Court of Appeal File No. CA029048
Court of Appeal Registry: Vancouver
No. L002698
Supreme Court Registry: Vancouver

COURT OF APPEAL

ON APPEAL FROM: the judgment of the Honourable Mr. Justice Pitfield of the Supreme Court of British Columbia pronounced the 2nd day of October, 2001

BETWEEN:

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

APPELLANTS
(PETITIONERS)

AND:

THE ATTORNEY GENERAL OF CANADA
THE ATTORNEY GENERAL OF BRITISH COLUMBIA
and THE DIRECTOR OF VITAL STATISTICS FOR BRITISH COLUMBIA

RESPONDENTS
(RESPONDENTS)

Court of Appeal File No. CA029017
Court of Appeal Registry: Vancouver
No. L003197
Vancouver Registry

COURT OF APPEAL

BETWEEN:

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

APPELLANTS
(PETITIONERS)

AND

THE ATTORNEY GENERAL OF BRITISH COLUMBIA
THE ATTORNEY GENERAL OF CANADA

RESPONDENTS
(RESPONDENTS)

FACTUM OF THE INTERVENOR, THE INTERFAITH COALITION FOR MARRIAGE

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OPENING STATEMENT

> **Introductory Note Regarding Factum Length and Format :** By Order of Madam Justice Rowles, in oral reasons for judgment delivered on June 6th, 2002, the Inter-faith Coalition for Marriage shall have up to 30 pages for its Factum and need not provide the usual chronology (referred to in Form 10) and may make further changes to the form of the factum at counsel's discretion.
>
> *Barbeau et al. v. AG of Canada et al*. 2002 BCCA 425 June 6, 2002 at 5.

A. POSITION OF THE INTERFAITH COALITION

1. The Interfaith Coalition takes the position that the learned Judge did not err in the decision below with one exception. He erred when he found a breach of Section 15 of the Constitution Act, 1982. The proper disposition of this appeal is to uphold the decision for the reasons given below but not with respect to Section 15 because there is no breach of that Section. It is not necessary, therefore, to have recourse to Section 1 of the Charter to justify any breach on the facts at bar. Even if, *arguendo*, the common law extension, Charter rights or other constitutional arguments lead this court to find a breach of any part of the Constitution, the context of this case, properly construed, leads to legislative deference as the appropriate judicial response. In any case, the doctrine of progressive interpretation cannot be used so broadly as to effectively vitiate the provisions established for constitutional amendments. The notion of marriage as the union of one man and one woman is a living conception not one that can properly be described as a "frozen meaning." The judge below did not apply a frozen meaning or "originalist" argument. Rather, he applied an ongoing understanding of marriage that is both universal and continuing.

PART 1

OVERVIEW: THE CONTEXT OF THIS CASE

2. "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, It has only been recognized recently 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 Appellants sought in the petition and continue to seek on appeal is nothing less than a fundamental redefinition and substantive change to this pre-existing and subsisting religious and societal institution. What the Appellants really complain of in this case is not the fact that the legislatures have legislated in respect of "marriage" nor the common law recognition. Rather, the Appellants 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.

3. "Marriage" symbolizes social and religious acceptance of the legitimacy of relationships. The Appellants 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.

4. 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.

5. There is a legitimate aid 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.

6. This case is about marriage and it is not about marriage. It would be difficult to imagine a more foundational concept for civil society than that of "marriage". As much as the notion of "the dignity of the human person", the concept of "marriage" is loaded with historical, sociological, anthropological, economic, political, philosophical and religious significance. That it is now contested is clear. What could be overlooked, however, is that the resolution of this matter requires a broad and searching analysis of some of the foundational questions for contemporary civil society -- such as; the nature of pluralism, the nature of tolerance and the proper role of judicial determinations in the absence of legislative action. It would be a serious error to view this case only through narrow legal tests and definitions. It was a recognition of the importance of this case *in social context* that led Mr. Justice Pitfield to find that:

> The legal nature of marriage is so entrenched in our society, *and the changes in law required so uncertain* in the event same-sex marriages are to be recognized by the state, that Parliament or legislatures, and not the court, must make the change.
>
> Reasons for Judgment, A.B. Vol. XVII at paragraph 97 (emphasis added).

7. A similar, measured, approach respectful of the role of the legislature was recently adopted by the English Court of Appeal in a case that contains some important analysis for this court on appeal. The *Bellinger* decision will be dealt with below in terms of the need for legislative deference.

PART 2

ISSUES ON APPEAL

8. The Interfaith Coalition says the issues in these cases are as follows:

(a) Marriage is not truly a common law concept or construct. It is a unique primordial institution recognized but not created by law.

