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CANADA / JUDGMENT

## P. (S.E.) v. P. (D.D.)

2005 BCSC 1290

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Supreme Court of British Columbia

DECIDED

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2005 BCSC 1290 P.(S.E.) v. P.(D.D.)

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

P. (S.E.) v. P. (D.D.),

2005 BCSC 1290

Date: 20050914

Docket: E044116

Registry: Vancouver

Between:

P. (S.E.)

Plaintiff/Petitioner

And

P. (D.D.)

Defendant/Respondent

Before: The Honourable Madam Justice Garson

Reasons for Judgment

Counsel for the Petitioner:

b. findlay, Q.C.

Counsel for the Intervenor, Attorney General of Canada:

J.A.M. Bowers, Q.C.

Date and Place of Hearing:

August 30, 2005

New Westminster, B.C.

## INTRODUCTION

- [1] The petitioner (Ms. P) applied for a divorce from her husband (Mr. P) on the grounds of his admitted "adultery" with another man. I heard submissions of the petitioner and the Attorney General of Canada (the latter as intervenor in this case) that adultery as defined in common law is not limited to sexual acts between persons of the opposite sex. I concluded that adultery can include sexual acts between a married person and a person other than the married person's spouse of the same sex. At the conclusion of the hearing, I granted the divorce on the ground of Mr. P's adultery with a man.
- [2] Following pronouncement of the divorce, I advised the parties that I would deliver written reasons for judgment concerning the definition of adultery for the purposes of the Divorce Act, R.S.C. 1985, (2nd Supp.), c. 3. These are those reasons.

## FACTUAL AND PROCEDURAL BACKGROUND

- [3] Ms. P is a heterosexual woman who has been married to the defendant, Mr. P, for almost 19 years.
- [4] Ms. P petitioned for divorce. In her petition she relied on the grounds specified in s. 8(2)(b) (i) of the Divorce Act (that is, that the respondent spouse had committed adultery), and she requested an order of divorce pursuant to the Divorce Act and Rule 60(24) of the Rules of Court (British Columbia, Supreme Court Rules). Rule 60(24) permits (subject to a number of specific requirements) divorce orders to be granted without a court hearing where the proceeding is undefended. Ms. P made no claim for corollary relief. Mr. P did not defend the petition for divorce.
- [5] The evidence in support of the petition for divorce included Mr. P's affidavit in which he admitted voluntary sexual intercourse with a male person at the location and on the date specified in the petition.
- [6] I declined to grant the divorce pursuant to Rule 60(24), that is without a hearing, and requested that the petitioner, by counsel, make submissions on the issue of whether "adultery" as used in the Divorce Act could include sexual relations between a married person and another person of the same sex. I am grateful for the thoughtful submissions made by Ms. Findlay, Q.C., on behalf of the petitioner, and by Ms. Bowers, on behalf of the intervenor the Attorney General of Canada.

## LEGISLATIVE HISTORY

- [7] Before 1985, the grounds for divorce in the Divorce Act, R.S.C. 1967-68, c. 24, included:

## GROUNDINGS FOR DIVORCE

3. Subject to section 5, a petition for divorce may be presented to a court by a husband or wife, on the ground that the respondent, since the celebration of the marriage
- (a) has committed adultery;
  - (b) has been guilty of sodomy, bestiality or rape, or has engaged in a homosexual act;
  - (c) has gone through a form of marriage with another person; or
  - (d) has treated the petitioner with physical or mental cruelty of such a kind as to render intolerable the continued cohabitation of the spouses.
- [8] In 1985, the amendments made to that version of the Divorce Act removed all fault grounds for divorce except adultery and cruelty (Divorce Act, 1985, R.S.C. 1986, c. 4). The waiting period for a divorce based on a separation was shortened to one year.
- [9] Section 8(2) of the current Divorce Act provides:
- (2) Breakdown of a marriage is established only if
- (a) the spouses have lived separate and apart for at least one year immediately preceding the determination of the divorce proceeding and were living separate and apart at the commencement of the proceeding; or
  - (b) the spouse against whom the divorce proceeding is brought has, since celebration of the marriage,
    - (i) committed adultery, or
    - (ii) treated the other spouse with physical or mental cruelty of such a kind as to render intolerable the continued cohabitation of the spouses.
- [10] The current Divorce Act does not define "adultery." Rather, adultery has been defined by the courts on a case-by-case basis. As mentioned above, until the 1985 amendment of the 1968 Divorce Act, a homosexual act was expressly stated to be a ground for granting a divorce. Once a homosexual act was removed as an express separate ground for divorce by the enactment of the 1985 Divorce Act, the question could arise, as it has in this case, whether a spouse's sexual act outside of the marriage with someone of the same gender is adultery within the meaning of the current Divorce Act.

