

IN THE COURT OF SHAKESPEARE
Motion Hearing from the Court of Appeal of Ontario

BETWEEN:

ATTORNEY GENERAL OF CANADA

Applicant

And

PETE PEARS, BEN BRITTEN and ors.

Respondent

FACTUM OF THE RESPONDENT

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I. THE FACTS

1. Pete Pears and Ben Britten, joined by seven other same-sex couples (“the Couples”) living in Toronto, applied for civil marriage licenses. The Clerk of the City of Toronto did not deny the licenses but, instead, indicated that she would apply to the court for directions and hold the licenses in abeyance in the interim.
2. The Couples commenced their own application. By order dated August 22, 2000, Lang J. transferred the Couples’ application to the Divisional Court. The Clerk’s application was stayed on consent.
3. The Couples’ application was heard by the Divisional Court, which in reasons released on July 12, 2002, unanimously held that the common law definition of marriage as the “lawful union of one man and one woman to the exclusion of all others” infringed the Couples’ equality rights under the Canadian Charter of Rights and Freedoms.
4. The Attorney General of Canada appealed from the judgment of the Divisional Court on the equality issue. The ruling of the lower court was, however, upheld on appeal. On June 10, 2003, the Court of Appeal for Ontario released its judgment, concluding as follows:

To remedy the infringement of these constitutional rights, we:

- 1) declare the existing common law definition of marriage to be invalid to the extent that it refers to “one man and one woman”;
- 2) reformulate the common law definition of marriage as “the voluntary union for life of two persons to the exclusion of all others”;
- 3) order the declaration of the invalidity in (1) and the reformulated definition in (2) to have immediate effect;
- 4) order the Clerk of the City of Toronto to issue marriage licenses to the Couples.

5. The Attorney General of Canada has appealed the judgment of the Court of Appeal of Ontario to the Court of Shakespeare and seek to rescind the order to the Clerk of the City of Toronto to issue marriage licenses to the Couples.

II. THE ISSUES

6. The respondents respectfully submit that the Court of Shakespeare has jurisdiction over marriage.
7. Further, that this court has the ability and the responsibility to change the definition of marriage.
8. Finally, that same-sex marriage is consistent with the laws of Shakespeare.

III. THE ARGUMENT

1. THE COURT OF SHAKESPEARE HAS JURISDICTION OVER MARRIAGE

1.1 Shakespeare accepts responsibility for discussing the institution of marriage.

9. Marriage is a subject on which Shakespeare, and therefore this court, has a great deal to say. In this way Shakespeare acknowledges the importance of marriage. This court recognized in its Heinrich decision that Shakespeare chooses not to address the issue of war crimes or crimes against humanity despite discussion of the topic in his day. (*In re Attorney General for Canada, ex parte Heinrich* [2003] (Yachnin j. concurring)) This is not the case with marriage. Not only does Shakespeare write an entire genre of plays dealing with the concept of marriage, but he discusses marriage in works outside the marriage plays as well.

1.2 Shakespeare provides a framework for us to understand marriage.

10. This court is able to rule on the question of marriage because Shakespeare takes on the task of defining marriage in the plays. He presents different engagement scenarios, thereby establishing what qualifies as marriage. The dissimilar lovers of As You Like It are a good example of this. Shakespeare presents Rosalind and Orlando alongside Celia and Oliver, Silvius and Phoebe, as well as Touchstone and Audrey. A Midsummer Night's Dream presents three levels of comparison: the young lovers, Theseus and Hippolyta, and Oberon and Titania. Often we are given differing options for these pairings such as in Twelfth Night where we are to consider whether the ideal pairing is Orsino and Olivia or whether they should each be with someone else. Not only do we see who does make it to the altar but who does not. The audience can see, through the multitude of options presented,

how to understand marriage. His examples provide an outline for us to define the institution.

11. Shakespeare addresses and confirms this directly in his work. He has Theseus outline the power of the poet to affect our understanding of complex issues.

The poet's eye, in a fine and frenzy rolling,
Doth glance from heaven to earth, from earth to heaven;
And as imagination bodies forth
The forms of things unknown, the poet's pen
Turns them to shapes and gives to airy nothing
A local habitation and a name. (A Midsummer Night's Dream 5.1.12-17)

1.3 Shakespeare provides a forum for the issue of marriage to be explored.

12. Shakespeare opens a forum for discussion on the nature of marriage. The characters work through a myriad of problems or obstacles before reaching the altar which provides for an examination of the issues. If marriage were a static or preordained institution this would be unnecessary. Instead marriage and engagement must be examined. Shakespeare has invited us to participate in this examination.

