2013 ONSC 129
Ontario Superior Court of Justice

Hincks v. Gallardo

2013 CarswellOnt 109, 2013 ONSC 129, [2013] W.D.F.L. 1709, [2013] W.D.F.L. 1770, [2013] W.D.F.L. 1775, [2013] O.J. No. 69, 113 O.R. (3d) 654, 223 A.C.W.S. (3d) 832, 273 C.R.R. (2d) 358, 30 R.F.L. (7th) 148, 358 D.L.R. (4th) 702

Wayne Trevor Hincks, Applicant and Gerardo Gallardo, Respondent

Mesbur J.

Heard: October 30-31, 2012
Judgment: January 7, 2013
Docket: FS-11-367046

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Sean Gaudet, for Intervener, The Attorney General for Canada
Courtney Harris, for Intervener, Attorney General of Ontario

Subject: Family; International; Constitutional; Human Rights

Headnote

Family law --- Marriage — Nature of marriage — Same sex marriage

Status of foreign civil partnership — Parties were same-sex partners who entered into civil partnership in United Kingdom under Civil Partnership Act ("CPA") while they were living in United Kingdom — After relationship ended, applicant commenced proceeding in Ontario seeking divorce, equalization of family property and spousal support, but respondent took position that parties were not married — Applicant brought motion for declaration that parties' civil partnership was marriage within meaning of Civil Marriage Act ("CMA") — Motion granted — Civil partnership entered into in United Kingdom pursuant to CPA was "marriage" as defined by CMA — Parties were "spouses" as defined by Divorce Act and Family Law Act — Union was lawful under laws of United Kingdom, as it was union of two persons, to exclusion of all others — As parties could not marry in United Kingdom but had to enter into civil partnership, they suffered discrimination on basis of sexual orientation — Under Canadian law, only equal access to marriage for civil purposes would respect same-sex couples' right to equality without discrimination — Civil partnership was marriage in all but name, and failing to recognize civil partnership as marriage would thwart choice parties made — Forum shopping was not reason to decide parties' civil partnership could not be marriage — Family Law Act had expansive definition of "spouse" to capture relationships that were formally and functionally equivalent to marriage.

Conflict of laws --- Family law — Divorce — Jurisdiction

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parties could not marry in United Kingdom but had to enter into civil partnership, they suffered discrimination on basis of sexual orientation — Under Canadian law, only equal access to marriage for civil purposes would respect same sex couples' right to equality without discrimination — Civil partnership was marriage in all but name, and failing to recognize civil partnership as marriage would thwart choice parties made — Forum shopping was not reason to decide parties' civil partnership could not be marriage — Family Law Act had expansive definition of "spouse" to capture relationships that were formally and functionally equivalent to marriage.

Family law --- Divorce — Effect of Charter of Rights and Freedoms

Status of foreign civil partnership — Parties were same-sex partners who entered into civil partnership in United Kingdom under Civil Partnership Act ("CPA") while they were living in United Kingdom — After relationship ended, applicant commenced proceeding in Ontario seeking divorce, equalization of family property and spousal support, but respondent took position that parties were not married — Applicant brought motion for declaration that parties' civil partnership was marriage within meaning of Civil Marriage Act ("CMA") — Motion granted — Civil partnership entered into in United Kingdom pursuant to CPA was "marriage" as defined by CMA — Parties were "spouses" as defined by Divorce Act and Family Law Act — Union was lawful under laws of United Kingdom, as it was union of two persons, to exclusion of all others — As parties could not marry in United Kingdom but had to enter into civil partnership, they suffered discrimination on basis of sexual orientation — Under Canadian law, only equal access to marriage for civil purposes would respect same sex couples' right to equality without discrimination — Civil partnership was marriage in all but name, and failing to recognize civil partnership as marriage would thwart choice parties made — Forum shopping was not reason to decide parties' civil partnership could not be marriage — Family Law Act had expansive definition of "spouse" to capture relationships that were formally and functionally equivalent to marriage.

Constitutional law --- Charter of Rights and Freedoms — Nature of rights and freedoms — Equality rights — Miscellaneous

Same sex marriage — Civil partnership in United Kingdom is marriage in Canada.

Table of Authorities

Cases considered by *Mesbur J.*:

Bell ExpressVu Ltd. Partnership v. Rex (2002), 212 D.L.R. (4th) 1, 287 N.R. 248, [2002] 5 W.W.R. 1, 166 B.C.A.C. 1, 271 W.A.C. 1, 18 C.P.R. (4th) 289, 100 B.C.L.R. (3d) 1, 2002 SCC 42, 2002 CarswellBC 851, 2002 CarswellBC 852, 93 C.R.R. (2d) 189, [2002] 2 S.C.R. 559 (S.C.C.) — referred to

Halpern v. Toronto (City) (2003), (sub nom. *Halpern v. Canada (Attorney General))* 172 O.A.C. 276, 2003 CarswellOnt 2159, 65 O.R. (3d) 161, 65 O.R. (3d) 201, 225 D.L.R. (4th) 529, 36 R.F.L. (5th) 127, (sub nom. *Halpern v. Canada (Attorney General))* 106 C.R.R. (2d) 329 (Ont. C.A.) — considered

