union of two persons to the exclusion of all others.'"[153] The additional proceeding and its outcome only emphasized the point that the British Columbia Court's decision was based more upon the desire for uniformity and equal application of the law than upon the violation of the claimants' Charter rights.[154]

Two conservative religious and family groups, the Association for Marriage and the Family in Ontario and the Interfaith Coalition, later attempted to challenge the Ontario Court of Appeal decision by

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149. *See* Halpern v. Toronto (City), [2002] CarswellOnt 2309 (Annotation by James G. McLeod) stating:

> If the legislators had simply returned "marriage" to the religious institutions where it originated and defined the type of intimate, interdependent relationships that would give rise to "family" rights without regard to marital status, the courts would have no role in defining or redefining the concept of "marriage" since it would no longer be a concept upon which legal rights are granted or withheld.

Id.

150. *See, e.g.*, Moore v. Canada, [1998] 4 F.C. 585, para. 61 ("[T]he scheme proposed by the employer establishes a regime of 'separate but equal', one that distinguishes between relationships on the basis of the sexual orientation of the participants. Thus, this scheme remains discriminatory [even though] . . . the two classes receive the same benefits.").

151. *See Halpern II*, 172 O.A.C. paras. 136-39, 149, 152-53.

152. EGALE Canada Inc. v. Canada, [2003] 15 B.C.L.R.4th 226, para. 5.

153. *Id.* paras. 4, 8.

154. *See id.* paras. 6-7.

appealing to the Supreme Court of Canada.[155] The Canadian Supreme Court unanimously granted motions by the federal government, MCCT, and the claimant couples which sought to deny the groups full party status for the appeal.[156] Chief Justice McLachlin stated that allowing the appeal would be "quite unprecedented" in light of the fact that the government had chosen to drop the suit, particularly where the issue had proven so divisive among the electorate and the general populace.[157]

The debate has not remained confined to Canada, however. In November of 2003, the Supreme Judicial Court of Massachusetts delivered a controversial ruling that the exclusion of same-sex couples from the institution of marriage violated the claimant couples' equality rights under that state's constitution.[158] Citing the noted case, the Massachusetts Supreme Court decided to reformulate the common law definition of marriage to include same-sex unions.[159] Unlike the Ontario Court of Appeal, however, the Massachusetts court ordered a stay of judgment for 180 days "to permit the Legislature to take such action as it may deem appropriate in light of this opinion."[160]

Following the Supreme Judicial Court's decision, the state legislature requested an advisory opinion from the Court to determine whether a law establishing civil unions for same-sex couples would be

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155. Tonda MacCharles, *Gay-Marriage Foes Lose Fight*, TORONTO STAR, Oct. 10, 2003, at A8.

156. *Id.* The groups had been intervenors in the original suit. *Id.*

157. *Id.* Interestingly, one of the intervenor groups now seeking remedy through the court system had previously claimed, at the lower court levels, that the courts were without jurisdiction to adjudicate the issue and that the decision should be left to the elected legislatures. *See* Halpern v. Toronto (City), [2002] 60 O.R.3d 321, para. 45, *rev'd by* [2003] 172 O.A.C. 276 (*Halpern I*); *see also* Clayton Ruby, *Opponents of Same-Sex Marriage Have Had Their Day*, NATIONAL POST, Oct. 6, 2003, at A13 ("[T]hese same groups have argued all along that these important issues should be decided by Parliament, not the courts . . . . Now, just because they don't like the outcome of the political process, they're asking the Supreme Court to overturn the will of the government.").

158. Goodridge v. Dept. of Public Health, 798 N.E.2d 941, 969 (Mass. 2003) (decided Nov. 18, 2003) ("We declare that barring an individual from the protections, benefits, and obligations of civil marriage solely because that person would marry a person of the same sex violates the Massachusetts Constitution.").

159. *Id.* at 969 ("We concur with [the Ontario Court of Appeal's] remedy, which is entirely consonant with established principles of jurisprudence empowering a court to refine a common-law principle in light of evolving constitutional standards.").

160. *Id.* at 970. Although the Supreme Judicial Court of Massachusetts did not give a reason for the length of time chosen for suspension of remedy, this author cannot help but notice the interesting coincidence that same-sex marriages will become legal in Massachusetts on the fiftieth anniversary of the landmark United States Supreme Court decision of *Brown v. Board of Education*, 74 S. Ct. 686, 692 (May 17, 1954) (holding the doctrine "separate but equal" has no place in public education).

constitutional under *Goodridge*.[161] The Court found that such a law would not, firmly stating:

> Because the proposed law by its express terms forbids same-sex couples entry into civil marriage, it continues to relegate same-sex couples to a different status. The holding in *Goodridge*, by which we are bound, is that group classifications based on unsupportable distinctions, such as that embodied in the proposal bill, are invalid under the Massachusetts Constitution. The history of our nation has demonstrated that separate is seldom, if ever, equal.[162]

The state legislature is currently considering amending the state's Constitution to negate the Court's decision by banning same-sex marriages and creating civil unions.[163] Thus the *Goodridge* decision sparked a debate in the United States echoing that of Canada: who should make the decision on same-sex marriage—the courts or legislatures?[164]

V. CONCLUSION

While controversial, the decision of the Ontario Court of Appeal is not surprising in light of the changing dynamics in Canadian equality rights jurisprudence. Although the Canadian legislatures have been increasingly reluctant to use their override powers under Section 33 of the Canadian Constitution, the option still exists.[165] However, democracy, by definition, is rule by the majority, while discrimination, by nature, is most likely to be directed at groups in the minority. In a free and democratic society, where the democratic process does not always lend itself to the protection of all members of society, there will necessarily be tension between the elected legislature and the appointed judiciary.

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161. *Majority Opinion*, *at* http://www.boston.com/news/specials/gay_marriage/sjc_20404/ (last visited Mar. 12, 2004).

162. *Id.* (citing Brown v. Board of Education, 74 S. Ct. 686 (1954)).

163. Raphael Lewis, *Vote Switches by Lawmakers Are Key to the Day*, BOSTON GLOBE, Mar. 12, 2004, at A1.

164. Because marriage capacity has typically been decided by the States despite the fact that the federal government provides benefits based on that classification as well, the same-sex marriage debate in the United States has also taken on a dimension of federalism issues. Starting with San Francisco Mayor Gavin Newsom local officials in several states have begun permitting same-sex couples to wed, while President Bush has called for an amendment to the United States Constitution banning those unions. *See* Marc Sandalow & Rachel Gordon, *Newsom Now a National Figure: Same-Sex Marriage Decision Turns Him into Lightning Rod*, S.F. CHRONICLE, Feb. 29, 2004, at A1; Robert D. McFadden, *With Polite Refusal, Same-Sex Marriage Issue Reaches City Hall*, N.Y. TIMES, Mar. 5, 2004, at B1; George W. Bush, Remarks Calling for Constitutional Amendment Protecting Marriage (Feb. 24, 2004) *available at* http://www.whitehouse.gov/news/releases/2004/02/print/20040224-2.html.

165. GALL, *supra* note 12 at 101-02.

Where the Attorney General declines to appeal the Court's decision, and the legislatures refuse to override it, however, they can hardly criticize the result.

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