Court File Nos. C39172/C39174

COURT OF APPEAL FOR ONTARIO

BETWEEN:

HEDY HALPERN and COLLEEN ROGERS
MICHAEL LESHNER and MICHAEL STARK
MICHELLE BRADSHAW and REBEKAH ROONEY
ALOYSIUS PITTMAN and THOMAS ALLWORTH
DAWN ONISHENKO and JULIE ERBLAND
CAROLYN ROWE and CAROLYN MOFFATT
BARBARA McDOWALL and GAIL DONNELLY and
ALISON KEMPER and JOYCE BARNETT

Applicants
(Respondents in Appeal)

- and -

THE ATTORNEY GENERAL OF CANADA
THE ATTORNEY GENERAL OF ONTARIO
NOVINA WONG, THE CLERK OF THE CITY OF TORONTO

Respondents
(Appellant)

- and –

EGALE CANADA
THE ASSOCIATION FOR MARRIAGE AND THE FAMILY IN ONTARIO
THE INTERFAITH COALITION ON MARRIAGE AND FAMILY
METROPOLITAN COMMUNITY CHURCH OF TORONTO

Interveners

FACTUM OF THE INTERVENER, THE ASSOCIATION FOR MARRIAGE AND THE FAMILY IN ONTARIO

AND BETWEEN:

METROPOLITAN COMMUNITY CHURCH OF TORONTO

Applicant
(Respondent in Appeal)

- and –

THE ATTORNEY GENERAL OF CANADA and
THE ATTORNEY GENERAL OF ONTARIO

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FACTUM OF THE INTERVENER,
THE ASSOCIATION FOR MARRIAGE AND THE FAMILY IN ONTARIO

PART I - THE INTERVENTION

1. This intervener, The Association for Marriage and the Family in Ontario (the "Association"), was granted leave to intervene as an added party in these proceedings by order of The Honourable Justice Lang, and filed affidavits from two expert witnesses.[1] The Association supports the submission of the Attorney General of Canada that these two appeals be allowed and that the definition of marriage in sections 91(26) and 92(14) of the *Constitution Act, 1867* be upheld as constitutional.

PART II - OVERVIEW

2. Reduced to its core, the decision of the Divisional Court held that same-sex couples should enjoy some form of legal recognition because the common law must "grow to meet the expanding needs of society"[2]. In order to find that the definition of marriage upon which rests federal and provincial legislative jurisdiction over marriage violated section 15(1) of the *Canadian Charter of Rights and Freedoms*, the court below (i) first had to find that a court possessed the authority to alter the meanings of the word "marriage" within sections 91(26) and 92(14) of the *Constitution Act, 1867*, and (ii) then proceed to radically reformulate the constitutional meaning of marriage. The Association submits that the Divisional Court erred in law in reaching both conclusions.

3. Section 91(26) of the *Constitution Act, 1867* grants to Parliament the legislative power regarding "Marriage and Divorce"; section 92(12) assigns to the provinces the power to legislate regarding the "solemnization of marriages". In the Constitution the word "marriage" has a

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1 The affidavits of Craig H. Hart sworn May 9, 2001 David Orgon Coolidge sworn April 23, 2001, Record of the Intervener, The Association for Marriage and The Family in Ontario (hereafter the "Association's Record"), Tabs 1 and 2, respectively.

clear, constitutionally-enshrined meaning as the union of a man and a woman. This meaning underpinned the allocation of legislative powers over social relationships: under section 91(26) Parliament received jurisdiction over 'marriage' (union of a man and woman) and under section 92(13) the provinces secured jurisdiction over the civil rights of non-marital relationships. A court cannot use provisions of the *Charter* to alter, reduce or strike down the constitutional meaning of marriage and thereby alter the constitutional allocation of legislative powers; such a change can only take place by way of amendment to the *Constitution Act, 1867*. Consequently, the Divisional Court lacked the jurisdiction to grant the relief requested by the Respondents (hereafter the "Halpern applicants") and erred in law in using a provision of the *Charter* to alter the meaning of heads of legislative power contained in sections 91 and 92 of the *Constitution Act, 1867,* thereby altering the constitutional assignment of legislative powers over social relationships.

4. Alternatively, the Association submits that the Divisional Court erred in law in finding that the definition of "marriage" underlying sections 91(26) and 92(12) of the *Constitution Act, 1867* as the union of a man and a woman infringed section 15(1) of the *Charter*. Marriage, as traditionally understood, is an institution that meets the needs of contemporary Canadian society and its definition rests on a distinction based on actual differences, not on stereotypes, and therefore is not discriminatory.

PART III - THE FACTS

5. The Association agrees with and adopts the statement of facts contained in paragraphs 8 to 24 and 26 to 51 of the Factum of the Attorney General of Canada (the "AG's Factum").

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[2] *Halpern et al. v. Canada (A.G.) et al*, per Blair, J. at para. 31 and per LaForme, J. at paras. 135 and 136.

PART IV – THE ISSUES AND ARGUMENT

6. The Association will focus its submissions on the following issues:

(a) The word "marriage" contained in sections 91(26) and 92(12) of the *Constitution Act, 1867* bears a distinct, constitutional meaning encompassing only a union between a man and a woman; its meaning underpins the constitutional assignment of legislative power over social relationships between Parliament and the provinces reflected in sections 91(26) and 92(13), "Property and Civil Rights". Section 15 of the *Charter* cannot be used to measure the constitutionality of this meaning because the *Charter* cannot be used to alter a provision in the *Constitution Act, 1867* or change an allocation of legislative powers that forms part of the Confederation compact. Accordingly, the court below could not grant the relief requested by the Halpern applicants and erred in so doing. Any change to the meaning of "marriage" in sections 91 and 92, and the allocation of legislative powers over social relationships that it reflects, can only be brought about by way of constitutional amendment.

(b) In the alternative, when a proper contextual and purposive analysis is undertaken, it is evident that the definition of marriage does not discriminate against same-sex couples in any way that infringes section 15 of the *Charter*.

FIRST ISSUE: **The word "marriage" contained in sections 91(26) and 92(12) of the *Constitution Act, 1867* bears a distinct, constitutional meaning encompassing only a union between a man and a woman; its meaning underpins the constitutional assignment of legislative power over social relationships between Parliament and the provinces reflected in sections 91(26) and 92(13), "Property and Civil Rights". Section 15 of the *Charter* cannot be used to measure the constitutionality of this meaning because the *Charter* cannot be used to alter a provision in the *Constitution Act, 1867* or change an allocation of legislative powers that forms part of the Confederation compact. Accordingly, the court below could not grant the relief requested by the Halpern applicants and erred in so doing. Any change to the meaning of "marriage" in sections 91 and 92, and the allocation of legislative powers over social relationships that it reflects, can only be brought about by way of constitutional amendment.**

A. The Association's Basic Point

7. Section 91(26) of the *Constitution Act, 1867* assigns to Parliament the power to legislate with respect to all matters coming within the "class of subject" described as "Marriage and Divorce"; the *Constitution* does not assign to the courts the power to legislate with respect to marriage. The claims of the Halpern applicants, and the decision of the Divisional Court, misconstrue this constitutional division of labour between Parliament and the courts. For all practical purposes, the Halpern applicants are asking the courts to direct the federal and

provincial governments to exercise their powers under ss. 91(26) and 92(12) of the *Constitution Act, 1867* in a way that recognizes same-sex marriages, arguing that the common law meaning of "marriage" can be changed by the courts. In reality the Halpern applicants are not asking the courts to change the common law; they are asking the courts to change the meaning of the word "marriage" contained in two sections of the *Constitution Act, 1867*. This case does not involve the interpretation of the common law; it involves the determination of the meaning of a constitutional term – "marriage".