(b) In the alternative, if it is a common law rule, it does not violate either section 15(1) or any other section of the *Charter* and the doctrine of progressive interpretation cannot be used to change the essential meaning of "marriage" in the *Constitution Act*, 1867.

(c) In the further alternative, if it does violate the *Charter*, it is saved by section 1 of the *Charter*.

(d) In the further alternative, these are not cases where judicial discretion should be exercised. Rather, this is a matter that must be left to the appropriate legislatures to resolve.

(e) In the further alternative, if the court grants an order extending marriage in these cases, the court should attach, as a term of any such order the express right for conscience and religious objections and that such right does not operate to suspend the public expression and practices of religions.

PART 3

ARGUMENT

B. THERE IS NO "BRIGHT LINE" BETWEEN THE RELIGIOUS AND THE CIVIL: ALL CITIZENS LIVE TOGETHER IN THE PUBLIC REALM

9. These Interveners 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 wide-spread nature of the claim for recognition made by the Appellants 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. Public order is one aspect of the rule of law about which the court should be concerned.

> *Chamberlain v. Surrey School District No. 36* (2000), 191 D.L.R. (4th) 128, *Trinity Western University v. College of Teachers (British Columbia)* (2001), 199 D.L.R. (4th) 1; *Affidavit of Daniel Cere A.B. Vol. XV, p. 2180,* paras. 31 and 51; *Revised Affidavit of Ernest Caparros A.B. Vol XVI, p. 2369,* paras. 7-11; Christopher Gray, "Marriage, the Law, and Same-sex Unions" (1999/2000) 30 R.G.D. 583-605; *Brillinger v. Brockie, supra.; Smitherman v. Powers and Durham Catholic District School Board* (May 10, 2002) (Ont. Sup.Ct.) No. 02-CV-227705CM3; *R. v. Big M. Drug Mart. supra.*

C. THE LANGUAGE OF "HETEROSEXISM" AND "HOMOPHOBIA" STIGMATIZES THOSE WHO HAVE DIFFERING BELIEFS ABOUT HUMAN SEXUALITY

10. Catholics and non-Catholics who have written in this area, 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 or similar conceptions in other religions.

> *Revised Affidavit of Ernest Caparros A.B. Vol XVI, p. 2369,* para. 17, 19 and 20; *Affidavit of Daniel Cere A.B. Vol XV, p. 2180,* paras 24-35, 62, 64, 65, 66 and 69; G. Good, *Humanism Betrayed* (Montreal: Queen's University Press, 2001) at pp. 22-38; *Reply Affidavit of Daniel Cere A.B. Vol. XV, p. 2180,* paras. 4 and 5.

D. SPECIFIC RELIGIOUS BELIEFS SHOWING MALE AND FEMALE MARRIAGE AND THE INABILITY TO ACCEPT OR "RECOGNIZE" SAME-SEX MARRIAGES WHILE MAINTAINING RESPECT FOR PERSONS.

(i) The Roman Catholic Conception of Marriage

11. 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 very 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." 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." The civil authority has competence with respect to marriage, but only "...with respect to the merely civil effects of marriage." Such "mere civil effects" are said to include such things as registration, succession, rights of inheritance, the time and place of the ceremony, tax liability and so on. The duty to follow civil authority is said to exist "as long as these [civil effects] do not conflict with the substance of marriage *or its essential properties…"* One of the essential properties is that marriage is between one man and one woman.

> *Affidavit of Daniel Cere A.B. Vol . XV, p. 2180,* paras 6, 7 and 9; *Catechism of the Catholic Church,* paras. 1131, 1601-1666, 2201 and 2202; *Revised Affidavit of Ernest Caparros A.B. Vol XVI, p. 2369,* paras. 16, 17 and 25; *Affidavit of John Witte Jr.,* A.B. Vol. VI, p. 785, Exhibit #4 "From Sacrament to Contract" pp.26-30; *Family, Marriage and De Facto Unions* (July 2000) para. 9, 26 and 50; *The Code of Canon Law,* Canon #1059 and *A Practical Guide to the Code of Canon Law* (1995) at pp. 575-576 (emphasis added) and *Net Commentary on the Code of Canon Law* (2000) at pp. 1254 – 1256.

12. 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." However, such respect 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 A.B. Vo. XV, p.2180,* para. 34; *Reply Affidavit of*

Daniel Cere A.B. Vol. XV, p.2180, para. 4; *Revised Affidavit of Ernest Caparros A.B. Vol XVI, p.2369,* paras. 14-17.

