No. L002698
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

EGALE CANADA INC.,
DAVID SHORTT AND SHANE MCCLOSKEY,
MELINA ROAY AND TANYA CHAMBERS,
LLOYD THORNHILL AND ROBERT PEACOCK,
ROBIN ROBERTS AND DIANA DENNY,
WENDY YOUNG AND MARY THERESA HEALY

PETITIONERS

AND:

THE ATTORNEY GENERAL OF CANADA,
THE ATTORNEY GENERAL OF BRITISH COLUMBIA, AND
THE DIRECTOR OF VITAL STATISTICS FOR BRITISH COLUMBIA

RESPONDENTS

No. L003197
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

B E T W E E N :

DAWN BARBEAU AND ELIZABETH BARBEAU
PETER COOK AND MURRAY WARREN
JANE HAMILTON AND JOY MASHUHARA

PETITIONERS

AND:

THE ATTORNEY GENERAL OF BRITISH COLUMBIA
THE ATTORNEY GENERAL OF CANADA

RESPONDENTS

SUBMISSION OF THE INTERVENER THE INTERFAITH COALITION FOR MARRIAGE

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PART I - OVERVIEW

1. "Marriage" is not a legal construct. It is an institution that was not created by law. It is, rather, a pre-existing societal and primarily religious institution which has existed for millennia and has only been relatively recently recognized by legislation. Unlike the legislative concept of "spouse," the institution of marriage was neither created by nor defined by legislation. It alone conferred the status of "husband and wife", and has been recognized by all major religious faiths and societal groups as existing uniquely between a man and a woman. What the applicants seek in this petition is nothing less than a fundamental redefinition and substantive change to this pre-existing religious and societal institution.

2. Neither federal nor provincial legislation defines marriage; Nor does the common law. They both simply recognize it as a pre-existing institution conferring the status of "husband and wife". The *Constitution Act, 1867* expressly acknowledges the existence of this institution and authorizes federal and provincial legislation pursuant to ss. 91(26) and 92(12) in respect of "marriage". Therefore, legislation which is expressly prescribed by the constitution cannot be subject to *Charter* review according to the principles established by the Supreme Court of Canada in *Reference Re Bill 30*. Furthermore, what the applicants really complain of is not the fact that the legislatures have legislated in respect of "marriage" nor the common law recognition. Rather, the applicants seek social recognition for the legitimacy of other forms of domestic partnership. These partnerships are not between "husband and wife". This is beyond the scope of *Charter* review. The applicants do not seek a review of existing legislation or law. "Marriage" symbolizes social and religious acceptance of the legitimacy of relationships. The applicants want the courts to mandate social acceptance of a form of domestic partnership. Their application is not about legal exclusion from a legislative or legal category. Rather, it seeks fundamental judicial redefinition of the institution of marriage. As recognized by the Ontario Divisional Court in *Layland*, this is both unprecedented and beyond the role of courts conducting *Charter* review.

3. This challenge is qualitatively distinct from previous legal challenges to the legislative concept of "spouse." The spousal category is completely the creation of statute and is the basis for the provision of statutory benefits or access to legislative regimes. In cases such as *Egan*, *M.* v. *H*, and *Vriend*, the Supreme Court of Canada determined that the exclusion of an identifiable group - gay men and lesbians - from legislative benefits and regimes contravened the *Charter*. However, as Justices Cory and Iacobucci recognized in *Egan* and *M. v. H*, those challenges did not raise the issue of whether the *Charter* should be used to fundamentally redefine the institution of marriage. It is beyond the purview of the *Charter* to seek a

judicially mandated status for gay men and lesbians that would require a fundamental redefinition of a pre-existing institution which, although recognized by common law and statute, was not created thereby.

4. There is a legitimate and important societal interest in encouraging legislative initiatives that recognize and encourage mutually affirming and committed domestic partnerships. Parliament and the legislatures have adopted statutory measures to protect "spousal" relationships, as they have been defined, and can adopt further legislative measures to recognize, register and provide benefits for spousal relationships and domestic partnerships that are not between husband and wife. The fundamental redefinition of "marriage", that would alter and change the essence of this institution, is neither constitutionally required nor necessary to accomplish these legislative objectives.

5. Many important things exist independent of legal recognition. Justice and religion, to name two, have important legal and non-legal dimensions. To come to a proper understanding of the principles that are central to this case, it is important to understand the distinction between legal and non-legal spheres. An illustration of some important social realities that have an existence independent of legal recognition leads us to a consideration of both foundational *institutions* (such as marriage) and foundational *concepts* (such as rights and freedoms themselves). Marriage and respect for the rights and freedoms that motivated the enactment of the constitution both logically pre-existed the documents themselves. For example, marriage, ethnicity, culture as well as fundamental rights and freedoms including conscience, religion, freedom of thought and belief, opinion, expression, peaceful assembly and association are not dependant upon legal recognition in order to be important and even foundational. While each of these in its own way may or may not be the subject of legal recognition, definition, regulation, qualification and enactment, the type and extent of legal "involvement" (for lack of a better word) requires careful attention to history, philosophy, religion and multi-cultural realities. Law must always ensure that its role is not extended beyond the proper jurisdiction of the State.

6. Marriage, as a religious and societal institution, has only conferred the status of "husband and wife" upon a man and a woman. As Justices LaForest and Gonthier recognized in *Egan* and *Miron*, this institution is uniquely capable of the procreation of children and has served a unique and vital role in this and many societies. Modern scientific reproductive capability does not obviate this unique function. All major world religions confine the institution of marriage to men and women. The existence of some dissentient views, as evidenced by some of the affidavit material filed in this petition, does not alter the fact that major world religions do not and cannot accept a fundamental redefinition of marriage to include same-

sex partnerships. If the court were to redefine the institution, it could no longer be accepted by most major religious groups who solemnize the vast majority of Canadian marriages.

7. Religious clergy in many denominations and faiths would be, by their religious principles, unable and unwilling to solemnize these redefined marriages between same-sex partners. This could require clergy to withdraw from the solemnization of marriage which could cause significant societal consternation and could also lead to legal and human rights proceedings against both the clergy and religious faiths who refuse to participate in the solemnization of certain redefined "marriages". This would also lead to significant societal confusion between the religious institution of marriage as understood for millennia and a new legal construct created by the courts. It is neither appropriate nor necessary for the courts to redefine this institution. If, however, they do so, they should be mindful of the serious repercussions for people of religious faith in Canada, their faith communities and institutions and their clergy in crafting remedies sought by the applicants. New remedies should not require, or be capable of requiring, religious institutions, clergy or people of religious faith to solemnize or be required to recognize a "marriage" that is contrary to their faith based conception of this religions institution.

8. In consideration of remedy, the court should not embark upon a legislative exercise that would not involve "reading down" or "reading in" but would effectively involve creating an entirely new legislative concept of "marriage" and provide for the recognition and registration of some type of redefined "marriage". This is beyond the principles established by the Supreme Court of Canada in *Schachter* and in subsequent jurisprudence. Rather, the court should, if it determines there is a constitutional violation, grant declaratory relief and the remedy of suspension to permit the legislatures to draft an appropriate legislative response that can balance the competing interests in society. Any such legislative response must take into account the important interests of religious faith groups in Canada pursuant to the provisions of s. 27 of the *Charter*. Furthermore, such legislative response need not redefine the institution of marriage, but, rather, can provide for equivalent registration benefits and recognition of other forms of domestic partnership.

PART II - THESE INTERVENERS' FACTUAL SUBMISSIONS

(i) The Legislative Context

9. Marriage is a societal and religious institution that has been recognized for millennia as an institution confined uniquely to the relationship between the male and female. It has confirmed a unique status in society of "husband and wife". The religious basis for this unique status, confined to heterosexual couples, has been grounded in the interpretations of the holy scriptures of the primary religions of the Western and Asiatic world - Christianity, Judaism and Islam. It has also been recognized for millennia as a uniquely heterosexual institution in other societal and religious groups.

Affidavit of Daniel Cere, **paras. 4, 5, 7, 8, 46, 47 and 65**

Revised Affidavit of Ernest Caparros, **paras.14, 16 and17**

Affidavit of Craig Gay, **paras. 4-5**

Affidavit of Rabbi David Novak, **paras. 4, 5, 9 and 10**

Affidavit of Abdalla Idris Ali, **paras. 6-10**

Affidavit of Stephen Michael Cretney, **paras. 13, 15, 17, 18, 20, 22, 26, 28, 29, 31 and 32**

Affidavit of John Witte Jr., **paras. 1, 4, 12, 15-25, 35 and 56**

Affidavit of Edward Shorter, **para. 128**

Affidavit of Beatrice Verschraegen, **paras. 45, 72, 95, 105 and 230**

Affidavit of Sanford Katz, **paras. 21-30 and 59-60**

Affidavit of Katherine Young, **paras. 2, 7, 34, 41-46 and 108**

Affidavit of Robert Stainton paras. 19 and 20

10. The status of marriage has neither been conferred nor created by statute or common law. Until the mid-eighteenth century in Western European legal traditions, marriage was recognized as a purely religious institution. It became legislatively recognized in Canada in the mid to late eighteen hundreds. The concept of civil marriage was subsequently introduced through a recognition of the status of marriage and the provision that it could be solemnized. However, the definition has never been prescribed by statute. Common law has recognized it as a pre-existing institution that predates not only the development of statutory but also common law.

