

The Case of Same-Sex Marriage Rights in Canada *Halpern et al. v. Attorney General of Canada et al.* [2003] & *Reference re: Same-Sex Marriage* [2004]

Teacher Resource

Curriculum Links: Understanding Canadian Law (CLU3E), Grade 11, Workplace Preparation

Legal Focus: Constitutional Law, Same-Sex Marriage Rights

Estimated Time: 1 period

Overall Expectations:

- Identify the rights and freedoms outlined in the *Canadian Charter of Rights and Freedoms* and explain how to exercise them.
- Describe how the law applies to family matters.
- Communicate legal knowledge effectively.

Specific Expectations:

- Identify the legal rights and fundamental freedoms outlined in the *Charter of Rights and Freedoms*.
- Explain the importance of acknowledging and respecting minority rights in a democratic society.
- Define what is meant by a legal marriage.
- Demonstrate an ability to listen and read critically, find relevant information, and express and support opinions using proper legal terminology.

Description of the Case

During the summer of 2000, eight same-sex couples applied for civil marriage licences from the City of Toronto. The City of Toronto Clerk did not grant the marriage licences, as she was unsure of the legal implications of issuing licenses for same-sex marriages. The licences were put on hold awaiting clarification from the courts. The Divisional Court heard the case on November 5, 2001. On July 12, 2002, the Divisional Court ruled unanimously that prohibiting same-sex couples from marrying is discriminatory and unconstitutional as it violates the *Canadian Charter of Rights and Freedoms*. The Court extended the right to marry to same-sex couples and gave the province of Ontario two years to comply with the decision. The two years were to allow Parliament to come up with an appropriate change to the law. If they failed to act within two years, then the definition of

marriage would automatically be reformulated by substituting the words “two persons” for “one man and one woman”.

The Federal Justice Minister announced that the federal government would seek permission to appeal the decision.

From April 22- 25, 2003, the Court of Appeal for Ontario heard a constitutional challenge to the definition of marriage. The definition of marriage, which is found only in the common law, required that marriage be between “one man and one woman”. The opposite-sex requirement was challenged by eight same-sex couples as offending their rights to equality as guaranteed by s. 15(1) of the *Charter* on the basis of sexual orientation.

The Final Judgment

In a unanimous judgment, the Court of Appeal for Ontario upheld the decision of the Divisional Court that the common law definition of marriage offends the equality rights of the couples under s. 15(1) of the *Charter* in a manner that cannot be justified in a free and democratic society. The Court declared the definition of marriage to be invalid, reformulated the definition of marriage to be “the voluntary union for life of two persons to the exclusion of all others”, and ordered it to have immediate effect.

Changes to the Law

In 2003, the Liberal government asked the Supreme Court of Canada to give an opinion on whether a proposed bill (C-38) on same-sex marriage was in line with the Canadian Constitution (known as the Reference re Same-Sex Marriage). Prior to this reference, the courts in several provinces had found that restricting marriage to only being between a man and a woman was unconstitutional. The government also asked the court to give its opinion on whether the bill, if passed, would violate the freedom of religion under s. 2(a) of the *Charter* of religious officials who did not want to perform same-sex marriages.

The court found that the proposed bill met the equality principles in s.15 of the *Charter*. The court spoke about how the *Charter* is a “living tree” which evolves as society changes. The court also recognized that the bill could lead to a conflict between s. 15 equality rights and s. 2(a) freedom of religion. However, it decided that Bill C-38 was broad enough to protect religious officials from being compelled to perform religious same-sex marriages that go against their religious beliefs. The court noted that when conflicts between *Charter* rights arise they must be resolved by balancing rights not by denying one right in favour of another. Same-sex marriages were legalized across Canada on July 20, 2005 when Bill C-38 was passed into law at *The Civil Marriage Act*.

Teaching & Learning Strategies

1. Ask students to read *The Big Question* and answer in the space provided. Discuss students’ answers and opinions as a class.