8. Political jurisdiction over marriage was a hotly contested issue in the negotiations and debates leading up to Confederation. As a political compromise, jurisdiction over "marriage' was carved out of provincial jurisdiction over "property and civil rights" and constitutionally assigned to Parliament. As a mater of political judgment, marital relationships were assigned to Parliament, while the provinces enjoyed legislative jurisdiction over all other social relationships. History shows that this division of responsibility was just as much a "compact of Confederation" as was the political settlement over denominational education

9. The terms used in the *British North America Act, 1867* possessed certain meanings that informed and guided this political division of the "subject matters" of legislative powers between the federal and provincial governments. As a result of the passage of the *BNA Act*, the then common law meaning of "marriage" became the meaning of a constitutional term and this meaning, in turn, defined and limited constitutional assignment of the "class of subject" in respect of social relationships. Put another way, the constitutional assignment of jurisdiction between the federal and provincial governments was predicated on the political understanding that Parliament gained jurisdiction over "the union of a man and a woman" and the provinces had jurisdiction over the civil rights associated with other non-marital social relationships.

10. That the *BNA Act* imported into the Constitution the meaning of "marriage" from the common law to effect this political division of powers does not mean that the meaning of the head of power, "Marriage" under section 91(26), and the scope of Parliament's legislative power thereunder, can be changed by the courts in the same way as the courts can change the common law. The constitutionally-granted "class of subject" of "Marriage and Divorce" in respect of which Parliament can legislate cannot be changed by common law. To do so would stand the Constitution on its head, making the meaning of politically-negotiated, constitutional terms, and the allocation of legislative powers that they reflect, subject to changes in the common law. A foundational political act took place in 1867 when the subject-matter of "marriage" was constitutionally assigned to Parliament. The decision of the Divisional Court interfered with this foundational political decision and constitutional allocation of legislative powers by altering the meaning of the head of power under section 91(26) and thereby changing the allocation of legislative jurisdiction over personal relationships made in 1867. The Association submits that this constitutional assignment of legislative jurisdiction can be changed only by the process of constitutional amendment contained in section 38 of the *Constitution Act, 1982*, and not by a decision of the courts.

11. As a consequence of the political allocation of legislative responsibility over social relationships under sections 91 and 92 of the *Constitution Act, 1867*, Parliament is limited to legislating under that head of power with respect to the "class of subject" that is a union between a man and a woman; section91(26) does not authorize Parliament to legislate with respect to unions between members of the same sex. Those social relationships, and other non-marital social relationships, do not fall within the "class of subject" that is "marriage"; they fall under provincial jurisdiction under "Property and Civil Rights". Similarly, under s. 92(12) a province can only solemnize marriages between men and women; a province does not possess the

constitutional power to solemnize 'marriages' between members of the same-sex. In short, the impediment to the Halpern applicants' claim for the legal recognition of marriage between same-sex couples does not lie in federal or provincial legislation or common law, but in the language of the Constitution itself that reflects an allocation of legislative powers over different social relationships.

12. It is important to emphasize that the Association is NOT arguing that the legislatures lack the power to legislate with respect to the benefits or obligations of relationships between members of the same sex or any other non-marital economically interdependent relationship. Since sections 91 and 92 exhaustively distribute legislative powers over subject-matters between Parliament and the provincial legislatures, the provinces likely could legislate with respect to the appropriate civil benefits and obligations of same-sex couples under section 92(13), "Property and Civil Rights in the Province", but neither Parliament nor the legislatures could do so under the heads of power dealing with "marriage".

B. The Meaning of 'Marriage' in ss. 91 and 92 of the *Constitution Act, 1867*

13. What is the meaning of the word "Marriage" in section 91(26) of the *Constitution Act, 1867* which determines the subject-matter in respect of which Parliament may legislate in respect "to all Matters"? Extracts from the Confederation debates leading up to the passage of the *British North America Act* make it clear that when the drafters of the Constitution used the word "marriage", they used the word "marriage" as meaning the union of a man and a woman:

> *March 6, 1865*: Hon. Attorney General Cartier: "It would be proved before Parliament that the marriage contracted under these circumstances is null as regards the Canon law and the law of Lower Canada. There are ecclesiastical authorities in Upper Canada just as there are in Lower Canada, but as the Civil law there is not the same as it is here, the couple whose marriage would be void under the Canon law but not under the Civil law – *for in the eyes of the law the marriage would be valid and binding, and neither husband nor wife could remarry without having obtained a divorce – the couple, I say, would have*

> *the right of applying to Parliament, who might legally declare that marriage null which had been so declared by the ecclesiastical authorities."* (Debates, p. 692)[3]

14. During the Confederation Debates 'marriage' was clearly understood to mean the union between a man and a woman. The judgments of the Divisional Court accepted this fact.[4] Two legal decisions rendered close to Confederation confirm that at that time the word "marriage" meant the union of a man and a woman. In 1866, just one year before it voted to pass the *British North America Act*, the English House of Lords decided the case of *Hyde v. Hyde,* in which Lord Penzance stated that marriage can be defined as the "voluntary union for life of one man and one woman, to the exclusion of all others". One week after Confederation, on July 9, 1867, Mr. Justice Monk of the Quebec Superior Court issued a decision in which he defined marriage as the union of a man and woman:

> "Before, however, proceeding any further, it may be well to state some general principles applicable to the law of marriage…
>
> By the law of nature, a man and a woman, without religion or law, have the right, it is said, to form a union upon such conditions as they may choose to impose. By the law of nations, all communities which observe that law, have agreed to recognize as husband and wife persons of the opposite sexes, who in their union have observed and fulfilled all the laws in force relative to matrimony, in the country which they inhabit or where the union is formed; and by the Civil law, each nation has established certain formalities upon the observance of which the validity of marriage depends."[5]

15. While the Divisional Court accepted that in 1867 the word "marriage" meant a union between a man and a woman, it rejected the Association's submission that the word "Marriage" in section 91(26) of the *Constitution Act, 1867* confines the "class of subject" over which Parliament may legislate to unions between men and women. Justice LaForme, with whom the other members of the panel concurred on this point, stated:

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3 Emphasis added. See also: See also: *March 6, 1865*: Debates, pp. 691-692, *Respondents' Record*, Vol.6, Tab 0-4, pp. 1856-1857; *February 15, 1865*: Hon. Mr. Bureau, Debates, p. 192, *Respondents' Record*, Vol.6, Tab 0-4, p. 1818; and *March 9, 1865*: Hon. Mr. LaFramboise, Debates, p. 849, *Respondents' Record*, Vol.6, Tab 0-4, p. 1888, *Respondents' Record*, Vol.6, Tab 0-4, p. 1857.

4 *Halpern*, supra., per Blair, J. at para. 40 and LaForme, J. at para. 157. Confederation Debates are admissible to establish the meanings of words and phrases enshrined in the constitutional text: Peter W. Hogg, *Constitutional Law of Canada* (Loose-leaf Edition) (Toronto: Carswell, 1997), at p. 57-5.

5 *Connolly v. Woolrich* (1867), 11 L.C.J. 197 (Que. Sup. Ct.), at 215.

> "In my opinion the Association's submission in this regard amounts to an attempt to freeze a meaning that may have been understood by the framers of the constitution back in 1867. Such a proposition is unsupportable in law".[6]

The Association submits that the Court below erred in law in reaching this conclusion and the Association will deal, in turn, with each reason advanced by the Divisional Court to support its conclusion.

