Court File No. 684/00

ONTARIO
SUPERIOR COURT OF JUSTICE
(DIVISIONAL COURT)

B E T W E E N:

HALPERN *et al*

Applicants

and

CANADA (A.G.) *et al*

Respondents

Court File No. 39/2001

A N D B E T W E E N:

MCCT

Applicant

and

CANADA (A.G.) *et al*

Respondents

FACTUM OF THE RESPONDENT, THE ATTORNEY GENERAL OF CANADA

PART I – THE FACTS

OVERVIEW

Marriage is unique in its essence, that is, its opposite-sex nature. Through this essence, marriage embodies the complementarity of the two human sexes, playing a unique and foundational role in Canadian society. The contextual approach to this case considers marriage as a pre-legal concept that has existed since time immemorial. The definition of marriage aims to describe a bond that is common across different times, cultures and religions as a virtually universal norm. In effect, marriage is not truly a common law concept, but one that predates our legal framework, through its long existence outside of it. The Canadian common law absorbed this opposite-sex definition of marriage to underpin the myriad of federal and provincial legislation relating to it.

The definitional boundaries of marriage, delineated as the lawful union between one man and one woman to the exclusion of any other person, do not engage or violate the constitutional rights of equality, security or religious freedom of those whose unions have an essential difference. Preserving the definition of marriage as the descriptor of this opposite-sex institution is not discriminatory. The unique opposite-sex nature of marriage does not imply that the human dignity of those in other relationships is diminished.

However, if *Charter* rights are engaged simply by the definitional uniqueness of marriage, preserving this definitional uniqueness is both justifiable and in accordance with the principles of fundamental justice. The social and legal context in which this issue is placed demonstrates that these *Charter* rights are currently protected, and amenable to prospective protection, without the necessity of changing the definition and common understanding of marriage. But, in any event, if this definition fails constitutional standards, Parliament, rather than the courts, must be tasked to choose among the variety of possible legislative options to best achieve the appropriate recognition of same-sex unions.

A. THE BROAD CONTEXT

1. Introduction

1. The Supreme Court of Canada mandates that every *Charter* analysis be conducted in the total context in which the impugned provision operates. Here, the impugned provision is the common law definition of marriage – the union of one man and one woman to the exclusion of all others. The context in which this definition operates in Canada is multifaceted, both within a broad social context as well as within a legal context. This broad context includes the historical and religious foundations of marriage as received into Canada, the anthropological and sociological history of this unique societal institution and a profile of marriage as it is lived and

understood, in Canada today. The legal context includes the legal history of the definition's acceptance in Canada's common law, the constitutional division of powers between the two levels of government relating to the numerous aspects of marriage and the array of legislation enacted by the respective levels within their own spheres. Finally, this context includes the international domain in which this definition of marriage operates in a virtually universal way.

2. Historical and Religious Foundations of Marriage

a) The Western World

2. There has always been a core of consistent understanding about marriage in the Western world, much of which has been profoundly influenced by religion. Marriage has been understood as a special kind of monogamous heterosexual union with spiritual, social, economic and contractual dimensions, for the purposes of procreation, raising of children from the marriage, companionship, and the uniting of the two opposite sexes. This understanding was largely inherited from and influenced by classical Greek and Roman literature, and developed by the major Western Christian religions. Roman Catholic and Protestant formulations were of particular importance in shaping it, but the Western understanding has also been informed by an Enlightenment tradition, which developed into the dominant one over the past century.[1]

3. The idea that marriage should be sacramental began with the writings of Plato (ca. 428 –347 B.C.)[2]. It was Aristotle's insights that characterized marriage as the natural institution fundamental and foundational to any republic[3]. St. Augustine (354-430) drew upon this thinking and, subsequently, his work became the touchstone for the early Christian Church's formulations about marriage. In his view, procreation, fidelity and sacrament were the three goods and goals of marriage:

> *Augustine usually listed the goods of marriage in this order, giving first place to the good of procreation. The other purposes of marriage were not, however, secondary. Spousal fidelity and sacramental stability were essential for a marriage to be good and sufficient when married couples were childless or their children*

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[1] ***Affidavit of John Witte Jr.,*** Respondent's Record, Volume 1, Tab B, pp. 168-69, 173, paras. 1, 3, 4, 12
[2] *Ibid*, p. 174, para. 15
[3] *Ibid*, p. 175, para. 16

> *had left the household. He highlighted therefore, the benefits of marriage to the couple themselves, as did the classic authors. In particular, he highlighted the idea of a natural companionship (societas) between the opposite sexes.*[4]

4. Thomas Aquinas (1225-1274) systematized Augustinian thought for the Church, elaborating on the three goods of marriage, but resolving the question of their priority more clearly. "Aquinas argued effectively that marriage is a three-dimensional institution, as a natural, contractual and sacramental union. Each of the marital goods anchors one of these three dimensions".[5] When marriage is viewed within each of these dimensions, a different one of each of these three goods becomes the primary good.

5. In the Western tradition, as it evolved, all of these dimensions were complementary, but co-existed in considerable tension, linked as they were to competing claims of ultimate authority over the form and function of marriage – claims by the couple, the church, the state, and by nature and God. Some of the deepest fault lines in the historical formation and the current transformations of Western marriage break out from this central tension of perspective.[6]

6. Catholics, Protestants, and Enlightenment exponents of marriage all constructed models to address the priority and inter-relation of these perspectives. Each model recognizes multiple perspectives on marriage but gives priority to one of them in order to achieve an integrated understanding. The Catholic model emphasizes the spiritual or sacramental perspective of marriage, and dominated Western marriage law until the sixteenth century. The Protestant model emphasizes the social and public perspective, and shared dominance over Western marriage law, along with the Catholic model, from the mid-sixteenth century to the mid-nineteenth century. The liberal Enlightenment model emphasizes the contractual and private perspective, and has become dominant over the past century.[7]

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[4] ***Affidavit of John Witte Jr.,*** Respondent's Record, Volume 1, Tab B, pp. 180-181, para. 25
[5] *Ibid*, p. 182, para. 28
[6] ***Affidavit of John Witte Jr.,*** Respondent's Record, Volume 1, Tab B, p. 173, para. 13
[7] *Ibid*, pp. 173-174, para. 14

7. According to the Enlightenment model, the essence of marriage is a voluntary agreement between a man and a woman who want to come together to form an intimate association, not preset by God or nature, church or state, tradition or community. On the strength of these contractarian convictions, Enlightenment thinkers advocated the abolition of much of what was considered sound and sacred in the Western legal tradition of marriage. These views were too radical in the nineteenth century. But, over the course of the twentieth century, they gained enough momentum to shape much of marriage law in the Western world with the introduction of changes to marriage formalities, divorce, marital property, wife abuse, child custody, etc. "The Catholic sacramental concept of the family governed principally by the church and the Protestant concepts of the family governed by the church and broader Christian community began to give way to a new privatist concept of the family whereby the wills of the marital parties became primary."[8]

8. The dominance of this one model over the last century has recently shown signs of waning. This is manifested by a growing reaction to the over-contractualization of marriage, and a general return to, and reconstruction of, more traditional understandings of marriage.[9] This reflects the continuing co-existence and tensions within modern society between these competing formulations of the goods and goals of marriage, with each complementing the other, and no one formulation displacing the other.

9. For all this theological and philosophical diversity in the different formulations, however, the West has long enjoyed an overlapping consensus about the essence of marriage as a monogamous heterosexual union. This understanding is that, at its core, marriage:

> *... is good, does good, and has goods both for the couple and the children." Classical, Partistic, Catholic and Protestant writers alike have all recognized the natural teleology and utility of marriage: (1) the natural drive on the part of most adults toward the institution of marriage because of the inherent goods of individual survival, flourishing, happiness and even perfectibility that it provides; and (2) the natural capacity on the part of most adults to engage in the expected performance of marriage – the unique combination of sexual, physical, economical, emotional,*

[8] *Ibid*, p. 198, para. 60
[9] *Ibid*, pp. 199, paras. 61-62

> *charitable, moral and spiritual performances that become marriage.*[10]

b) From the Perspective of Comparative Religions

10. The study of comparative religions is useful as a means of discerning the universal in human experience.[11]. According to the five major world religions[12]- Judaism, Confucianism, Hinduism, Christianity, and Islam – marriage is a universal norm. Consistent across each of them, marriage is a culturally approved, opposite-sex relationship intended to encourage the birth and rearing of children, at least to the extent necessary for the preservation and well-being of society. As such, it exhibits the following *universal* features: it is supported both by the highest and most attractive incentives possible; maleness and femaleness lie at its heart, just as they lie at the heart of human existence; it has a public dimension; it sets restrictions as to who may marry, with all religions disapproving of marriage within the immediate family; it encourages procreation under specific conditions: and, finally, the contributions of both men and women, towards each other and towards their children, are necessary for family life.[13]

11. Marriage also exhibits the following *nearly universal* features: durability, mutual affection and companionship, alliances and the intergenerational cycle.[14]

12. Marriage also exhibits a number of *variable* features, such as marrying within a group (endogamy) or out of a group (exogamy), marrying up in status or down, arranged marriage or chosen, polygamy or monogamy, marriage for everyone or marriage for some, provision for separation or divorce, and so forth. The variables make each culture's definition of marriage distinctive, but variables outside of the previously described *universal* norms do not constitute marriage. Rather, in their social context, they constitute alternatives to marriage:

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[10] ***Affidavit of John Witte Jr.,*** Respondent's Record, Volume 1, Tab B, p. 202, para. 69
[11] ***Affidavit of Katherine Young***, Respondent's Record, Volume 2A, Tab F, p. 699, para. 26
[12] Buddhism is not discussed because the scripture of this major world religion focuses on a monastic tradition, leaving Buddhist family structure to the regulations of other local religions, *Ibid*, p. 703, para. 33
[13] *Ibid*, pp. 685, 703-723, paras. 1, 34-70
[14] ***Affidavit of Katherine Young***, Respondent's Record, Volume 2A, Tab F, pp. 685-686, 745-751, para. 3 and Appendix

> *...same-sex marriage is an oxymoron, because it lacks the universal, or defining, feature of marriage according to religious, historical, and anthropological evidence. Apart from anything else, marriage expresses one fundamental and universal need: a setting for reproduction that recognizes the reciprocity between nature (sexual dimorphism) and culture (gender complementarity).*[15] *(Emphasis in original)*

3. Anthropological and Sociological Evidence on Marriage and the Family

a) Marriage in Earlier Societies or Non-Western Cultures

13. Marriage as an opposite-sex institution has also been a universal norm across different cultures and times, as well as across religions.[16]

14. There are some examples of same-sex "unions" having been conducted in earlier societies, or in non-Western cultures. However, there is no evidence that there has ever been a same-sex marriage norm in any society or culture. [17]

15. Consistent with this view, the Applicants' own historical expert acknowledged that even these examples cannot be considered as conclusive evidence that such same-sex unions were ever equated with the traditional idea of marriage.[18] Moreover, from a comparative perspective, the evidence that does exist is problematic from several viewpoints:

> *Substantive and methodological problems exist because (1) there are very few examples of same-sex marriage, given the vast historical and anthropological records, which means that they must be considered exceptions and never norms for the society as a whole; (2) some examples are ambiguous, because they are analogies to opposite-sex marriage and limited to specific contexts; (3) some examples are irrelevant because they refer only to same-sex relationships; (4) the evidence is indirect, (5) the*

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[15] *Ibid*, pp.686-687, paras. 5, 6 and 7

[16] ***Affidavit of Katherine Young***, Respondent's Record, Volume 2A, Tab F, p. 698, para. 26; ***Affidavit of Dwight Duncan***, Respondent's Record, Volume 5, Tab M, pp. 1623-1624, paras. 17, 21

[17] "*...an accurate reading of the historical record reveals that same-sex marriages have been a rarity historically and have never enjoyed widespread sanction of recognition by the state or by society.*" ***Affidavit of Dwight Duncan***, Respondent's Record, Volume 5, Tab M, p. 1617, para. 1

[18] ***Affidavit of William Eskridge***, Applicants' Record, Volume 3, Tab 1, p.372, para 5; ***Supplementary Affidavit of William Eskridge***, Reply Record of the Applicant Couples, Tab 4, p.170, paras. 5, 9; ***Cross-examination of William Eskridge***, Respondent's Record, Supplementary Volume 2, Tab N, p. **xxxx**, lines 8-15.

> *arguments are from silence; (6) the context is ignored; and (7) the practice was later forbidden. (Emphasis in original)*[19]

b) Sociological History of Marriage and the Family

16. The institutions of marriage and the family in Western society have undergone tremendous change over the past 500 years. It is important to note, however, that "[M]arriage, in spite of its tremendous evolution over the last five centuries, has continued to serve as a core, societal institution because of the fact that its fundamental membership and purpose have remained constant – that is, a man and woman united with a view to the possibility of producing and raising children."[20] The history of marriage and family from early modern times until the present may be periodized into three phases: the Traditional Family, the Modern Family and the Postmodern Family.

17. The Traditional Family served as the primary means of producing goods for society and children for the next generation. In contrast to the two later phases, its primary ties were not emotional ones. There was little time or scope for intimacy and privacy. Property and lineage were the main considerations in choice of marriage partner, and there was an emotional distance as between husband and wife, due to the strict demarcation of work assignments and sex roles. There was also little intimacy between parents and children, due to the basic struggle for survival and the realities of infant mortality. In short, the Traditional Family served the needs of the community first, carrying out duties mandated by religion and by centuries of custom: producing goods for society and children for the next generation, doing one's duty.[21]

18. The late eighteenth century saw the beginning of the Modern Family, with romantic love unseating material considerations in bringing the couple together. Romance became the vehicle of self-exploration and personal happiness. Family continued to serve the important goals of continuity of lineage and generation, as well as the community, but family life began to be valued as well for what it brought to its members. Affectionate ties between all

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[19] ***Affidavit of Katherine Young***, Respondent's Record, Volume 2A, Tab, F, p. 726, para. 80: See also pp. 726-737, paras 81-101; ***Affidavit of Dwight Duncan***, Respondent's Record, Volume 5, Tab M, pp. 1619-1625, 1633-1634 paras. 8-12, 13-24, 43-44

[20] ***Affidavit of Edward Shorter***, Respondent's Record, Volume 2, Tab C-1, pp. 394-395, paras. 2, 3

[21] ***Affidavit of Edward Shorter***, Respondent's Record, Volume 2, Tab C-1, pp. 410-412, paras. 39-40, 42

members, but especially children, became the focus of family life, and the virtues of mothering were celebrated. *"Thus the nuclear Modern Family was born in the shelter of domesticity*."[22]

19. The Post-Modern Family began to take shape in the late 1960's and today has become the common experience. Family life is characterized now by: (a) an emotionally intense but eroticized tie between the couple, making it more subject to sudden dissolution; (b) the increasing frequency of women working outside the home, choosing to have fewer or no children at all; (c) increasingly distant ties between parents and adolescent children; and (d) the family's growing withdrawal from the surrounding community, cocooning itself in a private world of pleasure and intimacy. All this leads to the most significant characteristic of the Post-Modern Family -- its relative impermanence. Divorce rates are high, and an increasing percentage of Canadians choose to form families other than through the bonds of marriage.[23]

20. In spite of this characteristic of impermanence, two things should be noted: (a) marriage remains the most stable unit for family formation (in contrast, 50 percent or more of common law unions in Canada end in dissolution); and (b) the majority of Canada's children – around 73 per cent as of 1996 - continue to live in families of married couples, with women who marry having twice as many children (2.87) as those in common law relationships:

> *Thus the Canadian family's awareness of itself as a basic building block of society has not been shattered in the onrush to postmodernity, merely weakened. ... This review of the Canadian Postmodern Family emphasizes the extent to which our inherited beliefs about the [strong link of marriage to family] remain central today not only in our individual lives but in our national identity.*[24]

c) Effects of Changing Marriage

21. Aspects of marriage have been affected by consequences of past legislative changes. All changes are made carefully, after full policy consideration, because of the strong possibility that changes effect the behavior of individuals and thus our society. One small example is the introduction of a change to the married credit under the *Income Tax Act* so that

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[22] ***Affidavit of Edward Shorter***, Respondent's Record, Volume 2, Tab C-1, p. 418, para. 53
[23] ***Affidavit of Edward Shorter***, Respondent's Record, Volume 2, Tab C, pp. 402, 404, 421-438, 439, 445, 450, paras. 21, 26, 60-89, 90-91, 103, 111
[24] ***Affidavit of Edward Shorter***, Respondent's Record, Volume 2, Tab C, pp. 409, 442, para. 36. See also paras. 35, 98

persons who married prior to December 31 could claim the credit for the entire taxation year. There were concerns that this provision had resulted in changes to the timing of marriages, and so it was amended. [25] Another example is the introduction of no-fault divorce throughout much of the Western world in the 1960's. The impetus behind its introduction was to bring about positive changes for all by facilitating the end of bad marriages for some. There was broad support for no-fault divorce at the time of its introduction (including from religious organizations), and minimal political debate about it:

> *Indeed, one is hard pressed to find another example of fundamental social legislation that was debated so minimally before its introduction. And why should there have been any debate when no-fault divorce was based on principles that were both noble and well-intended – to minimize suffering, prevent perjury, to treat marriage partners as equals, to eliminate the adversarial nature of assigning blame and to maintain the notion of marriage as a core societal institution*[26].[27]

22. Thirty years later, while it is clear that the advent no-fault divorce has achieved these positive ends, it has also resulted in some unfavorable outcomes. Inherent in the concept was a view that both parties to the divorce should be financially independent following the divorce, a principle which some academics criticize as contributing to the feminization of poverty. For children, evidence indicates the following:

> *Of the approximately 50,000 children each year that enter single families through divorce, 1/3 of them become disadvantaged in some way ...Discussions of the effect of divorce on children during the no-fault debate suggested that, at worst, the result would be ambiguous if not positive for children. It was argued that children would be better off in single parent homes rather than in homes with dead marriages. Furthermore, it was argued that children would benefit from blended families where there were more siblings, grandparents, etc. Nothing could have been further from the truth. The real negative impact of the no-fault divorce regime has been on children, and increasing the divorce rates meant increasing number of disadvantaged children.*[28]

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[25] Excerpt from Supplementary Information and Notice of Ways and Means Motions on the Budget, tabled in the House of Commons, 26 February 1986, Respondent's Record, Supplementary Volume 1, Tab D

[26] Excerpt from Supplementary Information and Notice of Ways and Means Motions on the Budget, tabled in the House of Commons, 26 February 1986, Respondent's Record, Supplementary Volume 1, Tab D

[27] ***Affidavit of Douglas Allen***, Respondent's Record, Volume 4, Tab I, p. 1274, para. 11; ***Affidavit of Edward Shorter***, Volume 2, Tab C-1, pp. 452-457, paras. 114-124

[28] ***Affidavit of Douglas Allen***, Respondent's Record, Volume 4 Tab I, pp. 1282-1283, paras. 30-31

23. As these examples show, changes affecting the attributes of marriage should only be undertaken very cautiously, and with the benefit of rigorous, longitudinal social science studies, because the outcomes of such changes need sufficient time and study to be adequately calculated in advance.[29] This would be even more the case here, where the change requested in not merely to an attribute of marriage, but to the institution itself. The need for a cautious approach is especially significant when the interests of children are present.

24. The Applicants rely on social science to submit that extending marriage to same-sex couples would provide favourable outcomes for children living with parents in same-sex relationships. While there is no reliable evidence to the contrary, it is important to understand that the evidence offered by the Applicants is also highly limited[30] and should not be relied on to support the point made. It is highly risky to rely on such limited science as a basis for effecting the kind of wholesale social policy change demanded by the Applicants in this case. As their own witness, Professor Judith Stacey, stated:

> *I think that I am very clear in the article that I don't think that our study is the basis for definitive social policy. I – I don't for a minute think that any one article ever is so I would never recommend that any one thing that I or anyone one else wrote becomes the basis for definitive social policy.*[31]

25. As identified by two expert witnesses, a change to the definition of marriage, by including within it same-sex unions, could have the following possible effects:

- A profound impact on each of the universal or nearly universal features of marriage, leading to the loss of the cultural norm of opposite-sex marriage;[32]
- The further de-stabilization of marriage privately and publicly by breaking the sense of constancy in its mission – "the most durable union through which to bear and raise children."[33]; and
- A negative impact on women where marriage becomes treated as a relationship between two independent adults of equal power without an inherent core recognition that it includes the cost of child bearing and rearing:

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[29] ***Affidavit of Edward Shorter***, Volume 2, Tab C-1, p. 457, para. 124
[30] ***Affidavit of Steven Nock***, Respondent's Record, Volume 5, Tab L, pp. 1560-1564, paras. 115-122; 135; 140
[31] ***Cross-examination of Judith Stacey*** Respondent's Record, Supplementary Volume 2, Tab O, p. **xxxx**, Q. 226, **p. 54, line 16 to p. 55, line 2**
[32] ***Affidavit of Katherine Young***, Respondent's Record, Vol. 2A, Tab F, pp. 737-744, paras. 102-115
[33] ***Affidavit of Edward Shorter***, Respondent's Record, Vol. 2, Tab C-1, pp. 457-459, para. 125-128

> *Marriage is an institution that society uses to regulate a specific type of union. Marriage is an institution that maximizes gains from the exchange between an man and a woman, net the tremendous transaction costs that arise in such an exchange, such as the need to rear children until they reach a state of independence … Failure to recognize this can only lead to faulty public policy decisions.*[34]

4. The State of Marriage and Family Formation in Canada Today

a) Statistics

26. The following statistics relate to the issue in these applications:

- legal marriage as a conjugal relationship is losing ground in Canada - for the generations from 1920 to 1940 (turning 20 between 1940 and 1960), the percentage of those who married was over 80%;
- for the generation born in 1965, the percentage of those who married at least once before the age of 40 is 61 % of men and 71 % of women;
- projecting further out for current generations, the percentage of those who marry could be less than 60% in Canada; approximately 30% in Quebec[35];
- common-law relationships appear highly unstable – five years after the beginning of such a relationship, over 50% that did not lead to marriage have dissolved; five years after the beginning of marriages, or common-law relationships that quickly led to marriages, less than 10% have dissolved[36]; and
- 60% of married couples have children as compared a to little under 40 percent for common-law couples.[37]

b) Religious Affiliation and the Conduct of Marriages

27. 89.7% of Canadians report having a religious affiliation (Census 1991). As well, a high percentage of Canadians choose to marry by means of a religious ceremony as opposed to a civil one. In 1997, the last year for which statistics were available, 76% of marriage

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[34] ***Affidavit of Douglas Allen***, Respondent's Record, Vol. 4, Tab I, pp. 1294, 1293-1297, 1307-1308, paras. 60, 58-67, and Appendix – *Transaction Costs in Marriage*
[35] ***Affidavit of Evelyne Lapierre-Adamcyk***, Respondent's Record, Volume 2, Tab D-2, pp. 619^{-5}-619^{-7}, paras. 7-11
[36] ***Affidavit of Evelyne Lapierre-Adamcyk***, Respondent's Record, Volume 2, Tab D-2, pp. 619^{-11}-619^{-12}, para. 22
[37] ***Affidavit of Evelyne Lapierre-Adamcyk***, Respondent's Record, Volume 2, Tab D-2, pp. 619^{-14}-619^{-15}, paras. 28-29

ceremonies were conducted by a member of the clergy. Ontario had the highest percentage, at 94%, with variances existing across the land.[38]

c) Linguistic Meaning of the Word "Marriage"

28. "Marriage" as a word leads a double life. It has a meaning in common parlance - the union of a man and a woman - and it has a recognized legal status, also the union of a man and a woman. It follows that the legal definition of the word cannot be changed without creating "an unacceptable cleavage between ordinary usage and the legal meaning; moreover, such redefinition is in conflict with the normal use and development of language."[39]

29. There is no evidence that the interaction of language and thought foments prejudice towards gays and lesbians. Nor is there any evidence that changing the definition of marriage to include gay and lesbian couples would have a positive effect on people's perceptions of them in Canadian society.[40] In fact, the evidence is to the contrary:

> *...consider previous attempts to alter societal attitudes by tinkering with the language. Recall, for instance, efforts in the United States to change the use of racial terms, in order to overcome racism: displacing 'negro' by 'colored', 'colored' by 'black', 'black' by 'afro-American', 'afro-American' by 'African American'. Sadly, this has not done away with the actual problem of systemic racism. What happens, instead, is that each new coinage comes to take on familiar negative connotations –....*[41]

d) Consensus of Opinion Relating to Marriage and Same-Sex Benefits

30. Through successive polls taken by well-respected polling organizations, a majority of Canadians demonstrate a belief that the benefits enjoyed by married couples should be shared by same-sex couples. Canadians said that they would strongly (19%) or somewhat support (34%) extending benefits in this way.[42] But much more significant to the exact issue in

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[38] ***Affidavit of Evelyne Lapierre-Adamcyk***, Respondent's Record, Volume 2, Tab D-2, pp. 619-20-paras. 47-48 and 70, Figure 6.1, p. 619-81, and Figure 9-1, p. 619-83; ***Affidavit of Suzanne Scorsone***, Respondent's Record, Volume2A, Tab E, paras. 20, 39, Exhibits 2 and 3. pp. **xxxx**

[39] ***Affidavit of Robert Stainton***, Respondent's Record, Volume 5, Tab K,, pp. 1502-1505, paras.54-64, para. 9-10,

[40] ***Affidavit of Robert Stainton***, Respondent's Record, Volume 5, Tab K, pp. 1502-1505, para. 63, 37-47

[41] ***Affidavit of Robert Stainton***, Respondent's Record, Volume 5, Tab K, p. 1497, para. 45, bullet 2

[42] ***Cross-examination of John Fisher***, Respondent's Record, Supplementary Volume 2, Tab L, pp. 40, Q. 116-118, and Exhibit 1, pp. 19-20

this case, however, 67 percent of Canadians, strongly support (53%), or somewhat support (14%), the current definition of marriage as "[t]he union of one man and one woman to the exclusion of all others".[43]

B. THE LEGAL CONTEXT

1. Pre-Confederation

a) Reception of British Marriage Law into English Canada

31. The roots of Canadian marriage law in Canada's common law jurisdictions are found in the common law and the statutory marriage laws of England. The definition of marriage, as the union of one woman and one man, derives from the English common law and the classic statement of Lord Penzance in the 1866 British case, *Hyde v. Hyde and Woodmansee*[44] Lord Penzance defined marriage as "the voluntary union for life of one man and one woman, to the exclusion of all others". This is the single definition consistently followed and applied by both English and Canadian courts.[45]

32. The law governing the formation of marriage in England was long regarded as a matter exclusively for the Church.[46] Acts of Parliament dealing with one aspect of legal capacity to marry – the rules defining the degrees of relationship within which marriage was not permitted – were enacted in the reigns of Henry VIII and Elizabeth I, in consequence of the difficulties experienced in determining the validity of King Henry's marital relationships. Although these statutes gave legislative expression to the essentials of a valid marriage, the ultimate source of law remained the revelation of the Christian religion.[47]

33. By 1753, with the enactment of the *Clandestine Marriages Act* and the *Marriages Act of 1836,* the law governing the formation of marriage had become clearly a matter for the

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[43] ***Cross-examination of John Fisher***, Respondent's Record, Supplementary Volume 2, Tab L, pp. 39, Q. 114-115, and Exhibit 1, pp. 17-18
[44] ***Hyde v. Hyde and Woodmansee*** (1866), L.R. 1 P&D 130, at p. 133
[45] ***Egale v. Canada,*** at paras 75-82
[46] ***Affidavit of Stephen Cretney***, para 12, Respondent's Record, Volume Tab p. 7
[47] *Ibid*, para 19, Exhibit "4" pp. 11-12, 97-99

legislature. However, in contrast to the codified civil law systems of continental Europe, the legislation did not aim to be entirely self-contained. For this reason, it did not attempt to define marriage and, indeed, to this day English statute law does not make any attempt at definition. It is assumed that the "marriage" which is to be created is a concept so well understood that definition would be superfluous.[48]

34. From the legal perspective, marriage has always been subject to limitations. Historically and continuously, marriages have been prohibited in Canada on grounds of consanguinity or affinity, also derived from English law.[49] Polygamous and polyandrous relationships have never received legal recognition, as well. Additionally, English statutes that established the law with respect to the solemnization of marriage, and the central role played by the Church in performing and recording marriages, is reflected in Canadian provincial laws on solemnization.[50]

35. For example, Upper Canada statutes dealing with the solemnization of marriage were predicated upon English marriage law. Initially, the statutes of Upper Canada consisted of amendments to the English marriage law to deal with local realities. As an example of this phenomenon, in 1793 legislation an exception was created to the requirement that marriages be solemnized by a Parson or Minister of the Church of England. In circumstances where there was no Parson or Minister living within eighteen miles of the individuals who wished to marry, a Justice of the Peace could solemnize a marriage. The Justice of the Peace had to use the form established by the Church of England and it was required that he affix in a public place a notice concerning the intended marriage for three consecutive Sundays.[51]

b) Quebec/ Lower Canada

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[48] Ibid, para 16, p. 10

[49] ***An Act for the better preventing of clandestine Marriages***. 26 George II, c.33 (1753) (Volume 6, N 1)

[50] ***An Act for amending the Laws respecting the solemnization of Marriages in England***, 4 George IV, c.76 (1823) (Volume 6, N 2). ***An Act for Marriages in England,*** 6 & 7 William IV (1836), c. 85, Respondent's Record, Volume Tab. pp.