Hyde v. Hyde (1866), L.R. 1 P.D. 130, 35 L.J. P. & M. 57 (Eng. P.D.A.) — referred to

Montreal (Ville) v. 2952-1366 Québec inc. (2005), (sub nom. *Montréal (City) v. 2952-1366 Québec Inc.)* 134 C.R.R. (2d) 196, [2005] 3 S.C.R. 141, 201 C.C.C. (3d) 161, 32 Admin. L.R. (4th) 159, 15 M.P.L.R. (4th) 1, 2005 CarswellQue 9633, 2005 CarswellQue 9634, 2005 SCC 62, 258 D.L.R. (4th) 595, (sub nom. *Montreal (City) v. 2952-1366 Québec Inc.)* 340 N.R. 305, 18 C.E.L.R. (3d) 1, 33 C.R. (6th) 78 (S.C.C.) — referred to

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Vervaeke v. Smith (1982), [1982] 2 All E.R. 144, [1983] 1 A.C. 145, [1982] 2 W.L.R. 855 (U.K. H.L.) — referred to

Walsh v. Bona (2002), 211 N.S.R. (2d) 273, 659 A.P.R. 273, 2002 SCC 83, 2002 CarswellNS 511, 2002 CarswellNS 512, 102 C.R.R. (2d) 1, 32 R.F.L. (5th) 81, (sub nom. *Nova Scotia (Attorney General) v. Walsh)* 221 D.L.R. (4th) 1, 297 N.R. 203, (sub nom. *Nova Scotia (Attorney General) v. Walsh)* [2002] 4 S.C.R. 325 (S.C.C.) — distinguished

Wilkinson v. Kitzinger (2006), [2006] EWHC 2022 (Eng. Fam. Div.) — considered

Statutes considered:

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
Generally — referred to

s. 15(1) — considered

Civil Marriage Act, S.C. 2005, c. 33
Generally — referred to

Civil Partnership Act, 2004, c. 33
Generally — referred to

Pt. 5 — referred to

Constitution Act, 1867, (U.K.), 30 & 31 Vict., c. 3, reprinted R.S.C. 1985, App. II, No. 5
s. 91 ¶ 5 — considered

s. 91 ¶ 27 — considered

s. 91 ¶ 26 — considered

Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.)
Generally — referred to

Family Law Act, R.S.O. 1990, c. F.3
Generally — referred to

Pt. I — referred to

s. 1(1) "spouse" — considered

s. 1(2) — considered

Human Rights Act, 1998, c. 42

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Generally — referred to

Legislation Act, 2006, S.O. 2006, c. 21, Sched. F
s. 64(1) — considered

Matrimonial Causes Act, 1973, c. 18
s. 11(c) — considered

MOTION by same sex partner for declaration that parties' civil partnership was marriage.

***Mesbur J.*:**

Introduction and factual background:

1 In Canada marriage for civil purposes is defined as "the lawful union of two persons to the exclusion of all others."[1] The issue on this motion is whether the union the parties entered into pursuant to the United Kingdom's *Civil Partnership Act 2004*[2] is a marriage that can be dissolved under the provisions of Canada's *Divorce Act*,[3] and whether that union made the parties "spouses" as defined by Ontario's *Family Law Act*.[4]

2 Wayne Hincks and Gerardo Gallardo are same sex partners. Mr. Hincks holds dual Canadian/United Kingdom citizenship. Mr. Gallardo is a dual Canadian/Mexican citizen. Shortly after the parties met in August of 2009, they developed a romantic relationship. At that time, Mr. Hincks was practicing architecture in the UK, while Mr. Gallardo owned and operated a business in Toronto. According to Mr. Hincks, Mr. Gallardo expressed a wish to reside in the UK. Mr. Gallardo says Mr. Hincks invited him to come and live in the UK because Mr. Gallardo could not practice architecture in Ontario. Regardless of what led to the decision, the parties decided to live together and formalize their relationship. They agreed Mr. Gallardo would move to the UK and they would enter into a civil partnership so that Mr. Hincks could sponsor Mr. Gallardo to come to the UK under a Civil Partnership Entry Visa.

3 The United Kingdom, unlike Canada, does not have provision for marriage between same sex partners. Instead, the *Civil Partnership Act* creates a parallel regime that affords same sex partners the same rights and responsibilities as civil marriage by virtue of a civil partnership. Only same sex partners can enter into civil partnerships in the UK.

4 Mr. Gallardo travelled to the UK under the Civil Partnership Entry Visa in early October of 2009. On October 21, 2009 the parties entered into a civil partnership under the UK's *Civil Partnership Act*. In order to enter into their civil partnership, the parties were required to do the following:

a) Post a declaration of their impending civil partnership in a newspaper and on the wall in the council two weeks before the ceremony;

b) Provide documentation proving that neither was married or a civil partner in another civil partnership, and swear a declaration to that effect;

c) Be separately interviewed by the Registrar to ensure that their relationship was genuine and that they understood their rights and obligations as civil partners;

d) Have two witnesses present for the creation of the civil partnership before the Registrar.