(i) First Divisional Court Reason: Since the *Constitution* is a "living tree", the meaning of its terms may change over time, as decided by the courts. [7]

16. Viscount Sankey's famous dictum in the *Edwards* case that the *Constitution* is "a living tree capable of growth and expansion within its natural limits" has attained mythical status, viewed by some as empowering courts to change the meaning of the *Constitution Act* as they see fit. There are two problems with the myth. First, it ignores what Viscount Sankey actually said – there are "natural limits" to judicial interpretation of the *Constitution*, with one of those limits being the plain meaning of the language contained in the *Constitution*.

17. Second, the myth ignores how Viscount Sankey actually interpreted the *Constitution Act* in the *Edwards* case. At issue in *Edwards* was a reference by the Government of Canada to the Supreme Court of Canada to determine whether the words "qualified persons" in section 24 of the *Constitution Act, 1867* dealing with the appointment of Senators included women. The Supreme Court of Canada answered in the negative; the Privy Council reversed. The reasoning of the Privy Council is summarized at the end of the decision where Sankey, L.C. stated that having regard:

> "(1) To the object of the [British North America] Act, viz., to provide a constitution for Canada, a responsible and developing State;
>
> (2) That *the word 'person' is ambiguous* and may include members of either sex;

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6 *Halpern*, per LaForme, J. at para. 102.
7 *Halpern*, per LaForme, J. at para. 103

> (3) That there are *sections in the Act* above referred to which show that in some cases the word 'person' must include females;
>
> (4) That *in some sections* the words 'male persons' is expressly used when it is desired to confine the matter in issue to males, and
>
> (5) To the *provisions of the Interpretation Act*;
>
> their Lordships have come to the conclusion that the word 'persons' in s. 24 includes members both of the male and female sex and that, therefore, the question propounded by the Governor-General must be answered in the affirmative and that women are eligible to be summoned to and become members of the Senate of Canada, and they will humbly advise His Majesty accordingly."[8]

18. The ratio of Lord Sankey's decision rests upon an examination of the meaning of the word 'persons' as used in the text of the *Constitution Act, 1867*. In the course of his judgment Lord Sankey stated:

> " The word [persons] is ambiguous and in its *original meaning* would undoubtedly embrace members of either sex." (at 104) (emphasis added)
>
> " As already pointed out, 'persons' is not confined to members of the male sex…" (at 109)
>
> " From Confederation to date both the Dominion Parliament and the provincial legislatures have interpreted the word 'persons' in ss. 41 and 84 of the *B.N.A. Act* as including female persons and have legislated either for the inclusion or exclusion of women from the class of persons entitled to vote and to sit in the Parliament and legislature respectively, and this interpretation has never been questioned…
>
> Neither is it without interest to record that when upon May 20, 1867, the Representation of the People Bill came before a committee of the House of Commons, John Stuart Mill moved an amendment to secure women's suffrage and the amendment proposed was to leave out the word 'man' in order to insert the word 'person' instead thereof…" [9]

19. An actual reading of the *Edwards* case reveals that the Privy Council decided the case not by going outside of the text of the *B.N.A. Act*, but by staying within the "natural limits" of the written text to conclude that the Constitution, when read as a whole, uses the word 'persons' to include women. This reasoning simply provides no support for the Divisional Court's conclusion that the meaning of the word "marriage" in the *Constitution* can be changed by the

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8 *Re Section 24 of the B.N.A. Act*, [1930] 1 D.L.R. 98 (P.C.), at 112-113 (the "Edwards case") (emphasis added)
9 *Re Section 24,* [1930] 1 D.L.R. 98 (P.C.), at 104, 109 and 112.

courts by using the "living tree" metaphor. The word 'marriage' in its "original meaning" in Anglo-Canadian jurisprudence never included same-sex couples, and no other part of the Constitution of Canada uses the word 'marriage' in a way which includes couples of the same sex.[10]

20. This is not to say that Parliament or the legislatures are limited to legislating in respect of those things in existence at the time of Confederation. It is well established that heads of power described by general language can include things that as the result of technological invention have come into existence since Confederation: for example, "undertakings connecting the provinces with any other or others of the provinces" in section 92(1)(a) has been held to include an inter-provincial telephone system. But Parliament is limited to legislating with respect to matters that fall within the meaning of an enumerated head of power. In the 1949 *Alberta Bill of Rights* case the Privy Council was required to consider whether certain loan operations by a bank fell within the term "banking" used in s. 91(15). The Privy Council stated: "The question is not what was the extent and kind of business actually carried on by banks in Canada in 1867, but *what is the meaning of the term itself in the Act*…The concept of banking certainly includes the granting of credit by banks…" Thus, while banks could develop specific new activities, whether those activities constituted "banking" within the meaning of section 91(15) depended on the more accepted, general meaning of the term.[11]

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[10] Nor did the Supreme Court of Canada in *Egan* or *M. v. H.* engage in a form of "living tree" constitutional interpretation that pointed the way to a change in the meaning of marriage. On the contrary, in both cases, the Supreme Court of Canada went to great pains to emphasize that the decisions did not affect the meaning of marriage *M. v. H.,* [1999] 2 S.C.R. 3, per Cory, J. at 48, and *Egan v. Canada*, [1995] 2 S.C.R. 573, per Cory, J. at 583.

[11] *Attorney-General for Alberta v. Attorney-General for Canada*, [1947] A.C. 503, at 516 and 517. At the same time, the Supreme Court of Canada has in recent years described the difficulty in defining 'banking'. *Canadian Pioneer Management Ltd. v. Saskatchewan (Labour Relations Board)*, [1980] 1 S.C.R. 433, at 449 – 450, per Beetz, J.: "'Banking' on the other hand, while not a legal term, evokes economic notions which are notoriously not amenable to the discipline of the law. Furthermore, the meaning of the word has evolved considerably over the centuries."

(ii) Second Divisional Court Reason: Section 91 does not entrench a "particular set of rules", but confers jurisdiction to make rules

21. Justice LaForme wrote that section 91(26),

> "merely sets out a head of power and there is no definition to either term, although in 1867 there no doubt was an understanding of what the word meant. The purpose of section 91 was not to entrench a particular set of rules, but rather it was to confer jurisdiction to make rules, including the jurisdiction to fix the qualifying factors for and incidents of the status of marriage. Given that "marriage" refers only to a topic or "class of subjects" of potential legislation, it cannot contain an internal frozen in time meaning that reflects the presumed framers' intent as it may have been in 1867." [12]

22. The Association respectfully submits that this analysis is flawed and ignores the internal structure of sections 91 and 92 of the *Constitution Act, 1867*. The purpose of sections 91 and 92 is to confer jurisdiction to make rules regarding subject matters that possess a meaning, not to make rules with respect to subject matters that have no limit on their meaning. Sections 91 and 92 of the *Constitution Act, 1867* impose an internal limitation on each "class of subject", otherwise one level of government could expand its sphere of activity into that of another by simply asserting that the meaning of a "class of subject" had changed. Canadian jurisprudence has not permitted legislatures to engage in this kind of game. Justice LaForme's analysis confuses the "essence" of a legislative head of power (or its "pith and substance"), with the "accidents" of the legislative subject-matter (or its "incidental" aspects). The evidence before the court below unequivocally demonstrated that the essential meaning of marriage used in section 91(26) has been the union of a man and a woman: or, as put Justice LaForme, "in 1867 there no doubt was an understanding of what the word meant." That is not to say that the "accidents" of marriage have not changed through legislation over the years –

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12 *Halpern*, per LaForme, J. at paras. 105-106.

eg. age of consent, prohibited degrees of consanguinity, etc. While under section 91(26) Parliament may legislate changes to those "accidents", it cannot legislate changes to the "essence" of that head of power, the union between a man and a woman.