13. Shakespeare's views on marriage are not monolithic. He is both critical and reverential of the institution. While working towards the ultimate goal of marriage, he presents to us the failings of the institution as well. In As You Like It, Rosalind notes that the feelings of courtship don't always last throughout a marriage: "men are April when they woo, December when they wed. Maids are May when they are maids, but the sky changes when they are wives" (4.1.134). Touchstone refers to the betrothed as "country copulatives" (5.4.35), and jokes about the pervasive problem of cuckoldry are scattered throughout this play, like

many others (e.g. 3.3.48, 4.1.49). Shakespeare doesn't expect us to simply accept marriage as a preordained entity but encourages a critical examination of it.

14. Shakespeare refrains from explicitly defining marriage. Instead, he provides the framework in which marriage can exist. We are not bound to a series of rules and regulations which detail exactly who can get married and under what circumstances. We have the responsibility to establish these ourselves.

2. THE COURT OF SHAKESPEARE HAS THE ABILITY AND RESPONSIBILITY TO CHANGE THE DEFINITION OF MARRIAGE.

2.1 Shakespeare recognizes that law and customs change.

15. Shakespeare recognizes that legal and customary norms must change and therefore the court has a responsibility to acknowledge these changes. In Act IV scene 1 of The Winter's Tale, Time appears and tells us:

..... it is in my power
To o'erthrow law and in one self-born hour
To plant and o'erwhelm custom. (7-9)

Time tells us that this is not a crime (4) and that he will continue in this fashion.

..... so shall I do
To th' freshest things now reigning, and make stale
The glistering of this present. (12-14)

16. This court has also acknowledged this in the Heinrich decision as it referred to the 'living tree' model of interpretation.

... the relevant interpretive community can be no past community, either fictional (as naturalistic fallacy would have it) or real (as the originalist fallacy would have it). ... there is only one community for which the interpretation *matters*: ours. In Constitutional terms this is the doctrine of the "living tree"... (*In re Attorney General for Canada, ex parte Heinrich* [2003] (Manderson J., concurring))

2.2 Shakespeare recognizes change as important to society.

17. It is not enough to imply that Time can change law and custom, Shakespeare insists upon it. The marriage plays lay out a pattern of order being transformed through rejection of the old order, transformation of values and customs, and establishment of a new order. This rebirth is necessary for the maintenance of society. Without the social rebirth engendered by marriages: As You Like It's usurper would remain in power; Orlando, Rosalind, and Duke Sr. would remain disenfranchised, and Oliver would remain unenlightened, bitter, and evil; in The Winter's Tale, Hermione would remain dead, and both Sicilia and Bohemia would lose their heirs; Hermia of A Midsummer Night's Dream would be condemned to a nunnery or worse. In short, society would remain corrupt, unbalanced, unjust, and unproductive, with the suggestion that it might disintegrate completely. The rift between Titania and Oberon in A Midsummer Night's Dream mirrors the tension between Theseus and his conquered bride-to-be Hippolyta. The discord between the fairies produces disastrous consequences in the natural world (2.1.88-117) and by extension in the social world of Athens.

2.3 Shakespeare recognises marriage as an important part of this transformation.

18. The institution of marriage is the agent of this change. Shakespeare always has his characters return from the forest to be reintegrated back into society and change it. Characters flee the rigidity of the city or the court to the forest world where their transgressive loves become possible. While in the forest, lovers enjoy the freedom to act out their fantasies, perform their transformations, and develop their relationships. However, the forest world is not presented as a viable

permanent alternative life for most characters. Remaining in the forest would not be advantageous either for the characters, or for the society that has temporarily ejected them. Consequently they are always welcomed back into society, which is altered to accommodate their marriages and in the end is strengthened by that alteration. The Marriage Plays highlight this re-ordering principle and trumpet its success. The Tragedies leave the future of the society in doubt or in peril. The Histories support this idea as well. Occasionally they end with a positive, optimistic outlook for the future like the one that accompanies the marriage of Henry V and Katherine. However they often end in disruption, like at the end of Richard III.

19. This is most apparent in A Midsummer Nights Dream: lovers must flee Athens because the law does not condone their relationships; confusion and disorder ensue; and in the end, order is restored through the reintegration of the lovers into society. However, one can see this theme repeated in the other plays as well. In As You Like It, four marriages accompany the return of the rightful authority to power from exile in the forest. Viola and Sebastian of Twelfth Night begin the play as outsiders, excluded completely from the society of Illyria, which is flawed by the misplaced affections of its leaders. A forest-like confusion of disguises and mistaken identities ensues, but in the end the twins become integrated into a new, stronger society through marriage. Finally in The Winter's Tale, the marriage of Florizel and Perdita not only reunites Leontes and Hermione, and restores the close relations between Sicilia and Bohemia, but provides both

kingdoms with the security of an assured heir. In the end it is always the reintegration of the lovers into society which stabilizes and restores that society.

