

Gay extramarital flings don't count as adultery

Woman heading to court in Vancouver to challenge law

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Tuesday, August 30, 2005

From The Globe and Mail

Shelly Pickering thinks it is unfair that her husband's extramarital affair with a man doesn't legally count as adultery. So today, she's heading to court in Vancouver to challenge the law.

The 44-year-old Vancouver resident had been married nearly 17 years when, in October of 2004, she discovered her husband was having an affair with a younger man.

She and her husband separated immediately and she filed for divorce two months later, seeking an immediate end to their union.

Canada's Divorce Act allows for a no-fault divorce after a one-year separation, on grounds of marital breakdown.

It also allows for an immediate divorce if there is admitted or proven adultery or cruelty.

Ms. Pickering's ex-husband signed an affidavit on Jan. 5, 2005, acknowledging his adulterous relationship, and did not appear in court in February to contest the divorce.

But Justice Nicole Garson of the B.C. Supreme Court declined to order the immediate divorce, because the definition of adultery in common law does not include homosexual relations.

The judge also told Ms. Pickering that she would hear the case again if a lawyer would argue why the legal definition of adultery should be broadened to include same-sex adultery.

The traditional definition of adultery, which dates back to church-based courts in England, is "penetrative sexual contact between a man and a woman not married to each other and one of whom is married to someone else," notes Ms. Pickering's lawyer, barbara findlay (who spells her name in lower-case letters).

Ms. findlay argues that the definition of adultery is as outdated as the original common-law definition of marriage, which was based on procreation. Times have changed, along with the definition of marriage, and so too should the definition of adultery, she said.

"The grounds for divorce should be interpreted in a way which is consistent with the views of the Supreme Court of Canada about the purpose of marriage," she said,

noting that the top court has deemed marriage to be the intimate union of two people, regardless of gender.

Ms. Findlay suggests that the definition of adultery be amended to something along the lines of "intimate sexual contact between two people not married to each other and one of whom is married to someone else." She said such a definition is closer to what the public already considers to be adultery.

Ms. Pickering realizes that her divorce may not come any more quickly through this legal challenge than if she had simply waited the requisite one year and obtained a no-fault divorce. But she says she is doing it to help others who find themselves in the position she did.

"It's important to me to take back that bit of control," she said. "I feel like I haven't had any control [during the marriage] . . . I wasn't given the facts. . ."

While the Divorce Act falls under federal jurisdiction, it is administered provincially. The results of the Pickering case could set a precedent not only in British Columbia but in other provinces, Ms. Findlay said. "If we win this case, I think it will be followed across the country."

Chris Girouard, a spokesman for the Justice Department, said the department does not know of other similar cases or decisions that have challenged the heterosexual definition of adultery. Judith Bowers, a B.C. lawyer who works for the Justice Department, will be present as an intervenor at today's hearing at the B.C. Supreme Court and will file a brief outlining their position to the court at that time.

Ms. Findlay said she will also launch a constitutional challenge based on the Charter of Rights and Freedoms, arguing that the definition of adultery discriminates against gays and lesbians by making divorce less accessible to them than to heterosexuals.

For the past two decades, Toronto psychotherapist Caryn Miller has devoted part of her practice to couples with one straight partner and one homosexual or lesbian partner.

"The courts really have to catch up to protect the straight spouse in this situation and to legitimize the union of gay and lesbian people," she said.

Ms. Miller said that homosexual or lesbian infidelity is often labelled as something distinct from adultery by the gay spouse, but the effect can be no less devastating for the heterosexual spouse.