(iii) Third Divisional Court Reason: Since Parliament has changed the meaning of "status Indian" under the Indian Act pursuant to section 91(24), it can change the meaning of marriage.[13]

23. The Association submits that this reason advanced by Justice LaForme rests on an incorrect understanding of section 91(24) of the *Constitution Act* and the history of the *Indian Act.* As Dean Hogg has observed in his *Constitutional Law of Canada*, the meaning of "Indian" in the *Indian Act* is not co-terminous with the meaning of "Indian" under s. 91(24) of the *Constitution Act, 1867*; while all status Indians under the Indian Act are "Indians" within the meaning of s. 91(24), many persons of Indian blood and culture who are outside the statutory definition are 'Indians' within the meaning of section 91(24).[14] What is the "class of subject" of the federal head of power in section 91(24)? In the *Canard* case Justice Beetz wrote:

> "The British North America Act, 1867…by using the word "Indians" in s. 91(24), creates a racial classification and refers to a racial group for whom it contemplates the possibility of a special treatment. It does not define the expression "Indian". This Parliament can do within constitutional limits by using criteria suited to this purpose but among which it would not appear unreasonable to count marriage and filiation and, unavoidably, intermarriages, in the light of either Indian customs and values which, apparently were not proven in Lavell, or of legislative history of which the Court could and did take cognizance."[15]

The "essence" of the subject-matter "Indian" is a racial classification, and under section 91(24) Parliament can legislate in respect of member of that race.

24. The 1939 case of *Re Eskimos* the Supreme Court of Canada was required to determine whether the term 'Indians' used section 91(24) of the *British North America Act, 1867*, includes

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13 *Halpern*, per LaForme, J. at paras. 107 – 112.
14 Peter Hogg, *Constitutional Law of Canada* (Loose-leaf Edition) (Toronto: Carswell, 1997), at pp. 27-3 to 27-4.
15 *Attorney-General of Canada v. Canard* (1975), 52 D.L.R. (3d) 548, at p. 575.

Eskimo inhabitants of the province of Quebec. In answering the question in the affirmative, the Supreme Court of Canada drew on a large volume of historical documents from before and at the time of Confederation to conclude that at the time of Confederation the term 'Indian' was employed by well established usage to include Eskimos. Cannon, J. viewed the inquiry as one into "the exact meaning of the word 'Indians' at the time of Confederation." Kerwin, J. stated:

> "There are also a few other publications to which our attention has been called where 'Indians' and 'Esquimaux' are differentiated but the majority of authoritative publications, *and particularly those that one would expect to be in common use in 1867*, adopt the interpretation that the term 'Indians' includes all the aborigines of the territory subsequently included in the Dominion…
>
> That so soon after Confederation the position of Eskimos should be treated in this manner is significant. It not only more than counter-balances any reference made later as to the Department's attitude but, to my mind, is conclusive as to what was in the minds of those responsible for the drafting of the Resolutions leading to the passing of the British North America Act, at that time and shortly thereafter…
>
> The weight of opinion favours the construction which I have indicated is the proper one of head 24 of section 91 of the British North America Act but *the deciding factor, in my view, is the manner in which the subject was considered in Canada and in England at or about the date of the passing of the [British North America] Act.*" (emphasis added)[16]

25. Justice LaForme tried to distinguish the *Re Eskimo* case by confining its principles to circumstances where the federal and provincial authorities contest jurisdiction over a subject-matter, and not to cases where they agree that the federal government has jurisdiction, as in the case of marriage. The Association submits that this is not a valid distinction. The whole history of Canadian constitutional jurisprudence is built upon courts ascertaining the meaning of a head of power as a result of the contest between two levels of government; where there is no dispute, there usually is no case and therefore no need for the courts to wade into the interpretive fray.

26. The courts have also clearly stated that the *constitutional* meaning of the term 'Indian' cannot be changed by alterations to the definition of 'Indian' in the federal *Indian Act*. In *R. v.*

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16 *Reference Re: British North America Act, 1867 (U.K.), s. 91*, [1939] S.C.R. 104, per Cannon, J. at 117; and Kerwin, J. at 112, 123 and 124 (hereafter "*Re Eskimos*").

Grumbo, a 1997 decision of the Saskatchewan Court of Appeal, the court had to consider whether a Métis was an Indian within the meaning of section 12 of *The Natural Resources Transfer Agreement*, a schedule to the *Constitution Act, 1930*, 20-21 George V. c. 26 (U.K.), which by virtue of section 52(2)(b) of the *Constitution Act, 1982* forms part of the Constitution of Canada. In the course of his judgment for the majority overruling a prior judgement of that court, Sherstobitoff, J.A. stated:

> " It seems also apparent that if the court had realized that it was interpreting a part of the constitution when it interpreted s. 12 of The Natural Resources Transfer Agreement, it would not have incorporated by reference, as it has done, as a definition of the word "Indian" in that section, the definition of that word found in an ordinary statute, the Indian Act (Canada). The result of this incorporation by reference would be that Parliament is empowered to amend the constitution by simply amending the definition of the word "Indian" in the Indian Act from time to time as it has done. This cannot be right. The constitution cannot be amended by simple Act of Parliament. Even *The Natural Resources Transfer Agreement* itself, by s. 26, says that the agreement may be varied by agreement confirmed by concurrent statutes of the Parliament of Canada and the Legislature of the province." (emphasis added)[17]

27. The Association respectfully submits that Justice LaForme therefore was incorrect in concluding that the "class of persons (i.e. "Indians") under s. 91(24) can, and has been changed by Parliament many times since the time of Confederation". While it is true, as Justice LaForme pointed out, that for a period of time the *Indian Act* extended the benefits of registration to the wives or widows of a person who was entitled to be registered as a "status" Indian under the *Indian Act*, [18] that does not mean that Parliament was thereby declaring non-Indians to be Indians under the *Constitution*. Under section 91 Parliament can legislate in respect "to all Matters Coming within the Classes of Subject" enumerated in the section. By extending the benefits of registration to the wives of Indians, Parliament was legislating in respect of a "matter" relating to Indians – i.e. the statutory benefits which their wives could obtain under the *Indian Act*. This did not turn those wives into Indians under the *Constitution Act*, it incidentally extended certain

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17 *R. v. Grumbo* (1997), 159 D.L.R. (4th) 577, per Sherstobitoff, J.A., at p.588, para. 24.

statutory benefits to them because of their relationship with "Indians", the "class of subject" dealt with in section 91(24).

(iv) Fourth Divisional Court Reason: Since the circumstances under which divorce has been available have changed over time, therefore the meaning of marriage can be changed ; and if the essential nature of marriage is frozen at its 1867 meaning, then women would still be subordinate to men.

28. Justice LaForme wrote:

> " If the federal power over "Marriage and Divorce" were somehow limited by an internal definition reflecting the understandings of 1867, I would venture to say that there would exist a significant number of unlawful marriages in Canada today. By way of example - as illustrated in the evidence and materials filed - in 1867 a husband could only petition for divorce if his wife committed adultery. That, may have been the understood definition of divorce in 1867, but it has since clearly undergone many and repeated legislative changes."[19]

The Association submits that Justice LaForme again confused the "incidents" of a subject-matter with its "essence". Divorce, in 1867, meant the legal termination of a marriage, the union between a man and a woman. Divorce continues to bear the same meaning today, for the essence of divorce remains the termination of the legal relationship "marriage" between a man and a woman. It is true that the circumstances under which a marriage can be terminated have changed over the years, but those circumstances represent the "incidents" of the subject-matter, not its essence. Justice LaForme confused the two.