13. 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, A.B. Vol. IX, p. 1253, A.B. Vol IX, p. 1253*, paras 126, 127 and 128; *Affidavit of Katherine Young, A.B. Vol. IX, p. 1239,* A.B. Vol. IX, p.1329 paras. 111-115; *Affidavit of John Witte Jr.*, A.B. Vo. VI, p. 785m Exhibit #3 "The Goods and Goals of Marriage" p. 153;

(ii) The Protestant Evangelical Christian Conception of Marriage

14. Conservative/Evangelical Protestants comprise approximately three million Canadians and include the fastest growing Christian churches in Canada. They believe that the scriptures establish expressly 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. 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. Because of its divine origins, marriage cannot be redefined. 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 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, A.B. Vol. XV, p. 2219,* paras. 3, 4, 5, 6, 7, 14 and 15; *Affidavit of John Witte Jr.,* A.B. Vol. VI, p. 785 para. 38.

15. Because of their interpretation of 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, A.B. Vo. XV, p. 2219,* paras. 4, 5 and 7; *Trinity Western University v. College of Teachers (British Columbia), supra*.; *Brockie, supra.;*.

(iii) The Islamic Conception of Marriage

16. 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 complimentarity 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,* A.B. Vol XVI, p. 2351, paras. 6, 7, 8 and 9: *Affidavit of Katherine Young, A.B. Vol. IX p. 1329,* paras. 39, 45, 51, 57, 63 and 69.

17. Islamic tradition 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, particularly with respect to public education and their own religious schools. 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.

> *Affidavit of Abdalla Idris Ali, A.B. Vol XVI, p. 2351,* paras. 10, 11, 12, 13 and 16-21.

18. 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 an 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, A.B. Vol XVI, p. 2351,* paras. 16-21.

(iv) The Jewish Conception of Marriage

19. 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,* A.B. Vo. XVI, p. 2232, paras. 4 and 5; *Affidavit of Katherine Young, A.B. Vol. IX, p. 1329,* paras. 36, 42, 48 and 60-65.

20. 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. 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,* A.B. Vo. XVI, p. 2232, paras. 4, 5, 9, 10 and 12.

21. 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 altogether 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. 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 be stigmatized in all aspects of public life.

Affidavit of Rabbi David Novak, A.B. Vo. XVI, p. 2232, paras. 12, 16 and 19.

E. THE *CONSTITUTION ACT, 1867* AND THE *CONSTITUTION ACT, 1982*; *ADLER* AND *BILL 30* DECISIONS.

22. In the *Constitution Act, 1867*, the Court specifically authorized Parliament to legislate in respect of marital capacity pursuant to s. 91(26) and the provincial legislatures with respect to the solemnization of marriage (s. 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*. This Intervener supports the arguments of the Intervener Coalition for Marriage and the Family on the *Bill* 30 and *Adler* decisions in relation to the Section 91 and 92 and *Charter* s. 52 interpretative issues that were accepted by and incorporated into the decision of Mr. Justice Pitfield and adopts the submissions of that Intervenor regarding s. 91 interpretative issues.

Constitution Act,1867 (U.K.) 30 and 31 Vict. C.3, reprinted in R.S.C. 1985, App. 11, No. 5, 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,* at pp. 640-4, 645-9 per Iacobucci J.; Reasons for Judgment A.B. Vol. XVII at pp. 16 and 26.

(i) The common law recognition of the institution of Marriage which confers the unique status of "husband and wife" precludes the inclusion of same-sex partnerships within that institution. It is recognized but not created by law.

23. With respect to the development and application of the common law as an institution that is prior to law and recognized but not created by law the Interfaith Coalition agrees with and supports the well articulated arguments of the Attorney General of Canada. The Appellants and the Liberal Rabbis Intervenor, despite their statements to the contrary, seek a fundamental redefinition of the institution of marriage which has been recognized by the common law, and regulated by statute. Such a change cannot be in any sense of the term

"incremental" as that term is required in the authorities. Substantial changes in the law should be left to the legislature.

24. The fact that the principle enunciated in *Hyde v. Hyde*, regarding whether England should recognize a marriage solemnized in a jurisdiction which permitted polygamous marriages has been overruled does not, in any way, affect the definition of marriage as being essentially heterosexual in that case that has been followed for almost 150 years. Similarly, the fact that another principle, established in *Corbett*, regarding the ability of a transsexual to engage in heterosexual sex, does not affect the definition of marriage as uniquely heterosexual, conferring the status of husband and wife, following that decision. The recognized definition of marriage in both cases was recently relied upon and affirmed by the English Court of Appeal in *Bellinger* in relation to the issue of whether the status of male or female was relevant to the meaning of marriage. The court declined to "fill in the gaps" and deferred to the *Corbett* criteria. With respect, the submissions made on behalf of the B.C. Partners to the effect that "Marriage does not plainly exclude same-sex unions" are entirely without foundation. The cases cited at para. 27 of that Factum do not support the assertions made - -quite the reverse. The Interfaith Coalition adopts the analysis of these authorities made on behalf of the Marriage Coalition Intervenor in its Factum.

