

Web-exclusive comment

## **Five years ago today, gay marriage became legal in Ontario – and equality has lived more happily ever after**

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Five years ago today, I put on a white suit and my good luck shoes and went to the office of the Ontario Court of Appeal to pick up a judgment.

The case was Halpern et al v. the Attorney-General of Canada et al. The result: “The Clerk is directed to immediately begin issuing marriage licences to same-sex couples.” Within hours, our clients Michael Leshner and Mike Stark were married in a Toronto courthouse. I could barely stand up during the ceremony; I was so emotional, my co-counsel, Joanna Radbord, had to hold me up.

Over the next few weeks, we attended many marriages – of our clients, colleagues and friends – and wept throughout each one. It was totally surreal. We had fought a huge fight, had invested hours and hours, alongside many, many, others. Many, including community members, thought we couldn't win it. It had been a battle royale: The government had argued against gay marriage in three different provinces for three years. They had spent hundreds of thousands of dollars on expert reports, and if we calculated their time using Bay Street rates, many millions of dollars for the Attorneys-General to yield their litigation power. They said that marriage was “the foundation on which civilization was built” (and wondered why we felt excluded); that equal marriage “would have unintended consequences”; that it that could “make the institution less durable”; that marriage was “inherently procreative”; that equal marriage would remove incentives for heterosexuality and so all women would naturally become lesbians, and “men's contribution to society would be reduced to little more than a teaspoonful of sperm”; that gay marriage was linguistically impossible, just as it would be to say that “my boys are close sisters” or “he's a married bachelor” (that one actually scared me at first); and that gays and lesbians had caused or would cause the breakdown of the family.

Nobody expected that the judgment would have immediate effect. We argued for it – begged for it, truth be told – but between counsel felt that there was little prospect of an immediate remedy. That was the beauty of Halpern and the genius of Roy McMurtry, then the chief justice of Ontario. The judgment had immediate effect. Marriages proceeded. And everybody went on television and said “the genie is out of the bottle,” “the toothpaste is out of the tube,” “the horses are out of the barn” and, well, so it was. Just seven days after the judgment, the federal government announced that it would not appeal.

Nothing prepared us for the backlash and media saturation. For almost the entire summer of 2003, the newspapers were consumed by gay marriage, day after day of front-page stories, for weeks and weeks, tirades by those in opposition, threats by sociologists and “ethicists” about “the end of marriage” or “the rights of children to have a mother and a father,” and volumes of ranting and downright hateful letters to the editor. Few appeared to recognize that, at least legally and, well, practically, too, it seemed, the matter was decided.

Over the next three years, the issue certainly consumed more than its share of public debate. We had religious groups seeking the right to appeal the judgment, court decisions in favour of equal marriage from British Columbia, Quebec, Nova Scotia and the Yukon, the first same-sex divorce, a Reference before the Supreme Court of Canada, endless debate during two subsequent federal elections, and massive efforts made by Egale and political experts in Ottawa to get the bill passed. Eventually, by a free-vote at 9 p.m. on June 28, 2005, same-sex marriage became a reality across Canada. The judgment of the Court of Appeal for Ontario in Halpern has continued the tradition of Canadian human-rights jurisprudence showing international leadership. Perhaps the best indicator of how influential the case would become was that within weeks, both U.S. Supreme Court Justice Antonin Scalia and the Pope came out with aggressively negative statements against Ontario's highest court (we joked about how those two events were the highest measure of the accomplishment).

In November, 2003, the Massachusetts court decision, the first American court decision in favour of equal marriage, cited Halpern at the operative part of its judgment, saying: "We face a problem similar to one that recently confronted the Court of Appeal for Ontario, the highest court of that Canadian province. ... In holding that the limitation of civil marriage to opposite-sex couples violated the Charter, the Court of Appeal refined the common-law meaning of marriage. We concur with this remedy ..."

A few weeks ago, the California Court of Appeal became the second American appellate court to render judgment in favour of equal marriage. The decision, perhaps out of necessity, is without any doubt the most emotive and powerful of any of the judgments so far. It references Halpern and also two other Supreme Court of Canada sexual-orientation equality cases, Egan v. Canada and M. v. H.

It's estimated that about 15,000 gay or lesbian couples have been married in Canada since June 17, 2003. In Toronto, 4,650 licences had been issued to same-sex couples at the end of 2007, making up 6 per cent of the total issued in the period. Marriage rates have not declined. Divorce rates have not increased. The English language seems to have no problem accommodating the concept (in fact, several dictionaries have been amended). Nobody seems to be forcing churches to do things they don't want to do.

Other signs of the breakdown of the family, whatever that means anyhow, are not apparent. The opposing interest groups, including some big-spending American traditional family forces, have publicly announced their retreat. Of course, what that data doesn't show is that individual lives have changed. I have experienced and heard about my share of gay and lesbian weddings, all different and yet, often so similar. Again and again, couples speak of authenticity, and of greater feelings of citizenship and inclusion in families and communities. They tell of neighbours sewing their dresses, reuniting and acceptance with family members, the importance of the public declaration, the effect of the event on their relationships with others.

Many are surprised by how different they feel, both as a couple and in their lives generally. Our 12-year-old client Robbie Kemper perhaps said it best when he took to the microphone the day of the decision and declared, "Now nobody can say I don't have a real family."

The wedding stories are poignant and astonishing. I continue to be awed. I don't want to leave the impression that discrimination has been eradicated, but things are just a little different. You can feel it in our cities. Not just on Church Street or Ste-Catherine, although you can feel it there, too. Yes, the pace of

progress is slow, but today, on the fifth anniversary of Halpern, let's just celebrate that it worked. The Charter is not just some academic document.

And for all of the thousands of volunteers – people working with the Metropolitan Community Church, with Egale, all of the psychological and psychiatric associations and legal-interest groups, professors, lawyers, lobbyists, educators and thousands of other community volunteers, we all get to say, five years later, we were right. The sky has not fallen. A few people's lives are better, that's all. Heterosexuality remains remarkably popular. As the California Court of Appeal wrote just a few weeks ago, “There are enough marriage licenses to go around.”

When we argued the case before the Ontario Court of Appeal, then-chief justice Roy McMurtry interrupted my co-counsel, and said something like, “You are asking us to go further than any other country has gone to date, aren't you?” Joanna stood back from the lectern. She paused, and took a deep breath. I began scribbling answers for her. She didn't need them. The room was still. She simply said, “Yes, Chief Justice. And that's why I'm proud to be a Canadian.”

Today, five years later, as the judgment continues to change lives here and internationally, I simply say: Indeed. How proud we all should be that the Canadian vision of equality and freedom has life and meaning. And wings.

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