29. Justice LaForme similarly confused "incidents" for "essence" when he wrote that:

> "if it indeed were the case that the essential nature of marriage was that as frozen in 1867, it must now be accepted as having been overtaken by the passage of time. By way of one example, the subordination of the wife in the identity of the husband was absolutely central to the legal conception of marriage in the 19th century Canada. That is obviously no longer a view that is held by any right thinking person in Canada."[20]

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18 *Indian Act*, R.S.C. 1975, c. I-6, s. 11(1)(f)
19 *Halpern*, per LaForme, J. at para. 120.
20 *Halpern*, per LaForme, J. at para. 121

The essential meaning of "marriage" is the union of a man and a woman; what legal benefits or obligations accompany marriage is a matter of "incidents", and those incidents certainly have changed over time. However, the essential meaning has not.

(v) Fifth Divisional Court Reason: The *Charter* must be brought to bear and applied to any judicial interpretation of s. 91(26).

30. The final reason given by Justice LaForme for rejecting the Association's argument was as follows: "I believe that because the Charter is part of the constitution, the Charter must be brought to bear and applied in any judicial interpretation of s. 91(26)."[21] In reaching this conclusion Justice LaForme erred in law by completely ignoring, and failing to deal with, the Supreme Court jurisprudence since the *Bill 30* case holding that the *Charter* cannot be used to alter or cut down the powers granted to legislatures under sections 91 and 92 of the *Constitution Act, 1867*.

31. In the *Bill 30* case, which dealt with legislation by the Ontario Legislature to extend provincial funding to the senior grades of Roman Catholic high schools, opponents of the legislation asserted that the extension of funding would violate section 15(1) of the *Charter* because funding would only be extended to schools of one religious group. The Ontario government contended that its bill was immune from *Charter* scrutiny because it represented an exercise by the province of its legislative powers under section 93(1) of the *Constitution Act, 1867* with respect to denominational schools and therefore was protected by section 29 of the *Charter*. The Supreme Court of Canada accepted this position, but went on to consider what the result would be if the bill could only be supported under the province's general plenary power with respect to education under the opening language of section 93. Madame Justice Wilson wrote:

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21 *Halpern*, per LaForme, J. at para. 117

> " This does not mean, however, that such rights or privileges are vulnerable to attack under ss. 2(a) and 15 of the Charter. I have indicated that the rights or privileges protected by s. 93(1) are immune from Charter review under s. 29 of the Charter. I think this is clear. What is less clear is whether s.29 of the Charter was required in order to achieve that result. In my view, it was not. I believe it was put there simply to emphasize that the special treatment guaranteed by the constitution to denominational, separate or dissentient schools, even if it sits uncomfortably with the concept of equality embodied in the Charter because not available to other schools, is nevertheless not impaired by the Charter. *It was never intended, in my opinion, that the Charter could be used to invalidate other provisions of the Constitution, particularly a provision such as s. 93 which represented a fundamental part of the Confederation compromise*...(emphasis added)

Of a panel of seven judges, four others adopted this approach of Wilson, J.[22]

32. The relationship between the *Charter* and the rest of the Constitution was considered again by the Supreme Court of Canada in the *Nova Scotia Speaker's* case in which a television company sought to review a decision by the Speaker of the Nova Scotia House of Assembly prohibiting the broadcasting of proceedings of the House. The Supreme Court of Canada upheld the Speaker's decision and applied the principles set out in the *Bill 30* case. McLachlin J. stated:

> "It is a basic rule, not disputed in this case, that one part of the Constitution cannot be abrogated or diminished by another part of the Constitution: *Reference re Bill 30, An Act to amend the Education Act (Ont.),* [1987] 1 S.C.R. 1148…(p. 373)
>
> *To put it another way, the province's constitutional power to provide for separate education gave it the constitutional right to discriminate between groups.* To deny that power on the ground that it infringed the Charter would be to diminish or abrogate the very power which the Constitution conferred on the province. This the Charter cannot do…(p. 392)
>
> *In this case, the issue is not the fruit of the constitutional tree (the exercise of a power), but the tree itself (the existence of the power)…. The issue is – indeed the issue can only be – whether the Assembly has a constitutional power to exclude strangers from its deliberations. If this Court were to rule that the Assembly could not to do this, this Court would be taking away a constitutional power possessed by the Assembly. At issue, in other words, is the constitutional "tree" itself, rather than the fruit of the tree. It is*

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22 *Reference Re Bill 30, an Act to Amend the Education Act (Ont.)*, [1987] 1 S.C.R. 1148, at 1197g – 1198h, per Wilson, J. In the other judgment Estey, J. wrote: "The role of the Charter is not envisaged in our jurisprudence as providing for the automatic repeal of any provisions of the Constitution of Canada which includes all of the documents enumerated in s. 52 of the Constitution Act, 1982." (at 1206i – 1207d).

> *therefore no answer to a claim for constitutional privilege to say that it constitutes the mere exercise of a constitutional power.*" (pp. 392-393) (emphasis added)[23]

33. In the language of the *Nova Scotia Speaker's* case, does Parliament have a constitutional power to exclude same-sex couples from the definition of "marriage", or the constitutional power to discriminate between groups in respect to marriage? The Association submits that it does because the constitutional power possessed by Parliament under s. 91(26) of the *Constitution Act, 1867* only permits it to legislate in respect of a union between a man and a woman – that is the "constitutional tree" or "compact of Confederation" enshrined in s. 91(26) which cannot be abrogated or diminished by the *Charter*. It therefore follows that the provinces, under their head of power in s. 92(12), can only solemnize marriages between men and women. As stated in paragraphs 8 to 11 above, the constitutional allocation of legislative powers between Parliament and the provinces over social relationships cannot be altered by the court changing the meaning of a head of power under section 91 or 92, for that would involve changing the "constitutional tree". While a term such as "marriage" that constitutionally assigns legislative powers between the levels of government certainly can be "reformulated" or its meaning changed, the process which must be used is that contained in the amending formula for the Constitution set out in section 38 of the *Constitution Act, 1982* because any such change would alter the allocation of legislative powers between the federal and provincial governments. A court does not possess the jurisdiction to make such a change.

34. Again, the Association wishes to reiterate that it is not asserting that legislatures lack the power to legislate with respect to the appropriate benefits/obligations of same-sex or other non-

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[23] *New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly)*, [1993] 1 S.C.R. 319, at 373, 392 and 393. In *Adler v. Ontario*, [1996] 3 S.C.R. 609, per Iacobucci, J at p. 642, para. 35 and 649, para. 49, the Supreme Court of Canada reaffirmed that one section of the Constitution cannot be held to be violative of another. This Court followed the *New Brunswick Broadcasting* case in *Ontario (Speaker of the Legislative Assembly) v. Ontario (Human Rights Commission)*, (2001), 146 O.A.C. 125 (C.A.), at pp.134-135, paras. 29 – 33. Per Finlayson, J.A., at para. 32.

marital economically interdependent couples; they simply lack the power to do so under the legislative heads of power dealing with "marriage".

***SECOND ISSUE*: In the alternative, the Association submits that when a proper contextual and purposive analysis is undertaken, it is evident that the definition of marriage does not discriminate against same-sex couples in any way that infringes section 15 of the *Charter*.**

35. The Association adopts and relies on the submissions made by the Attorney General of Canada in paragraph 56 of her Factum that:

> "the Court erred in law in finding that marriage breaches the couples' right to equality; it adopted an incorrect approach to the s. 15 (1) analysis, made factual determinations which were not supported by the evidentiary record and, as a result, incorrectly applied the elements of the s.15(1) test set down by the Supreme Court in the *Law* decision. "

More specifically, the Association adopts and relies on the submissions made in paragraphs 62 to 67 of the AG's Factum that "Laforme J. created an erroneous and inappropriate dichotomy between the 'purposive' and the 'contextual' approaches", with the result that he treated them as competing, and wrongly rejected the "contextual" approach in favour to the "purposive" one.