Affidavit of Stephen Michael Cretney, **para. 12, 15 and 20**

***Affidavit of John Witte Jr.*, paras. 4, 46 and 47**

Affidavit of Robert Stainton para. 18

***Constitution* Act , *1867* (U.K.), 30 & 31 Vict., c.3, reprinted in R.S.C. 1985, App. II, No. 5. [hereinafter *Constitution Act, 1867*]**

***Marriage Act,* R.S.C. 1906, c. 105**

***Layland v. Ontario* (Minister of Consumer and Commercial Relations) (1993), 104 D.L.R. (4th) 214 (Ont. Div. Ct.) at pp. 217-8. Southey J. [hereinafter *Layland*]**

11. The status of marriage could only be conferred through religious ceremony, solemnized by religious clergy, in some provinces and territories, until quite recently as a result of legislative enactments. However, the vast majority of Canadians continue to have their marriages solemnized though religious services performed by religious clergy. These marriages must conform with the common law and legislative requirements.

***Revised Affidavit of Ernest Caparros* para. 7**

Affidavit of Suzanne Scorsone, para. 20, 39 and 40

***Marriage (Prohibited Degrees) Act,* S.C. 1990, c. 46 [hereinafter *Marriage Prohibited Degrees Act*]**

Constitution* Act , *1867, supra

Divorce Act,* R.S.C., c.3 (2ndSupp) [hereinafter *Divorce Act]

***Criminal Code,* R.S.C. 1985, c. C-46, ss.214, 290-295 [hereinafter *Criminal Code*]**

***Marriage Act,* R.S.B.C., 1996 c. 282, as amended [hereinafter *Marriage Act*]**
Vital Statistics Act,* R.S.B.C. 1996, c.479 [hereinafter *Vital Statistics Act]

***Layland v. Ontario, supra,* p. 219. Southey J.**

12. A number of restrictions have been placed on the capacity of people to marry. Both heterosexual and homosexuals are permitted to enter into marriage as "husband and wife" in a context which is not proscribed by law. Legislative and common law proscriptions include laws against prohibited degrees of consanguinity, polygamy and bigamy.

***Marriage (Prohibited Degrees) Act,* supra**

Divorce Act, supra

Criminal Code, supra

Marriage Act, supra

***Vital Statistics Act,* supra**

13. In the *Constitution Act, 1867*, the court specifically authorized Parliament to legislate in respect of marriage pursuant to ss. 91(26) and the provincial legislatures with respect to the solemnization of marriage (ss. 92(12)). Therefore, given this constitutional recognition of marriage and authorization of legislation in respect of marriage, any *Charter* challenge to legislation in respect of marriage is, effectively, precluded by the principles enunciated by the Supreme Court of Canada in *Reference Re Bill 30* as further recognized by the court in *Adler*.

***Constitution Act , 1867,* s-ss. 91(26), 92(12)**

***Reference Re Bill 30, An Act to Amend the Education Act (Ont.),* [1987] 1 S.C.R. 1148, at pp, 1173-74 and 1196-98 per Wilson J., at p. 1206-9 per Estey J.**

***Adler v. Ontario,* [1996] 3 S.C.R. 609 at pp. 640-4, 645-9 per Iacobucci J. [hereinafter *Adler*]**

(ii) The Roman Catholic Conception of Marriage

14. In Canada almost 50% of Canadians are Roman Catholics. The Catholic Church believes and teaches that the matrimonial covenant can only be between a man and a woman and that "God himself is the author of marriage." In addition, that "...the vocation to marriage is written in the vary nature of man and woman as they came from the hand of the Creator. Marriage is not a purely human institution despite the many variations it may have undergone through centuries in different cultures, social structures and spiritual attitudes." The matrimonial covenant is, by its nature, ordered toward the good of the spouses and the procreation and education of offspring and is one of the seven sacraments recognized by the Church - alongside baptism, confirmation, reconciliation, priestly orders and the last rites. Catholics believe that sacraments are "efficacious signs of grace, instituted by Christ and entrusted to the Church, by which divine life entrusted to us." Marriage is between a man and a woman and the institution is "…prior to any recognition by public authority, which has an obligation to recognize it." Marriage is not created by any public authority and, according to Catholic thought, the nature of marriage exceeds "in an absolute and radical way, the sovereign power of the State." Marriage exists "...prior to the State and any other community, and possesses inherent rights which are inalienable."

***Affidavit of Daniel Cere,* paras 6, 7 and 9**

***Catechism of the Catholic Church,* paras. 1131, 1601-1666, 2201 and 2202**

***Revised Affidavit of Ernest Caparros,* paras. 16, 17 and 25**

***Affidavit of John Witte Jr.,* Exhibit #4 "From Sacrament to Contract" p.p. 26-30**

***Family, Marriage and De Facto Unions* (July 2000) para. 9, 26 and 50**

15. The only sexual relationship that is considered morally acceptable within Catholicism is the one that takes place within heterosexual marriage. Any other way to express sexuality by whatever relationship, *heterosexual or between members of the same sex,* is considered by Catholic teaching to be morally wrong. Nevertheless, in Catholicism, the dignity of all persons is to be respected. Homosexual persons "must be accepted with respect, compassion and sensitivity. Every sign of unjust discrimination in their regard should be avoided." Such respect, however, does not involve any recognition of the legitimacy of sexual conduct outside of its appropriate context in heterosexual marriage. Sexual desires, like many human passions, must be evaluated by standards beyond the desires themselves. This is so for all human beings regardless of their sex or sexual orientation (and heterosexual desire is a sexual orientation as well). Recognition of same-sex marriage is not an option for Catholics since it is completely opposed to the Catholic understanding of the moral, religious, social and legal traditions that include the purpose of creation itself.

***Catechism of the Catholic Church, supra,* at para. 2358**

***Affidavit of Daniel Cere,* para. 34,**

***Reply Affidavit of Daniel Cere*, para. 4**

***Revised Affidavit of Ernest Caparros,* paras . 14 - 17**

16. Catholics believe that the inclusion of same-sex relationship recognition into the institution of marriage would fundamentally change the existing institution, not just add to it. There is no "bright line" that can be drawn between civil marriage and marriage before religious clergy. This is so because of the nature of the intermeshing that exists between civil and religious authorities and because all citizens live in civil society and share its institutions and legal recognitions. This inter-connection is particularly the case with such public institutions as public education. What is deemed to be required in "the Supreme Law of Canada" will become, in the nature of things, part of the expected curriculum of public education. The concept of a "bright line" or "water-tight compartment" between civil and religious institutions breaks down when one considers the reality of contemporary legal challenges and the widespread nature of the claim for recognition made by the applicants in these proceedings. Those parents with a belief (religiously motivated or not) that same-sex conduct is wrong ought not to be put in the position of having this view forced upon their children by way of constitutional determinations on another issue such as "marriage." It would be naïve to assume that this case will not produce just such a result when the flurry of recent court cases in this Province and elsewhere have been in just this direction.

***Chamberlain v. Surrey School* [District No. 36 (2000), 191 D.L.R. (4th) 128, [hereinafter *Chamberlain*]**

***Trinity Western University v. College of Teachers (British Columbia),* 2001 SCC.31, [hereinafter *Trinity Western University*]**

***Affidavit of Daniel Cere,* paras. 31 and 51**

***Revised Affidavit of Ernest Caparros,* paras. 7 - 11**

Christopher Gray, "Marriage, the Law, and Same-sex Unions" (1999/2000) 30 R.G.D. 583-605

17. Catholics share the concerns of many about the threats already posed to the existing meaning of marriage due to changes made in recent decades. Many developments have damaged marriage already and it is already an institution under considerable stress.

***Family, Marriage and De Facto Unions* July 2000 para. 50**

***Affidavit of Edward Shorter,* paras 126, 127 and 128**

***Affidavit of Katherine Young,* paras. 102-107 and 111-115**

***Affidavit of John Witte Jr.,* Exhibit #3 "The Goods and Goals of Marriage" p. 153**

18. Catholics are also concerned that due to the inter-related nature of civil society the inclusion of the claimants into the primordial institution of marriage will lead to the stigmatization and exclusion of those who hold different views on the acceptability of "same-sex marriage." The language of "heterosexism" and "homophobia" is a language that attacks those who view heterosexuality as normative and attempts to turn the respectful disagreement with homosexual conduct into an "ism" akin to racism. This sort of loosely constructed stereotype, in addition to being highly controversial, stigmatizes religious traditions, threatens those who oppose it and fractures civil discourse. The appropriate approach to competing claims is a rich notion of "the common good" which appropriately considers and accommodates rights and duties. Those who claim that the Church's teaching on the exclusivity of heterosexual marriage could "develop" to include same-sex marriage do not understand the foundational anthropology of the person that underlies the Catholic position or the nature of the development of doctrine within the Catholic tradition.