2. Review *The Facts of the Case* by having students read it aloud or quietly to themselves. Teachers should decide what reading strategy will work best with that particular group of students.
3. Introduce *The Relevant Law* and explain how these laws apply to these particular cases.
4. Read *The Arguments in Court* for the Halpern decision to students and have them discuss the validity of each argument. This is a good opportunity for students to ask clarifying questions and provide personal opinions.
5. Ask students to read *The Final Judgments*. Instruct students not to look at this section until they have expressed their own opinions and speculated as to the outcome of the cases. Discuss the judgments as a class.
6. Ask students to complete the *Check for Understanding* exercise. Instruct students whether or not they are allowed to look back on their reading.
7. Have students complete the *Reflecting* exercise. Students can begin by discussing questions 1-3 in small groups. You can choose to have students complete the chart either individually or in their groups. Discuss students' answers as a class.

Assessment & Evaluation

- Class discussions
- *Check for Understanding* worksheet
- *Reflecting* worksheet

Resources

Ontario Justice Education Network

www.ojen.ca

- Landmark Case - The Same Sex Marriage Case: *Halpern et al. v. Attorney General of Canada et al.*
- Landmark Case - Sexual Orientation and the Charter: *Vriend v. Alberta*
- Landmark Case - Equality Rights and the Canadian Pension Plan: *Law v. Canada*
- Cases That Have Changed Society
- Equality DVD (Svend Robinson speaking on the exclusion of same-sex rights from the drafting of s.15 of the *Charter*)

Equal Marriage for Same-sex Couples

www.samesexmarriage.ca

Ontario Court of Appeal Decisions

<http://www.ontariocourts.on.ca/search> (includes synopsis and the full decision)

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Student Handout

The Big Question

How should the rights of same-sex couples be protected while still allowing Canadians to adhere to their religious beliefs?

The Facts of the Cases

- Summer 2000 Eight same-sex couples applied to the City of Toronto for marriage licences. The licences were not given because there was uncertainty about the legality of same-sex marriages. Instead, the licences were put on hold while the City of Toronto Clerk applied to the Court for clarification on the issue.
- November 5, 2001 The case was heard by the Ontario Divisional Court.
- July 12, 2002 The Court ruled unanimously that preventing same-sex couples from marrying was discriminatory and violated the *Canadian Charter of Rights and Freedoms*. The Court ordered the province of Ontario to comply with its decision within two years by giving same-sex couples the right to marry.
- July 29, 2002 The Federal Justice Minister announced that the government would appeal the ruling and filed a motion two days later.

April 22-25, 2003 The appeal was heard by the Court of Appeal of Ontario.

2003 The Liberal government asked the Supreme Court of Canada to give an opinion on whether a proposed bill on same-sex marriage (*The Civil Marriage Act*, Bill C-38) was in line with the Canadian Constitution and whether the bill, if passed, would violate the freedom of religion under s. 2(a) of the *Charter of religious officials* who did not want to perform same-sex marriages.

The Issues

- Did the government infringe on the equality rights of same-sex couples, as set out in the *Canadian Charter of Rights and Freedoms*, by supporting a definition of marriage that is only between “one man and one woman”?
- Should the definition of marriage have been changed to include same-sex couples, even if it infringes on some people’s freedom of religion, also guaranteed by the *Canadian Charter of Rights and Freedoms*?
- Could religious officials be compelled to perform same-sex marriages even if this was contrary to their religious beliefs?

The Relevant Law

Canadian Charter of Rights and Freedoms

2. Everyone has the following fundamental freedoms:
a) freedom of conscience and religion

15. (1) 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.