36. The Association's submissions will supplement those in paragraphs 95 to 106 of the AG's Factum that "the meaning of marriage must be assessed to include its historical, biological, sociological, religious and anthropological roots." In particular, the Association will expand upon the Attorney General of Canada's conclusion that "universal patterns demonstrate that the raison d'etre of marriage is to complement nature with culture for the sake of the intergenerational cycle. "

A. Marriage Uniquely Meets the Needs of Contemporary Canadian Society.

37. Society's need to promote marriage – the one unique union that complements nature with culture for the sake of the intergenerational cycle – has not changed. In striking down the common law definition of marriage as violating section 15(1) of the *Charter* it was a common

theme of the judgments below that the common law must evolve to reflect "contemporary social reality", that that the role of the courts under the common law is to "determine existing needs and values of society" and that the common law cannot "isolate itself from the dictates and reality of modern society."[24] Each judge agreed that the existing definition of marriage no longer served "contemporary social reality" because it did not grant some form of legal recognition to same-sex relationships. The Association submits that the court erred in reaching this conclusion and, in so doing, failed to engage in a proper contextual analysis which forms the third-step of the *Law* approach to section 15 claims. In particular, the court below erred in failing to find that the legal distinction arising from defining marriage as the union of a man and a woman issue takes into account "actual needs, capacity or circumstances"[25] and is objectively justifiable.[26]

38. Marriage, historically understood, satisfies the "existing needs and value of society" to promote a union that complements nature with culture for the sake of the intergenerational cycle. In so doing, marriage is not isolated from the realities of modern society, but continues to reflect and respond to primary needs of our "contemporary social reality". Humans continue to be a species populated by males and females (or in the words of the anthropologists, a "sexually dimorphic" species), and this characteristic of humans continues to be a key social reality of contemporary Canadian society.

39. As the extensive evidentiary record before the lower court demonstrates, marriage "complements nature with culture for the sake of the intergenerational cycle" in three defining ways:

(i) marriage promotes the long-term co-operation between men and women;

(ii) marriage perpetuates humanity through procreation; and,

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24 *Halpern*, per LaForme, J. at paras. 135 and 136; per Smith, A.C.J.S.C. at para. 16; and per Blair, J. at para. 31.
25 *Law v. Canada*, [1999] 1 S.C.R. 497, at paragraph 70
26 *Law*, paras. 59 to 61 and Walsh, paras. 36-39

(iii) marriage provides the crucible for the socialization and raising of children.

These defining characteristics of heterosexual marriage are as necessary to meeting the needs of our contemporary social reality as they were in the past. Marriage as the union of a man and a woman is the only social institution that is oriented to meeting these crucial needs of society. This is a key distinction that sets marriage apart from same-sex unions within the section 15(1) purposive and contextual analysis. The union of a man and a woman acts to satisfy these needs of society in a way non-marital relationships, including same-sex relationships, are unable to do.

40. Both Justices Blair and Justice LaForme attempted to reduce the historic conception of the "principal rationale", or defining characteristic, of marriage to one thing: in the case of Justice Blair, the procreation of children "through heterosexual coupling"; in the case of Justice LaForme, the purpose of "companionship". [27] The Association submits that those findings misconstrued the evidence before the court below about the purposes of marriage and thereby narrowed the historic understanding of the defining characteristics of marriage. Those characteristics are broader and richer than were conceived by the court below. In identifying the universal features of marriage, Professor Katherine Young deposed:

> "Marriage is supported by authority and incentives; it recognizes the interdependence of maleness and femaleness; it has a public dimension; it defines eligible partners; it encourages procreation under specific conditions; and it provides mutual support not only between men and women but also between men and women and their children (the sharing of resources, apart from anything else, or transmission of property)."[28]

In his affidavit, David Coolidge observed that the "sexuality" of the human race "means the reality that all human beings are embodied as male or female: different, yet designed to complement one another".[29] Marriage, he argues, has been the unique social institution that "embodies and governs sexual community". While marriage is characterized by the biological as

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27 *Halpern*, per Blair, J. at paras. 69 to 70; and per LaForme, J. at para. 240.

28 Affidavit of Katherine Young Affidavit (hereafter the "Young Affidavit"), para. 2, p. 1, Respondent's Record, Vol. 2A, p. 685.

exemplified in the act of sexual intercourse, it also includes a strong cultural dimension providing the context for social relationships between men and women as well as the context for the socialization of children in respect to their development, including their development in the area of gender identity.[30]

B. Marriage serves the continuing need of Canadian society for a cultural institution oriented towards encouraging co-operation between the sexes.

41. Marriage is a form of life geared toward managing sexual difference. As put by David Coolidge:

> "What is the purpose of this sexual 'complementarity'…? I believe sexuality is meant to unite those different from, yet designed for, each other – males and females. It is the primordial dynamic of human society, the drive for 'community' at its most basic level…
>
> Sexual intercourse between a man and a woman exemplifies the purpose of sexuality: In this act, two people can simultaneously unite their entire persons into a dynamic sexual community…"[31]

Coolidge then points out the uniqueness of this sexual dynamic between a man and a woman:

> "No other form of sexual activity can provide this total union. For this reason, same-sex 'intercourse' is different than male-female intercourse, because it does not exemplify the reality of sexual complementarity. The bodies of same-sex partners do not complement one another or bring forth new life. This is no small thing, because a person's body is intrinsic to his or her existence. The idea of splitting sexuality into 'parts' – for instance, procreation, partnership, and pleasure – and then separating those parts in practice is inimical to a pluralist view of sexual wholeness"

Coolidge concludes:

> "…marriage can be defined as total sexual community. The institution of marriage is the social structure which embodies and governs that community…
>
> Marriage is therefore the most basic institution of society. Society depends upon men and women who make total commitments, give fully of themselves, nourish intimacy, and gift the world with children." [32]

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29 Coolidge Affidavit, Exhibit "B", "*Same-Sex Marriage? Baeher v. Miike and the Meaning of Marriage*" (1997), 38 South Texas Law Review 1 (hereafter, the "Coolidge Article"), p. 46, Association's Record, Tab 1B.

30 Coolidge Article, at pp. 46 – 55; Association's Record, Tab 1B.

31 Coolidge Article, at pp. 47, 50, Association's Record, Tab 1B.

32 Ibid., at pp. 51 and 53.

42. Professor Katherine Young also points to the need for a cultural institution reflecting the complementarity of men and women when she deposes that "[b]ecause male and female bodies are biologically different from each other in at least a few important ways, even though it may sound counterintuitive, the fact is that a massive cultural effort is needed to bind them together, on an enduring basis, for the collective good."[33]. Consequently, some of the universal features of marriage that she found as a result of her comparative studies included the recognition of the interdependence of maleness and femaleness, its public dimension, its definition of eligible partners and the mutual support it provided between men and women[34]. In sum, a key defining characteristic of marriage is that it supports the bonding of men and women and the process of living together notwithstanding their sexual differences.

43. The Divisional Court ignored this distinctive characteristic of marriage based upon the complementarity of the sexes. Instead, the court below watered-down this characteristic from one of supporting the relationships between the sexes to simply supporting any long-term committed relationship or "companionship".[35] Although companionship may be an ancillary effect of marriage, LaForme J.'s finding is not supported by the historical record – marriage was not an institution intended to support long-term committed relationships or companionship "per se"; it served as a cultural institution to unite members of the opposite sex in a monogamous and committed "dynamic sexual community" reflecting the sexuality of males and females and their natural complementarity of design. To use the vernacular, men and women were made for each other and in marriage they came together into one and thereby fulfilled their natural purpose and design.