***Revised Affidavit of Ernest Caparros,* para. 17, 19 and 20**

***Affidavit of Daniel Cere,* para's 24 - 35, 62, 64, 65, 66 and 69**

G. Good, *Humanism Betrayed* (Montreal: McGill -Queen's University Press, 2001) at pp. 22-38.

***Reply Affidavit of Daniel Cere,* paras. 4 and 5**

(iii) The Protestant Evangelical Christian Conception of Marriage

19. Conservative/evangelical Protestants comprised approximately three million Canadians and include the fastest growing Christian churches in Canada. They develop religious, theological and social teachings from their interpretation of the divine authority of Christian scriptures. They believe that all human beings, regardless of sex, race creed or colour are created by and loved by God. They believe that the holy scriptures expressly establish the "uniquely heterosexual nature of marriage." The evangelical understanding of marriage is as a covenant between man and woman, which has been ordained by God. Accordingly, marriage cannot, in the evangelical Protestant understanding, exist other than between male and female. More generally, the evangelical Protestant understanding of sexual morality mandates "the celebration and protection of the marital covenant", an aspect of which is the corresponding proscription of the consummation of sexuality outside of marriage (excluding, for example, homosexual relationships and polygamous or adulterous relationships). Marriage is ordained by God and has been made central to the created moral order, which is a *universal* moral order. Evangelicals thus understand that the reasons which underlie that moral order have the same rational force and normative significance for all persons, regardless of whether they are evangelical Christians. Evangelical Protestants believe that marriage is both an institution and a sacred covenant rather than simply a convention or social construction. Because of its divine origins, marriage cannot be redefined.

***Affidavit of Craig Gay*, paras. 3, 4, 5, 6 and 7**

***Affidavit of John Witte Jr.*, para. 38**

19. Because of their interpretation of holy scripture, evangelical Christians would not be able to accept the legitimacy of gay and lesbian marriages, regardless of whether homosexuals were granted the legal power to marry. Evangelical Christians feel subject to societal marginalization and perceive that their religious beliefs have come under attack in recent years. They sense not merely societal indifference to their religious beliefs, but increasing intolerance. They are concerned that the courts, through judicial activism, are attempting to force evangelical Christians to accept gay and lesbian marriage, and other controversial social concepts, which contravene their religious teachings and principles.

***Affidavit of Craig Gay*, paras. 4,5, and 7**

20. Professor Gay points out that a judicially mandated redefinition of marriage to include same sex unions could not secure recognition of the legitimacy of such unions from evangelicals, because of their interpretation of their holy scriptures. For Canadian evangelicals, it would mean pitting the state against the authority of holy scriptures and "over and against the

very heart of conservative Protestant and religious belief." Such a fundamental redefinition of marriage would be rejected as deconstructive of longstanding religiously-based moral traditions. Evangelical Christians are concerned about state initiatives that would be aimed at forcing them to accept the legitimacy of same-sex unions. Evangelical Christians would interpret the legal recognition of same-sex unions as an unjust and illegitimate imposition of the state upon religious conscience.

***Affidavit of Craig Gay,* paras. 14 and 15**

(iv) The Islamic Conception of Marriage

1. Islamic tradition believes that the information imparted by Allah (All Mighty God) is considered to be of absolute truth. The Muslim holy book, the Qur'an, establishes the Islamic tradition that people are created as inherently heterosexual and that homosexual behaviour is unacceptable to Allah since it is a denial of the inherent nature of people. Thus, Islamic tradition teaches that only a man and woman can unite in marriage and that the Islamic personality of each person is incomplete until they marry. Islamic tradition teaches that a husband and wife are two pieces of the same whole and will not be spiritually fulfilled unless united in marriage. The marital unit can only be comprised of a man and a woman. This unit is essential as the environment in which to raise children. Muslim tradition teaches the complementarity of parenting between the sexes. This view of marriage as uniquely heterosexual and essential for the procreation and raising of children has continued for millennia and is constant in all Islamic communities around the world. It is a universal and unifying feature of Islam globally.

***Affidavit of Abdalla Idris Ali,* paras. 6,7,8 and 9**

***Affidavit of Katherine Young*, paras. 39, 45, 51, 57, 63 and 69**

2. The Islamic tradition also teaches the importance of respecting the dignity of all people regardless of their opinions. This is true even if Islamic religious traditions reject actions or opinions which conflict with Islamic traditional religious belief. Islamic tradition therefore accepts the dignity of gay and lesbian persons, however, if the state were to redefine marriage to include same-sex unions, this would have a detrimental impact on the Islamic community in Canada since it would result in a situation where the state would impose an acceptance of same sex marriage (and therefore conduct) that would be contrary to and would invalidate Islamic religious belief. Such a fundamental redefinition of marriage would make it harder for Muslims to participate in Canadian society. This would cause confusion for Muslim children and youth in

Canada as such a fundamental redefinition of marriage would directly conflict with Islamic teachings regarding the nature of marriage. This would result in the isolation of Muslims from full participation in Canadian society.

***Affidavit of Abdalla Idris Ali,* paras. 10,11,12 and 13**

3. Although Muslims are permitted to build relationships and marry with people from other faith traditions this could not extend to an acceptance of marriage between gays and lesbians. Muslim religious traditions would teach that the Canadian state was taking action offensive to Allah. This would create an inherent conflict for Canadian Muslims. If Muslim clergy were required to solemnize same sex unions they would have no choice but to disobey the law and face the consequences. Muslims would also be concerned about the impact that the redefinition of marriage to include same sex couples would have on public morality and public education including schools that Muslim students attend. Muslims are concerned that because the public school system must teach a respect for the law, therefore, it would by necessity be required to teach an acceptance of a redefined conception of marriage. Muslims whose children attend the public school system would be forced to remove their children from the public school because such teaching would be directly contrary to their religious beliefs. Furthermore, Islamic schools, in order to be licensed, are required to adopt the public curriculum and integrate their Islamic teachings into that curriculum in order to fill their educational mandate. The redefinition of marriage could therefore lead to a situation where Canadian Muslims felt alienated within the public school system, and the Islamic school system would be placed in untenable position. Muslims are very concerned that they would be increasingly stigmatized and marginalized and that the credibility of their religious thought and belief is and would be under attack. Canadian Muslims have contributed to Canadian society and wish to continue to be a fully participating community within this multicultural country. As a minority religious group, they are particularly concerned that such a fundamental redefinition of marriage would have a serious impact upon their religious community and their full participation in Canadian society.

***Affidavit of Abdalla Idris Ali,* paras. 16 - 21**

(v) The Jewish Conception of Marriage

4. Judaism recognizes marriages and institutions that, while in place before the emergence of Jewish religious traditions, have continued to function both inside and outside of that religious tradition. However, Jewish religious tradition recognizes marriage only as a union between a man and a woman. Marriage is regarded as an institution for all men and women as a result of the teachings of the Jewish holy scriptures. This institution is the basis for the procreative family.

***Affidavit of Rabbi David Novak,* paras. 4 and 5**

***Affidavit of Katherine Young,* paras. 36, 42, 48 and 60-65**

5. Jewish tradition teaches that marriage is a natural institution that religious traditions have elevated to the level of the sacramental without, however, changing its earlier pre-religious character. Rabbi Novak summarizes that religious traditions, like Judaism, Christian, Islam and others, have preserved and protected a pre-existing institution that they did not invent. Civil marriage, which was recently invented, is clearly copied after the model of "natural procreative marriage" that has been preserved for millennia by religions like Judaism. Each religious tradition believes they have the right to insist that the state not radically redefine an institution that the state did not invent. The historic rationale for marriage being restricted to heterosexual unions is continued in Jewish teachings because circumstances for the conception and birth of children have remained the same. Although Jewish tradition does not accept, and most Jews cannot accept, gay and lesbian marriage, this should not be construed as a rejection of homosexuals as people. Judaism recognizes the dignity of all persons who are made in the image of God.