## SAME-SEX MARRIAGE CASES AND LEGISLATION

- [11] In 2002 and 2003, three cases came before courts in Canada concerning the constitutionality of the common law bar to the marriage of same-sex couples: *Halpern v. Canada* (Attorney General), [2002] O.J. No. 2714, (2002) 215 D.L.R. (4th) 223 (Ont. S.C.), *aff'd in part* (2003) 225 D.L.R. (4th) 529, (2003) 65 O.R. (3d) 161 (C.A.) (the Ontario Court of Appeal affirmed the trial court's decision but varied the remedy granted); *Hendricks v. Quebec* (Attorney General),

[2002] J.Q. No. 3816; and *EGALE Canada Inc. v. Canada (Attorney General)*, [2003] B.C.J. No. 994, 2003 BCCA 251. Those cases held that the common law bar to marriage between same-sex couples contravened the Charter of Rights and Freedoms and could not be justified under s. 1 of the Charter.

[12] At ¶ 124 of *EGALE*, Madam Justice Prowse stated:

The evidence also shows, however, that the emphasis on procreation as being at the core of marriage has been displaced to a considerable degree by the evolving view of marriage and its role in society referred to by Mr. Justice Blair [in *Halpern*] and Madam Justice Lemelin [in *Hendricks*] in their reasons for judgment. It is on that basis that I find that procreation (including the rearing of children) resulting from sexual intercourse between a husband and a wife, can no longer be regarded as a sufficiently pressing and substantial objective that it satisfies the first stage of the s. 1 analysis. Or, to view the first-stage issue from a somewhat different perspective, I am not satisfied that denying same-sex couples the right to marry because of their inability to procreate "as between themselves" is a sufficiently pressing and substantial objective to satisfy the first stage of the s. 1 analysis.

[13] At ¶ 154, Madam Justice Prowse quoted with approval from p. 130 of the Law Commission of Canada's 2001 report entitled, *Beyond Conjuality, Recognizing and Supporting Close Personal Adult Relationships*:

The secular purpose of marriage is to provide an orderly framework in which people can express their commitment to each other, receive public recognition and support, and voluntarily assume a range of legal rights and obligations. The current law does not reflect the social facts: as the Supreme Court of Canada has recognized, the capacity to form conjugal relationships characterized by emotional and economic interdependence has nothing to do with sexual orientation. Furthermore, whether or not denial of same-sex marriage infringes the Charter, adherence to the fundamental values of equality, choice and freedom of conscience and religion, requires that restrictions on same-sex marriage be removed; the status quo reinforces the stigmatization felt by same-sex couples. If governments are to continue to maintain an institution called marriage, they cannot do so in a discriminatory fashion.

[14] In the result, Prowse J.A. reformulated the common law definition of "marriage" to exclude the necessity that it be of one man and one woman, saying that marriage means "the lawful union of two persons to the exclusion of all others."

[15] In 2004, the Supreme Court of Canada heard and determined the *Reference re Same-Sex Marriage*, [2004] 3 S.C.R. 698, [2004] S.C.J. No. 75, 2004 SCC 79. There, the proposed legislation, the legality of which was referred to the Supreme Court of Canada, read as follows:

1. Marriage, for civil purposes, is the lawful union of two persons to the exclusion of all others.

2. Nothing in this Act affects the freedom of officials of religious groups to refuse to perform marriages that are not in accordance with their religious beliefs.