[51] ***An Act to confirm and make valid certain Marriages heretofore contracted in the Country now comprised within the Province of Upper Canada, and to provide for future solemnization of Marriage within the same***, 33 George III, c. 5 (1793) (Vol. 10, Q 2).

36. The common law does not apply in Quebec with respect to marriage. As indicated in the preamble to *An Act respecting the Codification of the Laws of Lower Canada relative to Civil matters and Procedure*,[52] the laws of Lower Canada in civil matters were mainly those that at the time of the transfer to the British Crown, were in force in that part of France then governed by the Custom of Paris. The Custom of Paris was somewhat modified by provincial statutes or, in peculiar cases, by the introduction of portions of the Law of England. Following the enactment in France of the Napoleonic Code, it became increasingly difficult to obtain copies of the old French laws and the decision was made to codify the laws of Lower Canada in what became the *Civil Code of Lower Canada.* This code came into force in 1866 and was repealed in 1994 by the *Civil Code of Quebec.*

37. As the *Civil Code of Lower Canada* pre-dated the *Constitution Act, 1867*, it regulated the whole of marriage, including matters of capacity. See, for example articles 115 to 127: "The Qualities and Conditions Necessary for Contracting Marriage". Also. articles 124 to 127, spanning the years from 1866 to 1969, contained specific prohibitions on marriage between those related either "directly" or "collaterally", as explained in the Articles.[53]

38. Articles 128 to 147 of the *Civil Code of Lower Canada* dealt with "The Formalities Relating to the Solemnization of Marriage", an area in which all Canadian provinces have traditionally exercised their jurisdiction. Article 129 indicated that in 1866 those priests, rectors, ministers and other officers of law in Quebec who were authorized by law to keep registers of acts of civil status, were also competent to solemnize marriage.[54]

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[52] ***Acte pour pourvoir à la codification des lois du Bas-Canada qui se rapportent aux matières civiles et à la procédure***, L.C. 1857, c. 43; An Act to provide for the Codification of the Laws of Lower Canada relative to Civil matters and Procedure, L.C. 1857, c. 43 (Vol. 13, R 4).

[53] *Code civil, 1866-1980: An Historical and Critical Edition / Code civil, 1866-1980 : Édition historique et critique*, Paul-A. Crépeau and John E.C. Brierley, eds., Montréal, Société québécoise d'information juridique, 1981 (excerpts)

[54] . By 1969, the prothonotary appointed to a specific judicial district and each of his designated deputies were also authorized to solemnize marriages by virtue of their authority to keep registers of acts of civil status. By 1969, Article 129 of the Code provided for the manner in which marriage banns should be published by a priest, deacon, rector or minister in his Church and it stipulated that the prothonotary or his deputy had to publicize an upcoming marriage, twenty days in advance, by posting a notice in the district court house *Code civil, 1866-1980: An Historical and Critical Edition / Code civil, 1866-1980 : Édition historique et critique*, Paul-A. Crépeau and John E.C. Brierley, eds., Montréal, Société québécoise d'information juridique, 1981 (excerpts)

39. Other areas related to marriage were provided in the *Civil Code of Lower Canada:* "Oppositions to Marriage" (Article 136 to 147); "Actions for Annulling Marriage" (Article 148 to 164); "Obligations Arising from Marriage" (165 to 172); "The Respective Rights and Duties of Husband and Wife" (173 to 184) and the "Dissolution of Marriage" (185 to 217).[55]

2. Post-Confederation and the Canadian Division of Powers

a) Introduction

40. The *British North America Act* of 1867 ("*BNA*") created a divided jurisdiction over marriage in Canada. The federal government was given the power over Marriage and Divorce in s. 91(26) of the *BNA* while the provinces were accorded the power over the Solemnization of Marriage under s. 92(12) of the *Act*.[56]

41. The *BNA* division of power over marriage was the subject of considerable parliamentary debate prior to the passage of the *Act*, especially concerning how the respective related heads of power – marriage and solemnization – would be defined in practice.[57] For example, one Honourable Member raised the following questions during the debates:

> *I can well understand what is meant by the regulation of the law of divorce; but what is meant by the regulation of the marriage question? Is the General Government to be at liberty to set aside all that we have been in the habit of doing in Lower Canada in this respect? Will the General Government have the power to determine the degree of relationship and the age beyond which parties may marry, as well as the consent which will be required to make a marriage valid?*[58]

b) Legislation Within the Scope of the Federal Government's Jurisdiction

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[55] *Code civil, 1866-1980: An Historical and Critical Edition / Code civil, 1866-1980 : Édition historique et critique*, Paul-A. Crépeau and John E.C. Brierley, eds., Montréal, Société québécoise d'information juridique, 1981 (excerpts)

[56] ***Constitution Act***, 1867 (Volume 6, P 1).

[57] ***Index to Parliamentary Debates on the subject of the Confederation of the British North American Provinces***, 3rd sess., 8th Parl. at 15-18, 22, 30-32, 39, 41, 46-47 (Volume6, O3);

[58] ***Parliamentary Debates***, 3rd sess., 8th Parl., At 1-6, 15, 175-177, 189-193, 266-269, 333-336, 342-345, 384-390, 408-411, 502-506, 577-581, 690-692, 701-702, 775-787, 825-835, 845-850, 856-860, 876-878, 906-912 (Volume 6, O 4 at p.1821.

i) Prohibited Marriages

42. The federal power over marriage and divorce, as conferred by the *BNA Act*, provided exclusive jurisdiction to legislate with respect to the capacity to marry. Initially, English law on marriage established which marriages within Canada were prohibited, primarily on the grounds of consanguinity and affinity. In this regard, English law, based on a table of prohibited degrees arising either by blood or by marriage and prepared in 1563 by Archbishop Parker of the Church of England, was incorporated into the common law of Canada at the time of Confederation.[59]

43. In the late nineteenth century the federal government began to legislate on specific issues with respect to the capacity to marry. In 1882, Parliament passed legislation repealing the initial prohibition against marriage between a man and the sister of his deceased wife.[60] In 1890, a similar statute was passed, repealing the prohibition against marriage between a man and the daughter of the sister of his deceased wife.[61] These provisions were later incorporated into the *Marriage and Divorce Act* and made applicable to both male and female widowers.[62]

44. In 1990, Parliament passed a comprehensive federal law that prohibited marriages between persons related or connected by consanguinity or affinity called the *Marriage (Prohibited Degrees) Act.* Also, the *Marriage Act* was repealed.[63] The *Marriage (Prohibited Degrees) Act* provides that persons may not marry if they are related lineally by consanguinity or adoption or if they are brothers or sisters by consanguinity or adoption. There is no longer any

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[59] Minutes of Proceedings and Evidence of Legislative Committee 24 October 1990, 8 November 1990, House of Commons, Volume 7, P 18, Bill S-14, An Act respecting the laws prohibiting marriage between related persons, 2nd sess., 34th Parl. ().

[60] ***An Act concerning Marriage and a Deceased Wife's Sister***, S.C. 1882, c.42 (Volume 6, P 4); ***House of Commons Debates***, 4th sess., 6th Parl. at 4035 (Volume 6, P 5)

[61] ***An Act to amend an Act concerning Marriage with a Deceased Wife's Sister***, S.C. 1890, c.36 (Volume 6, P 6);

[62] ***Marriage and Divorce Act***, R.S.C. 1952, c. 176 (Volume 6, P 10); ***Marriage Act***, R.S.C. 1970, c. M-5; Respondent's Record, Volume 7, Tab P, p. ***Marriage Act***, R.S.C. 1985, c. M-2, Respondent's Record, Volume 7, Tab P, p.

[63] ***Bill S-2, An Act to amend and consolidate the laws prohibiting marriage between related persons***, 1st sess., 33rd Parl. (Sixth Proceedings, 30 October 1985, Standing Senate Committee on Legal and Constitutional Affairs) (Volume 7, P 16); ***Bill S-14, An Act respecting the laws prohibiting marriage between related persons***, 2nd sess., 34th Parl. (Minutes of Proceedings and Evidence of Legislative Committee 24 October 1990, 8 November 1990, House of Commons) (Vol. 7, P 18);

prohibition on marriage between uncles and nieces and aunts and nephews and in the case of persons related by marriage, persons whose marriage has been dissolved by divorce are no longer prohibited from marrying the brother or sister, niece or nephew, or uncle or aunt of the divorced spouse.[64]

ii) Divorce

45. Divorce is a matter also falling within the exclusive jurisdiction of Parliament under the *BNA Act*. However, initially after Confederation, the federal government did not pass comprehensive legislation with respect to divorce. Rather, initial legislation simply established, in one or two provisions, the conditions under which a wife could divorce her husband in any court that had been accorded the jurisdiction to grant divorces by the provincial legislatures.[65] Prior to the passage of this initial legislation, the governing English law of 1870 allowed a husband to petition for divorce if his wife committed adultery, while a wife could only obtain a divorce if her husband had been guilty of either incestuous adultery, bigamy with adultery or rape, sodomy or bestiality, adultery with cruelty or with desertion for two years or longer.[66]

46. Prior to the passage of the *Divorce Act* of 1967, a Canadian could seek a divorce in one of two ways. First, if the province that s/he lived in had passed legislation conferring jurisdiction over divorce to its provincial courts, s/he could apply to his/her provincial court for a divorce. Alternatively, if no provincial jurisdiction over marriage was in existence, s/he had to petition Parliament for the dissolution or annulment of the marriage.[67] A divorce was finalized by the passage of a private Act of Parliament which had the effect of dissolving a particular marriage.[68]

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[64] ***Marriage (Prohibited Degrees) Act***, S.C. 1990, c.46, Respondent's Record, Volume 7, Tab , p.
[65] ***Marriage and Divorce Act***, R.S.C. 1927, c. 127 (Volume 6, P 8); ***Marriage and Divorce Act***, R.S.C. 1952, c. 176 (Volume 6, P 10).
[66] ***Report of the Special Joint Committee of the Senate and House of Commons on Divorce***. Ottawa: Information Canada, 1967, pages 2033 to 2039 (Volume7, P 12);
[67] ***Report of the Special Joint Committee of the Senate and House of Commons on Divorce***. Ottawa: Information Canada, 1967, pp. 2033 to 2039 (Volume7, P 12).
[68] House of Commons Debates, 1st sess., 4th Parl. at 1878 –2011 (Volume 6, P 2); ***An Act for the Relief of Eliza Maria Campbell***, S.C. 1879. C. 79 (Volume6, P 3); ***Report of the Special Joint Committee of the Senate and House of Commons on Divorce***. Ottawa: Information Canada, 1967, pages 2039 to 2041 (Vol.7, P 12).

47. In 1963, the power to dissolve and annul marriages by resolution was delegated to the Senate, subject to an appeal to Parliament as a whole. An officer of the Senate would hear evidence in the case and report with a recommendation to the Senate. A recommendation to dissolve or amend the marriage could only be made pursuant to a ground found under the laws of England as they existed in 1870, or under the 1952 federal *Marriage and Divorce Act*.[69]

48. In this period, the courts of eight provinces had the power to grant divorces, while the provinces of Quebec and Newfoundland did not. The courts in the Yukon and the Northwest Territories also could grant divorces. With the exception of the three Atlantic provinces (which had their own pre-Confederation divorce laws), the divorce law administered by the courts in the eight provinces and two territories was basically the same as English divorce law in July of 1870 (the English law at that date was found in *The Divorce and Matrimonial Causes Act* of 1857).[70]

49. It was in 1967 that a separate federal law, solely addressed to divorce, was passed following the commission and release of a report of *the Special Joint Committee of the Senate and the House of Commons on Divorce.* The *Special Joint Committee* recommended, among other things, that the entire theory of marital offences as the grounds for divorce be abandoned and substituted with grounds that were indicative of marriage breakdown.[71]

50. The *Divorce Act* of 1967, ushered in the era of "no fault divorce".[72] While the grounds for divorce stipulated in the legislation included some of the traditional "fault" grounds, section four of the statute incorporated the ground of "permanent breakdown of the marriage", the definition of which included separation for a period of not less than three years. The introduction of no-fault divorce has been described as a "silent revolution", as the import of the legislation was little debated before its enactment. For example, after the introduction of the Bill into the House of Commons, the leader of the opposition simply stated "Mr. Chairman, in just a

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[69] ***Dissolution and Annulment of Marriages Act***, S.C. 1963, c.10 (Vol 6 P 11); ***Report of the Special Joint Committee of the Senate and House of Commons on Divorce***. Ottawa: Information Canada, 1967, pages 2040 to 2041 (Vol.7, P 12).
[70] ***Report of the Special Joint Committee of the Senate and House of Commons on Divorce***. Ottawa: Information Canada, 1967, pages 2033 to 2039 (Volume7, P 12).
[71] ***Report of the Special Joint Committee of the Senate and House of Commons on Divorce***. Ottawa: Information Canada, 1967, (Vol.7, P 12).
[72] ***The Divorce Act***, S.C. 1967-8, c.24 (Vol.7, P 13).

few words I should like to indicated that we on this side of the chamber approve of reforming the divorce law, and look forward to receiving the bill.…"[73]

51. The *Divorce Act* of 1967, also ended the era of petitioning Parliament for a divorce. The statute granted jurisdiction to the "court for any province" to entertain a petition for divorce. The *Act* defined "Court for any province" was the superior court of that jurisdiction. [74] As stated during the House of Commons debates by the Hon. Mr. Trudeau, it was the government's opinion that the scope of the legislation and its ground-breaking nature required that it be a matter dealt with by the superior courts:[75]

> *...in view of the fact that we were introducing divorce law that went way beyond any divorce law which existed in Canada hitherto, we felt that this completely new concept of divorce, at least during the initial years, should be adjudicated by the high courts and not the county courts.*

52. The *Divorce Act* of 1985 is in essence the federal legislation that is applied in Canada today. Jurisdiction to grant a divorce and ancillary relief rests with the courts of competent jurisdiction in each province. The ground for divorce is a breakdown in marriage, which is defined as a legal separation of at least one year or a marriage where a spouse has committed adultery or has treated the other spouse with physical or mental cruelty.[76]

c) Legislation Within the Scope of the Common Law Provinces' Jurisdiction

53. Under s. 92(12) of the *BNA Act* the provinces have the power to legislate with respect to the solemnization of marriage. The division of powers under the *BNA Act* reflects the reality that, prior to Confederation, the provinces had already legislated extensively with respect to the rules and requirements for creating a legal, solemnized marriage.[77]

54. For example, the first comprehensive statute dealing with the solemnization of marriage in Ontario is found in 1877 legislation entitled *An Act respecting the Solemnization of Marriages*. The *Act* provided that any duly ordained Minister of any denomination could

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[73] ***Affidavit of Doug Allen***, paras 11 and 18 (Vol. 4, I 1-2)
[74] ***The Divorce Act***, S.C. 1967-8, c.24, s. 2(e) (Vol.7, P 13).
[75] ***The Divorce Act***, House of Commons Debates, 2nd sess., 27th Parl., vol. 5 at page 5567
[76] ***Divorce Act***, R.S.C. 1985, c.3 (2nd supp.) (Vol.7, P 17).
[77] For example - see Volume 10, Q 1 to 13 for the legislation of Ontario on soleminzation

solemnize a marriage. The 1877 legislation also required all clergymen or ministers who celebrated a marriage to issue a certificate to the couple if they requested it, and to keep a record of marriages that they had solemnized in the prescribed manner and in the prescribed books provided by the province.[78]

55. Subject to certain minor amendments, the current legal requirements in Ontario with respect to the solemnization of marriage are found in Ontario's *Marriage Act*[79] and its *Regulations*.[80] The statute provides that no marriage may be solemnized except under the authority of a license issued in accordance with the *Act* or pursuant to the publication of banns. A couple has the option of having a civil marriage and/or a religious marriage which may then be registered with the province.

56. Section 5(1) of the *Act* states that any person who is of the age of majority may obtain a license, or be married under the authority of the publication of the banns, provided no lawful cause exists to hinder the solemnization. Although marriage itself is undefined in the statute, section 24(3) of the *Marriage Act* states that during the marriage ceremony the persons being married are required to be declared "husband and wife".[81] Furthermore, the marriage licence application, Form 3 under the *Regulations*, refers to a bride and a bridegroom.[82]

57. Currently, the legislation of each of the common law provinces provides that either a 'clergy person/cleric' or a 'marriage commissioner/clerk of the court/judge' appointed under the *Act* can solemnize a marriage, in either a religious or civil ceremony respectively. Although the specific content of the provisions may differ, each of the provinces has statutes concerning the solemnization of marriage and each includes the following:[83]

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[78] ***An Act respecting the Solemnization of Marriages***, R.S.O. 1877, c. 124 (Vol. 10, Q 14).
[79] ***Marriage Act,*** R.S.O. 1990, c. M.3 (Vol. 11, Q 49)
[80] ***Marriage Act,*** R.R.O. 1990, Reg. 738 (Vol. 11, Q 50).
[81] ***Marriage Act,*** R.S.O. 1990, c. M.3 (Vol. 11, Q 49)
[82]***Marriage Act,*** R.R.O. 1990, Reg. 738 (Vol. 11, Q 50).
[83] ***Marriage Act***, R.S.B.C. 1996, c.282, as amended (Vol. 15, S 16); ***Marriage Act***, R.S.A., 1980, M-6, as amended (Vol.15, T 7); ***The Marriage Act***, 1995, S.S. 1995, C.M- 4.1, as amended (Vol. 16, U 13); ***The Marriage Act***, R.S.M. 1987, c.M 50, as amended (Vol 17, V-21); ***Solemnization of Marriage Act***, R.S.N.S. 1989, C. 436, as amended (Vol. 17, W-26); ***Marriage Act***, R.S.N.B. 1973, c. M-3, as amended (Vol.17, X 28); ***Solemnization of Marriage Act***, R.S.N. 1999, c. S-19, as amended (Vol 18, Y 25); ***Marriage Act***, R.S.P.E.I. 1988, c. M-3,as amended (Vol. 18, Z 19); ***Marriage Act***, R.S.Y. 1986, c. 110, as amended (Vol. 19, AA 9); ***Marriage Act***, R.S.N.W.T. 1988, c. M-4 (Vol. 19, BB 14).

- the requirements for a marriage licence or for the publication of religious banns;
- the issuance of a certificate of marriage and the registration of marriage;
- the minimum age at which one can marriage;
- those situations where consent is necessary to marry; and
- the requirement to have witnesses present at the ceremony.

d) Quebec's Legislation on Marriage

58. In the 1950s, Quebec entrusted the general revision of the *Civil Code of Lower* Canada to a jurist, whose report was tabled in the National Assembly in 1978. Since the wide range of the proposed reforms made it necessary to spread the enactment of the various parts of the new Civil Code over a period of time and because it was expedient to proceed first of all with the reform of family law, Quebec adopted Book Two of the *Civil Code of Quebec* (*An Act to establish a new Civil Code and to reform family law*, S.Q. 1980, c. 39) in 1980. Some of its provisions came into force in 1981, some in 1982, and some never came into force.

59. Those articles which came into force dealt with "Opposition to Marriage", "Solemnization of Marriage", "Proof of Marriage", "Effects of Nullity", "Effects of Marriage", including "Rights and Duties of Spouses", "Matrimonial Regimes", "Separation as to Bed and Board", "Effects of Divorce on Spouses", "Effects of Divorce on Children", "Filiation", etc.[84]

60. From about 1981 to 1994, Quebec had two civil codes in force: the *Civil Code of Lower Canada*, with many of its articles of Marriage still in force, and the partial *Civil Code of Quebec* dealing with family law. Both were repealed by Quebec in 1994 when it adopted its current *Civil Code of Quebec*. Book Two ("the Family") Title One ("Marriage") deals with marriage, its solemnization, its proof and nullity, its effects, matrimonial regimes and separation from bed and board. Chapter VII on Divorce provides that divorce is granted in accordance with the *Divorce Act* of Canada (Article 517). Article 365 of the Code, under the Chapter "Marriage and the Solemnization of Marriage" states the following:

[84] The Civil Codes and Related Civil Law Statutes: A Critical Edition / Les Codes civils et lois civiles connexes : édition critique, P.A. Crépeau, ed., Montréal, Yvons Blais, 1992 (excerpts) (Vol. 12, R 2).

> *Marriage shall be contracted openly, in the presence of two witnesses, before a competent officiant.*
> *Marriage may be contracted only between a man and a woman expressing openly their free and enlightened consent.*[85]

i) Bill S-4, *Federal Law - Civil Law Harmonization Act, No. 1*

61. Until recently, the written law pertaining to capacity ("conditions de fond du mariage") in Quebec was found in provisions of the pre-confederal *Civil Code of Lower Canada*[86]("CCLC").[87]

62. On May 7, 2001, Parliament adopted Bill S-4, the *Federal Law – Civil Harmonization Act,* Part I of which can be cited as the *Federal Law and Civil Law of the Province of Quebec Act.* This Part contains various provisions on capacity to marry that apply in Quebec, including s. 5 which states expressly that marriage is between a man and a woman. The relevant provisions of Bill S-4[88] read as follows:

> *Marriage*
>
> *4. Sections 5 to 7, which apply solely in the Province of Quebec, are to be interpreted as though they formed part of the Civil Code of Québec.*
> *5. Marriage requires the free and enlightened consent of a man and a woman to be the spouse of the other.*
> *6. No person who is under the age of sixteen years may contract marriage.*
> *7. No person may contract a new marriage until every previous marriage has been dissolved by death or by divorce or declared null.*

3. Recent Legislative Developments with Respect to Same-Sex Unions

a) Recent Federal Developments

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[85] *Code civil du Québec / Civil Code of Québec*, L.Q./S.Q., 1991, c. 64, as amended, sous la direction de J.-L. Baudouin et Y. Renaud, éd. feuilles mobiles, Montréal, Wilson & Lafleur (Vol.13, R 3).
[86] *Code civil, 1866-1980: An Historical and Critical Edition / Code civil, 1866-1980 : Édition historique et critique*, Paul-A. Crépeau and John E.C. Brierley, eds., Montréal, Société québécoise d'information juridique, 1981 (excerpts)
[87] Quebec could not validly abridge these provisions pursuant to s. 129 of the *Constitution Act, 1867* when it enacted the *Civil Code of Quebec Code civil, 1866-1980: An Historical and Critical Edition / Code civil, 1866-1980 : Édition historique et critique*, Paul-A. Crépeau and John E.C. Brierley, eds., Montréal, Société québécoise d'information juridique, 1981 (excerpts)
[88] ***Federal Law – Civil Law Harmonization Act***, No. 1, S.C. 2001, c. 4.

i) Bill C-23, *An Act to Modernize the Statutes of Canada*

63. In 1999 the Supreme Court of Canada rendered its decision in *M. v. H.*,[89] holding that the definition of spouse as found in s.29 of Ontario's *Family Law Act* was discriminatory and was not saved by s. 1 of the *Charter*. The provision's exclusion of same sex partners from the spousal support obligations and benefits found in the *Family Law Act* was found to violate s. 15 of the *Charter*. This decision gave rise to statutory amendments to the definition of 'spouse' beyond the family law statutory regime, which have been fully implemented by the federal government, and implemented by some of the provinces.