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5 The parties exchanged vows and rings before the Registrar. While there is some dispute between the parties, it is apparent they enjoyed a celebratory dinner after the event, cut a special cake and then travelled to Bologna, Italy. Whether this trip was a "honeymoon" or not is of little importance. What is of importance is that the creation of their civil partnership changed the parties' legal status; after the ceremony they were no longer single persons, but became civil partners with virtually identical rights and responsibilities as those enjoyed by married persons in the UK.

6 After the parties became civil partners, Mr. Gallardo obtained a UK national identity card, which identifies him as "SPOUSE/PARTNER".

7 Mr. Gallardo did not work in the UK, but operated his Toronto business remotely. Because his business was struggling, he decided he would have to return to Toronto to manage it here. On January 15, 2010 the parties relocated to Toronto. At that time, Mr. Hincks' employer was experiencing a slowdown in its business so Mr. Hincks decided to take an unpaid six-month sabbatical for the period he would be in Toronto. Had he not, he likely would have been laid off.

8 After the parties returned to Toronto their relationship began to deteriorate. In July 2010, at the end of his sabbatical, Mr. Hincks returned to London only to find he no longer had a job. The parties agreed that Mr. Hincks would come back to Toronto again. He did so on September 17, 2010. The relationship deteriorated even further.

9 In November of 2010 Mr. Hincks found work in Toronto as an urban designer at a salary of $69,000 per year. He held the position from then until January, 2011. In February of 2011 Mr. Hincks accused Mr. Gallardo of assaulting him. Criminal charges followed, as did the end of the relationship later in February, 2011.

10 In February, 2011 Mr. Gallardo filed for divorce in Ontario but later withdrew the application. The parties disagree on why this was done. In March, 2011 Mr. Hincks commenced this proceeding. In it, he claims a divorce, equalization of net family property and spousal support. In the alternative, Mr. Hincks claims spousal support under the provisions of the *Family Law Act*.

11 When he received Mr. Hincks' application, Mr. Gallardo took the position the parties were not married and therefore the application disclosed no cause of action. Mr. Hincks then moved, among other things, for a declaration that the parties' civil partnership is a marriage within the meaning of Canada's *Civil Marriage Act*.

12 The motion came on before Grace J in April of 2011. Justice Grace was of the view[5] that the "requested declaration may have ramifications beyond the parties." He went on to hold that "the Attorney General of Canada and the Attorney General of Ontario should be given notice of and an opportunity to intervene in this proceeding." He recognized that while a constitutional issue had not been raised before him, the Attorneys should nevertheless be given notice of the declaration the applicant sought.

13 Both Attorneys General received notice, and were given an opportunity to intervene. Both elected to do so. Interestingly, like the parties themselves they take a contrary position to one another.

The parties' and Attorneys' positions:

The parties' positions

14 Mr. Hincks takes the position that first, the requirements of the UK *Civil Partnership Act* meet all the statutory criteria of marriage as defined by Canada's *Civil Marriage Act*. He therefore argues the parties are married, and this marriage can be dissolved. He says to hold otherwise would be discriminatory and contrary to the equality provisions of the *Charter*. Second, he says the provisions of the UK *Civil Partnership Act* are sufficient to satisfy the criteria of the *Family Law Act* in its definition of married spouse under Part I of the statute.

15 Mr. Gallardo takes the position that the parties were never married. In a nutshell, he says the *Civil Partnership Act* specifically states civil partnerships are not marriages in the UK. Indeed, the UK *Matrimonial Causes Act*[6] makes a marriage void if the parties to it are not "respectively male and female". In the face of this, he suggests an Ontario court cannot declare the civil partnership a marriage. As a result, he says the court has no jurisdiction to grant any relief under the *Divorce Act* or

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equalization under the *Family Law Act*. He says the parties do not fall into the extended definition of "spouse" under the *Family Law Act* since they did not cohabit for a period of more than three years, and therefore no support rights are available under the *Family Law Act*.

16 Mr. Gallardo suggests that some UK civil partners would not choose to marry even if it were an option in the UK. He therefore says that Canadian courts should not impose marriage on civil partners who move to Canada when they may have always intended to avoid marriage.

17 Mr. Gallardo points to the fact that same sex couples from foreign jurisdictions are free to marry when they come to Canada if they wish to change their legal status. He therefore says the court should not confer married status on such couples unless they unequivocally choose that particular status.

18 Mr. Gallardo also suggests that if the court recognizes foreign institutions as marriages in Canada, this will encourage jurisdiction shopping in order to acquire rights that would not be available to civil partners in their home jurisdiction.

19 Last, Mr. Gallardo raises what might be called the "floodgates" or "unintended consequences" argument, meaning that all civil partnerships, including those registered under provincial law in, for example, Quebec or Nova Scotia, would be deemed to be marriages. He says this would or could run contrary to the parties' express intentions in those jurisdictions, making them married with all the attendant rights and responsibilities they had no intention of acquiring. He therefore says this motion must be dismissed.

The Attorneys' positions

20 Canada also says the parties are not married. It points to the conflict of law rule that the validity of a marriage is determined by the law of the place where the marriage was celebrated. Canada relies on British case law that says a civil partnership is not, by definition, a marriage, and therefore Canada cannot confer a legal status on the parties that the *lex loci celebrationis* does not confer on them.