***Affidavit of Rabbi David Novak,* paras. 4, 5, 9, 10 and 12**

6. Under Jewish tradition, Jewish marriage does not require concomitant civil marriage. For most of Jewish history Jews have lived in societies where all marriages were initiated solely under religious auspices. Civil marriage, as it is known today began in the middle of the eighteenth century in Europe. Jews have participated in the institution of civil marriage because it did not fundamentally conflict with the requirements for Jewish marriage. If the state radically redefined marriage to include same sex unions, many religious Jews would avoid civil marriage all together as its new requirements would violate principles that Jews regard as morally binding on all human kind as a result of their interpretations of their holy scriptures. A redefined civil marriage would be an institution in which religious Jews could not participate in good faith because it would conflict with their religious traditions. Civil marriage can only be an effective institution in a society where the vast majority of citizens recognize the civil validity of every other civil marriage and where it is an institution in which the vast majority of citizens can participate in good faith. Religious Jews could not participate in a fundamentally redefined institution of marriage. This could lead to the implication that religious Jews, Christians and members of other faith communities would be regarded as un-Canadian and lead to a situation where religious Jews would be perceived as a community opposed to the newly recognized "constitutional requirement". This could lead to the marginalization and exclusion of the Jewish community and discrimination against Jews. This would strain the multi-cultural fabric of Canada. Many religious Jews in Canada believe that the judicial redefinition of marriage to include same-sex partnerships could be

construed as a thinly veiled attack against their religious beliefs and principles and would not respect diversity and their religious faith. They view these as the development of destabilizing tendencies against the place of religion in Canada and the right of their community and religious communities in general to have their beliefs respected and not stigmatized in all aspects of public life. Religious Jews are extremely concerned about the impact of the redefinition of marriage which would fundamentally alter this institution in a manner inconsistent with their fundamental religious beliefs.

***Affidavit of Rabbi David Novak*, paras. 12, 16 and 19**

7. Although a small number of reformed Rabbis in Canada have a different understanding of the Jewish faith and Jewish tradition, their views are dissentient and held by a very small number of Rabbis (36) in Canada. The vast majority of Rabbis and rabbinic teaching reject the possibility of same sex marriage. The affidavits of Rabbis Greenberg and Stevens do not reflect orthodox or traditional Jewish teaching. Neither speak for Jewish tradition. Jewish law, according to Rabbi Novak, cannot change or develop to accept homosexual marriage.

***Affidavit of Rabbi David Novak*, paras. 4, 13, 14, 16 and 17**

***Reply Affidavit of Rabbi David Novak*, paras. 5, 6 and 10 Exhibit #1, Letter of Rabbi Reuven Tradburks, July 9th, 2001, para.4**

PART III - ISSUES TO BE ARGUED

8. The Interfaith Coalition on Marriage and the Family will argue the following issues on the hearing of this petition:

(i) the common law and legislative recognition of the institution of marriage which confers the status of "husband and wife" is not discriminatory contrary to s. 15 of the *Charter*;

(ii) if the common law and legislative recognition of the heterosexual nature of marriage does contravene s. 15 of the *Charter*, it is, nevertheless, justifiable pursuant to s.1;

(iii) in the alternative, any remedy must be crafted in accordance with s. 27 of the *Charter* and must recognize the ss. 2(a) and s.15 rights of members of religious communities in Canada, and should defer any new legislative response to the legislature.

PART IV - ARGUMENT

(i) First Issue - s. 15 Challenge to Legislation and the Common Law

9. Unlike the legislative category of "spouse," the institution of marriage is neither created by nor defined by statute. There is no statutory provision that defines marriage or prescribes that it is a status limited to persons of the opposite sex. Statutory provisions in provincial marriage legislation such as the *Marriage Act*, R.S.B.C., establish procedures for the regulation of the solemnization of marriage, including the recognition of religious solemnization of marriage. Federal legislation provides certain restrictions on the capacity of marriage based on laws against consanguinity, polygamy and bigamy and deals with the dissolution of marriage.

Marriage Act, supra

Divorce Act, supra

Criminal Code, supra

***Marriage (Prohibited Degrees) Act,* supra**

***Vital Statistics Act,* supra**

10. Although it falls within the constitutional competence of Parliament to make laws in respect to "marriage and divorce" pursuant to s. 91 (26) of *The Constitution Act 1867*, Parliament has not defined marriage.

Constitution Act,* 1867, *supra

The Marriage (Prohibited Degrees) Act, supra

Divorce Act, supra

Criminal Code, supra

11. Marriage is an institution which confers the status of "husband and wife" as recognized by all major religious faiths. By its very nature it has been confined to male and female unions. Marriage is a pre-existing societal and religious institution which has been neither *created by, nor defined* by, other legislation or common law. Judges have recognized that this institution has been limited, by the nature of its status conferred of "husband and wife", as being essentially and uniquely heterosexual. Lord Penzance recognized in *Hyde v. Hyde* that:

> ***"Marriage has been well said to be something more than a contract, either religious or civil - to be an Institution. It creates mutual rights and obligations, as all contracts do, but beyond that it confers a status. The position or status of "husband" and "wife" is a recognised one throughout Christendom***: the laws of all Christian nations throw about

> that status a variety a legal incidents during the lives of the parties, and induce definite rights upon their offspring. What, then, is the nature of this institution as understood in Christendom? Its incidents vary in different countries, but what are its essential elements and variable features? If it be of common acceptance and existence, it must need (however varied in different countries in its minor incidents) have some pervading identity and universal basis. I conceive that marriage, as understood in Christendom, may for this purpose be defined as the voluntary union for life of one man and one woman to the exclusion of all others.

Similarly in *Corbett v. Corbett*, Ormrod, J stated:

> The fundamental purpose of law is the regulation of the relations between persons, and persons and the State or community. For the limited purposes of this case, legal relations can be classified into those in which the sex of the individuals concerned is either irrelevant, relevant or an essential determinant of the nature of the relationship...***sex is clearly an essential determinant of the relationship called marriage because it is and always has been recognized as a 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. It has, of course, many other characteristics, of which companionship and mutual support is an important one, but the characteristics which distinguish it from all other relationships can only be met by two persons of opposite sex.***

Again, in *Layland* v. *Ontario*, Southey J. wrote:

> I find that under the common law of Canada applicable to Ontario a valid marriage can take place only between a man and a woman and that persons of the same sex do not have the capacity to marry one another.
>
> One of the principal purposes of the ***institution*** of marriage is the founding and maintaining of families in which children will be produced and cared for, a procedure which is necessary for the continuance of the species...That principal purpose of marriage cannot, as a general rule, be achieved in a homosexual union because of the biological limitations of such a union. It is this reality that is recognized in the limitation of marriage to persons of opposite sex.
>
> It is true that some married couples are unable or unwilling to have children, and that the incapacity or unwillingness to procreate is not a bar to marriage or a ground for divorce. Despite these circumstances in which a marriage will be childless, the ***institution*** of marriage is intended by the state, by religions and by society to encourage the procreation of children... Unions of persons of the same sex are not "marriages", because of the definition of marriage. The applicants are, in effect, seeking to use s. 15 of the *Charter* to bring about a change in the definition of marriage. I do not think the *Charter* has that effect.

In *Re North et. al. and Matheson*, Philp J. wrote:

> "It is of equal importance in the determination of the issue before me that the meaning of marriage is universally accepted by society in the same sense. "Marriage" is defined in Webster's Third New Internati the purpose of founding and maintaining a family.'

Hyde v. Hyde and Woodmancee **(1866), L.R. 1 P & D 130, at 35 L.J. P & M 57 at p. 133 [emphasis added]**

Corbett v. Corbett (otherwise Ashley), **[1970] 2 All E.R. 33 at p. 48 [emphasis added]**

***Layland, supra,* at pp. 219, 222-223 [emphasis added]**

***Re North et al and Matheson,* [1974] 52 D.L.R. (3d) 280 at 284-285 [hereinafter Re North]**

32. Similarly, in both *Miron v. Trudel* and *Egan,* Gonthier J. and LaForest J. recognized the fundamental role marriage has played as a societal and religious institution "from time immemorial."

***Egan v. Canada,* [1992] 2 S.C.R. 513 at p. 535-539 per LaForest.; at p. 583 per Cory J. [hereinafter *Egan*]**

***Miron v. Trudel,* [1995] 2 S.C.R. 418, pp. 448-64 per Gonthier J. [hereinafter *Miron*]**

33. The decisions of the Supreme Court of Canada in *Egan* and *M. v. H.* are not apposite with respect to the issues raised by the inherently heterosexual nature of the institution of marriage. As mentioned, supra, both *Egan* and *M. v. H*. dealt with the under inclusiveness of the legislatively created spousal category. Similarly in *Vriend*, the Supreme Court of Canada, considered the under-inclusiveness of the Alberta human rights legislation. In *Egan,* the opinions of eight of the nine justices made it clear that the heterosexual nature of the institution of marriage was not being considered constitutionally invalid by virtue of the analysis in that judgment. The analysis of four justices (represented by the opinion of LaForest J.) accepted the constitutionality of the inherently heterosexual nature of the spousal category. Justice Cory, also writing for four Justices on this point, expressly stated that "any contention that this appeal will affect the societal concept of marriage can be set aside." In *M. v. H.*, Justices Cory and Iacobucci similarly indicated that the judgment did not relate to marriage.