> *Hyde v. Hyde and Woodmansee* (1866), L.R. 1 P & D 130, at 35 L.J. P & M 57 at p. 133; *Corbett v. Corbett (otherwise Ashley)*, [1970] 2 All E.R. 33 at p. 48; *Bellinger v. Bellinger* [2002] 1 All E.R. 311 (C.A.); [2001] E.W.C.A. Civ. 1140.

F. SUBSTANTIVE SECTIONAL ANALYSIS

(i) SECTION 2(a) The Freedom of Conscience and Religion

25. 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 matter, 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. Contrary to the assertions of the Appellants

and the Intervenor Liberal Rabbis, the record suggests considerable dislocation of public order should this court require by judicial determination, same-sex marriage.

> *Affidavit of Daniel Cere A.B. Vol XV, p. 2180,* Vol IV, 2180, para. 65; *Affidavit of Craig Gay, A.B. Vol XV, p. 2219, para.* 15 Revised *Affidavit of Ernest Caparros A.B. Vol XVI, p. 2369,* paras. 14 and 19; *Affidavit of Rabbi David Novak, A.B. Vol. XVI, p. 2232* paras. 16, 17, 18, 19; *Affidavit of Abdalla Idris Ali, A.B. Vo,. XVI, p. 2351, paras. 11, 13, 21; Affidavit of Suzanne Scorsone, A.B. Vol., X 1420*, paras. 39, 40 and Exhibits 3 and 4.

26. The record shows that religious clergy in many denominations and religious faiths would be, by their religious principles, unable and unwilling to solemnize these redefined "marriages". This could require clergy to withdraw from the solemnization of marriage which could cause significant societal confusion and could also lead to legal and human rights proceedings against both the clergy and religious faiths that refuse to participate in the solemnization of certain redefined "marriages". In view of recent judicial history it is not mere idle speculation or paranoia that leads to this conclusion but an objective reading of recent decisions.

> *Trinity Western University v. British Columbia College of Teachers* (2001) 1 SCR 772, (2001) 199 D.L.R. (4th) 1; *Chamberlain v. Surrey School Board* (2000), 80 B.C.L.R. (3d) 181 (C.A.); reversing (1998), 60 B.C.L.R. (3d) 311 (S.C.); leave to appeal to the SCC granted on October 4, 2001; *Brillinger et al. v. Brockie et al.* (June 17, 2002) Court File No. 179/00 (Ont. Div. Ct.) (hereinafter "Brockie"); *Smitherman v. Durham Catholic School Board,* (May 10, 2002) Court File NO. 02-CV-227705CM3 (Ont. Sup. Ct. of Justice) (hereinafter "Durham").

27. 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 lslam. It has also been recognized for millennia as a uniquely heterosexual institution in social and religious groups.

> *Affidavit of Daniel Cere A.B. Vol. XV, p. 2180*, A.B. 2180 paras. 4,5,7, 8,46, 47 and 65; Revised Affidavit of Ernest Caparros A.B. Vol xvi; p. 2369, A.B. 2369 paras. 14, 16 and 17; *Affidavit of Craig Gay A.B. Vol. XV, p, 2219*, A.B. 2219 paras. 4-5; *Affidavit of Rabbi David Novak, A.B. Vol. XVI*; *p. 2232 A.B.* 2232 paras. 4, 5, 9 and 10; *Affidavit of Abdalla Idris Ali, A.B. Vo. XVI, p. 2351, A.B.* 2351 paras. 6-10; *Affidavit of Stephen Michael Cretney,* A.B. 651 paras. 13, 15, 17, 18, 20, 22, 26, 28, 29, 31 and 32; *Affidavit of John Witte Jr. A.B. Vo. VI, p. 785* A.B. 785, paras. 1, 4, 12, 15-25, 35 and 56; *Affidavit of Edward Shorter, A.B. Vol. IX, p. 1253,* A.B. *Vol. IX, p.1253,* A.B. 1253, para. 128; *Affidavit of Beatrice Verschraegen, A.B. Vo. XIII p. 1776,* A.B. 1776 paras. 45, 72, 95, 105 and 230; *Affidavit of Katherine Young, A.B. Vol. IX, p. 1329,* A.B. Vol. IX, 1329 paras. 2, 7, 34, 41-46 and 108;

28. Until fairly recent legislative enactments, the status of marriage could only be conferred through religious ceremony, solemnized by religious clergy, in most provinces and territories. 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 A.B. Vol XVI, p. 2369,* A.B. 2369 para. 7; *Affidavit of Suzanne Scorsone, A.B. Vol. X, 1420,* A.B. 1420 *para. 20, 39 and 4.*

29. Here the Appellants and their supporting Intervener (Liberal Rabbis) claim that legal recognition is the means to achieve social recognition. The Liberal Rabbis assert a religious right to perform same-sex ceremonies and to have those rights recognized by law. The Interfaith Coalition supports the reasons of the Attorney General for Canada but wishes to make the following additional arguments.

