

**The Court of Shakespeare**

**Attorney General for Canada**

**(Applicants)**

**v.**

**Pete Pears, Ben Britten and Ors.**

**(Respondents)**

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**RESPONDENT FACTUM**

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**Montréal, November 10, 2003**

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## PART ONE: FACTS

1. Pete Pears and Ben Britten, joined by seven other same-sex couples (“the Couples”), applied to the Clerk of the City of Toronto for civil marriage licenses. The Clerk of the City of Toronto held the licenses in abeyance while applying to the Court for directions.
2. The Divisional Court held unanimously that the existing common law definition of marriage as “the lawful and voluntary union of one man and one woman to the exclusion of all others” infringed the Couple’s equality rights under the *Canadian Charter of Rights and Freedoms*.
3. The Court of Appeal for Ontario upheld the decision of the Divisional Court. The Court of Appeal declared the common law definition to be invalid to the extent that it refers to “one man and one woman” and ordered the reformulation of the definition of marriage as “the voluntary union for life of two persons to the exclusion of all others”.
4. The Court of Appeal of Ontario ordered the Clerk of the City of Toronto to issue marriage licenses to the Couples.

PART TWO: ISSUES

1. Is the transformation of the common law definition of marriage to allow same sex marriage consistent with the laws of the Shakespeare?

## PART THREE: ARGUMENTS

1. **Choice in marriage is integral to fulfilment of identity under the law of Shakespeare. To include same-sex couples in marriage is thus consistent with the law, for to exclude them is to deny recognition of their identity and their right to self-fulfilment.**

### 1.1 Recognition and fulfilment of identity is central to the law of Shakespeare.

1. In the case of Heinrich, this court placed “identity” at the centre of its conception of the law of Shakespeare and its proper interpretation. Seen through the lens of “identity”, the Court was asked either to recognise the identity of Karl Heinrich, with the necessary consequences thereof, or to support the placing of one’s selfhood in escrow. It is most explicit in the judgement of Manderson J. that the Court decided that the recognition of identity, capable of change but continuous, was a central principle of the law of Shakespeare.

*Re Attorney General for Canada; ex parte Heinrich* [2003] 1 C. of Sh. 1

(Hereafter referred to as Heinrich)

Manderson, Desmond. “In the Tout Court of Shakespeare: Interdisciplinary Pedagogy in law” [forthcoming]

Dworkin, Ronald. “Integrity in Law” in *Law’s Empire* (Cambridge, Mass.: Belknap Press, 1986) pp.225-239

2. Many commentators have noted the distinct and self-actualised identities of Shakespeare’s characters and their correspondence to real, complex human beings. The powerfully conceived identities of such figures as Rosalind, Viola and Hermione are constitutive of the authority of the Court of Shakespeare to decide upon the issue of same-sex marriage, which involves complex contemporary questions of identity.

Johnson, Samuel. “Preface to Shakespeare,” in Bronson, Bertrand H., ed.,

*Rasselas, Poems and Selected Prose* (New York: Holt, Rinehart & Winston, 1952) pp. 241-3

Bloom, Harold, *Shakespeare: the Invention of the Human*, (New-York :  
Riverside Books, 1998).

**1.2 Homosexuality as a social identity is a development which postdates the text of the law and makes re-interpretation of the text necessary.**

3. The transformation of the definition of marriage is the response of the law to a development not contemplated at the time the text of the law on marriage was written, namely, the development of homosexuality and heterosexuality as categories of social identity. It is only with the development of homosexual identity that marriage becomes, as per the traditional definition, as an institution exclusive to those of heterosexual identity.

Charney, Maurice. *Shakespeare on Love and Lust* (New York: Columbia  
University Press, 2000), pp.159-163

4. The question for this court is whether it should respond to the development of homosexual identity by including this social group within marriage, that is, by allowing same-sex couples to express their love and commitment through marriage rites. The argument that same-sex marriages are not permitted on the face of the text does not determine the definition of marriage in the law of Shakespeare as it is best interpreted today.

5. This case involves the best interpretation of the law governing marriage, and as precedent shows, the Court of Shakespeare is committed to a “living tree” model of legal interpretation. This model of legal interpretation values continuity in the law but recognises that the law must respond to contemporary circumstances and accord with community understandings of justice to maintain its integrity.