Egan, supra

***M.* v. *H.*, [1999] 2 S.C.R. 3 at pp. 28, 48-49. Cory and Iacobucci JJ. [hereinafter *M. v. H.*]**

***Vriend* v. *Alberta,* [1998] 1 S.C.R. 493, at pp. 525-6, 531-534, 539-545, 547-553. Cory and Iacobucci JJ.**

(ii) Application of the *Law* Test

(a) What is the "impugned law" being challenged?

34. In the *Law* decision, Iacobucci J. outlined for the Supreme Court the three part test to analyse a claim of discrimination under s. 15(1) of the *Charter*. The first step of the analysis is to determine whether the "impugned law" (a) draws a formal distinction between the claimant and others on the basis of a personal characteristic, or (b)

fails to take into account the claimant's already disadvantaged position within Canadian society resulting in substantively differential treatment. The initial consideration, therefore, is what "impugned law" is being challenged by the applicant. It has already been stated that the *Constitution Act, 1867*, prescribed in s. 91(26), that Parliament has the constitutional jurisdiction to legislate in relation to matters involving "marriage and divorce". Federal legislation has not altered or redefined this institution thereby recognizing and reflecting the institution of marriage which was understood in 1867 as uniquely heterosexual. The provincial legislatures were, pursuant to section 92(12), given jurisdiction over legislation relating to the solemnization of marriage. Provincial legislation, including the *Marriage Act*, has regulated the procedures under which it is solemnized without specifying or redefining the institution.

> ***Constitution Act, 1867* ss. 91(26) and 92(12)**
>
> ***Marriage Act, supra***
>
> ***Divorce Act, supra***
>
> ***Vital Statistics Act, supra***
>
> ***Criminal Code, supra***
>
> ***Law* v. *Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497 at para. 39 per Iacobucci J. [hereinafter *Law*]**

35. The applicants are not challenging any specific statutory provision or statutory definition that is under-inclusive as was the case in *Egan* or *M. v. H*. Furthermore, to the extent that the applicants challenge the common law recognition of the institution of marriage, they are not challenging a common law ***definition*** of marriage but, rather, the common law ***recognition*** of marriage as a millennial old social and primarily religious institution that confers the status of husband and wife on necessarily male and female unions. The common law has neither created nor altered this fundamental status but merely recognized its content.

> ***M. v. H., supra*.**
>
> ***Egan, supra***

33. In considering the first step of the *Law* analysis, the question to be considered, therefore, is whether the constitutional and statutory recognition of the institution of marriage, without statutory redefinition, and the common law recognition of the institution of marriage draws a formal distinction between gay and lesbian individuals and others. The statutory provisions in both the federal and provincial legislation simply regulate the

process whereby marriage is solemnized and establish certain restrictions based on laws against consanguinity, polygamy and bigamy. They draw no distinction between the applicants and others based on sexual orientation or any other "analogous ground." They do, however, draw distinctions between those who can marry and those who cannot based on family status (consanguinity) or marital status. This is not a situation, like that in *Loving* v. *Virginia*, where access to the institution of "husband" and "wife" is prohibited by legislation or law. The applicants can participate in the institution of "husband" and "wife". There is no legislative prohibition.

***Law v. Canada, supra* at para. 39, Iacobucci J.**

Marriage Prohibited Degrees Act, supra

Divorce Act, supra

Criminal Code, supra

***Vital Statistics Act,* supra**

Marriage Act, supra

***Loving v. Virginia,* 388 U.S. 1 (1967)**

36. Second, the court must consider if the common law recognition of marriage draws a formal distinction. The common law recognition of marriage does not create a formal distinction between the claimants and others. The common law does not "define" the institution of marriage. It recognizes that marriage is an institution that confers the status of "husband and wife" and that has historically been a religious institution. The status of husband and wife was conferred upon those who went through a religious ceremony in accordance with the traditions of their faith. Although the status of husband or wife is, by necessity, gender specific, the common law recognition of this institution does not "***draw*** a formal distinction", rather, the law recognizes a distinct status.

37. The courts have recognized that the common law is justiciable pursuant to the *Charter*. In *Dagenais, Hill and BCGEU v. B.C.*, the Supreme Court emphasized that common law "rules" should be interpreted and developed in accordance with the *Charter*. However, the common law recognition of the institution of marriage as conferring the status of "husband and wife" is not capable of redefinition or interpretation in the manner requested by the applicants without fundamentally altering the institution of marriage. This is not a common law "rule" that has been developed and evolved judicially. Judges at common law have recognized and identified the nature of a pre-existing

religious and societal institution. The principle of common law reinterpretation of "rules" and legal principles in accordance with *Charter* principles as identified in *BCGEU, Swain, Salituro and Dagenais* has no application in this instance. The common law has not defined or created the institution of marriage but, rather, recognized it. There is no common law rule that governs government action.

> ***Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835 at p. 874-876 per Lamer CJ. [hereinafter *Dagenais*]**
>
> ***Hill v. Church of Scientology of Toronto,* [1995] 2 S.C.R. 1130 at 1164-1169 per Cory J. [hereinafter *Hill*]**
>
> ***R. v. Salituro,* [1991] 3 SC R 654 at p. 670, 675 per Iacobucci J. [hereinafter *Salituro*]**
>
> ***B.C.G.E.U. v. British Columbia (Attorney General),* [1988] 2 S.C.R. 214, at pp. 243-4. Dickson CJ. [hereinafter *B.C.G.E.U.*]**
>
> ***R v.Swain,* [1991] 1 S.C.R. at pp. 933, 968, 978-997 per Lamer CJ, Sopinka and Corr JJ. [hereinafter *Swain*]**

38. Furthermore, Justice Iacobucci observed in *Salituro,* and Cory J. in *Hill,* that courts should not change a common law "rule" if this would "upset the proper balance between judicial and legislative action". Iacobucci J. wrote for the Court in *Salituro*:

> Judges can and should adapt the common law to reflect the changing social, moral and economic fabric of the country. Judges should not be quick to perpetuate rules whose social foundation has long since disappeared. Nonetheless, there are significant constraints on the power of judiciary to change the law. ***As McLachlin J. indicated in Watkins, supra, in a constitutional democracy such as ours it is the legislature and not the courts which has the major responsibility for law reform; and for any changes to the law which may have complex ramifications, however necessary or desirable such changes may be, they should be left to the legislature.*** The judiciary should confine itself to those incremental changes which are necessary to keep the common law in step with the dynamic and evolving fabric of our society. ...(at p. 670)
>
> ...Where the principles underlying a common law rule are out of step with the values enshrined in the *Charter*, the courts should scrutinize the rule closely. If it is possible to change the common law rule so as to make it consistent with *Charter* values, ***without upsetting the proper balance between judicial and legislative action that I have referred to above, then the rule ought to be changed.*** (at p. 675)

> ***Hill v. Church of Scientology of Toronto,* [1995] 2 S.C.R. 1130 at 1164-1169 per Cory J. [hereinafter *Hill*]**
>
> ***R. v. Salituro,* [1991] 3 SC R 654 at p. 670, 675 per Iacobucci J. [hereinafter *Salituro*]**

39. There is no distinction drawn by or created by the law, as there was in other section 15 cases dealing with same-sex rights. Neither can it be said that the statutory provisions dealing with "marriage" or the common law recognition of husband and wife fail to take into account the claimants disadvantaged position within Canadian society. The common law and statutory provisions which are challenged do not confer benefits in a discriminatory manner or deny access to benefits or legislative advantages. To the extent that legal benefits were afforded based on the status of marriage, through the definition of "spouse", these legislative benefits have been extended to non-married heterosexual and homosexual "spouses" through legislative response over the past three decades.

40. In the alternative, if there is a distinction drawn or created by law, such a distinction is based upon the long-standing recognition of the biological fact that heterosexual couples alone are capable of procreation and, as such, play a unique role in society. Recognition of this biological reality has been held to be an acceptable ground for distinction between heterosexual marriage and same-sex relationships. As Justice LaForest wrote 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...Suffice it to say that marriage has from time immemorial been firmly grounded in our legal tradition, one that is itself a reflection of longstanding philosophical and religious traditions. But its ultimate raison d'etre 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.***
>
> ***Egan, supra*, at para. 21 per LaForest J.**
>
> ***Miron, supra***

(b) Is there differential treatment?

41. The second step of the *Law* analysis is to determine whether the claimant is subject to differential treatment on the basis of an enumerated or analogous ground. The constitutional provisions of ss. 91 and 92 recognize the constitutional capacity of Parliament and the legislatures to legislate in respect of marriage. The institution, as it was understood as a heterosexual one, was constitutionally recognized and should be considered immune from *Charter* review.

***Reference Re Bill 30, supra*, at 1196 per Wilson J.**

***Constitution Act, 1867* ss. 91(26) and 92(12)**

***Law, supra*, at para. 39 per Iacobucci J.**

42. Neither the statutory nor common law recognition of marriage subjects the claimants to differential treatment under the law. The law recognizes marriage as conferring the status of husband and wife. Differential treatment under an impugned law can only occur if the law confers a benefit, denies an advantage or imposes a disadvantage based on an analogous ground. The recognition of the status of husband and wife or the regulation of the process under which such status can be confirmed through solemnization creates no differential treatment.