21 Canada points to the fact that the *Civil Partnership Act* sets out its own dissolution process that includes resolving property and financial matters. It says Mr. Hincks should therefore seek relief in England, rather than in Canada.

22 Last, Canada takes the position that section 15(1) of the *Charter* does not require the court to construe a UK civil partnership as a "marriage" under the *Civil Marriage Act* and the *Divorce Act*.

23 Ontario, however, takes the position the parties' civil partnership brings them into the definition of married spouses under section 1 of the *Family Law Act*. Ontario says that the "modern approach" to statutory interpretation must be applied having regard to the context and objectives of the *Family Law Act*. Ontario argues that the definition of "spouse" in section 1 must be given "a broad and liberal interpretation to capture relationships that are both formally and functionally equivalent to marriage."[7] It argues that by analogy to the *Family Law Act's* recognition of polygamous marriages and void and voidable marriages as "marriage", under the definition of "spouse" in section 1, similar recognition should be extended to the parties' civil partnership.

24 Ontario points to British case law[8] that has held an Ontario same sex marriage cannot be recognized as a marriage in the UK, but will be recognized as a civil partnership. It argues the same logic can be applied here; namely, if an Ontario same sex marriage can be recognized as a British civil partnership, why can a British civil partnership not be recognized as a marriage in Ontario? When he first considered this issue, Grace J raised this very question, asking:

> Why, logically, could the converse not also be true? Why couldn't a court in Canada look at the nature of the foreign process, the incidents which attach to the union and conclude, as a matter of public policy, that it may not be a marriage in name but it is one in substance?[9]

25 The contrary positions taken by Canada and Ontario raise the interesting question of whether the parties could be spouses for the purposes of Ontario legislation, but not spouses for the purposes of the *Divorce Act*.

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Discussion:

26 What is marriage? Put a different way, what marriages can be dissolved in Canada under the provisions of the *Divorce Act?* What relationships create the status of "spouses" under the *Divorce Act* and the *Family Law Act?* Would it violate our *Charter* values not to recognize these parties' registered civil partnership as a "marriage"? These are the fundamental question I must answer. In doing so, I will address all the arguments the parties have raised. First, however, I situate the issue in the context of the different legislative and constitutional frameworks in Canada and the UK.

The constitutional and legislative framework in Canada and the UK

27 The issue of whether the former common law definition of marriage as "the voluntary union for life of one man and one woman to the exclusion of all others"[10] was discriminatory against same sex couples came before the Ontario Court of Appeal in *Halpern v. Toronto (City)*.[11] There, the court expressly held that "separate but equal" partnership legislation that fell short of marriage was contrary to Canada's public policy, was discriminatory and violated the equality guarantees of our *Charter*.

28 The court in *Halpern* specifically found that same-sex couples were excluded from the fundamental societal institution called marriage, saying:

> Based on the forgoing analysis, 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. Accordingly, we conclude 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" violates s. 15(1) of the *Charter*.

29 As a result, the court struck down the former definition of marriage and reformulated it as "the voluntary union for life of two persons to the exclusion of all others." This new definition of marriage has effectively been codified in the *Civil Marriage Act*, which also codifies in the Preamble the policy statements the courts have enunciated in *Halpern* and elsewhere.

30 To the contrary, the United Kingdom has followed a different policy path. There, a civil partnership is the only method by which gay people can change their legal status from single to something different. They are not permitted to marry; instead, the UK has developed a parallel but equal system exclusively for the gay community. In the UK, a civil partnership and a marriage are legally equal. They are considered substantively equal. This was confirmed by the High Court of Justice, Family Division in the UK in *Wilkinson v. Kitzinger*.[12]

31 In *Wilkinson* the parties were same sex partners who had validly married in Canada. They applied to the court in the UK for a declaration recognizing their marriage as a marriage in the UK. Alternatively, they suggested that s. 11(c) of the *Matrimonial Causes Act* and chapter 2 of part 5 of the *Civil Partnership Act* were incompatible with the Human Rights Act of 1998.[13]

32 The court in *Wilkinson* describes the civil partnership scheme as making available to civil partners "essentially every material right and responsibility presently arising from marriage, with the exception of the form of ceremony and the actual name and status of marriage. Parliament ostensibly passed the Act ... because it elected to do so as a policy choice." The court goes on to address the UK's legislative intention and says it "was not to create a 'second class' institution but a parallel and equalising institution designed to redress a perceived inequality of treatment of long term monogamous same-sex relationships, while at the same time, demonstrating support for the long established institution of marriage."

33 In *Wilkinson* the court says: "Parliament has taken steps by enacting the C.P.A. to accord to same-sex relationships effectively all the rights, responsibilities, benefits and advantages of civil marriage save the name." It concludes that if that distinction discriminates against same-sex partners, the discrimination has a legitimate aim, and is reasonable and proportionate.