[16] The Court found that the proposed legislation was consistent with the Charter.

[17] Following delivery of reasons for judgment in the Reference re Same-Sex Marriage case, the government introduced Bill C-38, An Act Respecting Certain Aspects of Legal Capacity for Marriage for Civil Purposes, 1st. Sess., 38th Parl., 2005 (1st reading June 29, 2005), that became law as the Civil Marriage Act, R.S.C. 2005, c. 33, on July 20, 2005. Section 4 of the Civil Marriage Act provides: "[f]or greater certainty, a marriage is not void or voidable by reason only that the spouses are of the same sex."

[18] On June 15, 2005, Madam Justice Gerow granted a divorce to a same-sex couple in *J.S. v. C.F.*, [2005] B.C.J. No. 1491, 2005 BCSC 1011.

#### ADULTERY IN THE COMMON LAW

[19] I introduce this topic with a reminder that adultery is not defined in the current Divorce Act.

[20] Under the Divorce and Matrimonial Causes Act, 1857 (U.K.), c. 85, men could divorce their wives, but not women their husbands, for adultery. Divorce for any reason was rare and often had serious social and economic consequences. The courts held that adultery had to be strictly proven and insisted on a requirement that there be penetrative sexual contact: *Babineau v. Babineau*, [1924] 4 D.L.R. 951 (N.B. S.C. A.D.).

[21] In *Orford v. Orford* (1921), 58 D.L.R. 251 (Ont. S.C.), the common law meaning of adultery was discussed, as well as the historical rationale for its prohibition. The issue before the court was whether artificial insemination, without consent of the husband, was adultery and the court concluded that it was. Beginning at ¶ 22 of that decision, the court stated:

The term "adultery" has never had an exact meaning, nor has its meaning been the same in all countries or under all systems of law. It is not necessary here to draw distinctions between an act of incontinence by a wife and a similar act by a husband, or as to whether or not sexual intercourse between unmarried persons constitutes adultery. All the definitions, whatever may be the system of law, or whatever the country, in which the term calls for definition, use the term "sexual intercourse," or some synonymous expression, to describe one of the necessary ingredients or characteristics of the offence. And the learned counsel for the plaintiff, in referring to these numerous definitions, lays great stress upon this uniform characteristic as supporting his argument that without sexual intercourse there is no adultery. But this argument merely shews the fallacy of relying upon the precise terms of a definition without regard to the circumstances which give rise to it, or to the branch of the law in which the offence of adultery forms an element. Some of the definitions to which reference was made are as follows:--

"Adultery, by the common law, is criminal conversation with a man's wife. ... By the canon or ecclesiastical law, adultery was sexual connection between a man and a woman, of whom one at least was lawfully married to a third person. The ecclesiastical law regarded adultery as a sin arising out of the marriage relation:" Am. & Eng. Encyc. of Law, 2nd ed., vol. 1, p. 747.

"Adultery, or criminal conversation with a man's wife:" 3 Bl. Comm., p. 139.

"Violation of the marriage bed; the voluntary sexual intercourse of a married person with one of the opposite sex:" Murray's Dictionary.

"The sin of incontinence:" Wharton.

It is, of course, admitted that there is no direct authority upon the exact point raised here. And a reading of all the definitions makes it clear to my mind that, whenever any stress is laid upon actual sexual intercourse as a necessary ingredient of adultery, it is for the purpose of excluding from the term anything which falls short of that.

Mr. White pointed out that Geary's Law of Marriage and Family Relations (1892), p. 314, lays down that there must be actual sexual intercourse, and that no proof of indecent liberties, etc., would be sufficient, and he referred to some American authorities, in one of which, *State v. Frazier* (1895), 54 Kan. 719, 725, 39 Pac. Rept. 819, it was laid down that the words "sexual intercourse" mean "the actual contact of the sexual organs of a man and a woman, and an actual penetration into the body of the latter." But when this case is examined it is found to be one involving the crime of rape, and it is simply an illustration of the well-known principle that the act must have proceeded that far in order to constitute the crime.