64. Parliament's legislation in response to *M. v. H.*, Bill C-23 *or An Act to modernize the Statutes of Canada in relation to benefits and obligations*, extended federal benefits and obligations to all couples who have cohabited in a conjugal relationship for at least one year, regardless of their sexual orientation. The bill amended 68 federal statutes falling within the mandate of 20 federal departments and agencies. Some of the federal statutes that were modernized by Bill C-23 included the *Income Tax Act*, *Canada Pension Plan, Old Age Security Act, Bankruptcy and Insolvency Act,* and *Criminal Code.*[90]

65. Bill C-23 was debated extensively in the House of Commons[91] and underwent comprehensive hearings before *Parliament's Standing Committee on Justice and Human Rights*, from February of 2000 to March of 2000.[92] After the legislation was passed by the House of Commons, it went to the Senate,[93] and to the *Standing Senate Committee on Legal and*

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[89] ***M v. H***, [1999] 2 SCR 3

[90] ***Modernization of Benefits and Obligations Act***, S.C. 2000, c.12 (Vol. 10, P 32); ***Bill C-23, An Act to modernize the Statutes of Canada in relation to benefits and obligations***, 2nd sess., 36th Parl. (Minutes and Evidence, 29 February 2000 –29 March 2000, Standing Committee on Justice and Human Rights) at 2423 of Vol. 8, P 23.

[91] ***Bill C-23, An Act to modernize the Statutes of Canada in relation to benefits and obligations***, 2nd sess., 36th Parl. (first reading, 11 February 2000, House of Commons) (Vol. 7, P 21); ***Bill C-23, An Act to modernize the Statutes of Canada in relation to benefits and obligations***, House of Commons Debates, 2nd sess., 36th Parl., vol. 136 at 3581-3561, 3765-3820 (Vol.7, P 22); ***Bill C-23, An Act to modernize the Statutes of Canada in relation to benefits and obligations***, House of Commons Debates, 2nd sess., 36th Parl., vol. 136 at 5530, 5592-5620, 5718-5719, 5852, 5872-5933, 5937-6000, 6059 (Vol 9, P 25); ***Bill C-23, An Act to modernize the Statutes of Canada in relation to benefits and obligations***, 2nd sess., 36th Parl. (as passed by the House of Commons, April 11th, 2000) (Vol. 9, P 26);

[92] ***Bill C-23, An Act to modernize the Statutes of Canada in relation to benefits and obligations***, 2nd sess., 36th Parl. (Minutes and Evidence, 29 February 2000 –29 March 2000, Standing Committee on Justice and Human Rights) Vol. 8, P 23;

[93] ***Bill C-23, An Act to modernize the Statutes of Canada in relation to benefits and obligations***, 2nd sess., 36th Parl. (second reading, 9 May 2000, Senate of Canada) (Vol. 9, P 27); ***Bill C-23, An Act to modernize the Statutes of Canada in relation to benefits and obligations***, Debates of the Senate, 2nd sess., 36th Parl. vol. 138 at 1589-1593

Constitutional Affairs, which heard the submissions of witnesses between May 10th and June 7th, 2000.[94]

66. Many Members of Parliament, Senators and witnesses before the Committees were concerned that the legislation would erode the distinctiveness of marriage or alter its definition by equating unmarried common-law same-sex relationships and unmarried common-law opposite-sex relationships with heterosexual marriages. The position of the federal government, expressed by the Hon. Anne McLellan, Minister of Justice and the Attorney General of Canada, before the House of Commons Standing Committee on Justice and Human Rights, was that the definition of marriage would remain unchanged:

> *Bill C-23 will modernize federal legislation to extend benefits and obligations to common-law same-sex couples in the same way as to common law opposite-sex couples. What is equally important is that Bill C-23 does so while preserving the existing legal definition and societal consensus that marriage is the union of one man and one women, to the exclusion of all others, as defined by the courts. Let me briefly elaborate on this point. The definition of marriage, which has been consistently applied by the courts and governments in Canada and was reaffirmed last year through a resolution of this House, dates back to 1866. Let me be clear: this definition will not change. This bill is not about marriage. In fact, the approach chosen in this bill deliberately maintains the clear legal distinction between marriage and unmarried common-law relationships.*[95]

67. The Second Report of the Standing Committee on Justice and Human Rights indicated that the Committee had agreed, on March 23, 2000, to make an amendment to Bill C-23 to clearly indicate that the legal meaning of marriage would not be changed by the

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(Vol. 9, P 30); ***Bill C-23, An Act to modernize the Statutes of Canada in relation to benefits and obligations***, 2nd sess., 36th Parl. (assented to 29 June 2000) (Vol. 9, P 31).

[94] ***Bill C-23, An Act to modernize the Statutes of Canada in relation to benefits and obligations***, 2nd sess., 36th Parl. (Minutes and Evidence, 10 May 2000, 11 May 2000, 17 May 2000, 18 May 2000, Standing Senate Committee on Legal and Constitutional Affairs) (Vol. 9, P 28); ***Bill C-23, An Act to modernize the Statutes of Canada in relation to benefits and obligations***, 2nd sess., 36th Parl. (Minutes and Evidence, 31 May 2000, 1 June 2000, 7 June 2000, Standing Senate Committee on Legal and Constitutional Affairs) (Vol. 9, P 29)

[95] ***Bill C-23, An Act to modernize the Statutes of Canada in relation to benefits and obligations***, 2nd sess., 36th Parl. (Minutes and Evidence, 29 February 2000 –29 March 2000, Standing Committee on Justice and Human Rights) at 2424 of Vol. 8, P 23.

legislation.[96] Clause 1.1 was passed by both the House of Commons and by the Senate, which states:

> *Interpretation*
> *For greater certainty, the amendments made by this Act do not affect the meaning of the word "marriage", that is, the lawful union of one man and one woman to the exclusion of all others.*[97]

68. When she appeared before the Senate Committee on Legal and Constitutional Affairs, the Honourable Anne McLellan acknowledged the need for Clause 1.1 in order to affirm and to reassure Canadians that the definition of marriage was *not* changed by the legislation:

> *First, since the day Bill C-23 was introduced in the House of Commons I have repeatedly said that this bill is about fairness and tolerance. It is not about marriage and will not, in any way, alter or affect the legal meaning of marriage. However, it did become clear during consideration of the bill in the House of Commons that is was necessary for the government to reassure some Canadians by stating this fact in the bill itself. Clause 1.1 was added to clearly indicate that the legal meaning of marriage as the lawful union of one man and one woman to the exclusion of all others would not be changed by this bill.*
> *The Government of Canada recognizes that marriage is of fundamental value and importance to many Canadians. That value and importance is in no way undermined by recognizing in law other forms of committed relationships.*[98]

69. Parliament's concerns and intentions with respect to the definition of marriage were reiterated before, during and after the passage of Bill C-23. For example, in June of 1999, the House of Commons passed a Motion that was supported by the government, which stated the following:

> *That, in the opinion of this House, it is necessary, in light of public debate around recent court decisions, to state that marriage is and should remain the union of one man and one women to the exclusion of all others, and that Parliament will take all necessary steps to preserve this definition of marriage in Canada.*[99]

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[96] ***Bill C-23, An Act to modernize the Statutes of Canada in relation to benefits and obligations***, 2nd sess., 36th Parl. (second report, Standing Committee on Justice and Human Rights) Vol 9 at P 24;
[97] ***Modernization of Benefits and Obligations Act***, S.C. 2000, c.12 (Vol. 10, P 32).
[98] ***Bill C-23, An Act to modernize the Statutes of Canada in relation to benefits and obligations***, 2nd sess., 36th Parl. (Minutes and Evidence, 10 May 2000, 11 May 2000, 17 May 2000, 18 May 2000, Standing Senate Committee on Legal and Constitutional Affairs) (at 3062 of Vol. 9, P 28).
[99] ***Parliamentary Motion, House of Commons Debates***, 1st sess., 36th Parl., vol 135 at 15960-15993, 16034-16036, and 16068-16069 (8 June 1999) (Vol. 7, P 20); and see – Bill S-9, An Act to remove certain doubts regarding the

b) Recent Provincial Developments

70. Provincial jurisdiction over common law relationships (or *de facto* unions in Quebec) stems from the provincial power over property and civil rights in s. 92(13) of the *BNA Act*.[100] As a result, in Ontario and each of the provinces, heterosexual couples who separate have always looked to the relevant provincial legislation, such as the *Family Law Act* of Ontario, to determine their rights and obligations following separation.[101] Recently, several of the provincial legislatures have enacted legislation that extends the benefits and obligations enjoyed by heterosexual couples to same-sex partners.

i) British Columbia

71. Over the past few years, the government of British Columbia has amended, in an *ad hoc* manner, the definition of "spouse" in its legislation in order to include same-sex partners. For example, as of February 1998, the definition of "spouse" found in British Columbia's *Family Relations Act* had been amended to include "a person who has lived with another person in a marriage-like relationship for a period of at least two years". The definition explicitly states "the marriage-like relationship may be between persons of the same gender". This new definition of spouse applies throughout the statute, except with respect to the matrimonial property and division of pension entitlement chapters of the Act.[102]

72. In the summer of 1999, the government of British Columbia introduced Bill 100, the *Definition of Spouse Amendment Act, 1999*. The Bill amended five more provincial statutes by expanding the definition of "spouse" to include the same definition found in the *Family Relations Act*. The five statutes amended by this legislation were, the *Cemetery and Funeral*

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meaning of marriage, 1st sess., 37th Parl. (first reading, 31 January 2001, Senate of Canada) (Vol. 10, P 33); Bill C-266, An Act to amend the Marriage (Prohibited Degrees) Act in order to protect the legal definition of marriage by invoking s.33 of the Canadian Charter of Rights and Freedoms, 1st sess., 37th Parl. (first reading, 14 February 2001, House of Commons) (Vol. 10, P 34); Bill C-266, An Act to amend the Marriage (Prohibited Degrees) Act in order to protect the legal definition of marriage by invoking s.33 of the Canadian Charter of Rights and Freedoms, 1st sess., 37th Parl. (first reading, 14 February 2001, House of Commons) (Vol. 10, P 34); Bill C-264, An Act to amend the Marriage (Prohibited Degrees) Act (marriage between persons of the same sex), 1st sess., 37th Parl. (first reading, 14 February 2001, House of Commons) (Vol. 10, P 35).

[100] ***British North America Act***, s, 92(13)

[101] ***Family Law Act***, R.S.O., c. F.3

[102] ***Family Relations Act***, R.S.B.C. 1996, c.128, s.1, amendment to "spouse" in force 1998, Feb 4, B.C. Reg 24/98.

Services Act, the *Coroners Act*, the *Estate Administration Act*, the *Family Compensation Act* and the *Wills Variation Act*.[103]

73. Recently, Bill 21, the *Definition of Spouse Amendment Act, 2000*, was enacted in the province changing the definition of spouse in approximately thirty additional pieces of provincial legislation. The definition of spouse in statutes such as the *Health Professions Act*, the *Adult Guardianship Act* and the *Victims of Crime Act* have been amended to include a person who "is living and cohabiting with another person in a marriage-like relationship, including a marriage-like relationship between persons of the same gender". The amendments to the definition of spouse found in most of the statutes require a period of cohabitation before a partner can be considered a "spouse", generally either six months or two years.[104]

ii) Quebec

74. In June 1999, the province of Quebec amended some its legislation other than its *Civil Code*, to grant same-sex couples the same benefits and obligations already available to opposite-sex couples.[105] This legislation was unanimously approved by the Quebec National Assembly. It amended twenty-eight statutes and eleven sets of regulations that contained a definition of the concept of "*de facto* spouse" ("conjoint de fait") to allow *de facto* unions to be recognized without regard to the sex of the persons concerned. A *de facto* union is similar to the entity of "common-law couple" found in common law jurisdictions. However, it is a very different concept. One main difference is that the *de facto* unions have no private consequences, only marriage does in Quebec. The legislative areas changed by the Act include, workplace compensation and labour standards, pension statutes, public sector retirement benefits and some social assistance legislation.

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[103] Definition of ***Spouse Amendment Act***, 1999, S.B.C. 1999, c. 29 (Vol. 15, S 24).
[104] Bill 21, ***Definition of Spouse Amendment Act****, 2000,* 4 sess., 36th Parl. (third reading, 5 July 2000) (Vol. 15, S 25).
[105] ***An Act to amend various legislative provisions concerning de facto spouses***, S.Q. 1999, C.14.

75. With respect to the scope of the legislation, Mme Linda Goupil, Quebec Minster of Justice, stated clearly that the amendments relating to same sex couples did not apply to marriage:

> *M. le Président, c'est très pertinent, ce que mon collègue vient de mentionner. Cependant, l'objectif est de faire en sorte de répondre à une demande qui est de reconnaître les conjoints de même sexe au même titre que les conjoints de fait. La jurisprudence, que vous connaissez d'ailleurs peut-être même plus que moi dans certains domaines,* ***a confirmé noir sur blanc que le fait d'indiquer «vit maritalement» n'incluait pas quelqu'un qui vit dans le cadre du mariage, loin de là. Et d'ailleurs, ce n'est pas seulement au Québec, hein, c'est ailleurs, partout dans le reste du Canada aussi.*** *[Emphasis added]*
>
> *Donc, il reste cependant que ce que nous souhaitons vraiment dans l'avenir, c'est qu'on souhaite corriger de façon à ce qu'il y ait une cohérence et une harmonisation. Mais, dans ce but ponctuel, aujourd'hui, de par ce projet de loi là, nous n'avons absolument changé aucune loi. Ce qui était demandé, c'est que partout où on parlait des conjoints ou des conjoints de sexe différent qui vivaient ensemble et qui avaient des privilèges ou des obligations, on voulait que de façon ponctuelle, dans chacune des lois où on retrouvait la définition de «conjoint de fait», ça inclue également les gens de même sexe ou de sexe opposé.*[106]

iii) Ontario

76. In 1994, the Ontario provincial government introduced Bill 167, , the *Equality Rights Statute Amendment Act.*[107] The Bill sought to change the definitions of "marital status" and "spouse" in 57 of the province's statutes. in order to include persons of the same sex living together in a conjugal relationship outside of marriage. On June 9, 1994, the Ontario government's motion to have the Bill proceed to second reading was defeated in the Legislature.[108]

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[106] Journal des débats, Commission permanente des institutions, Le vendredi 28 mai 1999, ***Étude détaillée du projet de loi n° 32.***

[107] ***Bill 167, An Act to amend Ontario Statutes to provide for the equal treatment of persons in spousal relationships***, 3rd sess. (1994) (NDP Bill, never passed.) (Vol. 11, Q 52)

[108] ***Bill 167, An Act to amend Ontario Statutes to provide for the equal treatment of persons in spousal relationships***, Debates of the Ontario Legislature, 3rd sess., 35th Parl. at 6453 – 6810 (Vol. 11, Q. 53).

77. Following the decision of the Supreme Court of Canada in *M. v. H.*, the Ontario government had six months to respond and render its legislation constitutional. Bill 5, an *Act to amend certain statutes because of the Supreme Court of Canada decision in M. v. H.* amended the *Family Law Act* and to make its provisions governing support obligations applicable to same-sex partners in the same manner that they already applied to heterosexual common-law spouses. The *Act*'s provisions relating to domestic contracts and dependants' claims for damages were also extended to same-sex partners. Additionally, the Bill amended 67 public statutes in Ontario primarily by striking out the word "spouse" in the legislation and replacing it with the phrase "spouse or same-sex partner".[109]

78. The Ontario government preserved the existing definition of "spouse" and "marital status" by introducing the new term "same-sex partner". The rights and obligations possessed by opposite-sex partners were extended to the new category of couples, same-sex partners, rather than expanding the definition of spouse to include same sex common law couples. The Hon. Jim Flaherty (Attorney General, Minister Responsible for Native Affairs) explained the government's position as follows:

> *Marriage is not affected by this bill. There are certain unique rights and responsibilities that relate to marriage that are not affected by this bill; ... It is important for members to be aware of that fundamental in this debate, that marriage is not affected by this bill. Marriage, as members know, involves a man and a woman in Ontario.*
>
> *...*
>
> *I stress that this bill reserves the definition of "spouse" and "marital status" for a man and a woman, the traditional definition of "family" in Ontario. The bill introduces into law a new term*

[109] Bill 5, An Act to amend certain statutes because of the Supreme Court of Canada decision in M. v. H., 1st sess., 37th Leg. Ont. (first reading, 25 October 1999) (Vol. 12, Q 56); Bill 5, An Act to amend certain statutes because of the Supreme Court of Canada decision in M. v. H., Legislative Assembly of Ontario, 1st sess., 37th Parl. at 21-22 (first reading 25 October 1999) (Vol. 12, Q. 57); Bill 5, An Act to amend certain statutes because of the Supreme Court of Canada decision in M. v. H., Legislative Assembly of Ontario, 1st sess., 37th Parl. at 159-176 (second and third reading 27 October 1999) (Vol. 12, Q. 58); Bill 5, An Act to amend certain statutes because of the Supreme Court of Canada decision in M. v. H., Legislative Assembly of Ontario, 1st sess., 37th Parl. At 206 (royal assent 28 October 1999) (Vol. 12, Q. 59); An Act to amend certain statutes because of the Supreme Court of Canada decision in M. v. H., S.O. 1999, c. 6 (Vol. 12, Q. 60).

> *called "same-sex partner", while at the same time protecting the traditional definitions of "spouse" and "marital status"*[110]

iv) Alberta

79. Alberta decided not to legislate in the area of benefits and obligations relating to same-sex partners, except in response to court decisions in two areas – step-parent adoption and intestacy.[111] Alberta also chose, in March 2000, to adopt the *Marriage Amendment Act*, 2000,[112] adding two new provisions to Alberta's *Marriage Act*. The first, s. 1(c.1), states " 'marriage' means a marriage between a man and a woman". The second provision, s. 1.1 invokes the statutory override clause of the *Charter* and provides that the *Act* operates notwithstanding ss. 2 to 7 and 15 of the *Charter* and the *Alberta Bill of Rights.* The preamble to the legislation states the following:

> *WHEREAS marriage is an institution the maintenance of which in its purity the public is deeply interested in; and*
> *WHEREAS marriage is the foundation of family and society, without which there would be neither civilization nor progress; and*
> *WHEREAS marriage between a man and a woman has from time immemorial been firmly grounded in our legal tradition, one that is itself a reflection of long standing philosophical and religious traditions; and*
> *WHEREAS these principles are fundamental in considering the solemnization of marriage;*

v) Saskatchewan

80. In May of 2001 the Saskatchewan government introduced Bills 47 and 48, entitled, *An Act to amend certain Statutes respecting Domestic Relations and An Act to amend certain Statutes respecting Domestic Relations, No. 2*.[113] The *Acts* received royal assent in July of 2001, amending twenty-four pieces of legislation by extending the meaning of "spouse" to

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[110] Bill 5, ***An Act to amend certain statutes because of the Supreme Court of Canada decision in M. v. H***., Legislative Assembly of Ontario, 1st sess., 37th Parl. at 159-176 (second and third reading 27 October 1999) (page 3923 to 3924 at Vol. 12, Q. 58).

[111] Johnson v. Sand, [2001] A.J. No. 390 (Surr.Ct.), supplemental reasons for decision, [2001] A.J. No. 478 (Surr.Ct.); Re A (Adoption) (1999), Alta.L.R. (3d) 1, 2 R.F.L. (5th) 358 (Q.B.).

[112] ***Marriage Amendment Act***, 2000, S.A. 2000, c. 3 (Vol.16, T 18).

[113] An *Act to amend certain Statutes respecting Domestic Relations*, Bill 47 and An *Act to amend certain Statutes respecting Domestic Relations*, *No. 2* Bill 47.

include opposite-sex and same-sex couples who have cohabited in a conjugal relationship.[114] In most cases, the length of cohabitation required to qualify non-married individuals as spouses is two years.[115]

81. The second statute passed in Saskatchewan makes significant changes to Saskatchewan's inheritance, family, and matrimonial property legislation. Amendments to *Matrimonial Property Act, 1997*, give common law partners rights to property after 2 years of cohabitation

82. As stated by the Hon. Mr. Chris Axworthy on the second reading of the Bill, the legislation does not purport to redefine marriage, in any way[116]

> *Mr. Speaker, I think its important to clearly understand what this Bill does not do. The Bill does not redefine marriage in any way. The definition of marriage remains federal jurisdiction. The federal government has recently affirmed in the Modernization of Benefits and Obligations Act that marriage is the union of one man and one woman. Mr. Speaker, provincial governments have no jurisdiction to change that.*

vi) Manitoba

83. In May 2001, the Manitoba government introduced Bill 41, *An Act to comply with the Supreme Court of Canada decision in M. v. H.,*[117] which received royal assent on July 6, 2001. The bill amended ten pieces of Manitoba legislation[118] dealing with support, as well as certain pension and death benefit provisions, extending their application to common law same-sex couples where they previously pertained only to common-law opposite-sex couples. In general, the Bill amended the definition section of the ten statutes by adding a new definition -- "common law partner"-- defined as "a person who, not being married to the other person,

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[114] *The Miscellaneous Statutes (Domestic Relations)Amendment Act, 2001,* S.S. 2001, c. 50 and *The Miscellaneous Statutes (Domestic Relations)Amendment Act, 2001,* S.S. 2001, c. 51.
[115] For example, the *Homesteads Act, 1989*, and the *Fatal Accidents Act* each require a period of cohabitation of not less than two years
[116] Government Orders, Second Reading, Saska. Hansard, June 4, 2001, pages 1561 to 1563, at 1561
[117] Bill 41, ***An Act to comply with the Supreme Court of Canada decision in M. v. H.,*** 2nd sess., 37th Legislature, Manitoba, received royal assent, July 6th, 2001.
[118] ***The Civil Service Superannuation Act; The Court of Queen's Bench Act; The Dependants Relief Act; The Family Maintenance Act; The Fatal Accidents Act; The Legislative Assembly Act; The Pension Benefits Act; The Manitoba Public Insurance Corporation Act; The Teachers' Pension Act; The Workers Compensation Act***.

cohabited with him or her in a conjugal relationship". Most of the provisions that require a specific period of cohabitation to meet the definition specify a three-year period, as in the *Dependants Relief Act* and the *Family Maintenance Act*.

84. During the debates in the legislature during the 3rd reading of Bill 41, one Honourable member noted that the legislation was just the beginning and that many more statutes would have to be amended before the *M. v. H.* decision had been complied with in Manitoba.

> *...This bill amends some 10 statutes when quite clearly we can see, and we have heard, that if you are really going to bring this province into compliance with the broad framework of the Supreme Court ruling, then one needs to address not just 10 statutes but probably about 50 statutes. ...*[119]

85. In June of 2001 Manitoba's Attorney General announced the creation of a review panel to make recommendations on other provincial statutes affecting persons in same-sex relationships. Statutes to be reviewed include those respecting adoption and conflicts of interest, as well as statutes on the protection of public interest and property interests that effect persons in same-sex, common-law relationships. The advice of the review panel is to be submitted to the government by end of 2001.[120]

vii) Nova Scotia

86. Nova Scotia recently enacted legislation to respond to two separate court decisions dealing with common law partners: first, the *M. v. H.* decision and second, the *Walsh and Bona* decision of the Nova Scotia Court of Appeal. In the latter case, the Court of Appeal held that the *Nova Scotia Matrimonial Property Act*, which provides for the equal division of the assets of a "spouse" upon separation ("spouse" defined as a married individual) discriminates against common-law spouses and therefore contravenes the *Charter*. Leave to appeal this decision to the Supreme Court of Canada has been granted[121].

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[119] ***Concurrence and Third Readings***, Bill 41, June 27, 2001.
[120] Manitoba Government Press Release, dated June 29, 2001, *Province Appoints Hamilton, Cooper to Review Panel on Statutes.*
[121] ***Walsh and Bona*** (2000), 186 D.L.R.(4th) 50 (N.S.C.A), leave to appeal to the S.C.C. granted, February 15, 2001 (without reasons). S.C.C. Bulletin, 2001, p. 284 [2000] SCCA No. 517. In addition to Nova Scotia, the provinces

87. The Nova Scotia government was given 12 months to respond to the decision in *Walsh* and it has done so through Bill No. 75, *An Act to Comply with Certain Court Decisions and to Modernize and Reform Laws in the Province*, to be cited as the *Law Reform (2000) Act.* The statute came into effect on June 4, 2001[122] and it accomplishes two things: first, amendments were made to nine statutes, extending benefits and obligations to common-law same-sex and opposite-sex partners on the same basis; and second, it created a domestic partnership regime under its *Vital Statistics Act* that can be accessed by two individuals who are in a conjugal relationship.[123]

88. Pursuant to the domestic partnership regime, two individuals, regardless of gender, who are cohabiting or who intend to cohabit in a conjugal relationship, can now register as domestic partners by filing a domestic partnership statutory declaration under the *Act*. Upon registration, the domestic partners immediately have the same rights and obligations as a spouse under twelve pieces of legislation, including the *Matrimonial Property Act* and the *Intestate Succession Act.*[124] The partnership ends if the parties live separately for more than a year with the intention that the relationship not continue, enter into a separation agreement, file a statement of termination or if one of the parties marries another person.[125]

89. As noted by the Honourable Howard Epstein, a Member of the Nova Scotia legislature, Bill No. 75 created a third form of couplehood, the registered domestic partnership, which is a contractual relationship entered into between two unmarried persons, be they of the same or be they of different sexes. As such, Nova Scotia is the first jurisdiction in Canada to put in place a new form of legally recognized relationship.[126]

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of Quebec, Alberta, Ontario, British Columbia, and Manitoba have sought to participate in the hearing before the Supreme Court of Canada and have filed Notices of Intervention, as has the Attorney General of Canada. The constitutional question has been stated by the Attorney General of Nova Scotia as follows: "Decision on the motion to state a constitutional question (R. 32), The Chief Justice, 1. Does s. 2(g) of the *Matrimonial Property Act*, R.S.N.S. 1989, c. 275, discriminate against heterosexual unmarried cohabitants contrary to s. 15(1) of the Charter? 2. If the answer to question 1 is "yes", is the discrimination a reasonable limit prescribed by law which can be demonstrably justified in a free and democratic society under s. 1 of the Charter? Notices of intervention are to be filed on or before August 31, 2001. granted, no order as to costs.