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34 Finally, the court in *Wilkinson* determined that "apart from the insurmountable hurdle presented by s. 11(c) to recognition of a same-sex marriage as valid in English law, there is abundant authority that an English court will decline to recognise or apply what might otherwise be an appropriate foreign rule of law, when to do so would be against public policy: *Vervaeke v. Smith* (1982), [1983] 1 A.C. 145 (U.K. H.L.), at 164 C. As already indicated, English public policy in the matter is demonstrated by s. 11(c) of the MCA and the relevant provisions of the CPA."[14]

35 In the result, *Wilkinson*, relying on the express provisions of the *Civil Partnership Act* regarding foreign same sex marriages, treated the parties' marriage as a civil partnership under the *Act*.

36 The court's conclusion in *Wilkinson* is, of course, completely contrary to the Ontario Court of Appeal's conclusion in *Halpern* concerning Canadian values, public policy and the *Charter's* equality rights. Indeed, Canada's *Civil Marriage Act* codifies these very principles in its preamble, where it says, among other things:

> WHEREAS only equal access to marriage for civil purposes would respect the right of couples of the same sex to equality without discrimination and civil union, as an institution other than marriage, would not offer them that equal access and would violate their human dignity, in breach of the *Canadian Charter of Rights and Freedoms* ...
>
> AND WHEREAS in order to reflect values of tolerance, respect and equality consistent with the *Canadian Charter of Rights and Freedoms*, access to marriage for civil purposes should be extended by legislation to couples of the same sex...

37 By its statutory requirements in the UK, the parties' civil partnership is a "lawful union of two persons to the exclusion of all others." At first blush it falls into the definition of civil marriage under the *Civil Marriage Act*. It seems to me that to do anything other than recognize this particular civil partnership as a marriage would run contrary to the express values of Canadian society, expressed in both the case law, and the statute itself and would constitute impermissible discrimination.

38 But what about the arguments Mr. Gallardo and Canada raise?

The lex loci argument

39 Both Mr. Gallardo and Canada take the position that a civil partnership registered under the *Civil Partnership Act* cannot be a "marriage" because the UK does not consider it to be a marriage in law.

40 If Canada's position about the *lex loci* held, then surely the UK would have been bound in *Wilkinson* to recognize a valid Canadian same sex marriage as a "marriage", since it was a valid marriage according to the law of where it was celebrated. One of the reasons the court advanced in *Wilkinson* for failing to recognize "what might otherwise be an appropriate foreign rule of law" was that it would be against English public policy to do so. It seems to me the same argument holds here. An English law that makes a marriage other than between a man and a woman void, and another that creates a "separate but equal" system for same sex partners are clearly contrary to Canadian public policy and *Charter* values.

41 I recognize that the UK *Civil Partnership Act* has a specific provision in which it says valid foreign same sex marriages will be treated like civil partnerships in the UK. I see no reason why this civil partnership, a marriage in all but name, cannot be treated as a marriage in Canada, particularly when the parties chose to change their status to a status equivalent to married in the UK.

42 It is not, in my view, necessary for Parliament to legislate specifically to state that Canada will treat a UK civil partnership as a "marriage" in order for me to find it so. Turning again to *Halpern*, the court there said "In our view, 'marriage' does not have a constitutionally fixed meaning. Rather, like the term 'banking' in s 91(5) and the phrase 'criminal law' in s. 91(27), the term 'marriage' as used in s. 91(26) of the *Constitution Act, 1867* has the constitutional flexibility necessary to meet changing realties of Canadian society without the need for recourse to constitutional amendment procedures."[15] If constitutional amendments are unnecessary to define or redefine marriage, then surely a statutory

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amendment is unnecessary as well to include this civil partnership in the definition of marriage.

43 *Halpern* pointed out that one of the key components in analysing parties' rights is the issue of freedom of choice. One of the reasons the court found the former definition of marriage discriminatory was that gays and lesbians were denied the choice or whether to marry or not. The *Civil Partnership Act* does nothing to redress what we view as that discriminatory result. Given that the parties had no choice of whether or not to marry in the UK, and their only choice was this parallel method of changing their status, it seems to me that this particular relationship meets all the criteria for marriage. If I fail to recognize this union as a marriage, then discrimination will be perpetuated.

44 But what about the arguments concerning unintended consequences of such a finding, or the "floodgates" arguments?

Unintended consequences: the "floodgates" argument

45 Mr. Gallardo raises the spectre of unintended consequences if I were to declare this particular civil partnership a marriage. He points to the fact that, for example, both Nova Scotia and Quebec have registered civil partnership schemes. He suggests that if I find this civil partnership to be a "marriage", then those civil partnerships would also be captured in the definition of marriage. He goes further and says that, for example, Nova Scotia civil partners[16] would be treated as civil partners under the *Civil Partnership Act* if they moved to the UK. He suggests that if they then returned to Canada they would be considered married if they returned to Canada. He says this could have the unintended consequence of declaring parties who had no wish to be married as married.

46 I do not see it this way. In this hypothetical example, the Nova Scotia civil partners would be treated as UK civil partners. Their partnership would not be transformed into a UK civil partnership; it would simply be "treated" as one. That of course could well have the unintended consequence of imposing more rights and responsibilities on the parties under UK law than they would have under Nova Scotia law. It would not, however, transform their relationship into a Canadian marriage if they were to return to Canada since their partnership would not truly be a UK civil partnership.

