

Court of Appeal for British Columbia

Citation:
Barbeau v. British Columbia (Attorney General),

2003 BCCA 406

Date: 20030708

Docket: CA029017; CA029048

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Between:

Dawn Barbeau and Elizabeth Barbeau

Peter Cook and Murray Warren,

Jane Hamilton and Joy Masuhara

Appellants

(Petitioners)

And

The Attorney General of British Columbia and

The Attorney General of Canada

Respondents

(Defendants)

- and -

Docket: CA029048

Between:

EGALE Canada Inc.,

David Shortt and Shane McCloskey,

Melinda Roy and Tanya Chambers,

Lloyd Thornhill and Robert Peacock,
Robin Roberts and Diana Denny,
Wendy Young and Mary Theresa Healy

Appellants

(Petitioners)

And

The Attorney General of Canada,
The Attorney General of British Columbia, and
The Director of Vital Statistics for British Columbia

Respondents

(Respondents)

Before:
The Honourable Madam Justice Prowse

The Honourable Mr. Justice Mackenzie

The Honourable Mr. Justice Low

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Place and Dates of Hearing:
Vancouver, British Columbia

February 10-12, 2003

Written Submissions Received:
June 25 and 30, July 3 and 4, 2003

Place and Date of Judgment:
Vancouver, British Columbia

July 8, 2003

Supplementary Reasons of the Court

Reasons for Judgment of the Court:

[1] On May 1, 2003, this Court released reasons for judgment with respect to these appeals. (Those reasons may be found at 2003 BCCA 251, [2003] B.C.J. No. 994.) The Court declared that the common law definition of marriage as "the voluntary union for life of one man and one woman to the exclusion of all others" constituted a common law bar to same-sex marriage and was of no force or effect on the basis that it violated s. 15 of the Canadian Charter of Rights and Freedoms and could not be saved under s. 1. The Court reformulated the common law definition of marriage as: "the lawful union of two persons to the exclusion of all others". It then suspended these remedies until July 12, 2004.

[2] The reasons for suspending the remedies were set out at para. 161 of the reasons for judgment of Madam Justice Prowse, speaking for the Court on this point:

I would suspend the relief referred to in paras. 158 [the declaration of invalidity of the common law definition of marriage] and 159 [the reformulation of the new common law rule] until July 12, 2004, solely to give the federal and provincial governments time to review and revise legislation to bring it into accord with this decision. This period of

suspension coincides with the expiration of the 24-month suspension of remedy in *Halpern v. Canada (Attorney General)*, [2002] O.J. No. 2714, (2002) 215 D.L.R. (4th) 223], and is necessary, in my view, to avoid confusion and uncertainty in the application of the law to same-sex marriages. The appellants acknowledge that there will be consequential amendments required to both federal and provincial legislation to give effect to this decision.

[3] On June 10, 2003, the Ontario Court of Appeal issued its judgment in *Halpern v. Canada (A.G.)*, [2003] O.J. No. 2268, dealing with essentially the same issues as were dealt with in these appeals and reaching the same conclusions. The Ontario Court of Appeal, however, granted immediate relief, including a reformulation of the common law definition of marriage to permit same-sex marriages, and an order that the Clerk of the City of Toronto issue marriage licences to the same-sex couples who had been denied licences.

[4] It is common ground that the federal government has instructed its counsel not to appeal either the Ontario Court of Appeal decision in *Halpern* or the decision of this Court, and that marriages between same-sex couples have been taking place in Ontario since the *Halpern* decision was released.

[5] The appellants are now applying to re-open these appeals for the sole purpose of requesting this Court to lift the suspension of remedies to give same-sex couples in British Columbia the same right to marry as their counterparts in Ontario. The order which is sought to be varied in that regard has not yet been entered.

[6] It is important to note that these applications are consented to by counsel for the Attorney General of Canada and are unopposed by counsel for the Attorney General of British Columbia. It is reasonable to assume, therefore, that any consequential amendments to the law which may be required as a result of this Court's decision do not require the suspension of remedy which this Court originally imposed.

[7] It is also apparent that any further delay in implementing the remedies will result in an unequal application of the law as between Ontario and British Columbia, with same-sex couples being denied the right to marry in British Columbia until July 12, 2004 while same-sex couples in Ontario may marry as and when they choose to do so.

[8] In these circumstances, the Court is satisfied that it is appropriate to amend the order in these appeals to lift the suspension of remedies, with the result that the declaratory relief and the reformulation of the common law definition of

marriage as "the lawful union of two persons to the exclusion of all others" will take immediate effect.

The Honourable Madam Justice Prowse

The Honourable Mr. Justice Mackenzie

The Honourable Mr. Justice Low