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33 Young Affidavit, p. 53, para. 103, *Respondent's Record*, Vol. 2A, pp. 737-8
34 Young Affidavit, supra., para. 2
35 *Halpern*, per Blair, J. at para. 32; and per LaForme,J. at para. 240.

44. As noted above in paragraph 37, Coolidge warned against splitting sexuality into its parts, and instead argued that marriage reflects a holistic view of human sexuality. In its recent decision in *Attorney General (Nova Scotia) v. Walsh*[36] the Supreme Court of Canada cautioned courts against conducting a section 15 analysis which relied solely on a "functional" comparison between two groups without taking into account the "full range of traits, history and circumstances".[37] The Association submits that the Divisional Court fell squarely into this trap of trying to reduce the comparative analysis down to one of functional similarity, instead of considering the defining characteristics of marriage in the broader context of its "full range of traits, history and circumstances". By ignoring the sexual complementarity upon which marriage is based the Divisional Court radically departed from the long-standing legal view that the capacity for heterosexual intercourse is an essential characteristic of marriage. As stated by Ormrod, J. in *Corbett v. Corbett*:

> … sex is clearly an essential determinant of the relationship called marriage, because it is and always has been recognised as the union of man and woman. It is the institution on which the family is built, and in which the capacity for natural heterosexual intercourse is an essential element.[38]

C. Marriage serves the continuing societal need for a cultural institution dedicated to the perpetuation of humanity

45. It is a truism that any society requires the regeneration of its population to survive and flourish. Canada is no different: such a need exists today just as it has throughout the history of Canada. Marriage has served as the cultural institution dedicated to creating the conditions in

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36 *Attorney General (Nova Scotia) v. Walsh*, [2002] S.C.J. No. 84

37 *Walsh*, supra., at para. 39

38 *Corbett v. Corbett*, [1970] 2 All E.R. 33, at 48. *Corbett* has been quoted with approval in Canada in at least three cases: *North v. Matheson* (1974), 20 R.F.L. 112, (Man. Co. Ct.) at 116, *M. v. M. (A)* (1984), 42 R.F.L. (2d) 55 (P.E.I.S.C.) at 57-58, and *C.(L) v. C. (C.)* (1992), 10 O.R. (3d) 254 at 256. In *M. v. M.(A.),* at 59, McQuaid J. affirmed that "the capacity for natural heterosexual intercourse" is essential to marriage. Capacity for heterosexual intercourse was again affirmed in *Layland v. Ontario (Minister of Consumer & Commercial Relations)* (1993), 14 O.R. (3d) 658, (Div. Ct.) at 666, in which Southey J. on behalf of the majority, quoted extensively from Philp Co. Ct. J's affirmation of *Corbett* in *North v. Matheson*, (1974), 20 R.F.L. 112, and found: "…One of the principal purposes of the institution of marriage is the founding and maintaining of families in which children will be produced…That principal purpose of marriage cannot, as a general rule, be achieved in a homosexual union because of the

which Canadian society is perpetuated. The Divisional Court did not disagree with this fact, but it minimized the importance of the fact by contending that the presence of artificial means of conception no longer means that procreation is a defining characteristic of marriage. Justice Blair contended that "procreation through heterosexual coupling, as the source of the "reality" of children being born into a family, and therefore as the characteristic giving marriage its principal rationale and unique heterosexual nature, is becoming an increasingly narrow and shaky footing for the institution of marriage."[39] Why? Because, he wrote, that in view of modern medical technology the production of children "is presently attainable through means other than heterosexual intercourse." The Association submits that this reasoning is deeply flawed.

46. First, as noted in the AG's Factum, demographic statistics continue to show that marriage remains the most stable unit for family formation[40]. In *Egan* Justice LaForest observed that the family unit based on father, mother and child "is the only unit in society that expends resources to care for children on a routine and sustained basis."[41] Public policy should be based on the norm and not the exception, and procreation within marriage has been and continues to be the norm. Contemporary Canadian society continues to need such a social unit. As put by Professor Young:

> "Marriage has never been defined merely as one context for producing or rearing children, both of which can occur – and often do – without marriage. Marriage has always been defined as the *ideal* context for producing and rearing children. That is because marriage, at least in theory, provides them with parents of both sexes on an intimate and enduring basis (although it does not always work out this way due to death, divorce or abandonment).[42]

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biological limitations of such a union. It is this reality that is recognized in the limitation of marriage to persons of opposite sex." *Layland v. Ontario (Minister of Consumer & Commercial Relations)* (1993), 14 O.R. (3d) 658, at 666.

39 *Halpern*, per Blair, J. at para. 69

40 AG Canada Factum, para. 11.

41 *Egan v. Canada*, [1995] 2 S.C.R. 513, at p. 537, para. 25.

42 Young Affidavit, *supra*., para. 110; *Respondent's Record*, Vol. 2A, pp. 741-2

47. Second, the overwhelming number of children are conceived naturally. Justice Blair's contention that because some children are now conceived by artificial means, procreation through sexual intercourse no longer constitutes a defining characteristic of marriage simply ignores the predominant reality, and therefore a continuing need, of Canadian society.

48. Third, Justice Blair unilaterally shifts one of the principal purposes of marriage from procreation to the raising of children. While such a shift is necessary in order for Justice Blair to be able to conclude that "marriage is more fully characterized…by its pivotal child-rearing role"[43], where is the evidence in the record to justify a finding that Canadian society no longer recognizes the creation of children as a principal purpose of marriage? There is none.

49. If child-raising is a principal purpose of marriage, then *a priori*, procreation, as its antecedent cause, must also be a principal purpose, otherwise public policy is inverting the pyramid and giving priority to the effect over the cause. This is illogical. Child-raising is an effect or consequence of procreation. In the absence of a Brave New World where test tubes replace human acts, the act of intercourse resulting in procreation remains the overwhelmingly predominant way in which Canadian society replenishes itself. The Association submits that the common law must continue to meet this need of Canadian society by supporting "the only unit in society that expends resources to care for children on a routine and sustained basis", and the court below erred in ignoring this need.

D. The Need for an Institution To Support the Socialization and Rearing of Children

50. While the Divisional Court acknowledged that child-rearing constitutes one of the principal purposes of marriage, Canadian society needs an institution that will socialize and rear

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43 *Halpern,* per Blair, J. at para. 70

children in light of the fact that it is characterized by males and females. When discussing in his affidavit the sexual community of men and women, David Coolidge put the matter this way:

> "Sexuality involves socialization. This cultural dynamic affects the development of gender identity in children. The patterns of gender formation differ between boys and girls, based on separation from or identification with their mothers. In order to avoid either misogyny or passivity, children need mothers and fathers, regardless of their parents' specific gender roles."[44]

Professor Craig Hart deposed that there is a body of scientific evidence indicating that "natural family" structures which include married mothers and fathers living under the same roof are more likely to provide more stable and secure environments for children to flourish in. Research has documented that natural family structures benefit nearly every aspect of children's well being, including greater educational opportunities, better emotional and physical health, less substance abuse, lower incidences of early sexual activity for girls, and less delinquency for boys.[45]

51. According to Professor Hart, other studies indicate that fathers and mothers contribute to child development in ways that are different from, yet complementary to, one another. For example, evidence indicates that the most important factor that is more relevant than family income for diminishing delinquent behaviour is the presence of the father in the home. In fact, data shows that delinquency is twice as high in cases where the father is absent than when he is present. Other recent supporting research suggests that even after taking into account a wide variety of factors, including race, income, residential instability, urban location, and so forth, fatherless boys were still found to be twice as likely to be incarcerated as boys in a two parent, father present home.[46]

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44 Coolidge Article, p. 48, Association's Record, Tab 1B.