The Constitution Act 1867

The Distribution of Legislative Powers

91. Powers of the Parliament of Canada [...]

26. Marriage and Divorce.

92. Exclusive Powers of Provincial Legislatures [...]

12. The Solemnization (performing) of Marriage in the Province.

The Arguments in Court

Halpern

- Same-sex couples are able to have long lasting loving relationships and denying them the right to marry implies that they are not worthy of the same respect or recognition as opposite sex relationships.
- Same-sex couples and opposite sex couples can have children through adoption, surrogacy and donor insemination and can raise those children in a loving and caring environment. Having children is not the only purpose of marriage. In fact, many couples have children outside of marriage while many married couples choose not to have children at all.
- The dignity of same sex couples is violated when the definition of marriage makes a formal distinction between opposite-sex and same-sex couples.
- The equality rights of same-sex couples are violated when they are discriminated against because of their sexual orientation. (s.15 of the *Charter*)

The Attorney General of Canada

- "Marriage is the union of one man and one woman" and it is generally accepted that this is the "universal" definition of marriage across many religions and cultures.
- The reason for marriage is the ability and possibility of having children "naturally". If this is changed, there will be destructive consequences for the family unit and society in general will breakdown.

The Final Judgments

On June 10, 2003, the Court of Appeal for Ontario upheld the judgment of the Divisional Court and ruled unanimously that the existing definition of marriage was unconstitutional because it went against the equality rights set out in s.15 of the *Charter*. The Court said that the existing definition of marriage, referring to "one man and one woman", was invalid and provided a new definition of marriage, effective immediately, as "the voluntary union for life of two persons to the exclusion of all others".

The Supreme Court of Canada found that the proposed same-sex marriage bill met the equality principles in s.15 of the *Charter*. The court spoke about how the *Charter* is a "living tree" which evolves as society changes. The court also recognized that the

bill could lead to a conflict between s. 15 equality rights and s.2(a) freedom of religion. However, it decided that Bill C-38 was broad enough to protect religious officials from being compelled to perform religious same-sex marriages that go against their religious beliefs. The court noted that when conflicts between *Charter* rights arise they must be resolved by balancing rights not by denying one right in favour of another. Same-sex marriages were legalized across Canada on July 20, 2005 when Bill C-38 was passed into law as *The Civil Marriage Act*.

The Civil Marriage Act, Bill C-38

1. This Act may be cited as the *Civil Marriage Act*

2. Marriage, for civil purposes, is the lawful union of two persons to the exclusion of all others.

3. It is recognized that officials of religious groups are free to refuse to perform marriages that are not in accordance with their religious beliefs.

3.1 For greater certainty, no person or organization shall be deprived of any benefit, or be subject to any obligation or sanction, under any law of the Parliament of Canada solely by reason of their exercise, in respect of marriage between persons of the same sex, of the freedom of conscience and religion guaranteed under the *Canadian Charter of Rights and Freedoms* or the expression of their beliefs in respect of marriage as the union of a man and woman to the exclusion of all others based on that guaranteed freedom.

4. For greater certainty, a marriage is not void or voidable by reason only that the spouses are of the same sex.

Check for Understanding

1. The City of Toronto clerk did not issue the marriage licences because she did not like homosexuals. **TRUE/FALSE**
2. The Divisional Court required the province of Ontario to comply with its ruling within _____ years.
3. Which level of government decided to appeal the original decision of the court, municipal, provincial, or federal?

4. Subsection _____ of the *Charter* sets out the equality rights that were at the heart of this case.
5. Describe why same-sex couples argue that their marriage would not undermine the family.

6. According to the argument of the Attorney General of Canada, what would happen if same-sex marriage is allowed?

7. The Court of Appeal for Ontario **AGREED/DISAGREED** (please circle) with the original ruling made by the Divisional Court.
8. What does it mean when it is said that judges agreed “unanimously”?

9. The original definition of marriage included the words “one man and one woman”. How did that wording change?

10. How did the Supreme Court of Canada decision effect the law? What happened next?

Reflecting

Take a few minutes to discuss the following questions with 2-3 other classmates.

1. What is the purpose of marriage?
2. Why do people in our society get married? (think of both traditional and non-traditional reasons that people might have)
3. What role does religion play in discussions about same-sex marriage?

Now consider the following question and examine both sides of the issue by filling in the chart below. When you are finished, write your own view in the space provide and give reasons to support your decision.

Question	
Parliament has legalized gay marriage in Canada, however no individual or religious institution is required by law to perform same-sex marriages. Do you think this is a fair way to balance Canadians' right to equality with their freedom of religion?	
Reasons in Support	Reasons that Oppose
What is your view and why?	