43. In the alternative, if there is differential treatment, such distinctions are validly based upon the biological, philosophical, social, religious and historical facts recognized by the Supreme Court of Canada in *Egan*, *supra*.

(c) The contextual and purposive s. 15 analysis

44. Under the third step of the *Law* analysis the differential treatment must discriminate in a substantive sense given a contextual and purposive analysis of s.15. Section 15 was intended to remedy discrimination created by law or under law. It was not intended to require the courts to fundamentally redefine a pre-existing religious or societal institution conferring a status which has been recognized by law. What is the context of this analysis? What the applicants essentially challenge is not the law's recognition of the institution of marriage. Rather, the applicants do not like the historical nature of the institution of marriage, as recognized by law, and which only confers the status of being "husband and wife". The applicants seek the judicial elimination of this institution and the creation of a fundamentally different judicial construct. They wish to redefine marriage not as conferring a status of "husband" and "wife" but rather in some other fundamentally dissimilar way as "committed partner".

45. Their dispute is not with the role and function of the "impugned law" but rather with the fundamental definition of the underlying religious and societal institution as it has existed for millennia. They suggest that this

institution is by its very nature under-inclusive and that this promotes pre-existing disadvantage and stereotyping of gay and lesbian people. As recognized by Southey J. for the Ontario Divisional Court in *Layland*: "the applicants are, in effect, seeking to use s.15 of the *Charter* to bring about a change in the definition of marriage. I do not think the *Charter* has that effect."

> ***Layland, supra,* at p. 223**
>
> ***Law, supra,* at para. 39 per Iacobucci J.**

46. In essence, this is a dispute over the symbolism and power of language - the semantic debate over the term "marriage" - and not about a legally created category. In addition, the applicants claim that the dignity of gays and lesbians is violated by the fact that their partnerships are not capable of having the status of husband and wife. Yet this status cannot simply be changed to provide what is sought – acceptance and recognition of same sex partnerships as being between "husband and wife". If the applicants want legislative recognition for same sex partnerships, this request raises a political issue for the legislature, not a s.15 issue for the courts.

(iii) S. 15 must be subject to different interpretation where competing s. 15 and 2(a) claims are considered

42. As indicated in *Law*, the s. 15 analysis is not formulaic. It is contextual and purposive. It must be flexible to its context.

> ***Law, supra,* at paras. 30, 39 and 41 per Iacobucci J.**
>
> **S. Martin, "Balancing Individual Right to Equality and Social Goals" (March-June 2001) 80 (1 &2) Canadian Bar Rev 299, at 320**
>
> ***M. v. H., supra,* at 45-7per Cory and Iacobucci JJ.**
>
> ***Corbiere v. Canada* (Minister of Indian and Northern Affairs), [1999] 2 S.C.R. 203, at p. 250 per L'Heureux-Dubé J. [hereinafter *Corbiere*]**
>
> ***Lovelace v. Ontario,* [2000] 1 S.C.R. 950, at 984 per Iacobucci J. [hereinafter *Lovelace*]**
>
> ***Winko v. British Columbia* (Forensic Psychiatric Institute), [1999] 2 S.C.R. 625, at 675 per McLachlin J.**
>
> ***Granovsky v. Canada* (Minister of Employment and Immigration), [2000] 1 S.C.R. 703, at 735 per Binnie J. [hereinafter *Granovsky*]**

43. Approaches to existing *Charter* doctrine is insufficiently developed to deal with competing equality claims *within* s.15. The court must be attentive to the nature of the equality claim and the wider context and competing notions of equality, including those emanating from within a religious conception. There are at least two distinct kinds of equality claims. First, there are those between a person or group and the state ("a state claim"). Most s. 15 cases to date have arisen in this context. A second category of claims, however, are claims that arise in a context which requires consideration by the court of the competing s. 15 claims of different groups ("an intergroup claim" or a "horizontal claim"). It is important for the court to ensure, in its approach to equality rights claims, that the kind of equality conflict is accurately identified and analysed. In an intergroup claim, the court must consider, in a purposive and contextual analysis, the extent to which the equality interest of other groups and other constitutional interests (such as those arising under s-s. 2(a) or s.27), of other groups are affected.

> **McLachlin J., "Equality: the Most Difficult Right", Remarks of the Right Honourable Beverley McLachlin, P.C., Chief Justice of Canada, 2000, Constitutional Cases Conference, Osgoode Hall Law School, April 6, 2001**

44. In the context of the current Petition, the claimants' request for a fundamental redefinition of the institution of marriage creates a "collision of rights" and a "collision of dignities" within s.15 between the applicants, who object to the legal recognition of the institution of marriage and want the courts to fundamentally change and redefine the institution, and those who do not. The fundamental redefinition of marriage which the applicants seek would violate the s.15 and s-s.2(a) rights of many Canadians of religious faith who will be alienated by virtue of their constitutionally protected religious beliefs from the fundamentally redefined conception. The principles of historic disadvantage, stereotypical treatment, vulnerability, marginalization and so forth are not of assistance here because all sides can claim them with justification. The court cannot be the arbitrator of which group or groups are to be "more equal" than others.

45. This type of intergroup claim involves a consideration of the s. 15 and s-s. 2(a) rights of religious minorities. The fundamental freedom of "conscience and religion" is an important right and must not be diminished in relation to s.15 claims. As indicated in the affidavits filed, some of these religious minorities, such as the Jewish

and Muslim communities, are very concerned about the impact of such a fundamental redefinition of marriage on the continued rejection, alienation, stereotyping and disadvantage historically suffered by members of their communities in Canadian society. Where substantive equality rights are at issue, as they are for those individual citizens who enjoy the freedom to be members of religious communities, it should be part of the Court's consideration at the s. 15 stage, to give full scope to the equality rights of other s. 15 groups lest these rights be "made invisible" in the court's response to the equality claims of other groups.

> ***Affidavit of Rabbi David Novak,*** **at paras. 16-19**
>
> ***Affidavit of Abdalla Ali,*** **paras. 11, 13 and 21**
>
> ***Revised Affidavit of Ernest Caparros,*** **paras. 12, 14, 19 and 20**
>
> ***Affidavit of Daniel Cere,*** **paras. 65-68**
>
> ***Affidavit of Craig Gay,*** **para. 15**
>
> **David M. Brown "Freedom From or Freedom For?: Religion as a Case Study in Defining the Content of Charter Rights" (2000) 33 University of British Columbia Law Review, 551-615 at 564 ff.**

(iv) Second Issue - The Application of Section 1

46. The Supreme Court of Canada has recognized in *Egan, M. v. H.,* and other cases, the need to defer to the legislature, especially when a claim raises fundamental issues of social and political ideology and involves the fundamental redefinition of a legal, philosophical and religious tradition which underlies our law.

> ***Egan, supra,*** **at para. 29 per LaForest J. and at paras. 105-8 per Sopinka J.**
>
> ***M. v. H., supra,*** **at p. 79 per Cory and Iacobucci JJ.**
>
> ***Irwin Toy v. Quebec Attorney ,*** **[1989] 1 S.C.R. 927, at pp. 993-994, per Dickson C.J. and Lamer, Wilson JJ. [hereinafter *Irwin Toy]***
>
> ***McKinney v. University of Guelph,*** **[1990] 3 S.C.R. 229 at pp. 317-319 per LaForest J [hereinafter *McKinney]***
>
> ***Vriend, supra*** **at para. 126 per Cory J.**
>
> ***Tetreault-Gadoury v. Canada (Employment and Immigration Commission),*** **[1991] 2 S.C.R. 22, at p. 44 per LaForest J., [hereinafter *Tetreault-Gadoury*]**
>
> ***Eldridge v. British Columbia (Attorney General),*** **[1997] 3 S.C.R. 624, at paras. 85-6 per LaForest J. [hereinafter *Eldridge*]**

47. The Supreme Court of Canada has deferred to the legislature where the impugned law has involved claims of competing groups and required careful balancing. The court has also recognized that where the limitation of *Charter* rights raises complex social policy issues and competing societal interests, incremental legislative initiatives can satisfy the s. 1 requirements. This is such a situation. Parliament and the legislature have substantially amended benefit conferring legislation involving the spousal category to include gay and lesbian partnerships. The court should properly defer any further legislative initiative to Parliament and the legislature.

***Egan, supra*, at para. 29 per LaForest J. and at paras. 105-8 per Sopinka J.**

***M. v. H., supra*, at p. 79 per Cory and Iacobucci JJ.**

***Irwin Toy, supra*, at pp. 993-994 per Dickson C.J. and Lamer, Wilson JJ.**

(a) The Objective of the Impugned Law

48. The law impugned by the applicants is a combination of the (i) constitutional recognition of the institution of marriage in the *Constitution Act, 1867*, (ii) the statutory provisions recognizing the institution and regulating its solemnization as well as the (iii) common law recognition of the institution of marriage as conferring the status of husband and wife. As already articulated, the constitutional recognition of marriage as it was understood in 1867, was and is based upon the inherently heterosexual status of marriage, a status that retains in full measure its importance as a key focus for social, legislative and judicial support.