45 Hart Affidavit, *Association's Record*, Tab 2, p. 3, paras. 4 –5, and the studies cited therein. See also the summary of current social science literature in, "Why Marriage Matters: Twenty-One Conclusions from the Social Sciences" (2002: Institute for American Values, New York)

46 Hart Affidavit, *Association's Record*, Tab 2, p. 4, para. 5 and the studies cited therein.

52. Research provides other examples of this parenting complementarity. A significant body of research indicates that fathers are more oriented towards being physically playful with their children than mothers; fathers eliciting more positive and less negative emotion from children during play have been shown to help children learn to read social cues and regulate their emotions in ways that can result in more positive social adjustment with peers. Greater playfulness, patience and understanding with children on the part of fathers was associated with less child aggressive behaviour with peers at school.[47] Father effects outweighed mother effects in this regard, again illustrating relatively, stronger father influence in the playful domain of parent-child interaction. A father's presence also can provide daughters with a stable relationship with a non-exploitive adult male who loves and respects them. Security and trust derived from this relationship helps girls avoid precocious sexual activity and exploitive relationships with other males. In light of the data at hand many scholars have concluded that fathers contribute to core aspects of children's stability, self-confidence, self-regulation and self-identity.[48]

53. In other domains of parent-child interaction, mothers seem to matter more. There is evidence of stronger mother effects for children's pro-social behaviour relative to fathers in the domain of reasoning with children about consequences for their actions, and that children who had more reasoning-oriented mothers engaged in more pro-social, cooperative play with peers. They were also more accepted by peers. [49]

54. Taken together, these findings suggest that mothers and fathers do indeed make unique contributions to children's development. In his affidavit, Dr. Hart opined:

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47 Hart Affidavit, *Association's Record*, Tab 2, p. 4, para. 6, and the studies cited therein
48 Hart Affidavit, *Association's Record*, Tab 2, p. 5, para. 7 and the studies cited therein
49 Hart Affidavit, *Association's Record*, Tab 2, p. 6, para. 8 and the studies cited therein.

> … both mothers and fathers play vital roles in the healthy development of children. Same sex marriages (and partnerships) simply cannot possess the gender-based complementary quality of the heterosexual marriage union. The heterosexual marriage union holds the greatest potential for optimum child development due to the complementarity of mothering and fathering occurring together in an explicitly committed relationship.[50]

55. The Association recognizes that people who are not married and occupy non-traditional relationships endeavour to raise the children in their care properly and lovingly, and that there are differing views as to the probabilities of achieving socially important goals in traditional and non-traditional relational settings. However, the evidence submitted does suggest that the traditional institution of marriage has real life virtues and benefits that address needs of contemporary Canadian society and that these benefits should not be disturbed or obscured by changing the institution's core definition.

SUMMARY

56. By way of summary, the Association submits this Court does not possess the jurisdiction to change the definition of marriage to include same-sex unions as requested by the applicants. As used in sections 91(26) and 92(12) of the *Constitution Act, 1867*, the word "marriage" has a clear, constitutionally-enshrined, definition as the union between a man and a woman, and this meaning underpinned the allocation of legislative powers over social relationships that formed part of the Confederation compact. Provisions of the *Charter* are not available to the Halpern applicants to alter, reduce or strike down that definition, for such an application of the *Charter* would result in a change in the allocation of legislative powers between the federal and provincial governments. A change to the meaning of the word "marriage" found in sections 91 and 92, and any consequential change in the allocation of legislative powers over social

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50 Hart Affidavit, *Association's Record*, Tab 2, p. 6, para. 9.

relationships, can only take place by way of amendment to the *Constitution Act, 1867*. Accordingly, this Court lacks the jurisdiction to grant the relief requested by the applicants.

57. Alternatively, the Association submits that if this Court does possess the jurisdiction to assess the "constitutional tree" of legislative power over marriage contained in sections 91(26) and 92(12) of the *Constitution Act, 1867*, the internal limitation in section 91(26) of marriage to unions between men and women does not violate section 15(1) of the *Charter* since it rests on a distinction based on actual differences, not on stereotypes. Marriage, as the union of a man and a woman, uniquely serves critical needs of contemporary Canadian society, and any differential treatment arising from this constitutional definition is not discriminatory.

PART V – ORDER REQUESTED

58. The Association respectfully requests that this Court grant the appeals of the Attorney-General of Canada and dismiss the cross-appeals.

January 23, 2003 ALL OF WHICH IS RESPECTFULLY SUBMITTED,

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David M. Brown

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Cindy Silver

Counsel for the Intervener,
The Association for Marriage and the Family in Ontario

SCHEDULE "A"

AUTHORITIES

Adler v. Ontario, [1996] 3 S.C.R. 609, at 642 and 649

Attorney-General for Alberta v. Attorney-General for Canada, [1947] A.C. 503, at 516, 517

Attorney General (Canada) v. Canard (1975), 52 D.L.R. (3d) 548, at 575

Attorney General (Nova Scotia) v. Walsh, [2002] S.C.J. No. 84, at para. 39

Canadian Pioneer Management Ltd. v. Saskatchewan (Labour Relations Board), [1980] 1 S.C.R. 433, at 449-450

Corbett v. Corbett, [1970] 2 All E.R. 33, at 48

Connolly v. Woolrich (1867), 11 L.C.J. 197 (Que. Sup. Ct.), at 215

Egan v. Canada, [1995] 2 S.C.R. 513 at 537, 583

Halpern v. Canada (2002), 60 O.R. (3d) 321 (S.C.J., Div. Ct.)

Hyde v. Hyde and Woodmansee (1866), LR 1 P&D 130

Law v. Canada, [1999] 1 S.C.R. 497

Layland v. Ontario (Minister of Consumer & Commercial Relations) (1993), 14 O.R. (3d) 658

M. v. H., [1999] 2 S.C.R. 3, at 48

New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly), [1993] 1 S.C.R. 319, at 373, 392-3

R. v. Grumbo (1997), 159 D.L.R. (4^{th}) 577, at 588

Reference Re Bill 30, an Act to Amend the Education Act (Ont.), [1987] 1 S.C.R. 1148, at 1197-8; 1206-7

Reference Re: British North America Act, 1867 (U.K.), s. 91, [1939] S.C.R. 104, at 112, 117, 123-124

Re Section 24 of the B.N.A. Act, [1930] 1 D.L.R. 98 (P.C.), at 104, 109 and 112-113

(Speaker of the Legislative Assembly) v. Ontario (Human Rights Commission), (2001), 146 O.A.C. 125 (C.A.), at 134-5

ARTICLES/OTHERS

Peter W. Hogg*, Constitutional Law of Canada* (Loose-leaf Edition) (Toronto: Carswell, 1997), at 27-3 to 27-4 p. 57-5

Why Marriage Matters: Twenty-One Conclusions from the Social Sciences (2002: Institute for American Values, New York)

SCHEDULE "B"

Relevant Statutory Provisions

Indian Act, R.S.C. 1975, c.I-6, s. 11(1)(f)

Hedy Halpern and Colleen Rogers, et al Applicants (Respondents in Appeal)	and	**The Attorney General of Canada, et al** Respondents (Appellant)	Court File No: C-39172 Court File No. C-39174

COURT OF APPEAL FOR ONTARIO

Proceeding commenced at TORONTO

FACTUM OF THE INTERVENER, THE ASSOCIATION FOR MARRIAGE AND THE FAMILY IN ONTARIO

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