[122] Except for the changes to the *Income Tax Act*, which will come into force on January 1, 2001.

[123] ***The Law Reform Act***, S.N.S. 2000, c.29.

[124] Note: These two Acts were not extended to unregistered common-law partners.

[125] **The Law Reform Act**, S.N.S. 2000, c.29.

[126] ***N.S. House of Assembly***, November 30, 2000, 3rd reading of Bill No.75.

90. The *Law Reform (2000) Act* also extended benefits and obligations to common-law opposite-sex and same-sex couples on the same basis. The term "common law partner" is added to nine statutes and defined as the partner of another individual who has cohabited with the individual in a conjugal relationship for a period of at least two years (one year for some legislation). [127] As noted above, same sex partners in Nova Scotia now have access to the equal division of assets regime established in Nova Scotia's *Family Maintenance Act.*[128]

viii) Summary

91. A number of provinces have enacted legislation extending benefits and obligations to common-law same-sex couples on the same basis that they are provided to common-law opposite sex couples. Also notable, however, is that those jurisdictions in Canada that legislated this area have equated the treatment of common-law same-sex couples with that of common-law opposite-sex couples, as opposed to that of married couples. Many members of Parliament and the Legislatures have made it clear that their legislation extending benefits and obligations to same-sex couples is to be understood and interpreted as having no impact upon the definition of marriage as the union of one man and one woman.

4. International Survey: Legislation Relating to Same-Sex Unions in Other Countries

a) Introduction

92. Canada's governments have gone further than those in the majority of the world's nations in recognizing same-sex relationships. In the United Kingdom, as described below, Parliament has not even begun to approach this topic. In the United States, the federal government and a significant majority of state legislatures have passed *Defense of Marriage Acts* to protect the heterosexual definition of marriage. Only two states, Hawaii and Vermont, have passed legislation providing same-sex partners with rights, benefits, and obligations.

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[127] Portions of the province's ***Family Maintenance Act*** **(now the** ***Maintenance and Custody Act*****), the** ***Fatal Injuries Act*****, the** ***Health Act*****, the** ***Hospitals Act*****, the** ***Insurance Act*****, the** ***Members' Retiring Allowance Act*****,** ***Pensions Act*****,** ***Provincial Court Act*** **and the** ***Income Tax Act*****.**

[128] ***The Law Reform Act***, S.N.S. 2000, c.29

93. In all the countries of Europe, with the exception of the Netherlands, marriage means the union between one man and one woman.[129] More and more benefits and obligations associated with marriage have been extended to relationships that have similarities to marriages, over the past couple of decades, but the majority of European countries have not gone as far as Canada with respect to same-sex relationships and extending benefits to them. Where there have been discussions on improving the situation of same-sex couples and on recognizing their relationships, the extension of marriage has been rejected in favour of alternative forms of legal recognition. The solutions vary from models limited to the regulation of the financial and property aspects of the relationships, to models with certain effects linked to the personal commitment of the parties, to the registered partnership model. However, most countries of Europe do not have any statutory scheme regulating either partnerships or cohabitation.[130]

94. Attached as Appendix "A" to this factum is a chart which outlines the countries that have implemented legislation to recognize same-sex relationships, the form that the recognition has taken and the benefits and obligations included and excluded with that recognition.

b) England

95. There is no indication that the UK Parliament intends to legislatively address the issue of recognition for same-sex couples. In fact, suggestions made in a 1996 court decision to extend the benefit of succession to certain tenancies to persons of the same sex living together in a "husband and wife-like relationship" were not accepted by the government.[131] Not only has the UK Parliament not even considered extending the benefits and obligations accorded to "spouses" (defined as married couples only) to same-sex couples, it has not provided common-law opposite-sex couples with access to many of those benefits and obligations. For example, unmarried opposite-sex survivors do not have any entitlement to a widow's pension nor any

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[129] Even in the Netherlands, same-sex marriage does not have all of the same legal consequences as marriage. In *EGALE Canada Inc. v. Canada (Attorney General)* Justice Pitfield mistakenly refers to Germany as a country that ahs adopted the Netherlands model. See section on Germany, *infra* at para X.
[130] ***Affidavit of Bea Verschraegen***., Respondent's Record, Volume 3, Tab G, pp. 821, 823, paras. 105, 108.
[131] ***Affidavit of Stephen Cretney***, Respondent's Record, Volume 1, Tab A, p. para. 50

claim to the estate; there is no claim to lifetime support upon the dissolution of a non-marital relationship.[132]

96. However, in England and in Wales, there is some recognition of same-sex couples within the common law. Whenever the court has to apply principles of common law or doctrines of equity that depend on an assessment of the parties' intentions towards one another, the fact that the relationship is between members of the same sex will not adversely affect the outcome of the decision. With respect to family relationships, it is evident that the courts will avoid discriminating against a partner to a same-sex relationship, within the limits of the relevant statutory provision.[133] However, there is no indication that the courts would be willing to interpret the expressions of "wife" and "husband" in any legislation, including that dealing with creation of marriage, in a manner that extended those terms to members of the same sex.[134]

c) United States

97. Marriage remains a preferred legal status in American law. Again, common-law relationships of the opposite sex are not fully equated with married relationships for legal benefits and obligations. No matter what legislative amendments have been made by legislatures throughout the years, the one constant has been the legal definition of marriage as between one man and one woman.[135] In fact, the federal *Defense of Marriage Act* and thirty-three similar state statutes expressly state that marriage means the legal union of one man and one woman as husband and wife.[136]

98. Only two states – Hawaii and Vermont - have enacted legislation to provide same-sex couples, amongst others, with many economic and social benefits parallel to those enjoyed by married couples. In Hawaii, any two unmarried persons who are prohibited from marrying each other can create a registered legal partnership that provides them with some limited 'spousal' benefits and obligations, such as survivorship benefits, health-related benefits

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[132] ***Affidavit of Stephen Cretney***, Respondent's Record, Volume 1, Tab A, p. paras. 45-47
[133] ***Affidavit of Stephen Cretney***, Respondent's Record, Volume 1, Tab A, p. para. 59
[134] ***Affidavit of Stephen Cretney***, Respondent's Record, Volume 1, Tab A, p. para. 64
[135] ***Affidavit of Sanford Katz*** Respondent's Record, Volume 4, Tab H, p. para. 60;
[136] ***Affidavit of Sanford Katz***, Respondent's Record, Volume 4, Tab H, p. paras. 46 to 48

and jointly-held property claims.[137] This includes same-sex couples as well as other, non-conjugal relationships, such as brothers by blood or adoption who want to be treated as reciprocal beneficiaries.

99. In Vermont, same-sex couples can have their relationship recognized as a civil union. By virtue of being members of a civil union, they are granted all of the same benefits, protections and responsibilities under law that are granted to spouses in a marriage.[138] Vermont also created a new legal relationship called "reciprocal beneficiaries" in its *Act Relating to Civil Unions.* The reciprocal beneficiaries regime applies to two persons who are blood-relatives or related by adoption and it allows them to establish a consensual reciprocal beneficiaries relationship. Pursuant to this relationship each reciprocal beneficiary has the benefits and responsibilities of a spouse in the specific enumerated areas only.[139]

d) The Netherlands

100. With respect to the Netherlands, it is important to note that *An Act Opening Up Marriage* maintains some basic differences between same-sex and heterosexual marriages. Firstly, same-sex marriage will have no consequences in relation to the law of filiation based on descent. This means that a child born into a same-sex marriage will not have an automatic filiation link to both spouses. Only the biological parent will have a direct filiation link to the child and his/her partner must adopt the child, with the consent of the other biological parent. Foreign same-sex couples are not able to marry in the Netherlands, unless one of them has a place of residence in the country. Dutch same-sex marriages will have no effect outside domestic law, according to its legislation.[140]

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[137] ***Affidavit of Sanford Katz***, Respondent's Record, Volume 4, Tab H, p. paras. 33 and 56, Exhibit 8. The relevant legislation is the 1997 *Reciprocal Beneficiaries Law* (1997 Hawaii Laws Act 383), Haw.Rev. Stat. Ann. Ch.572C.

[138] ***Affidavit of Sanford Katz*,** Respondent's Record, Volume 4, Tab H, p. 1248,Exhibit 9, s. 1204 of the Act.

[139] ***Affidavit of Sanford Katz*,** Respondent's Record, Volume 4, Tab H, p. 1262, Exhibit 9, , s. 1301 of the Act. Those areas are hospital visitation and medical decision-making; decision-making relating to anatomical gifts and disposition of remains; power of attorney for health care; patient's bill of rights; nursing home patient's bill of rights; abuse prevention. The Act also states that "This chapter shall not be construed to create any spousal benefits, protections or responsibilities for reciprocal beneficiaries not specifically enumerated herein" (s. 1301(b))

[140] ***Affidavit of Bea Verschraegen***, Respondent's Record, Volume 3, Tab G, pp. 881-882, paras. 227-228.

101. On cross-examination, the Applicants' expert, William Eskridge, noted that the Netherlands is an exceptional country which gradually went from decriminalization of homosexual conduct to, years later, same-sex marriage.[141]

e) Nordic Countries

102. The Nordic countries, with the exception of Finland, have introduced domestic partnership regimes for same sex couples that allow them to register their relationships and receive most of the benefits and obligations of marriage. For example, Denmark was the first European country to introduce registered domestic partnership legislation for persons of the same sex. Significantly, Denmark's *Act* on registered partnerships does not apply to persons of opposite sex, as they have the option of marrying, nor does it expressly require that the partners live together in a sexual relationship. Although many of the rights and obligations of marriage are accorded to same-sex couples in a registered partnership, this type of civil union differs from marriage in that: it expressly prohibits the adoption of a child by both partners (although as of January 1st, 2000, a registered partner can adopted the child of his or her partner unless the child comes from a foreign jurisdiction); the couple is excluded from the provisions on joint-care and custody of children; paternity and pregnancy legislation does not apply; and church weddings are limited to persons of the opposite sex.[142]

103. The registered partnership regimes in the other Nordic countries are largely patterned on the Danish model.[143]

f) Germany

104. In Germany, *The Act to End Discrimination against Same-Sex Couples: Lifetime Partnerships* established a form of registered domestic partnership that is substantially similar to those of the Nordic countries. Germany's life-time partnerships are limited to persons of the same sex who chose to enter into such a partnership and be bound by its mutual obligations and

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[141] ***Cross-Examination of William Eskridge,*** Respondent's Record, Supplementary Volume 2, Tab N, p. 50, lines 6-14

[142] ***Affidavit of Bea Verschraegen***, Respondent's Record, Volume 3, Tab G, pp. 825-828, paras. 113 - 120

[143] *Ibid*, paras. 127-129, 134-137, 138-140. See attached Appendix – Tab 1

rights. Some aspects of the legislation include the following. The couple can choose a joint name or the name of the other partner or they can each keep their own name. They must decide on a property regime that will apply to them upon separation otherwise a "separation of property regime" will automatically apply and the parties remain the owners of the goods they had before the partnership or acquired later. A surviving spouse has intestate succession rights and the life-partner becomes a family member of the other partner and is considered an "in-law" relative of that family.[144]

g) France

105. In 1999, France introduced the concept of a "Pacte civil de solidarite" ("PACS") into its family and marriage law regime. The PACS is a contract between two adult persons of opposite *or* same-sex, which is entered into by a joint declaration and registration at the Court of first instance where the couple resides. Once registered, the PACS has effects towards third parties. For example, there is joint and several liability towards third parties for all debts incurred for the expenses of everyday life and the joint home. PACS- partners owe each other mutual help and assistance, details of which must be provided for in the PACS-agreement.[145]

106. The property regime of PACS is different from that of married persons. A PACS can be dissolved by mutual agreement, by unilateral decision or by death. The importance of PACS lies in the application of detailed tax and social security law. These provisions, unlike the registered partnerships in the Nordic countries, only apply when the parties contractually agree on the PACS. It is important to note that there are three legal forms of recognized relationships in France: marriage, which is preserved exclusively for opposite-sex couples; the cohabitation of two persons of opposite or same sex; the PACS of two persons of opposite or same sex.[146]

h) Conclusion

107. To summarize, throughout the world few countries have enacted legislation designed to benefit same-sex couples. Canada has done much more than the majority of

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[144] ***Affidavit of Bea Verschraegen***, Respondent's Record, Volume 3, Tab G, pp. 844-845, paras. 151 - 153
[145] ***Affidavit of Bea Verschraegen***, Respondent's Record, Volume 3, Tab G, pp. 847-848, paras. 158 - 160
[146] ***Affidavit of Bea Verschraegen***, Respondent's Record, Volume 3, Tab G, pp. 848 – 849, paras. 160-162

countries in this area and the Netherlands is the sole country that legally recognizes same-sex unions as marriages.

PART II –THE LAW

A. SECTION 15(1) – THE DEFINITION OF MARRIAGE IS NOT DISCRIMINATORY

108. Section 15(1) of the *Canadian Charter of Rights and Freedoms* provides as follows:

> Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

109. In *Law v. Canada,* the Supreme Court of Canada restated the law and established new guidelines for the interpretation and analysis of a claim under s. 15(1) of the *Charter.* Not all legal distinctions will result in discrimination, even where those distinctions are based on enumerated or analogous grounds. The s.15 analysis ultimately determines whether there is a conflict between the purpose or effect of the impugned law and the purpose of s. 15(1):

> *The existence of a conflict between the purpose or effect of an impugned law and the purpose of s.15(1) is essential in order to found a discrimination claim. The determination of whether such a conflict exists is to be made through an analysis of the full context surrounding the claim and the claimant.*[147]

110. Accordingly, a court is required to make the following three broad inquiries in determining a discrimination claim under s. 15(1):

> 1. Does the impugned law (a) draw a formal distinction between the claimant and others on the basis of one or more personal characteristics, or (b) fail to take into account the claimant's already disadvantaged position within Canadian society resulting in substantively differential treatment between the claimant and others on the basis of one or more personal characteristics?

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[147] ***Law v. Canada (Minister of Employment and Immigration),*** [1999] 1 S.C.R. 497 at 549. See also p. 531, para. 55 (For the guidelines, see p. 529, para. 51)

2. Is the claimant subject to differential treatment based on one or more enumerated and analogous grounds?; and

3. Does the differential treatment discriminate, by imposing a burden upon or withholding a benefit from the claimant in a manner which reflects the stereotypical application of presumed group or personal characteristics, or which otherwise has the effect of perpetuating or promoting the view that the individual is less capable or worthy of recognition or value as a human being or as a member of Canadian society, equally deserving of concern, respect, and consideration?[148]

1. Previous Supreme Court Jurisprudence on s. 15(1) of the *Charter* in Relation to Sexual Orientation

111. Whether the essence of marriage –its opposite-sex nature – is discriminatory, is an issue the Supreme Court of Canada has never confronted. In *Egan v. Canada,* the Supreme Court addressed a claim of discrimination brought by same-sex partners who claimed that the restriction of benefits available under the *Old Age Security Act* to "spouses", defined as persons of the opposite sex, was discriminatory. The challengers in *Egan* argued that the distribution of benefits was discriminatory because it included married couples and opposite-sex common law partners, but excluded same-sex partners whose relationships were said to be comparable to the others. The decision was split, but even those justices who would have extended same-sex benefits wrote:

> *...This case cannot be taken as constituting a challenge to either the traditional common law or statutory concept of marriage. ....Thus any contention that this appeal will affect the societal concept of marriage can be set aside, (per Cory, J).*[149]

112. The same is true of *M. v. H.*, where Cory J wrote: "The question to be resolved is whether the extension of the right to seek support to members of unmarried opposite sex couples infringes s. 15(1) of the *Charter* by failing to provide the same rights to members of same sex couples."[150]

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[148] ***Law v. Canada****, supra,* at 549, para. 88; see also at 531, para. 55
[149] ***Egan v. Canada****, supra,* per Cory J., at 583, para. 127. See also p. 596, para. 166
[150] ***M v. H***, [1999] 2 SCR 3, at 28, para. 8. See also at 83, 26, 49, 49, paras. 134, 2, 55, 52

113. Both *Egan* and *M v. H* concerned the extension of benefits to common law couples, and the extent to which same-sex couples shared certain needs with their opposite sex counterparts. The societal concept of marriage does not, in itself, determine the distribution of benefits, as the Justices who were prepared to extend benefits made clear in both cases. In these court decisions, it was proposed that the dignity interest of same sex couples could be fully met by extending benefits based on similar need. This was accomplished without altering the existing meaning of marriage that simply describes the heterosexual relationship common to all societies. It is that societal concept, captured in the common law definition of marriage, which is now in issue in this case.

2. Caselaw Concerning the Definition of Marriage

114. Two cases have examined the constitutionality of the definition. The Ontario Divisional Court upheld the opposite sex common law definition of marriage in *Layland v. Ontario (Minister of Consumer & Commercial Relations).*[151] In the companion case to this case presently before this Court, *EGALE* v. *Canada (Attorney General),* the Supreme Court of British Columbia held that the definition of marriage does not breach the constitutional rights of same-sex couples.

3. Contextual Approach

a) Introduction

115. An allegation of a breach of section 15 of the *Charter* requires the Court to apply a contextual approach to the analysis. A purposive and contextual approach is necessary to permit the realization of the remedial purpose of the equality guarantee and avoid the pitfalls of a formalistic or mechanical approach. The contextual approach requires a careful assessment of the claim and the claimant and, in particular, the government action, the legislation or, in the case of marriage, the common law alleged to be the source of the discrimination.[152]

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[151] ***Layland v. Ontario (Minister of Consumer & Commercial Relations)*** (1993), 14 O.R. (3d) 658, leave to appeal the Court of Appeal granted, but not pursued; ***Egale v. Canada*****,** *supra*

[152] ***Law v. Canada****, supra,* at 549, para. 88; ***Lovelace v. Ontario*** [2000] 1 S.C.R. 950 at 984, para. 54; Also 2000 SCC 37; See also: ***R. v. Turpin***, [1989] 1 S.C.R. 1296, p. 1331-32, paras. 43 - 46

b) Historical, Social, Religious and Anthropological Role of Marriage

116. The key to the s.15 analysis is the understanding that marriage predates both legislation and the common law.[153] The courts have discerned, from time to time, what the legal meaning of marriage is – usually for a limited purpose as in *Hyde v. Hyde*.[154] Also, the law has attached consequences to its membership, but that process is independent from determining the meaning of marriage itself. Marriage is an historical and worldwide institution that possesses an inherent meaning, and enjoys both universal and nearly universal features. It is not, and has never been, simply a creature of the civil or common law. The context in which the meaning of marriage must be assessed, therefore, includes the historical, religious, sociological and anthropological roots of the institution, which define its essence. That essence has a meaning and life, independent of the law, which makes it unique as a subject of *Charter* scrutiny. It is this unique essence, captured by the common law in ascribing meaning to it, that is in issue in this litigation.[155]

117. The primary premise of the Applicants' argument is that the purpose of marriage is to achieve public and state recognition of a committed and intimate adult relationship, with the distribution of benefits and obligations in recognition of that relationship. The evidence and legal context reveals, however, that this does not define, and never has defined, the purpose and role of marriage, generally. State recognition of a committed intimate adult relationship is only a collateral or secondary effect of marriage in relation to opposite sex couples.

118. The evidence related to the role and purpose of marriage demonstrates, instead, that marriage has always been understood and defined as a very particular kind of relationship -- a monogamous heterosexual union. This understanding is ancient (it pre-dates the common law and even Christianity), nearly universal (across religions and cultures) and it remains current. It is demonstrated by the following.

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[153] See section 15 (1) – ***The Definition of Marriage is not discriminatory***, *supra*

[154] ***Hyde v. Hyde*** (1866), L.R. 1 P & D 130

[155] ***Hyde v. Hyde****, supra*, at 133; ***Affidavit of Katharine Young***, Respondent's Record*,* Volume 2A, Tab F, pp. 685-687, paras. 1 – 7; ***Affidavit of Stephen Cretney***, Respondent's Record*,* Volume 1, Tab A, pp.7-16, paras. 12- 27,; ***Affidavit of John Witte, Jr***., Respondent's Record*,* Volume 1, Tab B, pp. 169, 173-191, paras. 4, 12 – 46; ***Affidavit of Robert Stainton***, Respondent's Record*,* Volume 5, Tab K, pp.1483-4, 1504, paras. 19 – 20, 60

119. The classical Greeks and Romans understood and wrote about marriage as the natural union of a man and woman for life, for the purposes of procreation, pooling of labour and companionship, and the rearing of children.[156]

120. The classical formulations of marriage as a monogamous heterosexual union took place in the context of a larger literature that accepted, and even celebrated, other kinds of sexual norms and practices, including homosexual relations. The particular understanding of the goods and goals of marriage itself, however, was overwhelmingly in relation to a heterosexual union, that distinguished from other kinds of relations, albeit ones that were tolerated and accepted. It was this particular understanding of the role and purpose of marriage that would later become a touchstone for the Western Christian understanding of, and formulations about, that institution.[157]

121. The law governing the formation of marriage itself, as distinct from the law governing the legal consequences of marriage, was long regarded, within the West (including in the United Kingdom and its colonies) as a matter exclusively for the Church. The Church, both within the Catholic and Protestant traditions, understood marriage as a monogamous, heterosexual union with social, economic and contractual dimensions. Marriage was regarded by the Church in the British Isles (and its colonies) in the past millennium as a relationship between a man and a woman only.[158]

122. In the 19th century, when courts in the United States began to define the basic law of marriage, the institution was defined as a consensual, permanent, monogamous union between a fit man and a fit woman of the age of consent, designed for mutual love, support, comfort, the begetting and rearing of children, and the protection of those children. In the United Kingdom, notwithstanding the fact that since the 19th century the State has assumed responsibility for controlling by legislation access to marriage, legislation was based on the assumption that the "marriage" in question was the institution defined by the Christian Church and its canon law, namely a permanent monogamous heterosexual union. In Canada the debate over the division of

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[156] ***Affidavit of John Witte Jr***., Respondent's Record, Volume 1, Tab B, pp. 173, 174-178, paras. 12, 15 – 21
[157] ***Affidavit of John Witte Jr***., Respondent's Record, Volume 1, Tab B, p. 178, para. 22
[158] ***Affidavit of John Witte Jr***., Respondent's Record, Volume 1, Tab B, pp. 173, 179-191, paras. 12; 23–46; ***Affidavit of Stephen Cretney***, Respondent's Record, Volume 1, Tab A, pp. 7, 12-13, 15-16, paras. 12, 20–22, 25–26

powers in the *British North America Act* makes clear that it was the intention of legislators that the rules and prescriptions set out by the Church to which the marrying parties belonged would govern the nature of the relationship.[159] Hence, its heterosexual nature was assumed.

123. A cross-study of the major world religions (Judaism, Confucianism, Hinduism, Islam and Christianity) and the worldviews of small-scale societies reveals a universal pattern of marriage that has existed historically and across cultures. This universal pattern demonstrates that the *raison d'être* of marriage has been to complement nature with culture for the sake of reproduction and the intergenerational cycle. Across world religions and throughout small-scale societies, the universal norm of marriage has been a culturally approved opposite sex relationship intended to encourage the birth (and rearing) of children. While there may be a few examples of "same sex marriages" from past societies, there has never been a same sex marriage norm. From a cross-cultural perspective, "same sex marriage" is without a commonly understood meaning, as it lacks the universal or defining feature of marriage according to religious, historical and anthropological evidence. [160]

124. The law in the West has embraced, in part, an "Enlightenment" understanding of marriage, which gives increasing emphasis to a contractual perspective of marriage, that is, a voluntary agreement struck between a man and a woman who want to come together into an intimate association. It is this conception which underpins the Applicants' argument that marriage is simply the recognition of a committed, intimate relationship between adults. The evidence demonstrates, however, that this perspective complements, but does not displace, the existing Western (and universal) understanding about the utility and teleology of marriage as a uniquely monogamous and heterosexual union. This is evidenced, in part, by the universal

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[159] ***Affidavit of John Witte Jr***., Respondent's Record, Volume 1, Tab B, pp. 195-6, para. 56; ***Affidavit of Sanford Katz,*** Respondent's Record, Volume 4, Tab H, pp. paras. 18-21, (American law); ***Affidavit of Stephen Cretney***, Respondent's Record, Volume 1, Tab A, pp. 7-16, paras. 12 – 26, (U.K. law); ***Parliamentary Debates on the subject of the Confederation of the British North American Provinces***, 3rd session, 8th Parl. Respondent's Record, Volume 6, Tab 03, pp. 1830, 1836-1840 see for example comments of Hon. Sir. E.P. Tache and Sol.Gen. Langevin.