Mr. White contended that the essential element of adultery rested in the moral turpitude of the act of sexual intercourse as ordinarily understood. With this I cannot agree. The sin or offence of adultery, as affecting the marriage-tie, may, without going farther back, be traced from the Mosaic law down through the canon or ecclesiastical law to the present date. The jurisdiction of the Supreme Court of Ontario to grant alimony is based upon the ecclesiastical law of England as it stood in 1857: Ontario Judicature Act, R.S.O. 1914, ch. 56, sec. 3; Ontario Judicature Act, R.S.O. 1897, ch. 51, sec. 34; *Nelligan v. Nelligan* (1894), 26 O.R. 8. In its essence, adultery was always regarded as an invasion of the marital rights of the husband or the wife. When the incontinence was that of the wife, the offence which she had committed rested upon deeper and more vital ground than that she had merely committed an act of moral turpitude, or had even seen fit to give to another man something to which her husband alone was entitled. The marriage-tie had for its primary object the perpetuation of the human race. For example, the Church of England marriage-service, which in this respect may well serve as the voice of the Ecclesiastical Courts of England; gives as the first of "the causes for which matrimony was ordained" that of "the procreation of children."

In my judgment, the essence of the offence of adultery consists, not in the moral turpitude of the act of sexual intercourse, but in the voluntary surrender to another person of the reproductive powers or faculties of the guilty person; and any submission of those powers to the service or enjoyment of any person other than the husband or the wife comes within the definition of "adultery."

The fact that it has been held that anything short of actual sexual intercourse, no matter how indecent or improper the act may be, does not constitute adultery, really tends to strengthen my view that it is not the moral turpitude that is involved, but the invasion of the reproductive function. So long as nothing takes place which can by any possibility affect that function, there can be no adultery; so that, unless and until there is actual sexual intercourse, there can be no adultery. But to argue, from that, that adultery necessarily begins and ends there is utterly fallacious. Sexual intercourse is adulterous because in the case of the woman it involves the possibility of introducing into the family of the husband a false strain of blood. Any act on the part of the wife which does that would, therefore, be adulterous. That such a thing could be accomplished in any other than the natural manner probably never entered the heads of those who considered the question before. Assuming the plaintiff's story to be true, what took place here was the introduction into her body by unusual means of the seed of a man other than her husband. If it were necessary to do so, I would hold that that in itself was "sexual intercourse." It is conceivable that such an act performed upon a woman against her will might constitute rape.

[22] In 1982, when the issue was what meaning should be given to the words "homosexual act" in the list of grounds for divorce under the Divorce Act, the Ontario Supreme Court held in *Guy v. Guy et al.* (1982), 35 O.R. (2d) 584 (Ont. S.C.) that "homosexual act" was to be given a very broad meaning. The court held that Section 3(b) of the 1968 Divorce Act required only a positive, physical act between at least two persons of the same sex having as its object, whether satisfied or not, the gratification of the sexual drives or propensities or preferences of the parties. There was no need to prove any vaginal contact or sodomy to establish such an act.

[23] In *Babineau*, the Court considered whether bestiality constituted adultery. In holding that it did not, the Court said:

In all of the authorities, adultery is defined as 'the sin of incontinence between two married persons, or it may be when only one of them is married'.

[24] In *Kahl v. Kahl*, [1943] O.J. No. 365, the Ontario High Court of Justice defined adultery as "the voluntary sexual intercourse by a married person with another person of the opposite sex other than his or her spouse." The Court relied on, but misquoted, Orford.

[25] In *B.(Y.) v. B.(J.)* (1989), 66 Alta. L.R. (2d) 193, 96 A.R. 181, the Alberta Court of Queen's Bench found that adultery was the only form of sexual conduct that constituted grounds for divorce, as specified in the Divorce Act, 1985 and that this excluded homosexual conduct.