47 The fundamental difference is one of choice.

The question of choice: the autonomy principle

48 Both Mr. Gallardo and Canada point to the issue of freedom of choice, and raise this specifically as a part of their floodgates arguments. They say that parties must be left to choose how to order their affairs, and should not have other rights and obligations thrust upon them when they did not choose them. They rely on the reasoning of the Supreme Court of Canada in *Walsh v. Bona*[17] to support this position. I disagree: *Walsh* is distinguishable.

49 In *Walsh*, the Supreme Court had to address the issue of whether excluding unmarried cohabiting opposite-sex couples from the definition of "spouse" in matrimonial property legislation was discriminatory. The court held there was no discrimination. It found that applying Nova Scotia marital property legislation only to married persons reflected the differences between unmarried cohabiting relationships and married relationships, and represented the fundamental personal autonomy and dignity of the individual.

50 The difference, of course, is that in *Walsh* the couple was an opposite sex couple and had the choice of whether to marry or not. They chose not to. The court respected this fundamental choice, and determined it should not impose married rights and responsibilities on them when they had not chosen to be married. Here, the parties had only the choice of civil partnership if they wished to change their status in the UK.

51 There is a fundamental difference between Canadian civil partnerships and those entered into under the UK *Civil Partnership Act*. In the UK only same-sex couples can enter into these civil partnerships, and in the UK only same-sex couples are not permitted to marry. The parties' only choice in the UK was to enter into their civil partnership if they wished to change their legal status from single persons to another status that in all ways is functionally equivalent to marriage.

52 Nova Scotia and Quebec both have provision for civil unions or civil partnerships. These are formal, registered

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relationships. They are open to both same- sex and opposite-sex couples. In Nova Scotia and Quebec, and indeed, throughout Canada, both same-sex and opposite-sex partners have a choice whether to marry or not. They may choose to marry. They may choose to cohabit. They may choose to enter into a registered civil partnership in some provinces. In Ontario there is no scheme of registered civil partnerships. Couples here may, however, choose to enter into cohabitation agreements which contractually set out their respective rights and responsibilities during their relationship. In Canada, all couples have a choice between marriage and civil partnerships. In the UK they do not.

53 Here, the parties chose a regime with all the rights and responsibilities of marriage. They deliberately chose to change their status from single to something functionally equivalent to marriage in the UK. In Ontario, the only regime with all the rights and responsibilities of marriage is marriage. Failing to recognize this civil partnership as a marriage would be to thwart the very choice the parties made. Recognizing this civil partnership as marriage would support the parties' freedom of choice and their autonomy.

54 As I see it, recognition of this civil partnership would extend only to a civil partnership sharing these particular characteristics; namely, I would limit recognition only to circumstances where same sex marriage is prohibited, and the state-authorized alternative, namely the civil partnership, is essentially identical to marriage except in name, and is restricted only to same sex couples.

55 But Mr. Gallardo and Canada say the parties could have married in Ontario when they moved back here. They suggest that since the parties chose not to, the court should not impose married status on them.

Free to marry in Ontario

56 Mr. Gallardo and Canada both point to the fact that the parties were free to marry in Ontario if they wished to be married spouses instead of civil partners. While this is true, Mr. Hincks' uncontradicted evidence is that he inquired in Toronto about the possibility of getting married here and was told there was no need, because as civil partners, he and Mr. Gallardo were considered already married. He said:

> Well, I went to the Toronto City Hall to get information about doing a civil marriage at the City Hall and I asked whether or not it was necessary to do that if we were already in a UK civil partnership, and we were told that it wasn't necessary to do that because we would already be married as far as the registrar was concerned.[18]

57 Whether what Mr. Hincks was told was true or not is irrelevant; Mr. Hincks relied on it as an accurate representation of his status.

58 What is interesting, of course, is that Mr. Gallardo must have considered the parties married as well, at least in February of 2010. After all, it was he who first commenced divorce proceedings in Ontario, although he later discontinued them.

59 There is another reason to reject the argument that the parties simply could have married in Ontario when they returned to live here. It bears on the issue of timing. Under the *Family Law Act* parties' property rights are affected by the date on which the parties married — that is, the date on which their legal status changed from single to married. The concept of equalization of net family property effectively results in parties sharing in the value of assets accumulated between the date of their marriage and the date they separated. Couples who marry in the UK, move to Ontario and seek equalization will have their marriage date as the operative date for the calculation, even though their legal status was changed in the UK.

60 If Mr. Gallardo and Canada are correct, then UK civil partners would not be able to rely on the date their legal status changed, but rather would have to go through another process, thus creating a different date. Under these circumstances, date of marriage deductions could be vastly different for UK civil partners than they would be for UK married partners. This would be so even though the *Civil Partnership Act* purports to create a parallel but equal system of rights and obligations for same sex partners and married partners.

61 I conclude that the potential option to marry in Ontario is not an answer to the problem, and would in fact perpetuate discrimination and unequal treatment that the *Civil Partnership Act* is apparently designed to eliminate.

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Forum shopping

62 Mr. Gallardo says that to recognize the parties' civil partnership as a marriage would encourage forum shopping, with parties attempting to "opt in" to more generous rights available to married spouses in Ontario.