[160] ***Affidavit of Katharine Young***, Respondent's Record, Volume 2A, Tab F, pp. 699-723, paras. 26 – 71

recognition (with the exception of one country) of marriage as the union of a man and woman to the exclusion of all others. [161]

125. The fundamental meaning or essence of marriage can only be derived in reference to its history, including its religious origins. It is not merely a legal status, or a creature of the common law, but a social practice and institution that has an independent and ordinary meaning which is universally understood - that is the union of a man and woman. While it may be possible to redefine the term legally, to do so would be to create an inconsistency with its essence as a social institution and a phenomenon of ancient and continuing relevance.[162]

4. The s.15 Tests

a) No Differential Treatment

126. As the contextual discussion of marriage above demonstrates, marriage exists, and is universally understood, in relation to heterosexual unions and heterosexual unions only. The purpose of the law in relation to marriage is to give legal recognition to that primordial, socially defined, unique relationship, namely, a monogamous heterosexual relationship, in order to give collateral effect to it through the distribution of benefits and obligations flowing from the relationship. Contrary to the Applicants' argument, the purpose of marriage is not to recognize any consenting, committed relationship between adults, although it may have that collateral effect for relationships captured within its meaning.[163]

127. Within the context outlined, any distinction in this case is one this is inherently tied to the concept of the institution (or definition, per se) and is not a distinction envisaged by the meaning of s.15 of the *Charter*. The *Charter* guarantees the equal *protection and of benefit*

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[161] ***Affidavit of John Witte Jr***., Respondent's Record, Volume 1, Tab B, pp. 196-199, paras. 57 – 62; ***Affidavit of Bea Verschraegen***, Respondent's Record, Volume 3, Tab G, pp. 883, paras. 230-233 (the exception referred to is the Netherlands which, as a result of a particular culture and legal developments, is an anomaly), see Conclusions, at paras. 230 - 233)

[162] ***Affidavit of Robert Stainton***, Respondent's Record, Volume 5, Tab K, pp. 1483-4, 1502-1505, paras. 19, 20, 54 – 64

[163] ***Affidavit of Katharine Young***, Respondent's Record, Volume 2A, Tab F, pp. 685-687, paras. 1 – 7; ***Affidavit of Stephen Cretney***, Respondent's Record, Volume. 1, Tab A, pp. 7-16, paras. 12- 27; ***Affidavit of John Witte, Jr***., Respondent's Record, Volume 1, Tab B, pp. 169, 173-191, paras. 4, 12 – 46; ***Affidavit of Robert Stainton***, Respondent's Record, Volume 5, Tab K, pp. 1483-4, 1504, paras. 19 – 20, 60

of the law -- not the right to nomenclature. That two persons of the same sex cannot obtain the label of "married" does not constitute a distinction based on a personal characteristic. Rather, it relates to the incapacity of their unique relationship to meet the core, opposite-sex, definitional requirements of marriage. In this sense, by capturing the essence of marriage, the common law recognizes the inherent differences between opposite sex and same sex relationships. This is analogous to the point made by the Supreme Court in *Vancouver Immigrant Society* that where a distinction relates to the nature and purpose of activities, rather than the personal characteristics of the claimants, s. 15 is not engaged. [164]

128. The distribution of benefits and obligations may attach to the relationship of marriage. But, clearly, it is not the definition of marriage, as captured in the common law that is the source of the differential treatment.[165] Rather, the source is the individual provisions of legislation (which may each be remedied as appropriate) that provide the authority for the distribution of government benefits and obligations.

129. Since the recent enactment of the *Modernization of Benefits and Obligations Act,* same-sex couples receive substantive equal benefit and protection of the federal law. Same sex couples are, insofar as benefits are concerned, no longer in a disadvantaged position within Canadian society as compared to opposite-sex couples.[166] To the extent that distinctions in treatment between married couples and non-married common-law couples remain, they are insignificant. Alternatively, they may be considered and, if not justified, remedied by individual amendment to provide immediate access to any residual benefits and protections engaged by marriage.

130. In the context of our federal system and division of powers, each level of government has responsibility for different aspects of the matters that affect human relationships. Within their sphere of exclusive jurisdiction, the provinces may effect the distribution of benefits and obligations based upon marital status. In practice, they have done so because each

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[164] ***Vancouver Society of Immigrant Women v. Canada,*** [1999] 1 S.C.R. 10 at para. 208
[165] ***Miron v. Trudel,*** *supra,* at para 158
[166] ***Modernization of Benefits and Obligations Act*** S.C. 2000, c. 12, Respondent's Record, Volume 10, Tab P 32, pp. 3257-3420

relationship attracts legal consequences. It makes sense to organize such legislative provisions around existing social structures as a matter of practical convenience.

131. The Supreme Court of Canada has made it clear that differential treatment that discriminates in the distribution of benefits or obligations to couples, based upon sexual orientation, whether or not they are married, is contrary to s. 15(1) of the *Charter*. Governments, whether provincial or federal, are presently required to respond to this finding.[167] But any discrimination that may flow from gaps in provincial legislation cannot result in a determination that the law in the federal sphere is unconstitutional.[168]

132. Therefore, the definition of marriage does not draw a distinction between the Applicants and others in society based on a personal characteristic. Nor does it fail to take into account any disadvantaged position of the Applicants within Canadian society that results in substantively differential treatment between them and others on the basis of one or more personal characteristics.

b) Enumerated or Analogous Grounds

133. If this Court finds that the meaning of marriage subjects the Applicants to differential treatment, then the Attorney General of Canada concedes that the sexual orientation of the Applicants, which is an analogous ground under s. 15(1) of the *Charter*, is the basis for such differential treatment.

c) Discrimination

134. The third step of the *Law v. A. G. Canada* test is crucial to the determination of whether suspect "distinctions amount to discrimination in the particular circumstances of the case."[169]

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[167] ***M v. H**, supra*. at 199, paras. 356-357; ***Egan v. Canada**, supra*, at 592, para. 155; see also, the section entitled "***The Legal Context***", subsection "***Legislation within the Scope of the Provincial Governments***", supra

[168] See, by analogy, ***Egan v. Canada***, *supra*, at 592 and 614, paras. 155 and 204, where the Court held that the existence of relevant provincial legislation could not remedy an unconstitutional gap in federal legislation.

[169] ***Corbière v. Canada***, [1999] 2 S.C.R. 203, at 216-217, paras. 7 and 8, per McLachlin and Bastarache JJ.

135. Equality does not necessarily require identical treatment. The essence of equality is the accommodation of differences. Iacobucci J made it clear in *Law v. A.G. Canada* that:

> *...there may be cases where a law which applies identically to all fails to take into account the claimant's different traits or circumstances, yet does not infringe the claimant's human dignity in so doing. In such cases, there could be said to be substantively differential treatment between the claimant and others, because the law has a meaningfully different effect upon the claimant, without there being discrimination for the purpose of s.15(1).*[170]

136. The meaning of marriage seeks to recognize, by its very essence, a particular kind of relationship, albeit one that corresponds to the characteristics of a majority, as opposed to a minority group. Nevertheless, as a definition, it remains uniquely suited to, and corresponds with, the particular needs of that group. It would represent a formalistic approach to equality to require identical treatment with respect to the definition of marriage (when such treatment would be inappropriate in the context).

d) Withholding a Benefit

137. The onus rests on the Applicants to prove that the substantively differential treatment first, imposes a burden or withholds a benefit, and second, does so in a manner that demeans his or her dignity. Each of these aspects will be addressed in turn.

138. The restriction of marriage to the union of opposite sex couples does not withhold a benefit on the basis of a stereotypical application of presumed group or personal characteristics. In fact, the meaning of marriage, per se, is distinct from the right to benefits or obligations that may flow from that status pursuant to other provisions that must be independently scrutinized for their compliance with the *Charter*.

139. The evidence establishes that the word "marriage" has an inherent meaning and an accepted definition in common parlance as the legal and state-sanctioned union of an opposite

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[170] ***Law v. Canada****, supra,* at para. 86. See also ***Andrew v. Law Society of British Columbia,*** [1989] 1 S.C.R. 143 at 168.

sex couple. It enjoys universal features that reveal it as, among other things, an opposite sex relationship intended to support the natural possibility of the birth (and rearing) of children.[171]

140. The question, therefore, is whether the fact that the definitional description of marriage does not encompass same sex couples, who are not contemplated within its meaning, can constitute a withholding of a benefit, that gives rise to a breach in s. 15(1) of the *Charter*? It defies any proper application of the *Charter* to accept that the ordinary meaning of a word, in itself, provides a benefit when it is purely descriptive of that which it seeks to describe. In the same way, can it constitute discrimination to withhold the descriptor "male" from a female if "male" is considered a beneficial label in a particular context (e.g. on written application forms)? Is it necessary to term a female as male to accord females the same benefits and obligations as male? The deprivation of a unique descriptor that cannot apply, according to its essence and ordinary meaning, does not withhold a benefit in a manner envisioned by s. 15(1) of the *Charter*.

e) Human Dignity

141. Human dignity may be described by a broad spectrum of ideas. However, the concept relevant to the engagement of s.15(1) has been defined as "essential human dignity" or "innate human dignity."[172] The Supreme Court has indicated that this concept of "human dignity" does not relate to the status or position of the individual in society, *per se*, but rather concerns the manner in which the individual *legitimately* feels when confronted with a particular law." [emphasis added][173] As a result, a "reasonable person" standard, from the perspective of the claimant, is imposed.[174] However, this standard requires an *objective* element as well as a subjective element, in order to meet the burden that "essential human dignity" is harmed. Clearly, every *Charter* claimant feels subjectively aggrieved in the circumstances of his/her case, but this measure of harm to dignity would render an unworkable analysis and untenable results in s.15 cases.

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[171] ***Affidavit of Robert Stainton***, Respondent's Record, Volume 5, Tab K, pp. 1483-4 , paras. 18, 19, 20; ***Affidavit of Katharine Young***, Respondent's Record, Volume 2A, Tab F, pp. 699-723, paras. 26 – 71
[172] ***Law v. Canada****, supra,* at 528, para. 48
[173] ***Law v. Canada****, supra,* at 530, para. 53
[174] ***Law v. Canada****, supra,* at 533, paras. 60-61

142. In the broad social and historical context relating to the institution of marriage, the essential human dignity of couples in a same-sex relationship is not engaged by the inapplicability of marriage to their circumstances, when their subjective claim is viewed from an objective perspective.

143. Even if it could be said that the withholding of the label of marriage, by itself, was a deprivation of a benefit under s. 15(1) of the *Charter*, the onus remains on the Applicants to establish that the deprivation would otherwise have the effect of perpetuating a view that any individual is less capable or worthy of recognition or value as a human being, or as a member of Canadian society, equally deserving of concern, respect and consideration.[175] Once again, the anecdotal evidence of individual claimants, asserting that they feel less worthy as a consequence of the definition of marriage, cannot meet the objective standards necessary to support the *Charter* claim.[176] Similar assertions by other of the Applicants' witnesses, based on alleged expertise in these matters, are little more than argument and add no weight to the claim. The Applicants have not discharged the onus.[177] On the parallel proceeding to this case in British Columbia, Pitfield J. determined that:

> *"the issue before the court has nothing to do with the worth of any individual whether his or her preference is for a same-sex or opposite-sex relationship."*

i) Disadvantaged Group

144. Gay and lesbian people have been recognized as a disadvantaged group in Canada. While pre-existing disadvantage/ vulnerability/ stereotyping of an affected group may often be an indicator that the impugned differential treatment is discriminatory, these factors are not determinative of discrimination. As Iacobucci J. observed in *Law*, "There is no principle or evidentiary presumption that differential treatment for historically disadvantaged persons is discriminatory."[178] But, in any event, the limit in the definition of marriage is not based on

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[175] ***Law v. Canada***, supra,
[176] In fact, many of the Applicants already describe themselves as "married" and as having been through a type of "marriage ceremony" that has granted them societal recognition and acceptance.
[177] ***Egale v. Canada*** at para 212
[178] ***Law v. Canada****, supra,* at 536, para. 67; See also: ***Winko v British Columbia*** [1999] 2 S.C.R. 625

stereotype – a misconception[179] – but on the naturally occurring bases of the institution the definition represents.

ii) Correspondence with Needs, Capacities and Circumstances of Applicants and Others

145. To the contrary of any presumption of disadvantage, the Supreme Court of Canada has recognized that distinctions drawn upon enumerated and analogous grounds have the potential to correspond with actual need, capacity, or circumstance. As a general matter, legislation (or in the case of marriage, a societal institution) that excludes a claimant group, because its provisions do not accord with the actual needs, capacity, or circumstances of that group, yet treats them in a manner that respects their value as human beings and members of Canadian society, will be less likely to have a negative effect on human dignity.[180] A distinction may not be discriminatory if it fits the needs, capacities and circumstances of the current recipients, but does not fit those of the claimants.

146. In *Law*, for example, the *Canada Pension Plan* excluded the claimant, a widow, from survivor benefits based on the fact that she was under the age of 35 at the time of the contributor's death. Although the legislation was clearly based on age, an enumerated ground, the Court held the distinction was constitutionally valid. It accurately (and without stereotype) reflected the ability of the claimant to survive without benefit of a spousal survivor's pension created to meet the needs of and to ameliorate the conditions of the elderly recipients. Therefore, despite the prohibited ground of discrimination, the legislation created a valid distinction, as age is generally a good indicator of an individual's capacity to re-enter and succeed in the workforce.[181]

147. This analysis was developed further in *Granovsky v. Canada*. Granovsky had suffered a temporary disability and alleged that his resultant exclusion from access to certain benefits under the provisions of the *Canada Pension Plan* infringed his s. 15(1) rights. The cumulative provisions of the *CPP* provided benefits for disabled claimants when they suffered

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[179] ***Law v. Canada***, *supra,* at 535, para. 64
[180] ***Law v. Canada***, *supra,* at 537-538, paras. 69, 70; ***EGALE v. Canada*** at para 212
[181] ***Law v. Canada***, *supra,* at 555-561, paras. 95 – 106.

from "permanent" disabilities. The Court found no breach of s. 15(1), since Granovsky's circumstance did not correspond to the purposes of the legislation, (--while the permanently disabled fit precisely within the legislation's purpose--) and his exclusion did not result in the demeaning of his dignity:

> *While Parliament was not required to create the CPP benefit scheme in the first place, having decided to do so, it must not confer benefits in a discriminatory manner contrary to s. 15(1). Here, in contrast[to Vriend], the design of the CPP contribution rules…are directed to a narrow class of persons seeking a narrowly restricted benefit. In Vriend, the underinclusion was designed to reinforce the rejection of gays and lesbians as individuals equally deserving of respect. No such lack of respect or loss of dignity is manifested in the CPP drop-out provision, which is simply tailored to correspond to the requirements of the pension benefit itself, none of which are challenged by the appellant.* [182]

148. The focus of this part of the *Law* test is whether the distinction complained of in the instant case corresponds to the actual needs, capacities and circumstances of the Applicants, on the one hand, and the program (legislation or in the case of marriage, social institution) on the other. If the Applicants' situation does not fall within the purpose and nature of the impugned provision, and the exclusion does not demean dignity, a finding of discrimination is unlikely.

149. As overwhelmingly demonstrated by the evidence, and discussed in paragraphs x to x above, marriage is universally understood, across time, societies and legal cultures, as an institution to facilitate, shelter and nurture the union of a man and woman who together, uniquely, have the natural capacity to have children. The greatest number of children continue to be both the offspring of marriage and brought up by their parents. [183] Consistent with the findings in *Granovsky*, the purpose inherent in defining marriage as an opposite sex institution, first in its social context and then in its legal one, was never designed to imply that same-sex couples are not deserving of respect; no such lack of respect is manifested by the definition, *per se*. Rather, because opposite-sex couples have this additional procreative role, the choice is offered to them to formalize their relationship as marriage or live common-law.

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[182] ***Granovsky v. Canada,*** [2000] 1 S.C.R. 703 at 739, para. 69 and at 736, para. 61; See also: ***Lovelace****, supra*. at 994, para. 75; see also ***Re Therrien***, 2001 SCC 35, para 132 where the Court found that a recommendation for dismissal from judicial office because the judge had a pre-existing criminal record was not discriminatory because integrity was of the essence of judicial office..

[183] See: Para. 2 *infra*.

150. Apart from history and sociology, the Supreme Court of Canada has also looked to the legal context of an impugned law to determine whether the legal assumptions made in it are acceptable, even where those assumptions touch on a ground of discrimination. In *Law*, the Court decided that one reason why the claimant should not have felt demeaned, objectively, by an age distinction in a survivor's pension was because the impugned law used age as a factor in labour force attachment in a way that had been accepted by the courts and in its own jurisprudence.[184]

151. With respect to the legal context, the essential elements of the institution of marriage are also revealed by the legal rules governing it. The courts have developed a complex web of rules for determining whether any particular relationship accords with the essential elements of the institution of marriage. Many of these rules flow from the recognition of the opposite sex nature of marriage. One such rule relates to the ability to annul a marriage for failure to consummate it through "ordinary and complete intercourse". [185] Age is not a bar to an action of nullity for non-consummation.[186] Similarly, the legal rules concerning consanguinity and incest are, in part, concerned with preventing genetic problems.[187] All of these rules support the natural procreative capacity of marriage, without intruding into privacy.[188] These rules are irrelevant to a same-sex couple that must *always* look outside itself for the possibility of children.

152. Examining the way the courts have developed rules relating to the consummation aspect of the capacity to marry demonstrates the fundamental nature of the heterosexual characteristic of the institution. These rules would require radical change and perhaps they would have to be completely repealed in order to include same-sex couples, since their continued application only to opposite sex marriages might well be discriminatory.[189] The same might be true of the consanguinity rules that would be less relevant to same-sex relationships.

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[184] ***Law v. Canada****, supra,*at 558, para. 101, per Iacobucci J.
[185] ***Corbett v. Corbett***, [1971] Probate Reports at 83, 107.
[186] ***Heil v. Heil***, [1942] S.C.R. 160, at 164, per Tachereau J.; ***Miller v. Miller***, [1947] O.R. 213 at 215 and 222; ***Corbett v. Corbett***, [1971] Probate Reports 83 at 105, 107; ***Gajamugan v. Gajamugan*** (1979), 10 R.F.L. (2d) 280 at 282, 283; ***Jones v. Jones***, [1948] O.R. 22 at 25, 26, 27 per Hogg JA; ***Mourant v. Mourant*** (1952), 6 W.W.R. (NS) 96 (re age); H.R. Hahlo, ***Nullity of Marriage in Canada*** (1979), at p. 35-41
[187] ***R v. CJF***, [1996] NSJ No. 79 (NSCA) and ***R v. MS***, [1996] BCJ No 2302 (BCCA), para. 50 leave to appeal refused [1997] SCCA No. 500.
[188] ***Egan v. Canada*****,** *supra.,* per La Forest J at 537, para. 25 and ***Hawkins***, *supra,* at 1043, para. 49
[189] ***EGALE v. Canada*** at paras. 93-97

153. In part, the Applicants seek to be married to be recognized as married couples. However, the institution, because of its inherent heterosexual social and legal nature, is not suited to confer recognition on relationships that are essentially different. In *EGALE v.* Canada, Pitfield J. stated:

> *"other than the desire for public recognition and acceptance of gay and lesbian relationships there is nothing that should compel the equation of a same-sex relationship to an opposite-sex relationship when the biological reality is that the two relationships can never be the same. That essential distinction will remain no matter how close the similarities are by virtue of social acceptance and legislative action.*[190]

154. While marriage might have the ancillary effect of providing recognition and encouragement for the union of committed heterosexual adults, this is not one of its purposes. Instead, marriage is understood throughout time and cultures as an institution designed to meet the unique needs, capacities and circumstances of opposite sex couples and their children – namely, an institution that brings together the two complementary sexes and provides a supportive environment for the procreation and rearing of successive generations.[191] In that sense, marriage is, uniquely, the descriptor of that institution through which heterosexual persons relate to each other, their children and society.

155. Providing recognition and encouragement for a union, the essence of which is the commitment of two adults, including same-sex unions, is an important and worthy goal. The extension of marriage, however, is not the means the *Charter* requires to provide this recognition, as it does not correspond in any way with the purpose or characteristics of marriage.

156. La Forest J. recognized the unique history and purpose of the marital relationship (although it was not itself in issue) in *Egan*:

> *My colleague Gonthier J. in* Miron v. Trudel *has been at pains to discuss the fundamental importance of marriage as a social institution, and I need not repeat his analysis at length or refer to the authorities he cites. Suffice it to say that marriage has from time immemorial been firmly grounded in our legal tradition, one that is itself a reflection of long-standing philosophical and*

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[190] ***EGALE v. Canada*** at para 210
[191] ***EGALE v. Canada,*** at para 204-205

> *religious traditions. But its ultimate raison d'être transcends all of these and is firmly anchored in the biological and social realities that heterosexual couples have the unique ability to procreate, that most children are the product of these relationships, and that they are generally cared for and nurtured by those who live in that relationship. In this sense, marriage is by nature heterosexual. It would be possible to legally define marriage to include homosexual couples, but this would not change the biological and social realities that underlie the traditional marriage.*[192]

157. The marital relationship has particular needs with which legislators, custom and judge-made law have long been concerned.[193] The Supreme Court of Canada, in *Andrews v. Law Society of British Columbia* stated "… for the accommodation of differences, which is the essence of true equality, it will frequently be necessary to make distinctions."[194]

158. This is a case where the difference is pre-existing and not a creation of law, rather, the law has adopted it. It does not demean anyone to be treated differently where there is no "fit" between the nature and essence of marriage and those who, consequently, do not come within the definition.

iii) Amelioration of Conditions of a Group

159. Marriage is a deep-rooted social institution. As recognized by the Supreme Court, in the quotation from *Egan*, above, it is of fundamental importance to all societies, providing a means, albeit not the only one, of serving and recognizing the realities of the goal of nurturing and protecting children. As the vast majority of children continue to be the natural offspring of their parents' heterosexual relationships, these relationships are recognized as having special needs, with which the legislatures and courts have justifiably been concerned. As Justice La Forest wrote in *Egan*, with respect to the support given under legislation to heterosexual couples who bring up the vast majority of children, "…this support does not exacerbate an historic disadvantage; rather it ameliorates an historic economic disadvantage."[195]

iv) Nature and Scope of the Interest Affected by the Impugned Law

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[192] ***Egan v. Canada****, supra,* at para 21, 22
[193] ***Egan v. Canada****, supra, at* 536, paras. 21, 22 (see also at 539, paras. 27, 28).
[194] ***Andrews v. Law Society of British Columbia***, [1989] 1 S.C.R. 143, at 169, per McIntyre J.
[195] ***Egan v. Canada***, *supra* at 539, para. 28

160. In the *Modernization of Benefits and Obligations Act*[196], Parliament recently amended 68 federal statutes. The first group of amendments extended to same-sex couples those benefits and obligations already available to married and common-law opposite sex-couples. The second group of amendments extended to all unmarried couples, whether same or opposite-sex, some benefits and obligations that were available only to married couples. The third group of amendments repealed or modified provisions where benefits and obligations could not be extended without creating an illogical result (for example, dower rights). As a result, all couples, regardless of sexual orientation, receive equal treatment in the provision of federal benefits and obligations under 68 statutes.

161. In sum, the definition of marriage does not infringe s. 15(1) of the *Charter* using the analysis outlined in *Law,* because the distinction it draws does not amount to "discrimination". While the definition distinguishes on the basis of sexual orientation, the distinction is not the product of stereotypical categorizations or assessments of the relative worth of individuals. Instead, marriage differentiates only on the basis of capacity or need, and thus it does not come within the range of invidious distinctions which s. 15(1) was designed to eliminate.

B. SECTION 7 OF THE *CHARTER*

1. General

162. The definition of marriage is not a manifestation of the direct state action required to engage the rights protected by s. 7 of the *Charter*.[197] But, in any event, the inability of the Applicants to marry is not an interference with those liberty or security rights protected by s. 7 of the *Charter*.

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[196] ***Modernization of Benefits and Obligations Act***, Respondent's Record, Volume 10, Tab P 32

[197] ***New Brunswick (Minister of Health and Community Services) v. G****,* [1999] 3 SCR 46, p. 79, para. 65, per Lamer CJ.; ***Blencoe v. British Columbia (Human Rights Commission),*** [2000] 2 S.C.R. 307, at 338, para. 46, per Bastarache J. Three judges decided that the contractual requirement that a city employee live in the city breached the liberty right in *Godbout v. Longueuil (City),* [1997] 3 S.C.R. 844, but could not attract a majority.

163. The constitutional right to liberty may include the right of individuals to make decisions of fundamental importance free from state interference in the administration of justice[198]. However, in this case, the Applicants have the freedom to choose their partners and relationships. They do not seek freedom from state interference in a fundamental personal choice of relationship. Rather, they demand that the state take positive action in their private lives to give legal effect to their choice.[199]

2. Psychological Security

164. While the Applicants suggest that the definition of marriage engages the s.7 right to psychological security of the person, the Supreme Court has held that the security interest is engaged by a psychological threat only in limited instances. Specifically, the impugned state action must engage the justice system and directly interfere with one's psychological integrity in a serious way. In the context of this case, applying s.7 in the broad manner suggested by the Applicants leads to the concern expressed by Lamer C.J. in *New Brunswick (Minister of Health and Community Services) v. G.(J.):*

> *It is clear that the right to security of the person does not protect the individual from the ordinary stresses and anxieties that a person of reasonable sensibility would suffer as a result of government action. If the right were interpreted with such broad sweep, countless government initiatives could be challenged on the ground that they infringe the right to security of the person, massively expanding the scope of judicial review, and, in the process, trivializing what it means for a right to be constitutionally protected. As in the case of the liberty interest, the Applicants are not seeking freedom from some direct state interference in a matter that would cause excessive psychological stress to the person of reasonable sensibility, such as the state attempting to remove the children from the guardianship of the parents. Rather, they seek to have the State take positive action in their relationships as described above.* [200]

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[198] ***Blencoe v. British Columbia*** *, supra,*at 340, para. 49, per Bastarache J.
[199] ***EGALE v. Canada,*** at paras 144-155
[200] ***New Brunswick (Minister of Health and Community Services) v. G.(J) [J.G.]***, *supra*, at 77, paras. 59 and 64-66

165. Any stress resulting from the inability to marry does not meet the above-noted standard set by the Court.[201] That the concept of marriage is limited by its inherently opposite-sex nature does not reflect a circumstance in which something has been taken away from the Applicants or interfered with by the State. The context bears no resemblance to cases where the state removes a child from his or her parents and, consequently, pries into the intimacies of a particular parent-child relationship.[202] Even in the case of the parent and child relationship, the right is not engaged where the child is sentenced to jail, conscripted into the army or even killed through the negligence of an official;[203] instances where the relationship is severed without examining the merits of a specific parent-child relationship within the justice system.