30. The claim that social recognition will follow upon legal recognition is dubious and, on the evidence, contested. Those who oppose the concept of same sex marriage assert the right to their freedom of belief, expression, conscience and religion to refuse such recognition and such refusal (based upon charter rights) is recognized at law to have a public as well as a private dimension. To refuse to recognize (i.e. accept) the concept of “same sex marriage” is something that the members of the Interfaith Coalition claim can be done and must be allowed while maintaining respect for individual homosexuals and lesbians.

31. Much turns on whether the courts accede to the recognition claim of the Appellants. For to do so elevates the claim for recognition to a constitutional right and thereby places those who continue to refuse it, "outside" the constitutional compact. It is the legitimacy of the claim for "same-sex marriage" that should be the subject of civil discussion and, if eventual agreement arises, civil remedy. Such a remedy would be the subject of civic debate and discussion and development not judicial fiat.

> *Brockie, supra.*; *R.V. Big M Drug Mart*, [1985] 1 S.C.R. 295 (hereinafter *"Big M."*); *Russell Hittinger, Natural Rights, Under specific rights and the Bill of Rights* (1998) 29 RGD 449 – 464.

32. A number of restrictions have been placed on the capacity of people to marry. Both heterosexuals 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. Everything argued on behalf of the Liberal Rabbis could be said to support a religious claim for polygamy and group marriage. In addition, since the claim is based upon "sexual orientation" and bi-sexuality is such an orientation, how could a claim for access to marriage be limited to couples when the very identity of bi-sexuality supposes a third person added to the relationship or, at least, an extension beyond the notion of "couples"? Should bisexuals be excluded from the category of marriage? If they are to be included, how are they to be included? These are the sort of questions raised by the logic of the claim but not discussed before the court.

> *Marriage (Prohibited Degrees) Act*, S.C. 1990, c.46; *Divorce Act*, R.S.C., c.3 (2nd Supp); *Criminal Code*, R.S.C. 1985, c. C-46, ss. 2145, 290-295; *Marriage Act, R.S.O. 1990, c. M.3, as amended; Vital Statistics Act* R.S.B.C. 1996, c. 479.

(ii) The Freedom of Religion of the Same-Sex Marriage Claimants is not violated.

33. The Intervenor Liberal Rabbis alleges that the legal restriction on "same-sex marriage" infringes religious beliefs because it has propounded that same-sex relationships and liberal Judaism can be reconciled. It further alleges that the denial of legal recognition of same-sex partnerships as "marriages" sends a message that liberal Judaism is not "real" Judaism and

its beliefs worth less. With respect, this is not so. The beliefs cannot amount to a requirement for judicial recognition and enforcement.

34. As observed by Chief Justice Dickson in *R. v. Big M Drug Mart Limited*, the constitutionality of an impugned law is determined by an analysis of both its purpose and effects. The purpose of the common law recognition of the institution of marriage has not been to limit the freedom of any religious group in society to practice or manifest their religious faith. Neither has the legislative regulation of the solemnization or capacity to marry by either parliament or the legislatures. Rather, the purpose of legal recognition and regulation has been, as found by the Supreme Court or Canada in *Egan* and *Miron*, to recognize the fundamental societal role played by this institution in society.

R. v. Big M Drug Mart Ltd., [1985] 1 S.C.R. 295.

35. Furthermore, as observed by Justice Wilson in *Jones*, marriage is one of the many institutions in society which has both civil and religious aspects. Legal recognition of "marriage" is provided irrespective of whether it is solemnized through religious ceremony or civil ceremony. Furthermore, it encourages freedom of religion and diversity of religious faith by recognizing the solemnization of marriage by a wide variety of religious faiths and non-religious faiths in a way that binds society as a whole. This recognition, unlike that sought by the Appellants, has not altered the fundamental nature of marriage as being an institution solely between one husband and one wife and has not sundered the shared and settled consensus of Canadians.

R. v. Jones, [1986] 2 S.C.R. 284.

36. Both Canadian courts and legislatures have refused to recognize as lawful forms of marriage advocated by those whose religious faith permits or compels them to enter into forms of "marriages" which do not comport with the fundamental nature of marriage as being between one man and one woman. For instance, courts and legislatures prohibit polygamous marriages as bigamous which are conducted pursuant to the religious teachings of Mormons or Muslims in other jurisdictions. The arguments adduced by the liberal Rabbis could justify polygamy or, indeed, multiple partner marriages. That this is not claimed is no answer to the fact

that they could be on the logic of the arguments as framed. There is no religious "right" to marry at law as claimed by the liberal Rabbis.