[26] Although there is some uncertainty in the common law as to the precise definition of adultery, until now the courts in Canada have generally said that the act of adultery is between persons of the opposite sex.

#### AMERICAN APPROACH

[27] Some American courts have developed a different approach.

[28] In the case of *S.B. v. S.J.B.*, 258 N.J. Super. 151; 609 A.2d 124; 1992 N.J. Super. LEXIS 275, from the Superior Court of New Jersey, the court said:

It is not the intention of this court to judicially add a new cause of action for divorce; a responsibility left specifically to the Legislature. Rather it is the function of the court to define terms, based upon the standards of the times so that law may truly reflect the mores of our society. Judge Considine's decision in *Melia v. Melia*, 94 N.J. Super. 47, 49-50, 226 A.2d 745 (Ch.Div.1967) states that:

"Conditions which by modern understanding abort the human and social objects of marriage are essentially incompatible with the public purposes of marriage". *Melia* at 50 [226 A.2d 745].

All laws dealing with the termination of a marriage must first be looked at through the eyes of the injured spouse. Other than eighteen month continuous separation (N.J.S.A. 2A:34- 2d) all grounds for divorce are bottomed in some type of "fault" concept which give the aggrieved spouse the right to seek termination of the marriage. While "fault" may not be a factor relative to other issues incident to divorce such as support or equitable distribution, *Chalmers v. Chalmers*, 65 N.J. 186, 320 A.2d 478 (1974), it is still the linch- pin in determining whether a marital relationship should be terminated.

An extramarital relationship viewed from this perspective is just as devastating to the spouse irrespective of the specific sexual act performed by the promiscuous spouse or the sex of the new paramour. The homosexual violation of marital vows could be well construed as the ultimate in rejection.

Pursuant to the current Criminal Code, Section 2C:14-1(c) "Sexual Penetration" means vaginal intercourse, cunnilingus, fellatio or anal intercourse between persons or insertion of the hand, finger or object into the anus or vagina either by the actor or upon the actor's instruction. The depth of insertion shall not be relevant as to the question of commission of the crime;"

This definition clearly indicates that the old traditional narrow construction of sexual intercourse is no longer the appropriate definition. Thus on purely technical grounds it could well be argued that acts set forth above should constitute "classical" events of adultery. But marital breakup should not be viewed on purely technical grounds. Rather it should be viewed from the standpoint of the parties.

What is important is to define, in human terms, those acts which constitute adultery so as to give rise to a termination of the marriage. Accordingly this court finds that adultery exists when one spouse rejects the other by entering into a personal intimate sexual relationship with any other person, irrespective of the specific sexual acts performed, the marital status, or the gender of the third party. It is the rejection of the spouse coupled with out-of-marriage intimacy that constitutes adultery.

- [29] American cases subsequent to *S.B. v. S.J.B.* addressing the issue of whether adultery may include a homosexual act outside of marriage have generated mixed results. The case has been considered in decisions from New Hampshire, South Carolina and Florida.
- [30] The courts in Florida and South Carolina followed *S.B. v. S.J.B.* and found no distinction between homosexual or heterosexual relationships involving one or both married partners, because both relationships involved extra-marital sex and therefore marital misconduct (*Patin v. Patin*, 371 So. 2d 682 (Fla. C.A. 1979), *RGM v. DEM*, 306 S.C. 145 (S.C. S.C. 1991)).
- [31] The Supreme Court of New Hampshire reached a different conclusion in *In re Branchflower*, 150 N.H. 226 (2003). There, the majority found that to include homosexual acts in the definition of adultery would be contrary to legislative intent given that the plain and ordinary meaning of adultery, according to Webster's Dictionary, includes the words "voluntary sexual intercourse" which implies that homosexual activity would be excluded. Furthermore, the court reasoned that including homosexual acts in the definition of adultery would, "change beyond recognition this well-established ground for divorce and likely lead to countless new marital cases alleging adultery, for strategic purposes". The court found that homosexual acts should therefore be excluded from the definition of adultery for policy reasons.
- [32] Several American decisions have classified heterosexual non-coitus events as adultery: *Rosser v. Rosser*, 355 So. 2d 717, 1977 Ala. Civ. App. LEXIS 749; *Doe v. Doe*, 286 S.C. 507, 334 S.E.2d 839 (S.C.C.A. 1985); and *Menge v. Menge*, 491 So. 2d 700 (5th Cir. 1986).
- [33] An Ohio court approved the extension of "adultery" to include homosexual activities, but gave no reason for that decision (*Bales v. Hack*, 31 Ohio App. 3d 111, 31 Ohio B. Rep. 197, 509 N.E.2d 95 (1986)). A Georgia court has also adopted this view, construing that under the Georgia statute a homosexual relationship is equivalent to having sexual intercourse with another person (*Owens v. Owens*, 247 Ga. 139, 274 S.E.2d 484 (1981)).