166. Section 7 does not protect the individual from the ordinary stresses of government action:

> *For a restriction of security of the person to be made out, then, the impugned state action must have a serious and profound effect on a person's psychological integrity. The effects of the state interference must be assessed objectively, with a view to their impact on the psychological integrity of a person of reasonable sensibility. This need not rise to the level of nervous shock or psychiatric illness, but must be greater than ordinary stress or anxiety.*[204]

167. Further, there must be a real "likelihood" of interference with one's integrity. It does not extend to protection from any speculative or potential psychological harm.[205]

3. Section 7 Limits – Principles of Fundamental Justice

168. Section 7 does not protect against the breach of other *Charter* rights and freedoms; otherwise the content of the other *Charter* rights would be subsumed by it, potentially

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[201] ***EGALE v. Canada***, at para 154
[202] ***New Brunswick***, *supra,* at 79, para. 64
[203] ***New Brunswick***, *supra,* at 79, para. 63
[204] ***New Brunswick***, *supra*, at 77, para. 60
[205] ***Singh v. M.E.I.*,** [1985] 1 S.C.R. 177 at 207-208, per Wilson J.; ***R. v. Morgentaler,*** [1988] 1 S.C.R. 30 at 56-57, *per* Dickson C.J.C.

trivializing them.[206] Section 7 does not protect free-standing rights to dignity, reputation or freedom from stigma.[207]

169. Even in the event that the Court finds the definition of marriage, simply by its inherent opposite-sex nature, engages the liberty and security interests of the Applicants, their rights under s.7 are not breached. The right to life liberty and security of the person *is not absolute*, but is limited to protection from those governmental actions that do not accord with the principles of fundamental justice.

170. Moreover, the words "principles of fundamental justice" *cannot be given any exhaustive content or simple enumerative definition,* but will take on concrete meaning as the courts address alleged violations of s.7.[208]

171. The principles of fundamental justice must be found in the basic tenets of our legal system. A common law rule by itself is not enough. The principles should be ones on which there is some social consensus that they are vital or fundamental to our notion of justice. They must be more than vague generalizations, but be capable of being identified with some precision and applied to yield an understandable result. They must also be legal principles. In discerning these principles it is helpful to look at the common law, not simply to extend old prohibitions, but to understand the rule in question and the principles underlying it.[209] The common law recognizes things and institutions by their essential characteristics. In the case of marriage, the courts have recognized that one of the essential elements of marriage, as virtually universally known, is that it consists of a man and a woman[210]. Similarly, it also recognizes who is a "woman" for the purpose of marrying a man by observing essential characteristics.[211]

172. In a case such as this, outside the context of criminal or administrative sanctions, it is more difficult to test and ascertain the principles of fundamental justice that apply. The Supreme Court found a similar difficulty in the *Rodriguez* case, where the blanket prohibition of

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[206] ***New Brunswick,*** *supra,* p. 77, para. 59
[207] ***Blencoe***, *supra,* at 355, para. 80
[208] ***Re: B.C. Motor Vehicle Act***, [1985] 2 S.C.R. 486 at at 513, per Lamer J.
[209] ***Rodriguez v. British Columbia (Attorney General)***, [1993] 3 SCR 519, at 591, paras 142 to 144, per Sopinka J.
[210] ***Hyde v. Hyde****, supra.,* ***Re North and Matheson*** (1974), 52 DLR (3d) 280 (Man.Co.Ct.)
[211] ***Corbett,*** *supra*., at 106

assisted suicide was also challenged as a violation of s.7 rights. The claim was the prohibition was arbitrary or unfair, in that it was unrelated to the state's interest in protecting the vulnerable, and was lacking a foundation in the legal tradition and societal beliefs represented by the prohibition.[212] The Court rejected this claim. But before it could do so, considering the legal difficulty of the claim, the Court looked to numerous categories of evidence to provide the proper contextual approach to the s.7 analysis. The same considerations should apply in this case.

4. Contextual Factors

i) The Social, Legal and Historical Common Law Context

173. Throughout the entire history of Western society, from a social and legal perspective, marriage has remained exclusively defined as the relationship of one man and one woman to the exclusion of all others, with the limited exception of the Netherlands.[213] The depth of this history on all fronts, as explained in the Facts section of this argument,[214] is the foundation for this concept that cannot be ignored. Its virtual universality is a factor that is compelling by itself. It speaks volumes about the fundamental nature of the institution in society,[215] which must be considered as an important contextual factor.[216]

ii) International Legislation

174. As outlined in great detail earlier, internationally –with one limited exception in the Netherlands– marriage is universally reserved for the relationship between an opposite-sex couple. Where a legislative approach has been taken to address the issue of same-sex relationships, the response has been the same: marriage remains exclusively for opposite-sex couples, while same-sex couples have the opportunity to benefit from a broad variety of alternate regimes. Some countries provide registration schemes applying exclusively to same-sex couples,

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[212] ***Rodriguez v. British Columbia (Attorney General)***, *supra,* at 595, para. 149, per Sopinka J.
[213] As noted in **Part I – The Facts ,**with respect to the Netherlands, there is different treatment between opposite-sex and same-sex marriage.
[214] See the sections entitled ***The Broad Context***, and ***The Legal Context***, above
[215] ***EGALE v. Canada*** at paras. 207, 214
[216] ***Rodriguez v. British Columbia (Attorney General)****, supra*

while all unmarried couples, regardless of sexual-orientation, may take advantage of other schemes. However, not one of these regimes provides an expanded definition of marriage.[217]

iii) Court Decisions in Other Jurisdictions

175. The issue in this case has been litigated in the states of Hawaii and Vermont and in a lower court in Alaska. While the Courts found the laws of those states to be a violation of either state or federal constitutional rights in the circumstances of their law, the courts did not require the definition of marriage to be expanded. The Hawaii Supreme Court stated in *Baehr v. Lewin* that redress of any deprivation of benefits "is a matter for the legislature" and that such benefits can be conferred "without rooting out the very essence of legal marriage"[218] Similarly, the Vermont Supreme Court in *Baker v. Vermont* stated that while the plaintiffs were entitled to obtain the same benefits and protections afforded to married opposite-sex couples, it did "not purport to infringe upon the prerogatives of the Legislature to craft an appropriate means of addressing its constitutional mandate."[219]

176. In each case the remedial options were left to the legislatures and in each case the legislative response was a clear repudiation of an expanded definition of marriage. Indeed, in both Hawaii and Alaska a constitutional amendment was effected limiting marriage to opposite-sex couples.[220] However, in Hawaii and Vermont, comprehensive schemes were enacted to grant same-sex couples many of the same benefits that might flow to married couples.

177. In Hawaii, the *1997 Reciprocal Beneficiaries Law* granted some marital benefits to certain dependent relationships, including same-sex couples.[221] The legislature in Vermont enacted the *Act Relating to Civil Unions* which mirrors the same economic, social and legal benefits, protections and responsibilities that married persons have in Vermont.[222]

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[217] ***Affidavit of Bea Verschraegen***, Respondent's Record, Volume 3, Tab G, pp. paras. 105, 108, 193 233.,
[218] ***Affidavit of Sanford Katz***, Respondent's Record, Volume 4, Tab H, pp. paras. 31-32;***Baehr v. Lewin*** 852 P. 2d 44 (Haw. 1993), at 1142
[219] ***Affidavit of Sanford Katz***, Respondent's Record, Volume 4, Tab H, pp. paras. 34-37
[220] ***Affidavit of Sanford Katz***, Respondent's Record, Volume 4, Tab H, pp. 1087, 1090, paras. 33, 40
[221] ***Affidavit of Sanford Katz***, Respondent's Record, Volume 4, Tab H, pp. 1087, 1097-1098, 1241-1244, paras. 33, 56, Exhibit "8"
[222] ***Affidavit of Sanford Katz***, Respondent's Record, Volume 4, Tab H, pp. 1088-1089, 1098, 1245-1269, paras. 36, 37, Exhibit "9"

iv) Consensus of Canadians

178. While the consensus of Canadians is never determinative of an issue, widely-held opinions in matters such as this give an indication of the values that are ingrained in our society. Through successive polls taken by well-respected polling organizations, a majority of Canadians demonstrate a belief that the benefits enjoyed by married couples should be shared by same-sex couples. However, in the single poll that squarely asked the question at issue in this case, the overwhelming majority of Canadians (67%) agreed that the definition of marriage should remain as the union of one man and one woman.[223]

5. Summary

179. As in the *Rodriguez* case, the contextual approach and analysis regarding s. 7 applies with equal result. The definition of marriage is neither arbitrary nor unfair, but is founded in our societal beliefs and legal traditions. This conclusion is based on the fact that this relationship between a man and a woman has been and remains a fundamental unit for the possibility of having and raising children within it and, therefore, has an important social purpose.[224] The principles of fundamental justice may be concerned with more than process, but they still must be "fundamental" in the sense that they would have general acceptance among reasonable people.[225] With respect to the opposite-sex essence of marriage, there is almost complete unanimity in our legal tradition and societal beliefs in Canada - and around the world - about this essential rule.

180. Although the s.7 analysis may be applied to the issues of this case, albeit with some difficulty, the exclusive essence of the marriage rule raises issues that should be more specifically dealt with in the equality analysis rather than a balancing of interests under s.7.[226]

C. SECTION 2: FREEDOM OF CONSCIENCE AND RELIGION, FREEDOM OF EXPRESSION, FREEDOM OF ASSOCIATION

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[223] ***Cross-Examination of John Fisher***, Respondent's Record, Supplementary Volume 2, Tab L pp. 39, Q. 114-115 and pp. 17-18, Exhibit "3"
[224] ***Rodriguez v. British Columbia (Attorney General),*** *supra*, 594, para. 147
[225] ***Rodriguez v. British Columbia (Attorney General)***, *supra*, at 594, para. 174
[226] ***Philippines v. Pacificador*** (1993), 14 OR (3d) 321 (CA) leave to appeal dismissed.

1. Section 2(a): Freedom of Religion

181. Freedom alone has been characterized by the Supreme Court of Canada as the absence of coercion or constraint. If a "person is compelled by the state or the will of another to a course of action or inaction which he would not otherwise have chosen, he is not acting of his own volition and he cannot be said to be truly free."[227] Freedom of religion in s.2(a) of the *Charter* encompasses absence of coercion or constraint in relation to the right to manifest religious beliefs and practices. These freedoms might require positive state action only in those rare cases where such action is necessary to protect the freedom itself, for example, where action may be required to remove constraint.[228].

182. MCCT complains that the current legal definition of marriage in Canada breaches religious freedom, as the state "purports to extend the fiat of traditional churches into MCCT's sanctuary by refusal to recognize marriages that conform to the doctrine of MCCT while honouring the marriage doctrine of those traditional churches through state recognition." MCCT also complains that the recognition of another church's marriage ritual provides an "endorsement" of the legitimate status of that church legally and socially over another. This claim misconceives the interests engaged and protected by s. 2(a).

183. In *Big M Drug Mart*, the Supreme Court elaborated upon the core value underlying the s. 2(a) freedom:

> *The values that underlie our political and philosophic traditions demand that every individual be free to hold and to manifest whatever beliefs and opinions his or her conscience dictates, provided inter alia only that such manifestations do not injure his or her neighbours or their parallel rights to hold and manifest beliefs and opinions of their own. Religious belief and practice are historically prototypical and, in many ways, paradigmatic of conscientiously-held beliefs and manifestations and are therefore protected by the Charter... It may perhaps be that freedom of conscience and religion extends beyond these principles to prohibit other sorts of governmental involvement in matters having to do with religion. For the present case it is sufficient in my opinion to say that whatever else freedom of conscience and religion may*

[227] ***R. v. Big M Drug Mart Ltd.***, [1985] 1 S.C.R.295 at 336-337, para. 95; See also ***Delisle v. Canada,*** [1999] 2 S.C.R. 989, at 1014, para. 26

[228] ***Haig* v. *Canada*** [1993] 2 S.C.R. 995, at 1033, para. 66 *et seq*

> *mean, it must at the very least mean this: government may not coerce individuals to affirm a specific religious belief or to manifest a specific religious practice for a sectarian purpose*[229]

184. The MCCT describes itself as a Christian church whose membership includes gay and lesbian persons, although not exclusively. The law does not prefer any other religion over MCCT's to the extent that civil recognition is given to unions based on the legal definition of marriage. The law does not distinguish between persons on the basis of religion. The law affects same-sex couples who may be of any religious or agnostic affiliation.

185. The main point, however, is that granting a civil sanction of "marriage" to opposite-sex couples union does not coerce any individual to affirm a specific religious belief or practice. Moreover, there is no sectarian *purpose* to the limitation in the legal definition of marriage[230]. As a result, the application of s. 2(a) to the context of this case is misguided and the interests protected by it are not engaged.

186. Section 2(a) of the *Charter* prevents state interference with an individual's practice of religion, not an individual's right to exact concessions of recognition or endorsement of his religious practice from the state.[231] The religious practices of the Applicants or members of the MCCT congregation are not affected by state coercion resulting from the legal definition of marriage. In contrast to the laws against polygamy,[232] there is no legal bar to religious formalization of the unions of same-sex couples. The government has not restricted or sought to interfere with MCCT's decision to celebrate unions of same-sex couples as "marriages" within their church. Indeed, in the MCCT's words, "their marriages were recognized as real marriages by themselves, their families, their friends and their Church."[233] Thus, the Applicant's statement that "the state is coercing MCCT into denying a religious ceremony to its members" is simply not true.[234]

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[229] ***R. v. Big M Drug Mart Ltd***., *supra*, at 346-347, para. 123
[230] *Ibid.*
[231] ***Adler v. Ontario,*** [1996] 3 S.C.R. 609, per Sopinka, J., at 702 – 703, para. 175; and McLachlin, J. at 713.
[232] See for example, section 293 of the ***Criminal Code of Canada,*** R.S. 1985, c.C-46, s.1
[233] **MCCT's factum**, p.2, para.1.
[234] **MCCT's factum,** p.55, para.127.

187. Not all civil marriages are recognized by religious institutions, just as not all religious marriages can be solemnized as a civil marriage under Canadian law.[235] While the definition of marriage may hold religious significance to some Canadians, it does not follow that Canada is, therefore, obliged to give recognition to all religious definitions of marriage. Failure to provide state recognition through civil recognition of all forms of religious marriage does not constitute coercion within the meaning of s. 2(a). This case is not at all analogous to *Big M Drug Mart*, where the Supreme Court of Canada found that the *Lord's Day Act* constituted a clear form of coercion upon non-Christians by imposing, through the state's power, a positive limitation upon an individual's right to work based upon an explicitly Christian understanding of a religious day of rest.[236]

188. What is being sought here, instead, is a positive state act endorsing MCCT's religious practice by according same-sex unions civil recognition as "marriages". This is analogous to the claim made in *Adler v. Ontario* where the Supreme Court considered whether Ontario was obliged by s. 2(a) to provide public funding to foster and facilitate religious education for all diverse religious groups in the province. The Court rejected the claim on the grounds that s. 2(a) enshrined no right to positive state facilitation of religious practice or belief:

> ***failure to act in order to facilitate the practice of religion cannot be considered state interference*** *with freedom of religion. The fact that no funding is provided for private religious education cannot be considered to infringe the appellants' freedom to educate their children in accordance with their religious beliefs where there is no restriction on religious schooling. ...* ***there are many spheres of government action which hold religious significance for religious believers. It does not follow that the government must pay for the religious dimensions of spheres in which it takes a role****. If this flowed from s. 2(a), then religious marriages, religious corporations, and other religious community institutions such as churches and hospitals would all have a Charter claim to public funding. The same could also be said of the existing judicial system which is necessarily secular. The appellants' argument*

[235] For example, as to the former, examples include civil marriages by Jewish partners where a "get" was not obtained, certain marriages where one or both of the partners was divorced, marriages between uncles and nieces (not prohibited as a civil marriage under the *Marriage (Prohibited Degrees) Act*), but may be by certain religions). As to the latter, examples include same-sex unions and marriage between adopted siblings (prohibited under the *Marriage (Prohibited Degrees) Act*), which may be recognized by certain religious institutions, but could not be solemnized as a civil marriage under Canadian law.

[236] ***R. v. Big M Drug Mart***, *supra* at 337, para. 95

> *would lead to an obligation by the state to fund parallel religious justice systems founded on canon law or talmudic law, for example.* ***These are clearly untenable suggestions****. (emphasis added)*[237]

189. The allegation that s. 2(a) requires the state to "endorse" the understanding of all religious groups about marriage on an equal basis confuses the s. 2 freedom analysis with the comparative analysis that occurs under s. 15(1). As Sopinka, J. noted in *Adler*[238], while *Big M Drug Marts* and *Edwards Books* were decided before s. 15(1) was in force, the Supreme Court has since made it clear that:

> *"… while the letter and spirit of the right to equality sometimes dictate a requirement of inclusion in a statutory regime, the same cannot be said of the individual freedoms set out in s. 2, which generally requires only that the state not interfere and does not call upon any comparative standard. In this case, the state has not restricted the appellant's freedom of association by creating a statutory regime which does not apply to him…*
> *It is because of the very nature of freedom that s. 2 generally imposes a negative obligation on the government and not a positive obligation of protection or assistance."*[239]

190. The application of s.2(a) to the circumstances of the MCCT is also inapt, as the definition of marriage does not protect one religion over another. Instead, it has the same impact on individual members of the MCCT as it does on same-sex couples belonging to other denominations that may celebrate or formalize their relationships within their own denominations.[240]

2. Equality and Discrimination on the Grounds of Religion

191. MCCT argues that the opposite-sex definition of marriage discriminates on the grounds of religion. This claim is based, primarily, upon MCCT's assertion that since the opposite-sex definition of marriage was historically linked to a traditional Christian understanding, it discriminates against those religious groups which no longer share that

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[237] ***Adler****, supra* at 702-703, para. 175
[238] ***Adler***, *supra*
[239] ***Delisle v. Canada***, [1999] 2 S.C.R. 989 at 1014, paras. 25-26
[240] See for example, ***Affidavit of Rabbi Elliot Stevens*****,** Record of the Respondent MCCT, Tab 5, for the limitation of the law regarding his Jewish Reform congregation.

understanding.[241] This allegation is misfounded. The opposite-sex definition of marriage reflects a widely held social understanding of a particular relationship in Canada which must be assessed on its own terms. The fact that it may or may not coincide with the religious views of some groups and not others, or that it may have historically evolved from a universally-held religious understanding, like, for example, the definition of many *Criminal Code* offences, does not render it suspect.[242]

192. Religious marriages and legal marriages have never been exactly the same for all religions.[243] If MCCT's claim of religious discrimination is correct, then in order not to discriminate on religious grounds, the state would be obliged to extend civil recognition of marriage to all alternative religious understandings of marriage, including polygamous marriages or marriages between siblings. This is, obviously, an untenable suggestion.[244]

3. Section 2(b): Freedom of Expression

193. The Applicants rely on the right to freedom of expression but are unable to cite any authority that states that 'freedom of expression' includes the right to form a relationship. The Supreme Court of Canada, ruled that, except in exceptional circumstances, freedom of expression requires only that Parliament not interfere.[245]. The desire to form a particular type of state-sanctioned relationship is not "expression" and this activity is not properly characterized as falling within "freedom of expression".

194. In *EGALE v. Canada*, Pitfield J. examined this issue and remarked that "the words 'freedom of expression' are not apt to describe the formalization of the legal relationship that is marriage whether same-sex or opposite sex". Furthermore, there is nothing to suggest that the opposite-sex definition of marriage precludes a same-sex couple from expressing their love and commitment to one another.[246]

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[241] **MCCT factum**, pp. 64-68, paras. 150 – 159
[242] See for example, ***Chamberlain v. Surrey School District,*** [2000] B.C.C.A. 519 at para. 40; ***Commission scolaire de Chambly v. Bergevin,*** [1994] 2 S.C.R. 525, at 540, para. 17
[243] For instance, Catholic doctrine prohibits marriage between first cousins, which is allowed by Canadian law.
[244] ***Adler***, , at 702 – 703, para. 175
[245] ***Delisle v. Canada***, [1999] 2 S.C.R. 989.
[246] ***EGALE v. Canada***, at paras. 132-133

4. Section 2(d): Freedom of Association

195. Both the Applicants and the MCCT claim that the exclusion of same-sex marriages from Canadian law infringes the freedom of association under s.2(d) of the *Charter*.[247] Like freedom of religion, freedom of association is primarily defined as a prohibition against state interference. "[E]xcept perhaps in exceptional circumstances, freedom of expression requires only that Parliament not interfere…[T]he same is true for freedom of association."[248] In the circumstances of the issue at hand, Parliament does not interfere with anyone's right to associate.[249] It determines instead, which unions it can recognize, for civil purposes, as "marriages". There are other recognized forms of association available to same-sex couples other than civil marriage, including the types of holy unions performed by the MCCT church. By way of corollary, the *Charter* does not require all religious affirmations or other practices to gain State sanction in order to accord with the ideals of freedom of association. By example, the consequences of communions, confirmations, bar mitzvahs and other similar religious ceremonies the like remain solely with the sphere of their respective religious institutions.

5. Conclusion

196. All of the fundamental freedoms guaranteed by section 2 of the *Charter* are ill suited for supporting claims for positive state action. In *Haig,*[250] the Supreme Court emphasized the importance of not unduly blurring the distinctions between different *Charter* guarantees. Where a group is seeking inclusion, it is preferable to address the issue within the boundaries of s.15, which is the real issue before this Court in this case.

D. CLAIM OF FREEDOM TO MARRY

197. MCCT argues that Canada is obliged to recognize same-sex relationships as marriage, based upon a "freedom to marry" in Canadian law. MCCT constructs the existence of this freedom in Canadian law upon the "common law" (namely, U.S. case law referred to by

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[247] ***MCCT factum***, p.41-42, paras. 95-96
[248] ***Delisle***, *supra* at 1016, para. 27; see also ***EGALE v. Canada*** at paras. 138-139
[249] ***R.v. MS,*** [1996] BCJ, leave to appeal refused [1997] SCCA 500
[250] ***Haig v. Canada,*** [1993] 2 S.C.R. 995at 1041, para. 85

Canadian courts), international law and sections 2(a), 2(d) and 7 of the *Charter*. The arguments with respect to s. 2(a) are, in effect, a repetition of the arguments made by MCCT on religious freedom, and are addressed above.[251] The response to the claims under s. 2(d) and s. 7 also addressed above.[252] The other bases are addressed immediately below.

1. Freedom to Marry as a Consequence of "Common-Law"

198. It is legally irrational to rely upon a "freedom to marry" argument in support of a right to demand recognition of same-sex unions as marriage. This is demonstrated by MCCT's reliance upon the United States Supreme Court decision in the 1967 decision of *Loving v. Virginia*. The issue in *Loving* was whether the state of Virginia's law which prohibited inter-racial marriages violated the 14th amendment of the U.S. Constitution. The court held that it did. Since *Loving* was decided 34 years ago, no state in the United States has provided for, or presently provides for, recognition of same-sex unions as marriages. Further, in the face of legal challenges brought before them, no U.S. Court has held that such recognition is required as a consequence of the 14th amendment, creating a "freedom to marry". Equally, no Canadian case relying upon *Loving*, asserts the existence of any such right.[253]

2. Freedom to Marry as a Consequence of International Law

199. The provisions found in international law referred to by MCCT, which enshrine the right of all men and women to marry, including Article 16 of the *Universal Declaration of Human Rights*, Article 23 of the *International Covenant on Civil and Political Rights* and Article 17 of the *American Convention on Human Rights,* do not protect a right of same-sex couples to marry. Such an interpretation is unreasonable, given that no country has ever provided for such a right until last year when one country, the Netherlands, did so. Such an interpretation is also untenable given the historical and grammatical context, as well as the connected right to "found a family". Indeed all of these provisions refer to the right of "men and

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253 ***R. v. Morgentaler***, [1988] 1 S.C.R. 20 at 169, para. 236; ***Miron v. Trudel***, [1995] 2 S.C.R. 418 at 448, para. 42 citing ***Loving v. Virginia***, 399 U.S. 1 (1967); ***McKinney v. University of Guelph*** (1987), 63 O.R. 92d) 1 at 44; ***EGALE v. Canada***, at paras. 50-52

women" to marry and to found a family and each proclaim that the family is the "natural and fundamental group unit of society". Clearly these provisions provide protection to men and women to enter into a consensual opposite-sex marriage, which has by its nature, the possibility of procreation.[254] The extension of marriage to same-sex unions was not envisioned when these provisions were framed and agreed upon, and same-sex unions are not within the intended ambit of their protection.[255]

200. Further, MCCT states that "the UNHRC (United Nations Human Rights Committee) has found that discrimination against gays and lesbians violates international equality rights guarantees".[256] Clearly, Canada agrees, but this does not address the issue before this court with respect to the opposite-sex definition of marriage. In fact, the only international law case cited by MCCT in relation to this statement, *Toonen v. Australia,*[257] does not even discuss marriage. In *Toonen*, the applicant challenged the Tasmanian laws criminalizing sexual contact between men on the basis that they violated the *International Covenant on Civil and Political Rights*. The State party of Tasmania and the Human Rights Committee conceded that the relevant sections of the Tasmanian Criminal Code violated this International Covenant. The issues related to the criminalization of sexual behaviour, not to marriage.