*Halpern v. Attorney General of Canada*, 2003 Ont CA LEXIS 271 (Hereafter  
referred to as *Halpern*)

Manderson, *In the Tout Court of Shakespeare*

6. The change in community understandings that underlies this case is as follows. In the time of Shakespeare, there were undoubtedly homosexual desire, love and sex, but homosexuality vis-à-vis heterosexuality was not recognized as a point of identity parallel to such distinctions as male/female or common/noble. In our times, sexual orientation, of which homosexuality is one case, has achieved social recognition (and legal recognition in other jurisdictions) as an aspect of personal identity, characterized by the Supreme Court of Canada as a “deeply personal characteristic that is either unchangeable or changeable only at unacceptable personal cost”. Sexual orientation, including homosexuality, is a vital constituent of personal identity. To deny this would place the law of Shakespeare at odds with community understandings of homosexuality.

*Halpern, supra* at paragraphs 74, 77-80

7. The respondents note in this respect that other forms of sexual preference have failed to achieve this form of recognition as constitutive of identity. It is our opinion that the preceding argument does not apply with respect to polygamous or incestuous marriages. Of the forms of sexual preference which could have appeared aberrant at the time of the writing of the law, homosexuality is unique in having established itself over time as a recognised personal identity.

**1.3 Under the law of Shakespeare, transgressive choice of marriage partner is often a powerful means of self-actualisation, aiding in the development of personal identity.**

8. In the dramatic tradition of Roman New Comedy – one of the most important influences on Shakespeare – the audience is positioned as sympathetic to the romantic struggles of young lovers. Blocking characters, typically parents or civic leaders, object to a perceived mismatch on the bases of class, rank, wealth or age. The inventory of the action of Roman comedy has

been given as “involv[ing] forbidden love affairs, misunderstandings, and confusions of identity”

Miola, Robert S. “Roman Comedy” in Legatt, A. *The Cambridge Companion to Shakespearean Comedy*, (New York: Cambridge University Press, 2002)  
*A Midsummer Nights’ Dream* 1.1.132-155

9. Applying Miola’s threefold division to Shakespearean comedy, the navigation of the perils of courtship in order to reach an acceptable marriage centre on 1) an interrogation of the forbidden by lovers, 2) an untangling of misunderstandings, typically of identity, and 3) self-actualization through the struggle to reveal or assert true identity.

10. The action of *A Midsummer Night’s Dream* is set in motion by Hermia and Lysander’s transgressive choice of each other as marriage partners. This choice is important in asserting their identities as distinct from their doubles: Hermia’s identity is clarified in that she is willing to risk death, exile, or a life of celibacy in selecting Lysander, as opposed to Helena’s choice of Demetrius. Similarly, Lysander’s choice of Hermia has a self-actualising function in that he chooses her for love, in contrast to Demetrius’ cold reliance on the protocol of a father’s ownership of his daughter.

*A Midsummer Night’s Dream*, 1.1.91-4

11. *The Winter’s Tale*’s engagement of Florizel and Perdita serves a similar self-actualising function. In particular, Perdita’s elopement is necessary for her to return to Sicily to be reunited with her parents and to discover the truth about her past and identity. When Polixenes and Camillo disguise themselves in order to inquire into the prince’s attachment, they at first appear sympathetic to the match. However, when Florizel fails to assure them that he intends to marry his lover openly, the king tells him abruptly “Mark you divorce, sir”. This dictum, reminiscent of Hermione’s complaint of “rigour and not law”, is intended to reassert the irreconcilably mismatched putative identities of Florizel and Perdita. Despite these harsh



injunctions, had Perdita obeyed the king, she would in fact have continued to live under the false identity of a poor shepherd's daughter. Her disobedience and elopement to Sicily are necessary conditions for her reunion with her parents and achievement of her true identity.

*The Winter's Tale* 3.2.112, 4.4.414

#### **1.4 The Court should apply a principle of progressive interpretation to allow same-sex couples self-fulfilment through marriage.**

12. The law involves re-interpretation of legal constructs to deal with new circumstances.

The recognition of homosexuality as constitutive of identity allows us to imaginatively analogise the role that marriage plays to the self-fulfilment of heterosexual couples, as an expression of choice, to the role that marriage can play in the self-fulfilment of homosexual couples. Marriage is important in the recognition of identity, especially where choices are in some way transgressive. This applies, a fortiori, to same-sex couples.