63 While the argument has some merit, I note that forum shopping exists today among married spouses of whatever sexual orientation. It is not uncommon for there to be two jurisdictions with concurrent jurisdiction over the parties for divorce and corollary relief. For example, when a couple separates in Ontario, one of the parties might return to his or her birthplace in a foreign jurisdiction. Both that foreign jurisdiction and Canada could have divorce jurisdiction over the parties. One might prefer to commence proceedings in Ontario to obtain greater rights, while the other might prefer to commence in his or her home country, with different rights and obligations. In these not uncommon circumstances, forum shopping is hardly unique, and is not limited to same sex unions or civil partnerships.

64 I cannot see forum shopping as a reason to decide the parties' civil partnership cannot be a marriage.

65 But Mr. Gallardo and Canada say it is not necessary to recognize this civil union as a marriage because Mr. Hincks is not without a remedy. He has returned to the UK and could initiate dissolution proceedings there under the *Civil Partnership Act* to dissolve the civil partnership. He could claim financial relief under that statute. Does that make a difference?

Does Mr. Hincks have another remedy?

66 It is true that Mr. Hincks could pursue dissolution proceedings in the UK. The difference, of course, is that if these parties were an opposite sex couple, married in the UK, they would have the choice of whether to dissolve their union either in Canada under the *Divorce Act*, or in the UK under their divorce legislation. These parties are unable to do so, only because of their sexual orientation. In my view, this constitutes discrimination on the basis of sexual orientation, which is prohibited under the equality provisions of the *Charter*. I therefore conclude it is irrelevant that Mr. Hincks has another remedy.

67 To this point, I have focused on the arguments Mr. Gallardo and Canada raise, but have not dealt with Ontario's particular arguments concerning the definition of "spouse" under the *Family Law Act*.

Ontario's arguments

68 Ontario raises some compelling arguments about statutory interpretation, when considering the definition of "spouse" in section 1 of the *Family Law Act*. It suggests that the modern approach to statutory interpretation should result in the parties being recognized as spouses under section 1.

69 Section 1(1) of the *Family Law Act* defines "spouse" in the following way:

> "spouse" means either of two persons who,
>
> a) are married to each other, or
>
> b) have together entered into a marriage that is voidable or void, in good faith on the part of a person relying on this clause to assert any right.

70 The *Family Law Act* goes on to provide, in section 1(2):

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> *Polygamous marriages* — In the definition of "spouse", a reference to marriage includes a marriage that is actually or potentially polygamous, if it was celebrated in a jurisdiction whose system of law recognizes it as valid.

71 Polygamous marriages are contrary to Canada's public policy. Nevertheless, under the *Family Law Act* we recognize parties to a polygamous marriage as "spouses" for all purposes under the *Family Law Act*.

72 Void marriages are not marriages at all, and yet the *Family Law Act* recognizes innocent parties to a void or voidable marriage as "spouses". Ontario argues that when one considers this expansive definition of married spouse under the *Family Law Act*, one should give the definition of "spouse" in section 1 of the Act a broad and liberal interpretation to capture relationships that are both formally and functionally equivalent to marriage within the scheme of the *Family Law Act*.

73 Ontario takes the position that the parties here undertook a formal event that changed their legal status from single to partner, while also living in a relationship that is "functionally equivalent to a married spouse under the *Family Law Act*, including the mutual expectation of an equitable division of family property upon dissolution of their relationship."[19] In support of this proposition, Ontario points to the expert evidence filed by the parties and Canada. The experts agree that a UK civil partnership provides equivalent rights and responsibilities to those which arise from marriage in English law, and is equivalent to marriage in all but name. These equivalent rights and responsibilities include not only the right to dissolution, but also to financial and property relief that is identical to that available to divorcing married spouses under UK law.

74 After the UK enacted the *Civil Partnership Act*, it made consequential amendments to more than one hundred statutes to add the term "civil partner" to almost all references to "wife", "husband" or "spouse" in the laws of England and Wales. Thus, UK civil partners have equivalent legal rights and responsibilities to those provided to married couples under statute.

75 Ontario points to the "modern approach" to statutory interpretation when considering whether these civil partners should be found to be "spouses" under the *Family Law Act*. By this, it means that statutory interpretation cannot be founded only on the wording of the legislation. Instead, "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament."[20]

76 Ontario goes on to say that this approach is consistent with s. 64(1) of the *Legislation Act, 2006*[21] which says: "An Act shall be interpreted as being remedial and shall be given such fair, large and liberal interpretation as best ensures the attainment of its objects." Where there is genuine ambiguity in the statute, that is, the provision at issue can be subject to differing but equally plausible interpretations, the presumption is that the interpretation that is consistent with the *Charter* shall prevail.[22]

77 Ontario points out that the definition of "spouse" in s. 1 of the *Family Law Act* includes persons who have entered a void or voidable marriage in good faith. Void marriages are not marriages at all. By including parties to a void or voidable marriage in the definition of "spouses", the *Family Law Act* does not restrict the definition of "spouse" only to strictly legal valid marriages. Similarly, the *Act* recognizes parties to a polygamous marriage as spouses, if the marriage was celebrated in a jurisdiction where such marriages are valid. Again, even though polygamous marriages are contrary to the definition of marriage in Canada, the *Act* nevertheless recognizes such parties as "spouses".