201. It should be noted that in *Rees v. United Kingdom*[258], the European Court of Human Rights held that there was no breach of the European Convention on Human Rights by the United Kingdom in its refusal to alter the Birth Register so as to indicate the post-operative sex of a transsexual. In regard to Article 12, which provides that men and women of marriageable age have the right to marry and to found a family according to the national laws governing the exercise of this right, the Court held that the right to marry refers to "the

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[254] ***Affidavit of Bea Verschraegen***, Respondent's Record, Volume 3, Tab G, pp. para. 95, 98

[255] For an interpretation of Article 16 of the Universal Declaration of Human Rights and Article 23 of the International Covenant on Civil and Political Rights, in reference to marriage and same-sex unions, see: ***Quilter et al. v. Attorney General (New Zealand)***. While Article 17 of the American Convention on Human Rights is not referred to in this judgment, it includes the restriction to "men and women", and further subjects the right to condition that the couple "meet the conditions required by domestic laws, insofar as such conditions do not affect the principle of nondiscrimination established in this convention."

[256] ***MCCT factum***, p.40, para.93.

[257] ***Toonen v. Australia*** Communication No. 488/1992, U.N. Doc. CCPR/C/50/D/488/1992 (1994) (Human Rights Committee).

[258] [1986] 9 E.H.R.R. 56 at paras. 49-50

traditional marriage between persons of opposite biological sex" and the "very essence of the right" was not impaired by the requirement of opposite biological sex.

202. The *Rees* decision was followed in *Cossey v. United Kingdom*[259] where the exclusively biological criteria for determining a person's sex for the purpose of marriage was challenged. The Court found that "the attachment to the traditional concept of marriage provides sufficient reason for the continued adoption of biological criteria for determining a person's sex for the purposes of marriage, this being a matter encompassed within the power of the Contracting States to regulate by national law the exercise of the right to marry". The *Rees* and *Cossey* decisions were again followed in *Sheffield and Horsham v. United Kingdom*[260] which adopted identical reasoning in finding that the term "marriage" is intended to mean the union of a man and a woman exclusively.

203. Consequently it is clear that there is no right to same-sex marriage at international law. Moreover, when interpreting Article 12 of the *European Convention on Human Rights*, the European Court of Human Rights has considered the developments in certain Contracting States which regard as valid a marriage between a male-to-female transsexual and a man. It found that such developments "cannot be said to evidence any general abandonment of the traditional concept of marriage…" and that in these circumstances "the Court does not consider that it is open to take a new approach to the interpretation of Article 12."[261]

E. SECTION 28: GENDER EQUALITY RIGHTS

204. Section 28 is not engaged in this case. The wording of s.28 does not support an argument that the section creates an independent *Charter* right that can be asserted by the Applicants and/or breached by the government. In *Morgentaler,* the Ontario High Court of Justice supported this interpretation:

> *Section 28 simply guarantees Charter rights equally to males and females; there is not she slightest suggestion that non-Charter rights are equally guaranteed to males and females. The Charter*

[259] [1990] 13 E.H.R.R. 622 at 642-643, paras. 43-46
[260] [1998] 27 E.H.R.R. 163 at 195, paras. 66-70
[261] ***Cossey***, supra, at 642, p. 46; ***Affidavit of Bea Verscraegen,*** Respondent's Record, Volume 3, Tab G, pp. para. 74

> *does not entrench any rights or freedoms other than the ones referred to in the document itself.*[262]

F. SECTION 1 OF THE *CHARTER*

1. Application of the s. 1 Analysis

205. If the definition of marriage constitutes a limit on the Applicants' *Charter* rights, the tests for justification under s. 1 must be applied to determine if that limit can be demonstrated as reasonable in a free and democratic society. Although the impugned definition of marriage is characterized as "common law", the s.1 analysis is as applicable to the common law as it is to legislative *Charter* violations.[263]

206. The Supreme Court has indicated clearly that, in dealing with what is exclusively a judge-made rule, a justification analysis along the lines of s. 1 must to be brought to bear. In *R. v. Robinson*, Lamer. CJ stated:

> *Since we are dealing with a judge made rule rather than with a legislative enactment, I am of the view that a strict application of the Oakes test (R. v. Oakes, [1986] 1 S.C.R. 103), and in particular of the proportionality prong of that test, is appropriate.*[264]

207. But, in any event, Parliament's *legislative* intent has been explicitly expressed. The common law definition of marriage has been, in effect, "prescribed by law", both directly, through recently enacted legislation, and by necessary implication, in longer standing statutory provisions based on this definition. Therefore, the full s.1 test applies to the determination of the definition's constitutional validity.

208. In *R. v. Therens* the Supreme Court ruled on what constitutes "law" for the purposes of a limit being "prescribed by law". LeDain J. held:

> *The requirement that the limit be prescribed by law is chiefly concerned with the distinction between a limit imposed by law and one that is arbitrary. The limit will be prescribed by law within the meaning of s. 1 if it is expressly provided for by statute or*

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[262] *R. v. Morgentaler* (1984), 47 O.R. (2d) 353 (H.C.J.) at para. 106 Q.L.; (1985), 52 O.R. (2d) 353 (C.A.) and [1988] 1 S.C.R. 30. And see ***EGALE v. Canada*** at paragraph 180.
[263] ***R. v. Oakes***, [1986] 1 S.C.R. 103; ***R. v. Robinson***, [1996] 1 S.C.R. 683
[264] R. v. Robinson

> *regulation, or results by necessary implication from the terms of a statute or regulation or from its operating requirements. The limit may also result from the application of a common law rule.*[265]

209. The meaning of marriage has been "expressly provided for by statute" by two recent federal enactments, namely the *Modernization of Benefits and Obligations Act*, [266] which reaffirms, the common law definition, and the *Federal Law - Civil Law Harmonization Act, No. 1,*[267] applicable in Quebec. The two statutes state, respectively:

> *For greater certainty, the amendments made by this Act do not affect the meaning of the word "marriage", that is, the lawful union of one man and one woman to the exclusion of all others.*
>
> -and-
>
> *Marriage requires the free and enlightened consent of a man and a woman to be the spouse of the other.*

210. The opposite sex meaning of marriage also results "by necessary implication from the terms of" statutes relating to marriage, or prohibited degrees of consanguinity, as well as divorce. It also results from the "operating requirements" of federal and provincial statutes[268] based on this same definition.

2. The s. 1 Tests

211. Section 1 of the *Charter* provides:

> *The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.*

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[265] ***R. v. Therens***, [1985] 1 S.C.R. 613, at 645, para. 56

[266] ***Modernization of Benefits and Obligations Act***, S.C. 2000,c. 12, s. 1.1, Respondent's Record, Volume 10, Tab P 32

[267] ***Federal Law-Civil Law Harmonization Act***, No. 1, S-4, c. 4, 2001

[268] ***Canada Evidence Act***, R.S. 1985, c.C-5, s. 4; ***Citizenship Act***, R.S. 1985, c.C-29, s, 11(2);
Marriage Act, R.S.O. 1990, c.M-3, s. 24(3) and R.R.O. Reg. 738, Form 3 Respondent's Record, Volume 11, Tabs. Q 49, Q 50
An Act to amend certain statutes because of the Supreme Court of Canada decision in M. v. H. S.O.1999, c. 6, Respondent's Record, Volume 12, Tab Q 60*;* ***Code civil du Québec/ Civil Code of Quebec***, L.Q./ S.Q. 1991, c. 64, Article 365;
Marriage Amendment Act, 2000, S.A. 2000, c. 3, s. 1(c.1), Respondent's Record, Volume 16, Tab T 18

212. The *Oakes* test for justifying legislation that *prima facie* infringes a *Charter* right was re-stated by Bastarache J. in *Thomson Newspapers Co. v. Canada (Attorney General)* [269] as follows:

> *In order to be sufficiently important to warrant overriding a constitutionally protected right or freedom, the impugned provision must relate to concerns which are pressing and substantial in a free and democratic society.*
> *The means chosen to achieve the legislative objective must pass a three-part proportionality test which requires that they be (a) rationally connected to the objective, (b) impair the right or freedom as little as possible, and (c) have deleterious effects which are proportional to both their salutary effects and the importance of the objective which has been identified as being of sufficient importance.*

a) Contextual Approach

213. In *Thomson Newspapers,* Bastarache J. held that the analysis under section 1 of the *Charter* will be shaped by the context of the impugned provision.[270] It is necessary therefore to examine the legislative context as this will inform "the type of proof which a court can demand of the legislator to justify its measures under section 1"[271] as well as "the degree of deference which the court should accord to Parliament's choice."[272]

214. The context in this case includes an examination of the evidence of the social and legal history of marriage[273] and its place as one of the foundational institution for Western society, and indeed, its universality. The evidence of its biological and social realities are also part of the context in which the state is justified in maintaining a distinct definition for this primordial and pre-legal institution.[274]

215. It is a fundamental principle of a democratic society that its values and priorities are mirrored by the legislative actions of its elected officials. Parliament has, on a number of

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[269] ***Thomson Newspapers Co. v. Canada (Attorney General),*** [1998]1 S.C.R. 877
[270] ***Thomson***, *supra,* at 939-946, paras. 87-95
[271] ***Thomson***, *supra.,* at 939, para. 88; see also ***EGALE v. Canada*** at para. 209
[272] ***M. v .H****., supra,* at 59-61, paras. 78-80*;* ***Thomson****, supra*, at 941-942 , para. 88, quoting McLachlin J. in ***RJR-Macdonald v. Canada (A.G.)***, [1995] 3 S.C.R. 199
[273] See sections "Anthropological and Sociological Evidence on Marriage" and "The Legal Context"
[274] ***EGALE v. Canada***, at paras. 204-205

occasions, confirmed that an important aspect of Canadian society is the institution of marriage.[275] This is an essential facet of the context in which this challenge is heard. Parliament, as reflector of its electorate and Canadian society in general, has determined that the essence of marriage is a union between one man and one woman. During the *Marriage Resolution* debate, parliamentarians asserted the important role marriage plays in our society.[276] During the *Modernization of Benefits and Obligations* debate, again, our elected representatives overwhelmingly supported the common law concept of marriage as being between one man and one woman.[277]

b) Pressing and Substantial Objective

216. When dealing with the justification for a common law rule generally, the task of the Court is to construe the overall objective of the rule that has been enunciated by the courts.[278] Parliament's support of a definition of marriage that includes a limitation in that it applies to opposite sex couples only is sufficiently important to warrant infringing the Applicants' constitutional rights.

217. Marriage is a foundational unit for society, and it effectively serves a number of important social functions. It brings together the two human sexes in a manner that reflects their complementary natures, and it is the institution within which procreation is a possibility and within which procreation generally occurs. As the core of one type of family unit, marriage benefits society at large, in that it has proven itself to be one of the most durable institutions for the organization of society, its continuity and the perpetuation of humanity.[279] The legitimacy of the legislation is beyond question.[280]

218. Marriage also serves as a model for the way in which society supports similar relationships, with appropriate and necessary distinctions, according to need and capacity.

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[275] *Section 1 Materials*, Vol. 1, tab7, Vol 2 tabs 8, 9, 11, 12
[276] Section 1 Materials, Vol. 2 tab 10
[277] *Section 1 Materials*, Vol. 2, tabs 11, 12,1 3
[278] ***R. v. Swain***,[1991] 1 S.C.R. 933, per Lamer C.J. at 981
[279] ***EGALE v. Canada*** at para. 207
[280] ***Ibid*** at paras. 209-211

219. The religious source of the definition of marriage does not render it a less important objective in a secular society. The courts have recognized that other institutions, with religious origins, remain important in a secular world. This is the case with religious holidays that are now accepted as part of the secular workplace cycle.[281] In a school system required to be secular, "Positions on moral issues should not be differentiated on the basis of their source in a religious or non-religious conscience."[282]

220. It follows that the Government of Canada must act to maintain the key societal institution of marriage as Canadians understand it, including the fundamental attributes of marriage that flow from its opposite-sex nature. These attributes form the underlying premise on which numerous federal, provincial and territorial laws are based.[283] (If any changes are needed, this is a case where the courts should defer to Parliament and the legislatures to undertake and address the choices and consequences that would result from a fundamental change to such a core institution.)

221. The importance of retaining the pre-legal definition of marriage[284] is strengthened by a single reality of the 21st century -- all jurisdictions in the world, with the sole exception of the Netherlands, define marriage in the same way. (Even in the Netherlands marriage for same sex couples is not absolutely identical in its effects as it is for opposite sex couples, given the inherent difference between these relationships regarding the possibility of children. Thus, a child born into a same sex marriage will not have an automatic filiation link to both spouses.)[285]

222. Moreover, Canada's international human rights obligations that inform the interpretation of what can constitute pressing and substantial s. 1 objectives[286] underscore the importance of marriage and also of the family as natural and fundamental units of society[287]. This is premised on the belief about the primary purpose of marriage as the union of a man and a

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[281] ***Commission scolaire regionale de Chambly v. Bergevin***, [1994] 2 S.C.R. 525, at 540, para. 17
[282] ***Chamberlain v. Surrey School District*** (1998), 168 D.L.R. (4th) 222, (B.C.S.C.), at 236, para. 40
[283] Statutory Materials, Tabs 14, 15, 16, 29, 39, 42
[284] ***Egan v. Canada***, supra at 536, para. ; ***EGALE v. Canada***, at para 208
[285] ***Affidavit of Bea Verschraegen***, Respondent's Record, Volume 3, Tab G, p. 882, para 227.
[286] ***Slaight Communications Inc. v. Davidson***, [1989] 1 S.C.R. 1038, per Dickson C.J. at pp. 1056-7, para. 23
[287]

woman, who have the unique natural capacity to procreate, and the consequent opportunity to raise children. In *Slaight Communications Inc. v. Davidson*, the Court found:

> *. . . Canada's international human rights obligations should inform not only the interpretation of the content of the rights guaranteed by the Charter but also the interpretation of what can constitute pressing and substantial s. 1 objectives which may justify restrictions upon those rights.*
> *and see*
> *In R. v. Keegstra Dickson C.J., in reference to the Slaight case stated:*
>
> [T]he international human rights obligations taken on by Canada reflect the values and principles of a free and democratic society, and thus those values and principles that underlie the *Charter* itself (*Reference re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313, per Dickson C.J., at p. 348). Moreover, international human rights law and Canada's commitments in that area are of particular significance in assessing the importance of Parliament's objective under s. 1. [288]

223. In the context of justifying an infringement of s. 2(b), the majority in *Slaight* made a point of noting that a value enjoying status as an international human right is generally to be ascribed a high degree of importance under s. 1 of the *Charter* (pp. 1056-57).

224. Canada is a signatory of the following international human rights statues:

> Universal Declaration of Human Rights, Article 16:
>
> (1) Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.
>
> International Covenant on Civil and Political Rights, Article 23:
> *(2) The right of men and women of marriageable age to marry and to found a family shall be recognized.*

225. The use of the plural "men and women" in the English context in these international conventions was commented upon by the New Zealand Court of Appeal in *Quilter et al. v. The Attorney-General of New Zealand*[289] where Keith J. stated:

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[288] ***R. v. Keegstra***, [1995] 2 S.C.R. 381, at 750, para. 67
[289] ***Quilter et. al. v. The Attorney-General of New Zealand,*** [1998] 1 N.Z. L. R. 523 at 563

> The explicit limiting reference to "men and women" is emphasized by the fact that throughout the other substantive provisions of the Covenant general wording is used to identify the beneficiary of the rights: everyone, anyone, (all) persons, no one…; If a further indication is needed that the right to marry is limited to opposite sex couples it appears from the French and Spanish texts of article 26 (and from the French text of the Universal Declaration) which refer in the singular to the right of a man and a woman to marry, thereby removing any possible semantic argument based on the use of the plural in the English context.

226. Thus, Canada's domestic law coincides with its international human rights obligations, in that both are based on the understanding that marriage has, amongst others, a biological purpose.

227. However, to say that marriage seeks to achieve a fundamentally important objective is not to deny that it may also be important to recognize, in specific circumstances, the claims of same-sex partners to equality of treatment with opposite-sex couples. As the *Charter* jurisprudence illustrates,[290] there are particular settings in which the failure to extend spousal benefits to same sex partners has been found to contravene s. 15(1), and the contravention has not been justified under s. 1. The present case differs from those situations in that here the Applicants seek to have their status assimilated and the label given to their relationship assimilated with that of opposite sex couples for all purposes, without further consideration of the context in which a specific claim to equality might arise, including that equal treatment can be extended without failing to appreciate the differences in the two relationships.

228. The common law meaning of marriage seeks to attain an objective that is pressing and substantial. While marriage has other purposes which are hardly unimportant – such as the provision of "emotional, psychological, social and material benefits", as the Applicants contend – they do not alone constitute the "ultimate *raison d'être"* of the challenged definition. Moreover, they may be realized by other means, which do not necessitate a fundamental change to this foundational unit of society.

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[290] For example, ***Knodel v. British Columbia (Medical Services Commission)*** (1991), 58 B.C.L.R. (2d) 356 (B.C.S.C.), at 365-392, paras. 36-179; ***Leshner v. Ontario*** (1992), 92 C.L.L.C. 16, para. 329 (Ontario Board of Inquiry).

c) Rational Connection

229. The objective of protecting and promoting marriage as the primary institution by which society maintains itself and the human species is logically served by supporting the definition of marriage as the union of one man and one woman. The definition is not "arbitrary, unfair or based on irrational considerations,"[291] but is instead rooted in biological, historical, sociological and legal reality. This is the rule in all other countries but one. The courts have been engaged in creating rules such as the nullity rules described earlier, in advancing these purposes. While it cannot be overlooked that medical technology makes it possible in some cases for lesbian partners to have children by means of artificial insemination, this still does not invest a lesbian couple with procreative capacity, as this method of reproduction inevitably requires the intervention of third parties. Therefore, it is not irrational to conclude that these relationships do not fit within the definition of marriage.

230. It is true, of course, that some opposite sex couples also have turned to artificial means of having children, although this would ordinarily be after medical technologies had been tried using reproductive material from the couple, such as *in vitro* fertilization. However, as La Forest J. observed in *Egan v. Canada,*[292] to exclude such couples from eligibility to marry would lead to procedures that were unnecessarily intrusive in terms of privacy concerns. Opposite-sex marriage represents the possibility of children, rooted in biological reality whether actualized or not.[293]

d) Minimum Impairment

231. This part of the *Oakes* proportionality test focuses on whether a right has been impaired to the least extent possible while still ensuring that the important governmental objective can be met. In *McKinney v. University of Guelph*, LaForest J. said the following:

> *The approach taken to these cases has been marked by considerable flexibility having regard to the difficulty of the*

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[291] ***R. v. Oakes****, supra*, at 139, para. 70
[292] ***Egan v. Canada****, supra*, at 538, para. 25; see also ***R v. Hawkins****,* [1996] 3 S.C.R. 1043, at 1074, para 49 where the Court rejected a change to the common law rule of spousal incompetency because it would be too invasive to inquire into the motives for a marriage.
[293] ***EGALE v. Canada***, at paras. 205-207

> *choices, their impact on different sectors of society and the inherent advantages in a democratic society of the legislature in assessing these matters. Implicit in earlier cases, this was expressly adopted in Irwin Toy Ltd. v. Quebec (Attorney General). There, the majority put it this way, at pp. 993-94:*
> *When striking a balance between the claims of competing groups, the choice of means, like the choice of ends, frequently will require an assessment of conflicting scientific evidence and differing justified demands on scarce resources. Democratic institutions are meant to let us all share in the responsibility for these difficult choices. Thus, as courts review the results of the legislature's deliberations, particularly with respect to the protection of vulnerable groups, they must be mindful of the legislature's representative function. For example, when "regulating industry or business it is open to the legislature to restrict its legislative reforms to sectors in which there appear to be particularly urgent concerns or to constituencies that seem especially needy" (Edwards Books and Art Ltd., supra, at p. 772).*
> *In short, as the Court went on to say, the question is whether the government had a reasonable basis for concluding that it impaired the relevant right as little as possible given the government's pressing and substantial objectives.*[294]

232. In the present case, there does not appear to be any other way to achieve Parliament's objective than by its support and recognition of the definition of marriage that is reflected in the common law and has been re-confirmed by statute.[295] While the Applicants' claim that same-sex relationships should be assimilated with opposite-sex marriages to serve important interests, this would not address the concern that such a change would virtually eliminate the "ultimate *raison d'être*" of marriage, the natural possibility of children.[296]

233. The Ontario Law Reform Commission appears to agree that the desirable policy course in these circumstances is not to extend the concept of marriage, thereby undermining its ultimate rationale, but rather to consider whether there might be a régime to suit the needs of gay and lesbian couples, and perhaps even non-conjugal, relationships. This has been accomplished elsewhere[297] and tends to confirm that there may well be more appropriate ways in which to

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[294] ***McKinney v. University of Guelph,*** [1990] S.C.R. 229, at 285-286
[295] ***EGALE v. Canada***, at para 211
[296] ***EGALE v. Canada*** at para 212
[297]

provide the benefits of legislative recognition and support same-sex couples and perhaps even support other kinds of enduring relationships.[298]

234. It is of course immediately apparent that the Applicants are urging this Court to apply the now rejected "similarly situated" test that proceeds on the basis that same sex relationships are just like opposite sex ones in all important respects. This serves the faulty basis for the Applicants' assertion that the only way to deal with this case is with an "across-the-board" declaration that extends the use of the term marriage.[299] However, it is not inevitable that all the legal consequences, rights and obligations that attach to the term marriage are also appropriate for same sex couples.[300] For that reason, it might well be more appropriate to deal with gay and lesbian relationships – and, indeed, perhaps even with other kinds of enduring relationships, whether of a conjugal nature or not – by some other means. Provincial "registered domestic partnerships," as the Ontario Law Reform Commission has recommended,[301] and as legislated by Nova Scotia[302], may be more appropriate than extending or disturbing the concept of marriage.

235. The means chosen by the government, sustaining the opposite sex meaning of marriage while extending equal treatment to same-sex relationships, infringes the Applicants' rights as little as reasonably possible. What the Applicants are denied is the formal recognition —the label "marriage" -- for their relationship. However, the Applicants have achieved the benefits that flow from marriage in both the public recognition of their relationships and in their receipt of almost all of the federal benefits and obligations of marriage through the passage of *The Modernization of Benefits and Obligations Act*.

e) Proportional to the Objective

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[298] See for example ***Vital Statistics Act***, N.S.R.S. 1989 ch 494, part 2 (2001) and ***Report On Recognition of Spousal and Family Status***, British Columbia Law Institute, November, 1998 in which a Domestic Partnership Act is proposed;
[299] ***EGALE v. Canada*** at para 210
[300] e.g. rules of nullity regarding consummation.
[301] **"*Report on the Rights and Responsibilities of Cohabitants under the Family Law Act*"**, Ontario Law Reform Commission, 1983, p. 53
[302]

236. On this branch of the s. 1 inquiry, the question is whether the deleterious effects caused by excluding same-sex couples from the definition of marriage are so severe that the common law rule cannot be justified by the purposes it is intended to serve.

237. The marginalization and historical disadvantage suffered by gay men and lesbians has not been caused by their legal incapacity to marry. The prejudice they have suffered has not been directed at them because they are not able to marry, but because of societal attitudes towards homosexuality. Further, the "material benefits" from which they have been excluded are not conferred by the common law, but by particular statutory régimes which operate in specific contexts. These benefits have now been provided federally to same-sex couples and to these couples in some provinces. Thus, the adverse effect of the challenged law is that it does not extend to same-sex relationships the identical recognition that is accorded to opposite-sex couples in relation to an institution that is by its nature, the union of individuals of the opposite sex.

238. The effect produced by the challenged law is relatively limited in comparison with the whole range of effects that are experienced by gays and lesbians on account of historical prejudice or the treatment afforded them by other laws which distinguish, directly or indirectly, on the basis of sexual orientation. In these circumstances, it is submitted that the limitation is proportional to the importance of the objective.

239. Lastly, there is proportionality between the effects of any infringement on the Applicants' *Charter* rights and the government's objective. The Applicants' *Charter* rights are possibly infringed only to the extent that the formal recognition or label of marriage is not available to them. However, when balanced against the potential detrimental effects of radically changing one of Canadian society's most deeply-rooted and fundamental institutions, within which the preponderance of Canadians bear and raise their children, the government's objective outweighs any detrimental effects on the Applicants.[303] There are also serious questions of whether the recognition that results from a heterosexual marriage can be transferred to same sex relationships.