*Heinrich, supra*

*A Midsummer Nights Dream* 5.1.204-207

Kornstein, Daniel, J. *Kill All the Lawyers: Shakespeare's Legal Appeal*, (Princeton: Princeton UP, 1994), pp.129-132

13. The plays themselves present living trees of interpretation in that they contextualise questions of personal freedom within carefully structured normative communities. Thus,, it is proper to look beyond the romance of the triumph of characters' transgressive choices and examine how an accommodation is reached without violating the normative integrity of the community. By the end of the plays under consideration, the respective authorities find that the restrictions on marriage are arbitrary and revisable in light of changes in the community's values. The transgressive nature of the choice of partner is temporary: the constituted authorities prove able to adopt a principle of progressive interpretation. The plays present proposed marriages that are transgressive only to the extent that they break with legal texts or

moribund traditions that their respective communities are now prepared to reconsider. The normal final state of the married couple is one of entitlement to marriage.

14. On discovering the young lovers asleep in the fields outside Athens, Egeus insists that Lysander has illicitly “defeated” him of his “consent” regarding the marriage of his daughter. Egeus has seen enough and will “have his bond”: a literal reading of the law permits him to have Lysander executed for kidnapping. Theseus rejects this demand, revising his initial positivist interpretation of Athenian law: “the law of Athens.../Which by no means we may extenuate”. By the time the lovers are discovered during the nobles’ hunt, it has become clear to Theseus that this law’s only currency is as a prejudice in the minds of those who regard others as movable property. With the conclusion of the war against the Amazons, the normative space of Athenian society has changed and authority now takes a different view of domestic affairs. Given Duke Theseus’ autocratic powers, his imprimatur is sufficient to instantiate this revised view as the law of his city state.

*A Midsummer Nights Dream* 1.1.119-20, 4.1.178, 4.1.156-8

15. Similarly, the proposed marriage of prince Florizel to a supposed shepherd’s daughter is ostensibly transgressive against the norms of Bohemia – so much so that Florizel himself is unwilling to announce it to his father. Yet, when Polixenes and Camillo disguise themselves in order to investigate, the point at issue is whether the couple’s commitment to each other is sufficiently strong. The final reconciliation reported in Act V indicates that, in light of what he has learned from his dealings with Leontes and Hermione, and knowing the true identity of Perdita, Polixenes is ultimately prepared to give his consent to the marriage of his son.

*The Winter’s Tale* 4.4.365-381, 5.2

16. Furthermore, the exiled couples in the Forest of Arden are finally forgiven and allowed to return to civilization. The usurping Duke Frederick undergoes religious conversion and allows

the restoration of the banished Duke Senior. It is presumed that the rightful duke will sanction the “outlaw” marriages.

*As You Like It* 5.4.149-161

17. To deny same-sex couples' rights to marry is unacceptable under the law of Shakespeare for it would abnegate the development of their identity and prevent self-actualization. Same-sex couples such as Pears and Britten are human beings seeking recognition of their identity and their right to self-actualisation. The law of Shakespeare supports the revision of the definition of marriage in response to developments in identity, based on an underlying ethos of self-actualisation through the expression and fulfillment of marital choice.

**2. To expand the definition of marriage to same-sex couples will extend the social stabilizing function of marriage**

**2.1 Marriage provides a structure within which lovers can be integrated into a stable community.**

18. The works of Shakespeare recognise the seeming irrationality of desire and arbitrariness of love's choices to those beyond the lovers themselves. The powerful forces of love and desire and the dualities of attraction and rejection give rise to the comic pains and confusions of courtship.

*A Midsummer Night's Dream* 1.1.53-57, 5.1.4-17

*As You Like It* 2.4.50-53

Traub, Valerie. *Desire and Anxiety: Circulations of Sexuality in Shakespearean Drama*, (London: Routledge, 1992)

19. Marriage functions as resolution of the forces of love and desire, integrating the lovers into the community while providing the stability necessary to preserve the community. In the comedy plays, there is a definite trajectory. The experience of passion draws the characters into a "courtship" period of comic chaos. They then fall into a new order of couples which represents the final product of the confusing process of human partner selection. The rites of marriage or the promise thereof is the stable destination that the entire narrative structure is oriented towards and symbolises not only the final expression of love's choices but the legal control of human sexuality on the basis of that expression.

