Reference re Same-sex Marriage (2004)

Before the *Civil Marriage Act* was passed 2005, Canada had no legislation that defined marriage. Rather, marriage was defined by the common law as "the voluntary union for life of one man and one woman."[1]This definition of marriage was challenged in a series of cases, culminating in the 2003 Ontario Court of Appeal decision in *Halpern v. Canada*.[2]Effectively, the courts established that excluding same-sex partners from access to marriage is contrary to the guarantee of equality in section 15 of the *Canadian Charter of Rights and Freedoms*.

In 2003, proposed legislation to broaden the legislated definition of civil marriage to include same-sex marriage was before the Parliament of Canada. The operative sections of the proposed law read:

1. Marriage, for civil purposes, is the lawful union of two persons to the exclusion of all others (*emphasis added*).

2. Nothing in this Act affects the freedom of officials of religious groups to refuse to perform marriages that are not in accordance with their religious beliefs.[3]

Mindful of possible constitutional challenges to the proposed legislation, the government referred four questions to the Supreme Court of Canada. The Court's response was unanimous and concise. The essence of each question and the Court's answers are as follows.

Question 1: Is the proposed Act within the legislative authority of Parliament of Canada?

The Court's answer: Not entirely. The *Constitution Act, 1867* gives the Parliament of Canada exclusive authority to enact laws related to "marriage and divorce." The provincial legislatures have exclusive authority over "the solemnization of marriage."[4] In other words, laws regarding the capacity to marry – covering issues like age, consanguinity, and consent – must be federally enacted. Laws regarding the performance of marriage – including licensing, witness requirements, and so forth – are the domain of provincial legislatures. Section one of the proposed Act deals with capacity to marry – a subject matter upon which Parliament has authority to legislate.[5] Section two relates to who may perform marriages – a provincial matter upon which Parliament may not legislate.[6]
This division of authority does not settle every aspect of the first question. The legislative authority of Parliament over "marriage" was scrutinized by several religious groups who participated as interveners in the case. They argued that even though Parliament has authority to pass laws regarding marriage, the fundamental character of marriage may not

be altered. They contended that the *Constitution Act, 1867*entrenches the common-law definition of marriage as between one man and one woman.[7] The Court responded to this argument by drawing an analogy with its decision from 1930 in the case of *Edwards v. Attorney-General of Canada*.[8]That case established that the legal definition of personhood – long held to exclude women – is not frozen in time. The concept of our constitution as "a living tree" allows for its growth and expansion in response to the changing values of society. Just as natural growth of the constitution has brought women into the category of personhood, so has same-sex marriage come within the meaning of marriage.[9]

Question 2: Is extending the capacity to marry to persons of the same sex consistent with the *Charter*?

The Court's answer: Yes. Some interveners suggested that the proposed law would be contrary to the equality provision in section 15(1) of the *Charter*. The Court dismissed this suggestion, stating that the proposed Act does not draw distinctions between groups of people. To the contrary, it rectifies an unjustifiable distinction. Therefore, no further analysis of a potential challenge based on section 15 is necessary, or even possible.[10] Interveners also argued that the proposed Act would infringe freedom of religion as protected by section 2(a) of the *Charter* by "imposing a dominant social ethos" which "limit[s] the freedom to hold religious beliefs to the contrary." The Court dismissed this argument with the same reasoning it applied to the equality argument: conferring rights upon one group does not imply violating the rights of another group.[11] The final religious freedom argument was that the proposed Act would create a collision of rights. The Court acknowledged that rights may come into conflict and when they do, there must be a balancing and reconciling of the rights. However, without a concrete factual context, the Court was not willing to enter into hypothetical speculation.[12]

Question 3: Does the Charter protect priests, pastors, rabbis and other religious officials, from being compelled to perform same sex marriages?

The Court's answer: Yes. The Court plainly and clearly said that it would be contrary to freedom of religion for the state to compel religious officials to perform same-sex marriages.[13]

Question 4: Is the opposite-sex requirement established by common law and Quebec civil law consistent with the *Charter*?

The Court exercised it discretion not to answer this question. It gave three reasons. First of all, the government stated that it would proceed with legislative enactments regardless of the answer. Because the government intended to give legislative force to the rulings of several lower courts, an answer to this question would serve no legal purpose.[14] Secondly, many same-sex couples have relied upon the rulings of lower courts and entered into marriages. The Court said that there is no compelling reason to jeopardize rights recognized by lower courts by answering this question.[15] Finally, answering the question might undermine the government's goal of achieving uniformity in respect to civil marriage across Canada.[16] Jim Young (May 12, 2010)

[1] *Hyde v. Hyde* (1866), L.R. 1 P. & D. 130. [2] *Halpern v. Canada (Attorney General)* (2003), 65 O.R. (3d) 161 (C.A.). [3] *Reference re Same-Sex Marriage*, 2004 SCC 79. [4] *Constitution Act, 1867*, ss. 91(26), 92(12). [5] *Supra* note 3 *at para. 19.* [6] *Ibid.* at paras. 36-37. [7] *Ibid.* at para. *21.* [8] *Edwards v. Attorney-General for Canada*, [1930] A.C. 124. [9] *Supra* note 3 at para.22. [10] *Ibid.* at para.45. [11] *Ibid.* at para.48. [12] *Ibid.* at para. 51. [13] *Ibid.* at para.58. [14] *Ibid.* at para.65. [15] *Ibid.* at paras.66-67. [16] *Ibid.* at para. 69.