***Constitution Act , 1867*, s-ss. 91(26), and 92(12)**

Marriage Prohibited Degrees Act, supra

Divorce Act, supra

Criminal Code, supra

Marriage Act, supra

Vital Statistics Act, supra

Layland, supra

Re North, supra

49. However, to the extent that the court considers the statutory and common law recognition of marriage, the objective of legislatively recognizing marriage must relate to and further the fundamental role that this social

institution has played for millennia in Western society. The fundamental role of this social institution has been recognized in *Egan*, *Miron* and *Layland* and current threats to the institution have been recognized by scholars.

***Egan, supra*, at para. 21 per LaForest J.**

***Miron, supra,* at pp. 448-452 per Gonthier J.**

***Layland, supra,* at pp. 217-19, 222-3 per Southey J.**

***Affidavit of Katherine Young,* paras. 102-115**

***Affidavit of Daniel Cere,* para. 62**

50. The objectives of the provincial legislation regulating the solemnization of marriage is to ensure that there are procedures for both the solemnization and registration of marriage. The provision of procedures for the civil solemnization of marriage, outside of religious ceremony, furthers this objective. It did not alter the recognition of the historical institution of marriage but simply provided for another procedure for its solemnization. The provisions which restrict the ability to marry on the basis of consanguinity has the objective of a biological concern to preserve the health of children who could be procreated in such a marriage. The objectives of prohibitions against polygamous and bigamous marriages reflect an historical understanding of the institution of marriage as being between one man and one woman. Similarly, federal legislation deals with the capacity to marry and the dissolution of marriage but does not define the institution. Unlike *M. v. H* or *Vriend*, there is no legislative scheme which is under- inclusive in which the court would be required to consider the purpose or objective of the "under- inclusion".

Marriage Act, supra

Vital Statistics Act, supra

***M. v. H., supra,* at paras. 82-107 per Cory and Iacobucci JJ.**

***Vriend, supra,* at paras. 109-16 per Cory and Iacobucci JJ.**

(b) The Proportionality Analysis

(i) Rational Connection

51. The recognition of the institution of marriage and the provincial regulations of the procedures for solemnization are rationally connected to and advance the fundamental role of this institution in Canadian society. This cannot be seriously challenged nor can the restriction of marriage on the basis of laws against consanguinity,

polygamy or bigamy rationally deviate from the importance of recognizing this fundamental, social and religious institution. At confederation, the only marriage recognized in Canada was that religiously performed. The provision for and recognition of civil marriage, in a manner consistent with the religious institution, is also rationally connected to and promotes the fundamental role of this institution in Canadian society. These legislative provisions are specifically contemplated within the "matters" specified in s-ss. 91(26) and 92(12) of the *Constitution Act, 1867.*

(ii) Minimal Impairment

52. As emphasized in s.1 jurisprudence, the court must consider whether the means chosen to accomplish the legislative objective impair constitutional rights as little as possible. Where there are competing claims by a number of groups in society, the court will, in that context, defer to the legislative choices made by the legislature. To the extent that the court determines that the recognition of marriage as a social and religious institution and the absence of a similar legislative recognition of other domestic partnerships constitutes a violation of s. 15, the court should consider whether it will be possible to recognize marriage legislatively in a less intrusive manner. If not, deference should be made to the choice made by Parliament or the legislature, particularly where, as here, other important rights, such as the freedom of conscience, religion and expression would be curtailed or threatened by the claim at bar.

***M. v. H., supra,* at para. 79 per Cory and Iacobucci JJ.**

***Egan, supra*, at para. 29 per LaForest J. and at paras. 105-8 per Sopinka J.**

***McKinney, supra*, at pp. 317-319 per LaForest J.**

***Irwin Toy, supra*, at pp. 993-994 per Dickson C.J. and Lamer, Wilson JJ.**

***Tetreault-Gadoury, supra*, at p. 44 per LaForest J.**

***Eldridge, supra*, at paras. 85-6 per LaForest J.**

***Affidavit of Daniel Cere,* para. 69**

***Vriend, supra* at para. 126 per Cory J.**

53. Parliament and the legislature cannot legislate to recognize and regulate the procedures for the institution of marriage in a less intrusive manner. Either marriage is recognized legislatively and at common law or it is not. Either the legislature prescribes procedures for the solemnization and registration of marriage or it does not. This is not a case where the legislature has engaged in "line drawing" by including one group and excluding others from a legislative definition or was the case with previous spousal benefits legislation, supra. Therefore, there is not a less intrusive means of accomplishing the objectives of the legislation and of fulfilling the constitutional mandate as set out ss. 91(26) and 92(16) of the *Constitution Act*, 1867.

(c) Proportionality Analysis

54. As specified by the *Oakes* test and interpreted in subsequent jurisprudence, the proportionality analysis must undertake a comparative approach between the legislative objectives, the means chosen to accomplish those objectives and the deleterious effects on equality rights.

55. As observed by Cory J. in *M v. H.* and by the Supreme Court in *Dagenais*, the courts should also consider the proportionality between the deleterious and salutary effects of the measures. The legislation recognizing, registering and regulating the solemnization of marriage has significant salutary benefits. It encourages and provides for marriage as it has existed for millennia. All society benefits from this institution including gays and lesbians.

***M. v. H., supra*, at p. 82, para. 133**

56. Obviously, where the s.1 analysis is undertaken in a context in which there are inter-group claims which will involve other competing s. 15 rights and other constitutional rights (such as ss. 2(a)), the proportionality analysis should also consider the impact on these other rights. Where the remedy to a *Charter* violation in itself occasions another violation, there must be heightened scrutiny of the proportionality analysis. Redefining "marriage" to include same sex couples will lead to violations of the s.2(a) and s.15 rights of these interveners.

***R. v. Oakes*, [1986] 1 S.C.R. 103**

***Egan, supra*, at para. 182 per Cory and Iacobucci JJ.**

57. When the above analysis leads to the conclusion that the rights of both groups conflict in a way that cannot be resolved without preferring the political or moral position of one group over the other, the court must recognize that it runs the danger of stepping into a legislative role. Unless it can be shown that other regimes would better balance the competing interests of different groups, line drawing and making difficult choices between different groups is best left to the legislature. In such circumstances, a court should defer to the decisions taken by the legislature or, if the violation of the petitioning group is so egregious as to require some action, limit the remedy granted to declaratory relief in order to force the legislature to re-examine the competing rights at issue and search for other solutions which by their nature may be political and not legal.

58. The presence of s.27 in our *Charter* enshrines respect for diversity and highlights the importance of respect for a diversity of traditions and beliefs in our pluralistic society. It also underlines the importance of recognizing the need to balance the interests of competing groups through the proportionality analysis described above. In a society that prides itself on tolerance and diversity, the court must be wary of legally sanctioning the preference for or elevation of one ethnic, cultural or religious group - or one set of "beliefs" held by such a group whether religious or not - over another.

***R v. Zundel* [1992] 2 S.C.R. 731, at pp. 815-19, per Cory and Iacobucci JJ.**

59. The proportionality analysis must consider the alternative regime that can be put in place (ie. through the registration of domestic partnerships) as well as the tact that the legislated advantages to spousal status (such as benefit schemes) are available to both same sex and opposite sex spouses. There is thus no "benefit" that the law can confer on same sex couples through redefinition of "marriage". The benefit sought - a social acceptance - cannot be legally mandated. A thorough proportionality analysis can only lead to the conclusion that it would be unnecessary and an inappropriate use of judicial power to redefine marriage to include same sex couples at the expense of the ss.2(a) and s.15 rights of religious communities and those who oppose same-sex marriage on ground of conscience however formed.

(v) Third Issue: Remedy

60. In *Schachter*, the Supreme Court of Canada specified the remedial powers of courts in considering remedies pursuant to s. 52 of the *Constitution Act, 1982*. Specifically, when faced with a violation of the *Charter* or other provisions of the *Constitution*, the court can (i) grant declaratory relief, (ii) strike down legislation as of being of no force and effect, (iii) sever certain legislative provisions and declare them to be inoperative, (iv) "read in" and or "read down" certain legislative provisions or common law doctrines to interpret them in accordance with the *Charter* or (v) grant any of the above remedies with a constitutional suspension to permit the legislatures or Parliament to respond in a constitutionally appropriate manner.