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[303] ***EGALE v. Canada*** at para. 214

240. There is no proportionality in the prospect of radically changing the definition of marriage to include same sex couples when all the potential effects of doing so are unforeseeable.[304]

f) Other Free and Democratic Societies

241. Nowhere in the world, with the sole exception of the Netherlands, has marriage been changed to include a union of two persons of the same sex. On the contrary, in the United States of America, at least thirty-three state legislatures have either rewritten their marriage laws, or restated the definition of marriage, based on a heterosexual definition. Moreover, the U.S. federal government enacted the *Defense of Marriage Act* ("*DOMA*"). This legislation sets out the definition of "marriage" for federal purposes as the "legal union between one man and one woman as husband and wife", and the word "spouse" as a "person of the opposite sex who is a husband or a wife". The *DOMA* also provides an exception to the Full Faith and Credit clause in the United States Constitution by stipulating that one state need not give full faith and credit to a law of another state that allows for same-sex marriage. [305]

242. In the United Kingdom, both legislation and jurisprudence have confirmed that marriage is a union between a man and a woman and that a marriage between two persons of the same gender would be considered void.[306]

243. In the Nordic European countries as well as in continental Europe various alternative models have been adopted to give recognition and effect to same-sex relationships. It is important to note, however, that most European countries still have *no* legislation on this issue. Where countries have taken a legislative approach, the solutions vary from models limited to the regulation of the financial and property aspects of the relationships, to models with certain effects linked to the personal commitment of the parties, to the registered partnership model wherein the couple receives most of the effects of marriage. [307] However, even in those countries considered to be more "socially progressive", marriage has not been altered and it remains a

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[304] See section entitled "Effects of Changing Marriage, paras. 23 and 24, *supra*
[305] ***Affidavit of Sanford Katz***, Respondent's Record, Volume 4, Tab H, pp. 1093-1094, paras 46-48
[306] ***Affidavit of Stephen Cretney***, Respondent's Record, Volume 1, Tab A, pp. 16-20, paras. 28-32
[307] ***Affidavit of Bea Verschraegen***, Respondent's Record, Volume 3, Tab G, p. 883, paras. 194, 233

heterosexual institution.[308] Indeed in Norway, a report published in 1993 of the Ministry of Children and Family Affairs emphasized the importance of marriage as follows:

> *[M]arriage is the most fundamental social unit and the national framework for bringing up children. Marriage has a unique status, and no provision is proposed for marriage between homosexuals. The Bill employs the expressions "registration" and "partnership". The terms "wedlock" and "marriage" are reserved for heterosexual marriage, with its ideological and religious status.*[309]

244. Therefore, the situation in the Netherlands where marriage has been extended as of April 1, 2001, to same-sex couples is unique and based on the particular cultural and legal developments in that country. Other examples of more liberal Dutch enactments are the legalization of soft drugs and euthanasia. In all other jurisdictions where there have been discussions on improving the situation of same-sex couples and on recognizing same-sex relationships, the extension of marriage to same-sex couples has been rejected in favour of alternative forms of legal recognition..

3. Deference to Parliament on Issues of Complex Social Policy

245. The role of the legislature demands deference from the courts on those complex social policy decisions that the legislature is best able to make. While a discussion of deference at the section 1 stage should not occur at the outset of the analysis, it can be discussed at any of the three stages of the second part of the analysis (rational connection, minimal impairment, balancing of deleterious and salutary effects).[310] Clearly, the societal concerns relating to marriage, as the foundational institution in modern society, are extremely complex.[311] In this regard, deference to Parliament's choices in addressing these concerns is necessary as part of the s. 1 determination.

4. Conclusion

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[308] ***Affidavit of Bea Verschraegen***, Respondent's Record, Volume 3, Tab G, pp. paras. 108-193
[309] ***Affidavit of Bea Verschraegen***, Respondent's Record, Volume 3, Tab G, pp. 828-830, paras. 121, 124
[310] ***M. v. H***., *supra,* at 622-624, paras.78-81, per Iacobucci J.; ***Thomson Newspapers Co. v. Canada (Attorney General)*** *supra*, at 939, paras. 87-88
[311] ***EGALE v. Canada*** at paras. 94-97

246. For all of these reasons, the Attorney General has met the tests to justify maintaining the definition of marriage as the union of one man and one woman. Considering the fundamental importance of the complementarity of the sexes in human existence and the manner in which the definition embodies all the human elements of the unique relationship between men and women, the change demanded by the Applicants exceeds what their Constitutional rights were designed to bear.

G. REMEDY

1. Common Law *Charter* Violations

247. In a constitutional democracy it is the legislature, as the elected branch of government, which should assume the major responsibility for law reform. Major revisions of legal rules i.e. common law, with complex or uncertain ramifications are best left to the legislature. The Supreme Court of Canada has explained the need for judicial caution as follows:

> *There are sound reasons supporting this judicial reluctance to dramatically recast established rules of law. The court may not be in the best position to assess the deficiencies of the existing law, much less problems which may be associated with the changes it might make. The court has before it a single case; major changes in the law should be predicated on a wider view of how the rule will operate in the broad generality of cases. Moreover, the court may not be in a position to appreciate fully the economic and policy issues underlying the choice it is asked to make. Major changes to the law often involve devising subsidiary rules and procedures relevant to their implementation, a task which is better accomplished through consultation between courts and practitioners than by judicial decree. Finally, and perhaps most importantly, there is the long-established principle that in a constitutional democracy it is the legislature, as the elected branch of government, which should assume the major responsibility for law reform.* [312]

248. In *R v. Hawkins* the common law spousal incompetency rule was in issue. The Court would not make the changes proposed by the Crown as they were far from incremental and went to the heart of the evidentiary rule. According to the Court, to make a spouse competent to

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[312] ***Watkins v. Olafson***, [1989] 2 S.C.R. 750 at 760-761; see also ***R. v. Salituro***, [1991] 3 S.C.R. 654 at 666, 670; ***R. v. Hawkins***, [1996] 3 S.C.R. 1043 at 1071-1072

testify against the other spouse, in circumstances where an accused married a witness to secure his/her silence, would strike at the original justification for the rule of supporting marital harmony. It was decided that the proposed change would be too significant for the courts to effect and should be left to Parliament.[313]

249. Contrary to the Applicants' contentions, a change to the long-standing common law meaning of marriage, to include a union between persons of the same sex, would not merely constitute a small or incremental extension[314] of the existing law with readily assessable consequences. Rather, it would constitute an enormous and far-reaching change, assailing the very heart of such a fundamental societal institution.[315] It would do so with complex and uncertain economic, policy and societal ramifications. The Court is not in the best position to fully appreciate and assess the impacts of a far-reaching change to the meaning of marriage, and therefore it should defer to the appropriate legislature to conduct such an assessment.[316]

2. General Remedy Principles

250. Where legislative intention has been exhibited in an impugned provision, the Court should chose a remedy that intrudes to the least possible extent into the legislative domain, while at the same time respecting the purposes of the *Charter*.[317]

251. The remedies available under s. 52(1) of the *Charter* include striking down legislation, severance, reading down or reading in, or any of these remedies along with a temporary suspension of the Court's order, to permit the government to legislate in conformity which conforms with the *Charter*.[318] The Supreme Court has provided guidance as to how courts should proceed to choose among these options, which is summarized below:

> The first step is for a court to determine the "extent of the inconsistency" of the legislative provision with the *Charter* right infringed. The critical factors in this determination are the manner

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[313] ***R v. Hawkins****, supra,* at 1071-1073
[314] ***EGALE v. Canada*** at para. 92
[315] ***EGALE v. Canada*** at para .93
[316] ***EGALE v. Canada*** at paras. 93-97
[317] ***Osborne v. Canada (Treasury Board),*** [1991] 2 S.C.R. 69 at 104-105; ***Schachter v. Canada***, [1992] 2 S.C.R. 679 at 707, 715
[318] ***Constitution Act***, 1982, s. 52(1); ***Schachter v. Canada***, *supra*, at 695-697; ***M. v. H***. *supra*, p. 84.

> in which the provision infringes the right and the specific step of the s. 1 justification process that it fails to meet.
>
> The second step is for a court to be mindful of the twin guiding principles - the role of the legislature, on the one hand, and the purpose of the *Charter*, on the other. In order to ensure that these twin principles are fully respected, it is necessary to consider:
>
> - if the remedy can be achieved with remedial precision;
> - if it will interfere with legislative objectives (in light of what those objectives are and the means chosen to meet them) and whether it will involve a substantial intrusion into legislative budgetary decisions); and
> - if it will amount to a substantial impact on the remaining portion of the legislation on its own, and in consideration of whether it is of a significant and long standing nature.
>
> Finally, a court should only suspend a declaration of constitutional invalidity where striking down a provision immediately would pose a danger to the public, would threaten the rule of law, or, due to a finding of underinclusiveness, would deprive deserving (and already included) persons of a benefit without thereby benefiting those wrongly excluded, in light of whether or not there is an obligation to provide the benefit at all.[319]

252. The Applicants argue that the Court has two options: a) to "reformulate" the common law definition of marriage to accord with *Charter* values and current understanding, which in effect would involve reading out the words "a man and a woman" and reading in the words "two persons", or b) to make a declaration of invalidity without any suspension. According to the Applicants, a suspension ought not to be granted as the only remedy that will comply with the *Charter* is "full and equal marriage recognition". This narrow position ignores a number of necessary considerations.

253. A key consideration in this case is that virtually all the alleged benefits and obligations of marriage (that the Applicants claim underpin their inequality and security concerns) flow from the adoption of marriage in specific legislation and not from the common law definition itself. The Supreme Court of Canada has recognized that the pursuit of equality in the distribution of benefits and obligations flowing from consenting and committed marriage-like

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[319] ***Schachter v. Canada***, *supra*, at 702-715, paras 43-79; ***M. v. H.***, *supra* at 84-85, paras 137-139.

relationships does not require conflation of the meaning or essence of marriage as a special kind of monogamous heterosexual union.[320] Equally, the Vermont Supreme Court recently found in *Baker v. State* that the need to ensure equality of benefits and protections between married couples and same sex couples did not require a re-definition of marriage. It only required that the legislator craft a solution that made such benefits and protections available to same sex couples. The means by which that was accomplished was left to the legislature. The notion of marriage remained, and remains, unchanged.[321]

254. Further, if the source of the inequality is a lack of the benefits and obligations that flow from the application of the definition of marriage, which was remedied federally by the *Modernization of Benefits and Obligations Act*, any remaining distinctions in treatment can be remedied by the extension of those individual benefits and obligations to same-sex couples.

255. For the reasons set out below, the Court ought not attempt to change the definition of marriage. However, the suspension of a declaration of invalidity would indeed be required in order to provide the appropriate legislature with a reasonable period of time to come up with a solution that would ensure substantive equality under the *Charter.*

3. Reading In Not Appropriate Remedy

256. In *Schachter,* the Supreme Court of Canada held that severance and reading in will only be warranted in the clearest of cases and that the courts should be careful to ensure that the severance or reading in would not constitute an unacceptable intrusion into the legislative domain. The Court set out the following criteria that would have to be met in order to warrant a severance or reading in:

> - *the legislative objective is obvious, or it is revealed through the evidence offered pursuant to the failed s. 1 argument, and severance or reading in would further that objective, or constitute a lesser interference with that objective than would striking down;*
> - *the choice of means used by the legislature to further that objective is not so unequivocal that severance/reading in would*

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[320] ***Egan v. Canada,*** *supra****, ; Miron v. Trudel*** [1995] 2 S.C.R. 418

[321] See ***Egan v. Canada****, supra.,*at 536, para. 22; ***Miron v. Trudel,*** *supra,* at 501-502, para. 159*;* ***Baker v. State of Vermont,*** [1999] 744 A. 2d 864 (Vt. 2000)

constitute an unacceptable intrusion into the legislative domain; and,

- *severance or reading in would not involve an intrusion into legislative budgetary decisions so substantial as to change the nature of the legislative scheme in question.*[322]

a) Parliament's Objective and Unequivocal Choice

257. As provided in the context of the s. 1 justification, the objective in maintaining the meaning of marriage as the union of one man and one woman is to re-affirm the foundational role that marriage plays in Canadian society as the unique long-standing institution that unites the two sexes, and has the natural possibility of producing children. Thus, marriage is a fundamentally heterosexual institution that has served society well in this aspect for millennia, and continues to do so.[323]

258. Furthermore Parliament has expressly and unequivocally chosen to reaffirm the meaning of marriage as a union of a man and a woman in two federal enactments – s. 1.1 of the *Modernizing of Benefits and Obligations Act*[324], and s. 4 of the *Civil Law Harmonization Act, No. 1*[325].

259. The intent of Parliament was also made evident in June 1999 when it passed a Motion stating that "marriage is and should remain the union of one man and one women to the exclusion of all others, and that Parliament will take all necessary steps to preserve this definition of marriage in Canada".[326]

260. In this case, the Applicants ask the Court to provide an entirely new meaning to marriage by extending it to two persons of the same sex. Any such expansion by the Court would irrevocably change the nature of marriage in our society, contradict the legislative

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[322] ***Schachter***, supra, at 718, para.85

[323] See Paras 32 and 45 above (evidence **Refers to Legal Objectives????**). ***Bill C-23, An Act to modernize the Statutes of Canada in relation to benefits and obligations***, 2nd sess., 36th Parl. (Minutes and Evidence, 29 February 2000 –29 March 2000, Standing Committee on Justice and Human Rights), Respondent's Record, Volume 8, Tab P 23 pp. 2423-2429 .

[324] ***Modernizing Benefits and Obligations Act***, S.C. 2000, c. 12, s.1.1, Respondent's Record, Volume 10, Tab P 32, p. 3257

[325] ***Federal Law-Civil Law Harmonization Act***, No. 1, S-4, Ch. 4, 2001, s.4

[326]. ***Parliamentary Motion, House of Commons Debates***, 1st sess., 36th Parl., vol. 135 at 15960-15993, 16034-16036, and 16068-16069 (8 June 1999), Respondent's Record, Volume 7, Tab P 20, pp. 2278-2313

intention, displace the role of Parliament and the legislatures and thus, constitute an excessive intrusion into the legislative sphere.

261. In *R v. Seaboyer* the Supreme Court refused to read an element of judicial discretion into the rape shield provision of the *Criminal Code* because such an addition would have directly contradicted Parliament's intention in enacting the impugned provision.[327] Likewise, in this case, the addition by the court of same-sex couples to the common law definition of marriage would directly contravene the express intention of Parliament in maintaining the common definition of marriage. Consequently, the Court should not read out or read in any additional words to the definition of marriage.

b) Repercussions on Other Laws

262. In addition, a fundamental change to the definition of marriage would likely affect the laws relating to marriage, the recognition abroad of Canadian marriages and the various provincial requirements for solemnization as well as every federal and provincial statute and regulation that grants benefits and obligations based on the current concept of marriage. Given the potential repercussions, the Respondent submits that the legislatures ought to be given some latitude to address these questions in a more comprehensive fashion.[328]

4. Suspension of Declaration Necessary

263. If the Court finds that the definition of marriage violates the *Charter* rights of the Applicants, the Respondent submits that the Court, for the reasons given below, should suspend its judgment of invalidity for a reasonable period of time and return the matter to the appropriate legislatures to craft a solution that is consistent with the Court's findings and the *Charter.*[329]

a) Broad Social Policy

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[327] ***R v. Seaboyer,*** [1991] 2 S.C.R. 577 at. 628
[328] ***M. v. H***, *supra*, at 87, para. 147
[329] ***Schachter v. Canada (Minister of Employment and Immigration)***, *supra* at 725, ***M. v. H***. *supra* at 87, para 145-146

264. In *Rodriguez* the Supreme Court of Canada stated in dealing with "contentious" and "morally laden" issues, Parliament must be accorded some flexibility.[330]

265. In *Vriend*, the Court stated that, in carrying out their duties, the courts should not attempt to second-guess legislatures and the executives or make value judgments on what they regard as the proper policy choice. Rather, respect by the courts for the legislative and executive role is as important as ensuring that those branches respect each other's role and the role of the courts.[331]

266. Similarly, in *M. v H.* the Court reiterated that:

> *...As a general matter, the role of the legislature demands deference from the courts to those types of policy decisions that the legislature is best placed to make".* [332]

267. In the context of the debates surrounding the enactment of the *Modernization of Benefits and Obligations Act,* the Minister of Justice reaffirmed the need for deference in important matters of social policy as follows:

> *While the courts have provided us with a road map of what needs to be changed, the onus is on us, as parliamentarians, to determine how to proceed. Important matters of social policy should not be left to the courts to decide.*[333]

268. The Respondent submits that any change to the meaning of such a fundamental societal institution as marriage constitutes an "important matter of social policy" requiring broad-based consultations and the participation of all stakeholders as well as the necessity to canvass the potential far-reaching consequences of the change. Consequently, such a broad social policy decision is better left to our legislatures.[334]

b) Participation of All of the Stakeholders

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[330] ***Rodriguez v. British Columbia (Attorney General)***, [1993] 3 S.C.R. 519 at 614; see also ***R. v. Hess,*** [1990] 2 S.C.R. 906 at

[331] ***Vriend v. Alberta***, *supra,* at 564, para. 136 per Cory and Iacobucci JJ.

[332] ***M. v. H***., *supra*, at 62, para. 78, *per* Cory and Iacobucci JJ.; see also ***R. v. Hess****, supra*

[333] ***Bill C-23, An Act to modernize the Statutes of Canada in relation to benefits and obligations***, 2nd sess., 36th Parl. (Minutes and Evidence, 29 February 2000 –29 March 2000, Standing Committee on Justice and Human Rights), Respondent's Record, Volume 8, Tab P 23, p. 2424

[334] ***EGALE v. Canada*** at para. 97

269. In *Corbiere*, L'Heureux-Dubé J wrote in her concurring judgment:

> *The link between public discussion and consultation and the principles of democracy was recently reiterated by this Court in Reference re Secession of Quebec, [1998] 2 S.C.R. 217, at para. 68: "a functioning democracy requires a continuous process of discussion". The principle of democracy underlies the Constitution and the Charter, and is one of the important factors guiding the exercise of a court's remedial discretion. It encourages remedies that allow the democratic process of consultation and dialogue to occur. (emphasis added)*[335]

270. In her affidavit, Dr. Scorsone notes that all Canadians, whatever their beliefs or ideology, have a stake in the nature of so foundational a social institution as marriage, with its implications for both adults and children as well as for the functioning of society generally. She stresses the important role played by religion and religious communities in the historical development and in the current formation of the institution of marriage. She refers to the fact that, for a great majority of Canadians, religious belief sets are a key part of their perception of the institution of marriage.[336]

271. Dr. Scorsone concludes that religious bodies are therefore key stakeholders in the celebration, the support and the public policy discussion on the institution of marriage. The failure to include the religious constituency in discussions concerning potential changes to marriage would disenfranchise this constituency and privilege those ideologies that are non-religious. Therefore, any debate on how to change the definition of marriage should be an inclusive one that facilitates the participation of all of the key stakeholders in the institution of marriage found within Canadian society.[337]

272. Furthermore, contrary to the Applicant's contentions, there is no evidence of a "broad base support of marriage recognition for same-sex spouses", and the polls on this issue vary considerably depending on the question being answered.[338]

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[335] ***Corbiere v Canada*** [1999] 2 S.C.R. 203 at p. 283, para 16.
[336] ***Affidavit of Susan Scorsone***, Respondent's Record, Volume 2A, Tab E, pp. 621, 641-643, paras. 2, 41, 42, 44,
[337] ***Affidavit of Susan Scorsone***, Respondent's Record, Volume 2A, Tab E, pp. 636, 641-642, paras. 28, 41, 42
[338] ***Cross-Examination of John Fisher***, Respondent's Record, Supplementary Volume 2, pp. Q 90, 113-118, pp. 33, 39-40; polls

273. Professor Somerville viewed the issues in this case as "ethical" ones, aside from their legal nature. Due to the existence of so many stakeholders, Professor Somerville proposed a method by which the ethical issues raised could be best addressed. Her approach, called applied ethics, involves the following steps: i) identification of the ethical issues raised; ii) identification of all the stakeholders, and the values, interests and claims involved; iii) when values conflict, prioritization of one set of values (and, as a result, one set of interests and claims) over another; and iv) finally, justification of the prioritization adopted. The type of analysis suggested by Professor Sommerville, which is extensive and complicated and involves the balancing of conflicting societal interests, is best undertaken by Parliament and the provincial legislatures.[339]

c) Need to Canvass the Potential Outcomes of Change

274. Additionally, it is the Respondent's position that changing the institution of marriage could have profound and unforeseen consequences that must be considered by the legislature in remedying any constitutional breach found by the court.

275. For example, Professor Katherine Young posits that changing the universal features of marriage could lead to increased polarization of men and women and/or an identity problem for men. She described changing the definition of marriage as amounting to "a massive experiment in social engineering". Professor Edward Shorter suggests that if we begin inserting players into legal marriage whose own values may be at odds with its core mission, that is, the union of a man and a woman for the bearing and nurturing of children, we may be undermining that sense of mission for all and end up undermining and diminishing the institution of marriage.[340]

276. The potential impacts of altering the definition of marriage, such as those identified by Professor Young and Professor Shorter, must be thoroughly debated within the legislative process before any reforms are made to the institution of marriage. To illustrate the need for thorough debate and analysis as part of the process of undertaking legislative changes to

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[339] ***Affidavit of Margaret Sommerville***, Respondent's Record, Volume 4, Tab J, pp. 1340, para. 16
[340] ***Affidavit of Katharine Young***, Respondent's Record, Volume 2A, Tab F, pp. 737, 743, paras, 102 and 114; ***Affidavit of Edward Shorter***, Respondent's Record, Volume 2, Tab C-1, pp. 458-9, para. 128

the institution of marriage, Professor Shorter and Professor Doug Allen provided evidence of the unfavourable consequences associated with the introduction of no-fault divorce.

277. In *Osborne v. Canada* the Court refused to carve out exceptions to a legislative restriction on the political activity of civil servants, Sopinka J. declaring that "…it is Parliament that should determine how the section should be redrafted and not the Court…Parliament will have available to it information and expertise that is not available to the Court."[341]

d) Deference in Other Western Democracies

278. The need for judicial caution and deference to the legislature when dealing with changes to the institution of marriage is prevalent throughout other western democracies. Each of the Respondent's experts on the law of marriage in specific foreign jurisdictions (Professor Stephen Cretney on the United Kingdom, Professor Sanford Katz on the United States and Professor Bea Verschraegen on Continental Europe and the Nordic countries) concluded that any reform of the law of marriage, or change to the definition of marriage is best left for the legislature to determine and not the courts.[342]

279. Professor Katz refers to the recent constitutional challenge to the Vermont marriage law and to the distribution of marital benefits in Vermont. He notes that, while the Supreme Court of Vermont held that the exclusion of same sex couples from marriage violated the inclusion principle of the *Common Benefits Clause* in the Vermont Constitution, the court also concluded that the appropriate means of enforcing the constitutional mandate was the prerogative of the legislature. In 1999, the Vermont legislature responded by enacting the *Act Relating to Civil Unions*, which affirmed the definition of civil marriage as a union between a man and a woman but also extended the benefits and protections of marriage to eligible same sex couples.[343]

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[341] ***Osborne v. Canada (Treasury Board)***, *supra*, p. 105, para. 71
[342] ***Affidavit of Stephen Cretney***, Respondent's Record, Volume 1, Tab A, pp. 45-6, para. 68,; ***Affidavit of Sanford Katz***, Respondent's Record, Volume 4, Tab H, pp. 1099, para. 61; ***Affidavit of Bea Verschraegen***, Respondent's Record, Volume 3, Tab G, pp. 883, para. 231,
[343] ***Affidavit of Sanford Katz***, Respondent's Record, Volume 4, Tab H, pp. 1088-9, para. 36

280. The Vermont approach illustrates the same understanding of the proper role of the judiciary vis-à-vis the legislatures, as adopted by the Supreme Court of Canada in the fashioning of the appropriate constitutional remedy. The extensive and profound impact that changing the definition of marriage could have on society, and the significance of any such change to numerous stakeholders in Canadian society, necessitates that determining how to remedy any discrimination created by the definition of marriage be undertaken within the legislative sphere.

e) Alternatives

281. The Supreme Court observed in *Hunter v. Southam* that:

> *While the courts are the guardians of the Constitution and of individuals' rights under it, it is the legislature's responsibility to enact legislation that embodies appropriate safeguards to comply with the Constitution's requirements. It should not fall to the courts to fill in the details that will render legislative lacunae constitutional.*[344]

282. Given the independent yet complementary constitutional jurisdiction over marriage and matters related to marriage, any lacunae in the provincial sphere cannot and should not be remedied through a change in the federal sphere, just as federal lacunae can not be remedied simply through provisions in the provincial sphere.[345] Thus any remedy in this case would have to be fashioned not by the Court, but through consultations between the two levels of government.

283. An expansion of the definition of marriage is not necessarily required to remedy a *Charter* breach. The Court should defer to Parliament and the legislatures to make their policy choice from any number of possible remedial actions. Parliament is especially suited to assess and take into account the competing values and interests of all societal participants, including the Applicants, as well as to assess the legal effects abroad of a state-recognized union between same-sex partners.

284. Contrary to the Applicants' contentions, alternative options, that would provide same-sex couples with formal legal recognition of their relationships, could achieve the goal of

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[344] ***Hunter v. Southam*** (1984), 11 D.L.R. (4th) 641 at 659.

[345]

substantive equality under the *Charter*. The Applicants' own expert, William Eskridge, stated that such alternatives to same-sex marriage are its equivalent.[346] Indeed, many countries in Europe have adopted registered partnership regimes that grant recognition and status to same-sex couples, as well as virtually all of the benefits of marriage.[347]

285. There are potentially numerous alternatives available which would guarantee substantive equality to the Applicants and thus, comply with the *Charter*, without resorting to a change in the fundamental nature of marriage. Once again, the Respondent submits that our legislatures are best equipped to consider and weigh such options.

PART III – ORDER SOUGHT

286. The Respondent asks the Court to dismiss the application.

287. In the alternative, if the Court declares that the definition of marriage is unconstitutional, the Respondent asks the Court to declare that the definition is of no force and effect, but suspend the effect of such a declaration of invalidity for a period of time, to be determined, until Parliament and the provincial legislatures have had an opportunity to create their own remedial provisions.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Dated at Toronto this of April, 2005.

Roslyn J. Levine, Q.C.
of counsel for the
Attorney General of Canada

[346] ***Supplemental Affidavit of Willam N. Eskridge, Jr.*** Reply Evidence of Applicant Couples, Tab. 4, p. 178, para. 23

[347] ***Affidavit of Bea Verschraegen***, Respondent's Record, Volume 3, Tab G, pp. 823, 831-3, 835-6, 847-9, 867-8, paras. 109, 127-129, 134-135, 158-160, 200-202

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FORM 4C – BACKSHEET (Rule 4.02(3))

Court File No. 684/00 and 39/2001

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MCCT	Applicant		EGALE CANADA INC. et al	Respondents
			THE ATTORNEY GENERAL OF CANADA et al	Respondents

(Short title of proceeding)

ONTARIO
SUPERIOR COURT OF JUSTICE
(DIVISIONAL COURT)

Proceeding Commenced at Toronto

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