> *Hyde v. Hyde and Woodmansee* (1866), LR. 1 P & t) 130, at 35 L.J. P & M 57 at p. 133; *Corbett v. Corbett (otherwise Ashley)*, [197012 All E.R 33 at p.48

37. The effect of the common law and statutory recognition of the institution of marriage as conferring the status of husband and wife does not violate the religious freedom of the lntervenor Rabbis or the Appellants. As noted by Chief Justice Dickson in *R. v. Big M Drug Mart*, "the essence of the concept of freedom of religion is the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal and the right to manifest religious belief by worship and practice or by teaching and dissemination." There is no limitation on the ability of the Intervenor's adherents to hold their religions beliefs, to teach them, promulgate them, or practice them openly. They are free to conduct religious ceremonies to solemnize marriages between men and women or same-sex partners and call them "marriages". Legal registration is unnecessary to hold the religious belief or manifest the religious practice claimed. Nor is there any imposition of a direct or indirect burden on the Appellants as a result of their religious belief through the legal recognition of the institution of marriage. There is no coercion to follow the religious beliefs of the majority such as the Ontario Court of Appeal proscribed in *Zylberberg* or *CCLA v. Ontario (Minister of Education)*.

> *Zylberberg v. Sudbury Board of Education* (1988), 65 O.R. (2d) 641; *CCLA v. Ontario (Minister of Education)* (1990), 71 O.R. (2d) 341 (C.A.).

38. As the Supreme Court of Canada recognized in both *CCLA v. Ontario* and *Edwards Books & Art,* not all legislation which has "any effect" on religious belief or practice will necessarily violate s.2(a). It must be viewed contextually. Any religious group which believed in and purported to solemnize marriages between siblings or polygamous unions, or group marriages would be refused registration on the basis of the core heterosexual (male/female) and dyadic (two people) requirement of marriage, not on the grounds of religious preference.

39. What the Appellants really seek is to solemnize other forms of domestic partnerships which are not between husband and wife and to appropriate the term "marriage" for those solemnized domestic partnerships. In order to do this, they must ask the Courts to fundamentally redefine and fundamentally change the institution. This redefined institution would not be between "husband and wife" it would be a union between "committed conjugal partners" or "registered domestic partners".

40. The absence of civil or legal recognition of a religious belief or practice does not abrogate or interfere with the ability to hold or manifest that religious belief or practice. In *Edwards* and *Adler* the Supreme Court of Canada held that the failure of the state to legislate support for particular religious practices did not violate those beliefs. Nor did the fact that legislation, with a valid non-religious purpose, was consistent with the beliefs or practices of some faiths, but not others, render it unconstitutional.

> *Edwards Books and Art Limited v. The Queen*, [1986] 2 S.C.R 713; *Adler v. Ontario*, [1996] 3 S.C.R. 609.

41. The Supreme Court of Canada recognized recently in *Trinity Western University*, as in other cases such as *Brockie*, that neither freedom of religion nor the guarantee against discrimination based on sexual orientation is absolute. Constitutional rights are inherently limited by the rights and freedoms of others through a contextual analysis. Furthermore, the Court recognized in *Dagenais v. Canadian Broadcasting Corp.* that it would reject a hierarchical approach to the delineation of Charter rights which allowed some rights to trump others. Rather, rights have to be interpreted in a balanced manner.

> *Trinity Western University v. British Columbia College of Teachers*, p. 22 par. 29-31 per Iacobucci J.; *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3. S.C.R. 835 at p. 877 per Lamar C.J.

(iii) Charter s. 15 Analysis

42. With respect to the development and application of the jurisprudence on Section 15 of The Charter of Rights and Freedoms generally, the Interfaith Coalition agrees with and supports the well articulated arguments of the Attorney General (Canada) at para.'s 43 to 94 of

its Factum. The Interfaith Coalition wishes to make the following additional arguments on Section 15.

43. 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". Although the status of husband and 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, like statutes recognizing the status of "Indians". Further, the common law and statutory provisions do not subject the claimants to differential treatment on the basis of an enumerated ground. Although a superficial analysis may support such a claim, when fully considered the legal recognition of the institution of marriage cannot be said to differentiate between those who participate in the institution and those who do not or cannot. It is only the consequential legal regime which grants statutory benefits, or denies benefits, based on the status which could be said to differentiate. These regimes have been substantially modified in response to *Egan, M. v. H.* and *Vriend*. If the Appellants want legislative recognition for same-sex partnerships, this request raises a political issue for the legislature, not a s. 15 issue for the Courts.