***Schachter v. Canada*, [1992] 2 S.C.R. 679, at pp. 695, 717-20 per Lamer CJ. [hereinafter *Schachter*]**

61. This claim raises the issue of whether the court should fundamentally redefine the institution of marriage as the applicants request or whether deference should be granted to Parliament and the legislatures to deal with any issues of under-inclusiveness or legislative failure to accommodate the needs of gay and lesbian people for legally registered and recognized institutionalized domestic partnerships. Given the absence of any legislative definition of marriage or common law definition of marriage, the applicants do not ask the court to engage in a process of "reading down" or "reading in" legislative provisions to make unconstitutional legislation otherwise constitutional. Nor do they seek a reinterpretation of the common law in accordance with the principles in the *Charter*. Essentially they ask of the court to engage in a process of complete legislative prescription. In *Vriend*, the court determined that a legislative lacunae or omission was constitutionally vulnerable. This is fundamentally different. The issue is whether the court should engage in a process of rejecting the legal recognition of a fundamental religious and social institution marriage's and marriage and replace the societal and religious institution through creation of a new institution of the court's making. The court is being asked to go far beyond anything that it has done pursuant to s. 15 in respect of any spousal benefits claim raised by same sex applicants. Should it accede to this claim, the Court would, in effect, be stating what beliefs should operate in the public sphere on a matter of fundamental importance where the claims of one group involve widespread philosophical rejection of the very social foundations upheld by other groups. Again, this is a matter far beyond a mere "equality" claim for valid "recognition" in Canadian society.

***Vriend, supra*, at para. 80 per Cory and Iacobucci JJ.**

***Affidavit of Daniel Cere*, paras. 12-35**

62. Furthermore, the process the court is being invited to embark upon is to undertake the formation of a new judicially created or judicially legislated and mandated social institution that would replace the institution of marriage as it has always universally been understood. This new institution is one that the members of the vast majority of religious faith communities in Canada could not and would not accept. It may confuse many other Canadians. Some of these represent larger faith communities and some represent small, historically ostracized, minority religious communities. These communities will be further alienated from the Canadian cultural and legal matrix. The Canadian multi-cultural fabric will be torn by the alienation of these religious communities from the new judicially defined "marriage".

Chamberlain, supra

Affidavit of Daniel Cere, para. 65

Affidavit of Craig Gay, para. 15

Affidavit of Rabbi David Novak, paras. 16, 17, 18, 19

Affidavit of Abdalla Idris Ali, paras. 13, 21

Revised Affidavit of Ernest Caparros, para. 19

Reply Affidavit of Rabbi David Novak, paras. 5 and 8

63. It is submitted in the context of this claim, that if the court determines that there is a constitutionally indefensible legislative or legal vacuum that fails to accommodate the needs of certain domestic partnerships for recognition through marriage, the courts should defer to the legislature with respect to this issue. The legislature can balance competing interests, and if it is considered necessary, can create a legislative regime that legally recognizes domestic partnerships that do not fall within the institution of marriage but which the legislature determines should be legally recognized in some appropriate manner. Certain European jurisdictions register domestic partnerships and provide for legal recognition in a manner similar to the legal recognition provided for the institution of marriage. The courts should defer to Parliament and the legislatures to implement such legislative responses that can be crafted in a manner that respects competing rights, s-s. 2(a) and s.15 and considers the multicultural interpretative requirements of s. 27 of the *Charter*.

***Affidavit of Beatrice Verschraegen*, paras. 105, 108, 110-129, 131, 132, 134-137, 138-140, 151-153, 158-170, 176-187, 189, 190, 196-202, 204, 206-209, 214, 226-229, 232 and 233**

64. In considering the remedy, if any, to be granted, the courts should also consider the impact of such remedy on those citizens or groups who are opposed on grounds of conscience or religion to such remedy. Given the Court's stated concerns about "substantive equality" this must apply, a *fortiori* to religious communities who have rights guaranteed by s.15 and ss. 2(a), especially minority religious communities. The evidence indicates that the Catholic, Conservative Protestant, Orthodox and Traditional Jewish and Muslim communities cannot participate in or accept a fundamental redefinition of marriage which would include same sex unions. They have a serious concern that any such judicial redefinition would not only alienate them from this institution but will render them subject to further legal and political challenges that affect the rights of religious adherents in Canada.

***Affidavit of Daniel Cere*, para. 65**

***Affidavit of Craig Gay*, para. 15**

***Revised Affidavit of Ernest Caparros*, paras. 14 and19**

***Affidavit of Rabbi David Novak*, paras. 16, 17, 18 and 19**

***Affidavit of Abdalla Idris Ali*, paras. 11, 13, 21**

65. The court should also be wary of creating a confusing tapestry in Canada of different conceptions of marriage which could involve a redefined conception of "civil marriage", which contradicts the institution of religious "marriage" pursuant to the tradition of many faith communities. The order the court grants could lead to the withdrawal from the solemnization of marriage of many, if not most, religious clergy. Given that the vast majority of Canadians currently have their marriages solemnized before clergy, this could lead to significant social confusion. These interveners submit that, if the court determines that there is a s. 15 violation, deference should be granted to the legislature or, in the alternative, that any remedy be suspended for a period of time to allow Parliament and the legislatures to establish an alternative legislative scheme for the recognition of domestic partnerships which could include a wide variety of domestic relationships including same sex domestic partnerships. Any necessary changes to legislative benefit schemes, although not sought in this proceeding, could also be considered.

***Affidavit of Daniel Cere,* para. 65**

***Affidavit of Craig Gay,* para. 15**

***Revised Affidavit of Ernest Caparros,* paras. 14 and19**

***Affidavit of Rabbi David Novak,* paras. 16, 17, 18, 19**

***Affidavit of Abdalla Idris Ali,* paras. 11,13, 21**

***Affidavit of Suzanne Scorsone,* paras. 39, 40 and Exhibits 3 and 4**

66. In addition to the Preamble's recognition of "the Supremacy of God" and "the Rule of Law" (and the two are conjunctive) two of the central principles of a free and democratic society are: 1) respect for the processes of democratic deliberation and; 2) the relationship between the judicial and the legislative branches of government. On the issue of same-sex benefits extension and prior judicial determinations to date both the courts and Parliament have been clear that prior decisions and legislative extensions dealing with benefits have not been intended to challenge the primordial marital institution of male and female marriage. Given this recent highly contested and clear history of legal development and Parliamentary and legislative response to those decisions. The courts should defer to the clear recognition by Parliament that recent extensions of benefits and obligations to same-sex couples should not include any alteration to the historic institution of marriage as between "one man and one woman."

67. The Supreme Court of Canada has stated that the relationship between the legislative and judicial branches of government is one that can be described as "dialogical". That is to say, the Courts "listen" to the Legislatures and the Legislatures in their turn "talk back" to the Court and talk amongst themselves. This approach has particular relevance in this case because of the flurry of legal and legislative activity that has occurred in recent years on questions related to "same-sex recognition issues." Following the decision of *M. v. H.* for example, the Federal Government responded by introducing a wide-reaching review of Federal legislation. The *Act* to *Modernize Benefits and Obligations* extended benefits for gays and lesbians in a number of areas. The *Act* also made it clear, in its Preamble, that any benefits extensions ought not to be viewed in any way as an indication that Parliament wished to amend or move towards changing the institution of marriage so as to accommodate same-sex wishes in that regard. In these circumstances, the following statement of Iacobucci J. in *Vriend* is apposite:

> As I view the matter, the *Charter* has given rise to a more dynamic interaction among the branches of governance. This interaction has been aptly described as a "dialogue" by some (see e.g. Hogg and Bushell, *supra*). In reviewing legislative enactments and executive decisions to ensure constitutional validity, the courts speak to the legislative and executive branches. As has been pointed out, most of the legislation held not to pass constitutional muster has been followed by new legislation designed to accomplish similar objectives (see Hogg and Bushell, *supra*, at p. 82). By doing this, the legislature responds to the courts; hence the dialogue among the branches.
>
> To my mind, a great value of judicial review and this dialogue among the branches is that each of the branches is made somewhat accountable to the other. The work of the legislature is reviewed by the courts and the work of the court in its decisions can be reacted to by the legislature in the passing of new legislation (or even overarching laws under s. 33 of the Charter). This dialogue between and accountability of each of the branches have the effect of enhancing the democratic process, not denying it.
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> ***Vriend*, supra, at para's 138 and 139**
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> ***Modernization of Benefits and Obligations Act*, S.C. 2000, c.12**

68. It is submitted that the appropriate approach to the principles of a free and democratic society in this instance is to respect the institutional “dialogue” that has been ongoing in Canada for some years - a dialogue that has, both between the courts and the Chamber and within the Chamber itself, spoken of maintaining the historic recognition of marriage as between “one man and one woman.”

69. In these circumstances, and in addition to the strong constitutional arguments against such extension, the Court should resist the temptation to second-guess what the Parliament has so clearly indicated are its views on the matter.

70. Should the Court, however, decide that marital recognition should be extended to gay and lesbian partnerships, it is essential that the rights of other citizens be protected by, at the very least, the provision of conscience and religion exemptions.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

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