20. It is marriage or the expectation of marriage which effects the new order.

Theseus highlights this at the opening of A Midsummer Night's Dream,

Four happy days bring in
Another moon; but, O, methinks, how slow
This old moon wanes! She lingers my desires,
Like to a stepdame, or to a dowager,
Long withering out a young man's revenue. (1.1.2-6)

Theseus is speaking for himself and for society, both eagerly awaiting the change to come through marriage.

3. SAME-SEX MARRIAGE IS CONSISTENT WITH THE LAWS OF SHAKESPEARE

3.1 Love is the primary requisite for and defining feature of marriage in Shakespeare.

21. While betrothals in Shakespeare may vary widely in their attributes, all successful courtships are based on love, which is characterized as mutual desire combined with supportive companionship and commitment. Shakespeare does recognize the importance of factors other than love in effecting a marriage, especially when considering the marriages of persons of political power, but these concerns are either subordinated in the plays or have become irrelevant to our jurisdiction.

22. Concerns about the distribution of wealth and power through marriage are less relevant to our society than they were to Shakespeare's. In Shakespeare's society, wealth and political power were distributed through patrilineal primogeniture, thus the paternity and relative ages of children was then of tremendous social, political, and economic importance. Accordingly, the plays show a pervasive

concern for the production of heirs, and anxiety about establishing the paternity of children. Wealth and political power are not primarily distributed along patriarchal lines in our society; therefore these concerns are not relevant to this court.

23. Even while they recognize the reproductive nature of marriage, the plays consistently subordinate this concern to love. In The Winter's Tale, Leontes loses faith in the love that informs his marriage with Hermione, and this causes him to view the marriage as simply a vehicle for licit sexuality and procreation (as opposed to the illicit sexuality and procreation of adultery). Similarly, Polixenes insists on his right to choose a bride for his son because “all [his] joy is nothing else / But fair posterity” (4.4.405). After Hermione's seeming-death and the loss of his children, Leontes learns instead to value his late wife and their marriage, not to mention his children, for the love and companionship they provided him. The resolution of the play reinstates love, not procreation, as the primary defining feature of marriage.

24. A Midsummer Night's Dream also upholds the choice of the lovers over the concerns of their society. It is Lysander, Hermia's choice, who succeeds in marrying her, rather than Demetrius, her father's choice. The law that provides Egeus the right to “dispose of her” (1.1.42) is shown to be unjust, and the lovers are vindicated.

25. The plays also consider other social factors but these are subordinated to the primary importance of love. For instance, the plays all champion marriages based on love over those motivated by political and economic concerns. In Twelfth

Night, Olivia believes Sebastian/Cesario to be far below her station, and yet she chooses to marry him over Orsino, even while she recognises that Orsino is the socially, economically, and politically appropriate match. Olivia characterizes love as something separate from the will, and as the most important feature of marriage.

Your lord does know my mind, I cannot love him.
 Yet I suppose him virtuous, know him noble,
 Of great estate, of fresh and stainless youth,
 In voices well divulged, free, learn'd, and valiant,
 And in dimension and the shape of nature
 A gracious person; but yet I cannot love him. (1.5.246-251)

3.2 Marriage is the ultimate goal of love in Shakespeare.

26. No character is left in love and not betrothed at the end of our plays. While Malvolio wished to marry, he was never in love with Olivia. He desired “To be Count Malvolio!” (Twelfth Night 2.5.32), and fantasized about having power over the other members of the household. Malvolio abuses marriage, by exploiting it as a means to gain status and power, and for this heinous crime, he is ridiculed and excluded from his society. Characters who do indeed suffer from unrequited love either win over their beloved, as in the case of Silvius (As You Like It) and Helena (A Midsummer Night’s Dream), or they find another, more suitable, partner, as in the case of Orsino (Twelfth Night). Every couple in these plays who has a mutually expressed desire to marry is assured the right to marry. This right applies to all, regardless of station, whether you are a princess like Perdita or Rosalind, a gentlewoman like Viola or Hermia, a servant like Maria, a shepherdess like Phoebe, or a country wench like Audrey.

27. Characters that do not marry are often presented in the plays as pitiable. In As You Like It, Jaques cynical and melancholy view of the world is overwhelmingly rejected by the trajectory of the play. He may have one of the most famous speeches in Shakespeare, but no one listens to him; and in fact, his cynical point of view is debunked by the entrance of Orlando, the lover who hasn't lost his mind, and Adam, the old man who still has both wits and physical strength. Jaques' views of love are similarly shown up by the tender and lasting bonds between the other characters of the play. His decision to remain in exile in the forest can only be viewed with pity by the other characters, a pity which is echoed in the Duke's "Stay, Jaques, stay" (5.4.189). However Jaques can not return to the court, for he is destined to remain outside of that world, confined to the forest by his unwillingness to marry and his inability to love.