*Twelfth Night* 4.3.22-28, 5.1.152-157

*As You Like It* 5.2.32-38

Bates, Catherine. "Love and Courtship" in Legatt, A. *The Cambridge Companion to Shakespearean Comedy* (New York: Cambridge University Press, 2002)

Hollindale, Peter. *A Midsummer Nights Dream* (St Ives: Penguin, 1992)

20. Marriage regulates the plurality of human desire through the symbolism of sacred commitment to one's partner, an "everlasting bond of fellowship". It is this promise of fidelity and commitment that is the pre-eminent quality of marriage as a mechanism of social stability. This is the symbolic and practical requirement for marriage to fulfil its social function.

*A Midsummer Night's Dream* 1.1.84- 85

21. *The Winter's Tale* explores consequences of not adhering to this essential quality of marriage. The sacredness of marriage is violated by Leontes, resulting in a disruption of rightful order, only reinstated when he longs for the peaceful order he destroyed, regrets his prejudices and understands marriage as mutual commitment based on love. This admittance of guilt triggers the "resurrection" of Hermione and the restoration of order based on marriage properly understood.

*A Winter's Tale* 3.2.91-93, 3.2.183-199, 4.4. 485-489

22. The comedy texts recognise that the prevention of parties from entering into marital commitments, perhaps because of an overly-strict application of the law or a flawed social order, itself may cause confusion. The plight of the lovers in *A Midsummer Nights Dream* demonstrates how the denial of marriage to those in the throes of love and desire forces flight from order and concomitant disorder. Egeus' will, which chooses Demetrius as irrationally as Hermia chooses Lysander, but the proposed application of marriage rites to this choice bring nothing but chaos

*A Midsummer Nights Dream* 1.1.156-169

Creaser, John. "Love and Confusion" in Legatt, A. *The Cambridge Companion to Shakespearean Comedy* (New York: Cambridge University Press, 2002)

23. As a general rule, marriage in the law of Shakespeare orders characters to satisfy mutual love where it exists and to further provide those who remain with a place in the institution

where possible. Marriage is given the widest application correlative with its function.

Examples include the marriages of Paulina and Camillo in *The Winter's Tale* and Touchstone and Audrey in *As You Like It*.

24. There are examples of types of heterosexual love that cannot satisfy the requirements for marriage. This is demonstrated in *Twelfth Night*, where in the absence of blocking parents or priests, marriage is quite liberally permitted. However, Orsino's professed love for Olivia reveals itself as in fact a love of melancholy and rhetoric. In turn, Malvolio's love of Olivia turns out to be a self-love based on the self-aggrandisement he imagines he will enjoy after their marriage. Music is not the food of love; only the presence of the properly loved other is. These forms of defective love cannot come within the purview of marriage because they are not based on love and commitment to another living person.

Warren, Roger and Wells, Stanley *Introduction to Oxford Shakespeare Twelfth Night*, (Oxford: Oxford UP, 1994) pp. 25-26

## **2.2 The definition of marriage should be adapted to include same-sex couples.**

25. The development of homosexuality and heterosexuality as categories of social identity impact on the social function of marriage. These modern conceptions fetter the plurality of desire as seen in the texts, in particular, the fluidity between heterosexual and homoerotic desire. However, they also expand notions of what kinds of couples are capable of making marital commitments and thus falling under the purview of marriage. It is with the development of homosexual identity that opposite-sex marriage becomes, as per the traditional definition, as an institution limited to regulating a certain social group.

Charney, *Shakespeare on Love and Lust*, *supra*

26. The question for this court is whether it should respond to the development of homosexual identity by including this social group within marriage, that is, by allowing same-sex couples

to express their love through marriage rites and be regulated by the commitments involved therein.

27. Marriage and rightful order are mutually dependent on one another. Recognition and acceptance into a community are important for married couple's happiness, but where the social order is flawed or over-strict in its conferral of this recognition, the texts recognise that people will flee, which itself undermines the social order. The alternative to inclusion of same-sex couples is to leave them outside the jurisdiction of the law of Shakespeare on marriage, symbolically equivalent to leaving same-sex couples in the Forest when they feel ready to end their courtship phase and enter the city.

Bates, "Love and Courtship", *supra*

Hollindale, *A Midsummer Night's Dream*, *supra*

28. The law of Shakespeare does not support leaving mutually loving couples "in the Forest". Over-strict laws will be overturned in necessary, for example, Theseus' overbearing of Egeus' will, in the resolution of *A Midsummer Night's Dream*. Alternatively, acceptance of "outlaws" may be reliant on the re-institution of a rightful and benevolent rule as in *As You Like It*.