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

44. As indicated in *Law*, the s. 15 analysis is not formulaic. It is contextual and purposive. It must be flexible to its context. The Court must be attentive to the nature of the equality claim and the wider context of competing claims for equality of other groups in society. It is essential for the Court to recognize that some s. 15 claims, such as this, involved competing s. 15 claims of different groups in society. In such a claim, the Court must consider, in a purposive and contextual analysis, the extent to which the equality interests of other groups and other constitutional rights (such as those arising under s-s. 2(a) or 27), of other groups are affected. Charter jurisprudence is still developing and such intergroup realities must be part of the Court's analysis.

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

***Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497 at paras. 30, 39 and 41 per Iacobucci J.; Martin, "Balancing Individual Right to Equality and Social Goals" (March-June 2001) 80 (1 & 2) Canadian Bar Rev 299, at 320; M. v. H., [1999] 2 S.C.R. 3 at 45-7 per Cory and Iacobucci J.; *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203, at p. 250 per L'Heureux-Dubé J.; *Lovelace v. Ontario*, [2000] 1 S.C.R. 950, at 984 per Iacobucci J.; *Winko v. British Columbia (Forensic Psychiatric Institute)*, [1999] 2 S.C.R. 625**

45. In the context of the current applications, the claimants' request for a fundamental redefinition of the institution of marriage creates a "collision of rights" and a "collision of dignities" between the Appellants and these Interveners. Such religious people will be alienated on the basis of their religious beliefs from the fundamentally defined societal institution of marriage as "committed conjugal partners". The principles of historic disadvantage, stereotypical treatment, vulnerability, marginalization and alienation apply equally to religious minorities who would be further excluded by such judicial action.

46. As indicated in the affidavits filed, some of these religious minorities, such as the Jewish and Muslim communities, are very concerned about the impact a fundamental redefinition of marriage would have 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, 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. As the Supreme Court of Canada recognized in *Swain*, *Mills* and *Trinity Western*, *Charter* rights must be interpreted in the context of other competing rights and freedoms.

***Affidavit of Rabbi David Novak, A.B. Vol. XVI, p. 2232* at paras. 16-19; *Affidavit of Abdalla Ali*, paras. 11, 13 and 21; Revised *Affidavit of Ernest Caparros* A.B. Vol. XVI, p. 2369, paras. 12, 14, 19 and 20; *Affidavit of Daniel Cere* A.B. Vol. XV, p. 2180,**

paras. 65-68; *Affidavit of Craig Gay* A.B. Vol. XV, p. 2219, 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.

(v) Section 1 and the Need for Legislative Deference Generally

47. 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 issues of social and political ideology and involves the fundamental consideration of a legal, social, philosophical and religious tradition which underlies our law.

***Egan v. Canada*, [1995] 2 S.C.R. 513 at para. 29 per LaForest J. and at paras. 105-8 per Sopinka J.; M. v. H., [1999] 2 S.C.R. 3 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.; *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229 at pp. 317-319 per LaForest J.; *Vriend v. Alberta*, [1998] 1 S.C.R. 493 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.; *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624, at paras. 85-6 per LaForest J.**

48. 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 legislatures 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 legislatures, particularly where the Law Commission of Canada has studied this very issue and suggested a panoply of possible legislative responses all of which would have wide public discussion before enactment and political accountability afterwards. Contrary to what the Appellants and the Liberal Rabbis Intervener imply, it is not at all clear that the Parliament and the legislatures would choose to fundamentally redefine marriage in the manner sought rather than choose from other constitutionally appropriate legislative alternatives.

> ***Egan v. Canada*, [1992] 2 S.C.R. 513 at para. 29 per LaForest J. and at paras. 105-8 per Sopinka J.; M. v. H., [1999] 2 S.C.R. 3 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.**

49. Obviously, where the s. 1 analysis is undertaken in a context in which there are claims which will involve other competing s. 15 and s. 2(a) rights, the proportionality analysis must 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 even if there was a breach of a Charter right (which is denied).

> ***R. v. Oakes*, [1986] 1 S.C.R. 103; *Egan v. Canada*, [1995] 2 S.C.R. 513, at para. 182 per Cory and Iacobucci JJ.**

50. 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 should be left to the legislature. Such an attentive stance to the difficulties of definition in the marital area is observed in the recent *Bellinger* decision of the English Court of Appeal, *op. cit*..

51. The presence of s. 27 in the Charter enshrines 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. The Court must be wary of sanctioning legally the preference for or elevation of one ethnic, cultural or religious group - or one set of "beliefs" held by such a group - over others. A judicially mandated redefinition of marriage to "committed conjugal partners" would have profound effects on the role of traditional religious and minority ethnic communities in Canada as is shown in all the affidavits filed on behalf of the Interfaith Coalition.