## THE LAW IN BRITISH COLUMBIA

- [34] Counsel have not directed my attention to any British Columbia cases specifically defining the word "adultery". I am unaware of any British Columbia authority binding on me that defines adultery.

- [35] Even if I were to find that adultery had been defined in British Columbia, the court can make incremental changes in the common law so as to harmonize it with values enunciated in the Charter.
- [36] In *R. v. Salituro*, [1991] 3 S.C.R. 654, the Court considered and changed the common law where to do otherwise would have perpetuated a common law evidentiary rule that was out of step with current societal values.
- [37] In *Salituro*, the accused was charged with using a forged document. He had signed his wife's name on a cheque payable to them jointly. The accused's wife, from whom he was legally separated, testifying for the Crown, denied giving him the authority to sign her name, this evidence being contrary to her husband's evidence. The trial judge accepted her evidence and convicted the accused.
- [38] At common law spouses may not testify against one another. The issue on appeal was whether there was a common law exception to the rule against spousal confidence for spouses who are separated without any reasonable possibility of reconciliation. Mr. Justice Iacobucci, speaking for the Court, held that this was an appropriate case for the court to change the common law rule in order to make spouses who are irreconcilably separated competent witnesses for the prosecution.
- [39] At p. 670, Iacobucci J. concluded as follows:

Judges can and should adapt the common law to reflect the changing social, moral and economic fabric of the country. Judges should not be quick to perpetuate rules whose social foundation has long since disappeared. Nonetheless, there are significant constraints on the power of the judiciary to change the law. As McLachlin J. indicated in *Watkins*, *supra*, in a constitutional democracy such as ours it is the legislature and not the courts which has the major responsibility for law reform; and for any changes to the law which may have complex ramifications, however necessary or desirable such changes may be, they should be left to the legislature. The judiciary should confine itself to those incremental changes which are necessary to keep the common law in step with the dynamic and evolving fabric of our society.

And at p. 675 he stated:

Where the principles underlying a common law rule are out of step with the values enshrined in the Charter, the courts should scrutinize the rule closely. If it is possible to change the common law rule so as to make it consistent with Charter values, without upsetting the proper balance between judicial and legislative action that I have referred to above, then the rule ought to be changed. The common law rule making an irreconcilably separated spouse an incompetent witness for the prosecution against the other spouse is inconsistent with the values in the Charter. Subject to consideration of the limits on the judicial role, the rule ought therefore to be changed. Society can have no interest in preserving marital harmony where spouses are irreconcilably separated because there is no marital harmony to be preserved.

[40] The common law is not static. Rather, it is dynamic and flexible. As Justice McCardie of the King's Bench Division remarked in *Prager v. Blatspiel, Stamp & Heacock*, [1924] All E.R. Rep. 524 at ¶ 3:

It [the common law] must grow with the development of the nation. It must face and deal with changing or novel circumstances. Unless it can do that it fails in its function and declines in its dignity and value. An expanding society demands an expanding common law.

See also *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130 at 1169.

