

The Top Five - 2003

Each year Justice Stephen Goudge of the Ontario Court of Appeal identifies five cases that are of significance in the educational setting. This summary, based on his comments and observations, is appropriate for discussion and debate in the classroom setting.



Halpern v. Ontario Court of Appeal, June 10, 2003

Civic Institution Of Marriage: Same Sex Couples: Whether Common Law Definition of Marriage Violates S. 15 of the Canadian Charter of Rights & Freedoms

<http://www.ontariocourts.on.ca/decisions/2003/june/halpernC39172.htm>

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

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

In a unanimous judgment, the Court of Appeal also upheld the decision of the Divisional Court that the common law definition of marriage offends the Couples’ equality rights under s. 15(1) of the *Charter* in a manner that cannot be justified in a free and democratic society. The Court further agreed that MCCT’s rights as a religious institution are not violated. In an effort to find the best way to remedy or fix the

infringement of equality rights, the Court declared the current 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 the declaration of invalidity and the reformulated definition to have immediate effect.