28. At the end of The Winter's Tale, when Paulina finally learns the details of her husband's death, she faces a lonely future as a widow:

. I, an old turtle,
 Will wing me to some withered bough, and there
 My mate, that's never to be found again,
 Lament till I am lost. (5.3.132-135)

This solitary future is presented as pitiable and ultimately unacceptable in the play, and Leontes offers her a chance to remarry with Camillo. Both characters have behaved with honour throughout the play, and it is expected that the audience will perceive the match as appropriate and beneficial to both characters. Through the image of the lone turtle dove pining on "some withered bough" Paulina characterizes her widowhood as separating her from society. This implies

that to be married is to participate in society in a manner which is unavailable to those who are unmarried.

29. The plays present marriage as an institution in which everyone has a right to participate, with real consequences for those who remain excluded. No couple remains in love and not betrothed at the end of the plays. Marriage is presented as the appropriate vehicle for the individual expression and social approbation of conjugal love.

3.3 The Couples' right to marry must be protected.

30. This court must protect the rights of individuals to perform their elective affinity. Our precedent, the Heinrich decision, establishes that under the laws of Shakespeare, individuals bear a personal responsibility for their actions (*In re Attorney General for Canada, ex parte Heinrich* [2003] (Manderson J., concurring)). Inherent in this responsibility is the right of the individual to choose the most just course. Without the ability to choose this course, the responsibility would be meaningless.
31. These plays affirm the role of human agency in determining the appropriate partners for marriage. While the plays contain elements of divine intervention, such as the oracle, the storm, and the bear in The Winter's Tale, the ultimate responsibility for education, for development, and for achieving the marriages they seek rests with the characters themselves. Leontes must study how to be a good husband under the tutelage of Paulina; Perdita and Florizel must risk their lives to seek recognition; and Rosalind takes great care to orchestrate the seeming-miracle of her transformation.

32. Inherent in the principle of individual responsibility for one's actions, and the consequent right to pursue a course of action consistent with one's elective affinity, is the right and responsibility to be recognized within one's community. Individuals must be able to stand up and declare their actions; to be judged, lauded, or punished according to their merit. The lack of this principle is one of the features of Leontes' tyranny: Camillo acts rightly but is forced to flee Sicilia in secrecy nonetheless. The laws of Shakespeare therefore accord individuals the right to honour if they have acted honourably and to dignity if they have respected the principles of the community.
33. The institution of marriage needs to reflect societal values to be valid. While Shakespeare lived in a time during which homosexuality was outlawed, and homosexual love was deemed to be merely lust, we do not live in such a time. Today, we recognize that same-sex relationships can be just as loving, supportive, and lasting as heterosexual ones. These relationships are not considered to be in and of themselves contrary to the principles of our society, therefore individuals participating in same-sex relationships are entitled to the same honour and dignity as those in heterosexual relationships. Yet a tradition exists in our society of devaluing same-sex relationships, and subjecting individuals involved in them to bigotry. To deny same-sex couples the right to marry would be to continue and uphold this tradition of intolerance. Since marriage is the appropriate institution for the social expression of love and commitment, then to deny same-sex couples the right to marry is to deny the honour and dignity of their relationships.

34. This court must immediately act to welcome the lovers back from the forest, to reintegrate these individuals into our society, and to affirm the dignity of their relationships, by upholding their right to participate in that most honoured and honourable of institutions: Marriage.

4. CONCLUSION

35. Shakespeare has demonstrated that this court has the ability and the responsibility to change the definition of marriage. Shakespeare not only acknowledges that laws, norms and cultures change, but he proposes that this change is an important part of the development of a society. In Shakespeare this change is accomplished through the integration into society of marriages which are based on love. In this way the society is transformed and its members' dignity is restored. Denying same-sex couples access to marriage is to confine these lovers to the forest and to deny society the strengthening power of their symbolic reintegration.

IV. REMEDY SAUGHT

36. The respondents respectfully request that the Court of Shakespeare affirm the common law definition of marriage as “the voluntary union for life of two persons to the exclusion of all others” and affirm the order for the Clerk of the City of Toronto to issue marriage licences to the couples.

V – AUTHORITIES

Halpern v. Attorney General of Canada, 2003 Ont. C.A. LEXIS 271

In Re Attorney General for Canada; ex parte Heinrich, (2003) 1 C. of Sh. 1.

Shakespeare, William. A Midsummer Night's Dream. Peter Holland, Ed. Toronto, Oxford UP: 1998.

--- As You Like It. Alan Brissenden, Ed. Toronto, Oxford UP: 1998.

--- The Winter's Tale. Stephen Orgel, Ed. Toronto, Oxford UP: 1998.

--- Twelfth Night. Roger Warren and Stanley Wells, Eds. Toronto, Oxford UP: 1998.