

Protecting Equality in the Context of a Separate but Equal Regime

A case comment on the Court of Appeal for Ontario's decision in *Hincks v. Gallardo*



Adam Black

Associate, Family Law

PHONE

416 643 8808

EMAIL

ablack@torkinmanes.com

Adam Black practises exclusively in the area of family law. Adam provides sound and practical advice to his clients with respect to all family law issues, including domestic contracts, separation and divorce. Adam and his husband, Steven, were married in 2007, not long after marriage equality became the law in Canada.

In November, 2014, the Court of Appeal for Ontario released its decision in *Hincks v. Gallardo*¹. Justice Hourigan, writing for the Court, upheld the motion judge's declaratory order that a civil partnership entered into in the United Kingdom is a marriage as defined by the Canadian *Civil Marriage Act* (the "CMA") and parties to such a civil partnership are considered spouses for the purpose of the federal *Divorce Act* (the "DA") and the Ontario *Family Law Act* (the "FLA"). This important decision promotes the principle of marriage equality which underpins the Court of Appeal for Ontario's 2003 decision in *Halpern v. Canada (Attorney General)*² and the companion cases across the country³.

In 2009, Wayne Hincks and Gerardo Gallardo, then residents of the United Kingdom, entered into a civil partnership under the United Kingdom's *Civil Partnership Act 2004* (the "CPA"). At that time, same-sex couples were not permitted to marry

in the United Kingdom⁴. The civil partnership, exclusive to same-sex couples, extended the same legal rights and obligations as marriage to those in a civil partnership. The CPA created a true separate but equal regime.

Shortly after entering into the civil partnership, Hincks and Gallardo moved to Ontario. One year later, they separated. Hincks commenced an application for divorce, equalization of net family property and spousal support. Hincks took the position that he and Gallardo were spouses under the DA and FLA. Gallardo disagreed. The issue of whether Hincks and Gallardo were spouses was brought before the Honourable Justice Mesbur of the Superior Court of Justice. In a thoughtful and well-reasoned decision, Justice Mesbur made a declaratory order that the parties' civil partnership is a marriage as defined by the CMA and that the parties are spouses under the DA and FLA. Gallardo appealed. The Court

of Appeal for Ontario upheld Justice Mesbur's decision. Justice Hourigan, like Justice Mesbur, provides a thorough and principled analysis.

Justice Hourigan points out that the failure to recognize the civil partnership as a marriage will result in the parties "being effectively treated as strangers". Such a result must be avoided when the parties expressly and deliberately opted into a civil partnership (which was the legal equivalent of marriage) at a time when marriage was not available to them. The parties entered into a relationship which, in substance but not form, was identical to marriage. Justice Hourigan adopted Justice Mesbur's comments in respect of the importance of recognizing such

a union as a marriage in Ontario and noted the following:

...the motion judge concluded that to do anything other than recognize the parties' civil partnership as a marriage would "run contrary to the express values of Canadian society, expressed in both case law, and the statute itself and would constitute impermissible discrimination⁵.

It must be noted that the Court limited the application of such declarations to foreign civil partnerships made in jurisdictions where same-sex marriage is not permissible. This limitation is important since the declaration

of marriage in respect of a union made in a jurisdiction in which same-sex marriage is possible will inappropriately impose rights and obligations on parties who, through their decision to enter into a civil partnership, had expressly opted out of marriage.

The Courts of Ontario are firmly committed to ensuring the equality of same-sex couples. The Courts appear to remain guided by the principle, gleaned from *Halpern v. Canada (Attorney General)*, of "recognizing and protecting human dignity and equality in the context of the social structures available to conjugal couples in Canada." O Canada, I'm proud to call you home.

1 2014 ONCA 494 (CanLII) ("*Hincks*"). On appeal from the order of Mesbur, J., dated January 7, 2013, 2013 ONSC 129 (CanLII).

2 2003 CanLII 26403 ("*Halpern*")

3 Those cases set the stage for the *Reference re Same-Sex Marriage* before the Supreme Court of Canada in 2004 and the introduction of Bill C-38, *The Civil Marriage Act*, on February 1, 2005, which received Royal Assent on July 20, 2005.

4 Since that time, the United Kingdom has legalized same-sex marriage in England pursuant to the *Marriage (Same Sex Couples) Act 2013*.

5 *Hincks*, *supra* note 1, at para 17.