78 Ontario suggests it would therefore be illogical to exclude this civil partnership from the definition of "spouse" when this same-sex union would be a legal marriage if performed in Ontario, while recognizing as spouses parties to foreign polygamous marriages that would not be legal marriages if performed in Ontario.

79 Ontario argues that an interpretation that would recognize these parties as "spouses" under s. 1 of the *Family Law Act* would be consistent with the objectives of the Act set out in its preamble. The objectives emphasize marriage as an economic partnership, equality between the spouses and an equitable settlement upon the "breakdown of the partnership".

80 When the parties entered into their civil partnerships they voluntarily chose to be governed by an equivalent statutory regime to the one applying to married spouses in the UK. They chose an economic partnership with equal rights and responsibilities to those of UK married spouses on the breakdown of their partnerships. Ontario has no mechanism for "same-sex civil partnerships" but rather a single statutory regime that applies equally to all married spouses, whether

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same-sex or opposite-sex. I agree with Ontario's argument that when one applies the modern approach of statutory interpretation to the definition of "spouse" in section 1 of the *Family Law Act*, and "broadly and liberally" construes it according to the objectives of the Act, these parties must be considered "spouses" under s.1.

Conclusion:

81 The parties entered into a civil partnership in the UK. They could not choose to get married in the UK because that country does not permit same sex couples to marry. That policy position runs contrary to Canadian public policy because Canadian law finds discrimination on the basis of sexual orientation prohibited under the *Charter*. Canadian law specifically holds that only equal access to marriage for civil purposes would respect same sex couples' right to equality without discrimination. Canadian law specifically holds that a civil union, as an institution other than marriage, would not offer same sex couples that equal access and would violate their human dignity, in breach of the *Charter*.

82 Failing to recognize this UK civil partnership as a marriage would perpetuate impermissible discrimination, primarily because in the UK these parties could not marry because of their sexual orientation, but had to enter into a civil partnership instead.

83 Their union is a lawful union under the laws of the UK. Their union is of two persons, to the exclusion of all others. In the simplest terms it meets the statutory definition of marriage in Canada. Because these parties could not marry in the UK, but had to enter into a civil partnership there instead, they have suffered discrimination on the basis of their sexual orientation.

84 In the particular circumstances of this civil partnership, where the parties were denied the choice to marry in the place where the union was celebrated I would perpetuate impermissible discrimination if I failed to recognize their civil partnership as a marriage.

85 For these reasons a declaratory order will issue declaring that the civil partnership entered into by the parties on October 21, 2009 in Hackney, London, United Kingdom, pursuant to the UK *Civil Partnership Act* is a "marriage" as defined by the *Civil Marriage Act*. A further order will issue declaring that the parties are "spouses" as defined by the Divorce Act and s. 1 of the *Family Law Act*.

86 As the parties agreed, there will be no order as to costs of this motion. I would like to take this opportunity to thank all counsel for their very thorough and helpful materials and submissions.

Motion granted.

Footnotes

[1] *Civil Marriage Act*, S.C. 2005, c.33

[2] 2004, c. 33

[3] R.S.C.1985, c.3 (2nd Supp.) as amended

[4] R.S.O.1990, c. F.3

[5] *Hincks v. Gallardo* Court file FS-11-367046 (S.C.J.) unreported endorsement of Grace J released April 8, 2011

[6] *Matrimonial Causes Act*, 1973 c.18 section 11(c)

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7 Ontario's factum at paragraph 2

8 *Wilkinson v. Kitzinger*, [2006] EWHC 2022 (Eng. Fam. Div.)

9 *Op cit* at footnote 5, paragraph 26

10 *Hyde v. Hyde* (1866), L.R. 1 P.D. 130, 35 L.J. P. & M. 57 (Eng. P.D.A.)

11 *Halpern v. Toronto (City)* (2003), 172 O.A.C. 276 (Ont. C.A.)

12 See *Wilkinson v. Kitzinger*, *op cit*

13 S. 11(c) of the *Matrimonial Causes Act* makes a marriage void if the parties are not "respectively male and female". Chapter 2 of Part 5 of the *Civil Partnership Act* deals with "overseas relationships" and treats them as civil partnerships in the UK. "Overseas relationships" are defined in the *Civil Partnership Act* and include same-sex marriages solemnized in Canada, as well as Nova Scotia Civil Partnerships and Quebec Civil Unions.

14 *Wilkinson* at paragraph 130

15 *Halpern* at paragraph 46

16 Nova Scotia has a legislative scheme for registering civil partnerships. The scheme is available to both same-sex and opposite-sex couples

17 [2002] 4 S.C.R. 325 (S.C.C.), sometimes referred to as *Walsh v. Bona*

18 Cross-examination of W.T. Hincks taken 10 January 2012 at Question 70

19 Ontario's factum at paragraph 2

20 *Montreal (Ville) v. 2952-1366 Québec inc.*, [2005] 3 S.C.R. 141 (S.C.C.), and the cases referred to in it

21 2006, S.O. 2006, C.21 Sched. F

22 *Bell ExpressVu Ltd. Partnership v. Rex*, [2002] 2 S.C.R. 559 (S.C.C.)

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