*A Midsummer Night's Dream* 4.1.175-85

*As You Like It* 5.4

29. There is a core principle to marriage that cannot be fractured and that is the symbolic requirement of commitment and fidelity. It is these requirements that give marriage its normative force and power to stabilise. It is not necessary that marital promises of fidelity be enforced. These requirements maintain their legitimacy and power by virtue of their prized place in the community's and the law's conception of marriage.

*Halpern*, *supra* at paragraph 94

*Mabo v Queensland (No.2)* (1992) 175 C.L.R 1 (High Court of Australia, Brennan J.)

30. The laws governing marriage are adaptable to marriages that conform to these essential requirements of marriage. Same-sex marriage does not challenge the form of marriage, as based upon fidelity as between two people based on mutual love and attraction, but simply seeks inclusion within it. This inclusion will not undermine the ability of marriage to order love and desire. Rather, the expansion of marriage to same-sex couples will improve its ability to provide social stability.

**2.3 Subsidiarily, marriage does not involve a fixed complementarity of gender roles.**

31. Any argument that marriage necessarily involves opposite sex couples because the complementarity of gender roles underlies the law of Shakespeare on marriage should be rejected. Far from essentializing conventional male/female gender attributes the law of Shakespeare supports the fluidity of gender. In both *Twelfth Night* and *As You Like It*, gender roles are played with and in some cases inverted. For example, Olivia's own desire to control her household, and her attraction to men who do not challenge this control, supports her marriage to Sebastian, whose reliance on Antonio indicates he will likely complement Olivia.

Charles, Casey. "Gender Trouble in Twelfth Night", *Theatre Journal*, v49 i2, 1997

**2.4 Subsidiarily, the prospect of natural child-bearing between marriage partners is not essential in the contemporary law of Shakespeare.**

32. Sexual relations between same sex couple will not lead to procreation. However, this does not justify the exclusion of same-sex couples from marriage. While it may be argued that marriage's social purpose in the texts is to encourage reproduction, this does not resonate in the dramatic or narrative structure or the plot of the four plays in the same way as the stabilising function of marriage does. Furthermore, the Canon contains numerous examples of childless couples without suggesting that these marriages are invalid.



33. Within the texts themselves the procreative dimension of married life is of less symbolic significance than the fidelity and social organisation involved in marriage. In *The Winter's Tale*, upon deciding that Hermione has been unfaithful and that his newborn child is illegitimate, Leontes admits that Mamillius is still his heir. If procreation were essential to Shakespearean marriage, we would expect Leontes to be delighted with his natural heir and to glean consolation from his existence. Instead, Leontes takes a cold view of him and decides begrudgingly not to have him destroyed with the rest of his family (though he revises this view on learning of Mamillius' death).

*The Winter's Tale* 2.1.56-62

34. Insofar as issues of procreation are emphasised in the plays, they are better interpreted as concerns with legacy and inheritance which reflect the importance of primogeniture for resource division and political power in the context of early modern England. In contemporary Canada, where the political and economic structure of society isn't organised on "blood right" or inheritance, it would be incorrect to assert that biological procreation is fundamental to marriage. It is also incorrect to maintain as sacrosanct the underlying ideal that community long-term happiness and survival necessarily involved bringing more people into the world, when the value of high levels of reproduction is highly contested today.

35. Contemporary interpretation of the promise of children through marriage that appears in the text should focus instead on child-raising and thus extend to adoption and alternative means of having children, which are available to same-sex couples.

*Halpern, supra* at paragraph 93

PART FOUR: ORDER SOUGHT

36. The respondents respectfully request that the Court of Shakespeare dismiss the appeal of the Attorney-General for Canada and uphold the transformation of the definition of marriage as undertaken by the Court of Appeal of Ontario.

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Attorney for the respondent

Montréal, October 20, 2003

PART FIVE: AUTHORITIES

Codex, Institutes, Digest

*Re Attorney General for Canada; ex parte Heinrich* [2003] 1 C. of Sh. 1

*As You Like It*

*The Winter's Tale*

*A Midsummer Nights Dream*

*Twelfth Night, or What You Will*

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Charney, Maurice. *Shakespeare on Love and Lust* (New York: Columbia University Press, 2000

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Secondary Material : Foreign jurisprudence

*Halpern v. Attorney General of Canada*, 2003 Ont CA LEXIS 271

*Mabo v Queensland (No.2)* (1992) 175 C.L.R 1 (High Court of Australia, Brennan J.)