F.L.D. A.D. 2004
No. 272 J.C.S.

IN THE QUEEN'S BENCH
(FAMILY LAW DIVISION)
JUDICIAL CENTRE OF SASKATOON

BETWEEN:

N.W. and J.R., L.S. and K.M., E.S. and L.S.,
W.H-B. and J.H-B., M.B. and E.A.

APPLICANTS

- and -

THE ATTORNEY GENERAL OF CANADA,
THE ATTORNEY GENERAL FOR SASKATCHEWAN,
THE DIRECTOR OF MARRIAGE UNIT and
WENDY DAVEY, MARRIAGE LICENCE ISSUER

RESPONDENTS

G. G. Walen, Q.C. and S. M. Buhler — for the applicants

C. J. Bernier — for the respondent, The Attorney General of Canada

J. T. Irvine — for the respondent, The Attorney General for Saskatchewan, The Director of Marriage Unit, and Wendy Davey, Marriage Licence Issuer

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FIAT — WILSON J.

November 5, 2004

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[1] The applicants in this case are five same-sex couples who have been denied a licence to marry by a marriage licence issuer in the Province of Saskatchewan.

[2] The applicants seek a declaratory order reformulating the common law definition of marriage to allow for civil marriage between same-sex couples. The applicants also seek an order, in the nature of *mandamus*, requiring marriage licence issuers in the Province of Saskatchewan to issue marriage licences to the applicants and other same-sex couples. Finally, the applicants seek costs of this matter on a solicitor-client basis.

[3] Neither the respondent, The Attorney General of Canada, nor the respondent, The Attorney General for Saskatchewan, opposed the relief being sought by the applicants except as regards the issue of costs.

[4] This Court is not the first Canadian court to be asked to reformulate the common law definition of marriage. In *Halpern v. Toronto (City)* (2003), 36 R.F.L. (5th) 127 (Ont. C.A.), the Ontario Court of Appeal held that the common law definition of marriage, being "the lawful union of one man and one woman to the exclusion of others", violates the equality rights of same-sex couples under s. 15(1) of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (U.K.)*, 1982, c. 11. The Court further held that the violation of rights could not be justified under s. 1 of the *Charter*. As a result, the Court reformulated the definition of common law marriage to be "the voluntary union for life of two persons to the exclusion of all others".

[5] A similar conclusion was reached by the Quebec Court of Appeal in *Hendrick v. Quebec (Procureure generale)*, [2004] Q.J. No. 2593 (Que. C.A.) (QL) and the British Columbia Court of Appeal in *EGALE Canada Inc. v. Canada (Attorney General)*, 2003 BCCA 251, (2003), 38 R.F.L. (5th) 32 (B.C. C.A.).

[6] After an exhaustive and sophisticated analysis of all facets of this issue, the Ontario Court of Appeal in *Halpern*, stated, at para. 108:

> ...it is our view that the dignity of persons in same-sex relationships is violated by the exclusion of same-sex couples from the institution of marriage....

[7] I agree. For the reasons set forth in *Halpern*, the application herein is granted. I make the following orders, in the wording submitted to me and approved by the applicants and respondents:

1. The common law definition of marriage for civil purposes is declared to be "the lawful union of two persons to the exclusion of all others" and civil marriage between two persons of the same sex, who otherwise meet the substantive and procedural requirements of the federal law governing capacity to marry, and whose applications otherwise meet the procedural requirements of *The Marriage Act, 1995* (Saskatchewan) is declared to be a lawful and valid marriage in Saskatchewan. It is further declared that a refusal to issue marriage licences to the applicants subsequent to this order on the sole basis of their sexual orientation constitutes a breach of the applicants' rights as guaranteed under section 15(1) of the *Canadian Charter of Rights and Freedoms* ("the *Charter*"), such breach not being a reasonable limit on those rights within the meaning of section 1 of the *Charter*.

2. There shall be an order in the nature of *mandamus* requiring Wendy Davey, marriage licence issuer, to issue marriage licences to the applicants and to other same-sex couples who apply and whose applications otherwise conform with the requirements of *The Marriage Act, 1995*.

[8] The applicants seek their costs of this application on a solicitor-client basis. The applicants ask this Court to set costs in the sum of $10,000, payable jointly and severally, by the respondents, other than the respondent, Wendy Davey.

[9] The Attorney General for Saskatchewan argues that the costs of this application should be borne solely by the federal government. The Attorney General does not deny that marriage licence issuers in the Province, acting under the authority of the Attorney General, refused to provide marriage licences to the applicants before me. However, the Attorney General argues that it had no choice because the Province has no power to determine the definition of marriage and is required to follow the existing law until it is changed by the federal Parliament or declared unconstitutional by a court in this Province.

[10] There is some merit to this argument. *The Marriage Act, 1995*, S.S. 1995, c. M-4.1 does not define marriage because under the *Constitution Act, 1867*, the federal Parliament was granted the sole power to determine who can marry. Pursuant to s. 17 of *The Marriage Act, 1995*, marriage licence issuers are to issue licences if all of the procedural requirements of the *Act* are met and there are no legal impediments to the proposed marriage. At the time the applicants requested their marriage licences, the legal impediment to marriage was the existing law defining marriage as a union between a man and a woman. Nonetheless, the Attorney General for Saskatchewan was well aware of the decisions of the courts in other Canadian jurisdictions and, although those decisions were not binding statements of the law for Saskatchewan, the province did have the choice to act or wait for a decision of this Court. As suggested by the Attorney General of Canada, the Attorney General for Saskatchewan could have proceeded with a reference to the Saskatchewan Court of Appeal. Alternatively, the Attorney General could have taken the risk of advising marriage licence issuers in this Province to issue licences to same-sex couples. I agree with the comments of McIntyre J. in *Dunbar v. Yukon*, 2004YKSC 54,

[2004] Y.J. No. 62 (Yuk. Terr. S.C.) (QL). As regards the matter of costs, the Court stated at para. 41:

> ...With respect to the Yukon Territorial Government, it is true, I acknowledge what counsel says on behalf of the Government, that it has not opposed the declaration; but it did not grant the request by the applicants, a request that I now say should have been granted; and it had a choice. It could allow the request or wait for a decision of the Court. It decided to await the decision of the Court, and it now has such a decision, but there is to be a cost associated with that. It is a litigant that lost, in my view, by not acting prior to this decision. Thus, I am going to order that costs on a solicitor client basis be shared by both the Attorney General of Canada and the Yukon Territorial Government.

[11] For the above reasons, I have concluded that the Attorney General for Saskatchewan must share the costs of this matter with the Attorney General of Canada.

[12] The Attorney General of Canada argues that because they did not oppose this application, costs on a solicitor-client basis would not be appropriate. However, the federal Attorney General has made the choice to wait for further guidance from the Supreme Court of Canada rather than to take immediate action to protect the equality rights of same-sex couples. By not acting immediately, this Court application was necessary and is an application of significant public interest. The quantum of costs being proposed by the applicants is not unreasonable.

[13] Costs are set in the sum of $10,000 to be paid equally by the Attorney General of Canada and the Attorney General for Saskatchewan.

_____ J.