[41] Chief Justice McLachlin noted in *Retail, Wholesale and Department Store Union, Local 558 v. Pepsi-Cola Canada Beverages (West) Ltd.*, [2002] 1 S.C.R. 156, 208 D.L.R. (4th) 385 at ¶ 19:

the common law does not exist in a vacuum. The common law reflects the experience of the past, the reality of modern social concerns and a sensitivity to the future. As such, it does not grow in isolation from the Charter, but rather with it.

[42] Clearly there is jurisdiction in this court to make incremental changes to the common law, although within the significant constraints described by Iacobucci J. above in *Salituro*.

## CURRENT COMMON LAW DEFINITION OF ADULTERY

[43] Returning to the case before me, the historical justification for civil and, in fact, criminal penalties for adultery was the societal interest in ensuring the line of heredity was not adulterated. While it is not for this court to engage in a searching review of evidence of current societal views, it is clear, based on the legislative and common law developments legalizing same-sex marriage, that there has been an evolution of societal values such that the societal interest in marriage is focussed largely on the forming of relationships characterized by emotional and economic interdependence. As was stated by the Law Commission of Canada (cited above), marriage is now an institution to provide an orderly framework in which people can express their commitment to each other, receive public recognition and support, and voluntarily assume a range of legal rights and obligations. The evolution of societal values concerning same-sex marriage has not been without controversy or opposition. However, I consider parliament's enactment of the Civil Marriage Act to be a legislative statement of the current values of our society consistent with the Charter that I am obliged to use as a guide to my consideration of the current common law definition of adultery. Individuals of the same sex can now marry and divorce and the common law would be anomalous if those same-sex spouses were not bound by the same legal and social constraints against extra-marital sexual relationships that apply to heterosexual spouses.

[44] I conclude that the definition of adultery used in our courts should reflect views that are consistent with the Civil Marriage Act and should be harmonized with the values enunciated in the Charter. If necessary to achieve this result, an incremental change in the definition of adultery should be made in accordance with the principles enunciated in *Salituro* and *Pepsi-Cola*.

- [45] I agree with counsel that in this case it is unnecessary to engage in a specific s. 15 Charter analysis, that is whether under the Charter the provisions of the Divorce Act are discriminatory and therefore unconstitutional.
- [46] I turn next to the question of the definition of what sexual acts constitute adultery and whether this court should attempt to define adultery.
- [47] The traditional definition of adultery included the requirement that the sexual activity be intercourse. Because sexual relations might involve no penetration at all, this requirement could serve to deny a divorce to a man or a woman whose partner is having a sexual affair with a person of the same sex. However, the uncertainty about precisely what would constitute adultery in a same-sex relationship is not a reasonable basis for denying spouses the ability to divorce on the basis of same-sex sexual activity.
- [48] In the modern understanding of marriage, the wrong for which the petitioner seeks redress is something akin to violation of the marital bond. Viewed from this perspective, the heterosexual nature of the sexual acts is not determinative. Intimate sexual activity outside of marriage may represent a violation of the marital bond and be devastating to the spouse and the marital bond regardless of the specific nature of the sexual act performed.
- [49] In this case, the evidence of an intimate sexual relationship outside of Mr. and Ms. P's marriage is sufficient to grant the divorce on the grounds of adultery, notwithstanding that the act alleged was a same-sex sexual act. Adultery may include same-sex sexual acts where as here the evidence supports a finding that such has occurred.
- [50] In this case I do not consider it is necessary or desirable for me to define what type of intimate sexual activity constitutes adultery. Questions about the meaning of adultery in same-sex marriages should be clarified over time on a case-by-case basis, just as those questions have been resolved on a case-by-case basis in the context of heterosexual marriages.

## DISPOSITION

- [51] On the basis of the evidence before me, I am satisfied that Mr. P committed adultery and accordingly Ms. P is granted an order for divorce as petitioned for. There is no claim for corollary relief or costs.

"N. Garson, J."

The Honourable Madam Justice N. Garson

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