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

PART 4

REMEDY:
THE NEED FOR DEFERENCE AND
CONSCIENCE/ RELIGIOUS OBJECTION PROTECTION

52. If the Court determines that there is a constitutionally indefensible legal vacuum that fails to accommodate the needs of certain domestic partnerships for recognition through marriage, the Court should defer to the legislature with respect to this issue. 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 Law Commission of Canada has suggested a variety of approaches. 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*, A.B. Vol. XIII, p. 1776, 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; Law Commission of Canada, *Beyond Conjugality: Recognizing and Supporting Close Personal Relationships Between Adults*, Discussion Paper (May 2000); Law Commission of Canada (Ottawa: December 21, 2001)**

53. The Court should consider the impact of any remedy on those religious communities opposed on grounds of religion and expression to such remedy. 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 to include same-sex unions. Any such judicial redefinition would not only alienate them from this institution, but will very likely render them subject to further legal, political and social stigmatization and exclusion.

> ***Chamberlain v. Surrey School District No. 36* (2000), 191 D.L.R. (4th) 128; *Affidavit of Daniel Cere* A.B. Vol. XV, p. 2180, para. 65; *Affidavit of Craig Gay*, A.B. Vol. XV, p. 2219, para. 15; *Revised Affidavit of Ernest Caparros* A.B. Vol. XVI, p. 2369, paras. 14 and 19; *Affidavit of Rabbi David Novak*, A.B. Vol.**

XVI, p. 2232 paras. 16, 17, 18 and 19; *Affidavit of Abdalla Idris Ali,* A.B. Vol. XVI, p. 2351, paras. 11, 13, 21

54. The Court should 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 have their marriages solemnized before clergy, this could lead to significant social confusion.

***Affidavit of Daniel Cere* A.B. Vol. XV, p. 2180, para. 65; *Affidavit of Craig Gay,* A.B. Vol. XV, p. 2219 para 15; *Revised Affidavit of Ernest Caparros* A.B. Vol. XVI, p. 2369, paras. 14 and 19; *Affidavit of Rabbi David Novak,* A.B. Vo. XVI, p. 2232, paras. 16, 17, 18, 19; *Affidavit of Abdalla Idris Ali,* A.B. Vol. XVI, p. 2351; paras. 11, 13, 21; *Affidavit of Suzanne Scorsone,* A.B. Vol. X, 1420, paras. 39, 40 and Exhibits 3 and 4**

55. 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. That this is so is abundantly clear when one considers that no specific language has been advanced that would define the scope and application of any proposed marital extension. Is bi-sexuality to be covered under "sexual orientation"? Is polygamy covered? What are the rules for consummation or does this matter at all? To ask the questions is to acknowledge that the court is being invited to embark upon a purely legislative function. In *M v. H. and 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, marriages 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* A.B. Vol. XV, p. 2180, paras. 12-35**

56. If the Court determines that there is a constitutionally indefensible legislative or legal vacuum the courts should defer to the legislature with respect to this issue. The legislature can balance competing interests and address unanticipated aspects not currently raised at bar. If it is considered necessary, that body 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. The Appellant, EGALE, in its Factum (para. 16) quotes the Law Commission as raising the question "If governments are to continue to maintain an institution called marriage…" The fact that the possibility of governments *not doing so* is, itself, an extraordinarily significant issue for the "dialogue" that is said to exist between courts and legislatures. 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*. In addition, the matter is one of broad social policy.

> ***Affidavit of Beatrice Verschraegen*, A.B. Vol. XIII p. 1776, 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; *Bellinger v. Bellinger*, supra para's 66, 74, 75, 99 and 106; *Tremblay v. Daigle* (1989), 62 D.L.R. (4th) 634 (S.C.C.)at 650.**

57. 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. Where there is no legislative action at all for judicial review, the courts should defer.

> ***Vriend*, supra, at para's 138 and 139 (emphasis added); *Modernization of Benefits and Obligations Act*, S.C. 2000, c.12.**

58. 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. 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". 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 concerns about their rights guaranteed by s.15 and ss. 2(a).

> ***Chamberlain, supra*; *Affidavit of Daniel Cere* A.B. Vol. XV, p. 2180, para. 65; *Affidavit of Craig Gay*, A.B. Vol. XV, p. 2219, para. 15; *Affidavit of Rabbi David Novak*, A.B. Vol. XVI, p. 2232, paras. 16, 17, 18, 19; *Affidavit of Abdalla Idris Ali*, A.B. Vol. XVI, p. 2351, paras. 13, 21; *Revised Affidavit of Ernest Caparros* A.B. Vol. XVI, p. 2369, paras. 14 and 19; *Reply Affidavit of Rabbi David Novak*, A.B. Vol. XVI, p. 2232, paras. 5 and 8; *Smitherman Marc Hall v. Durham Catholic School Board, supra, Brillinger v. Brockie, supra*.**

(v) The Requirement of a Conscience and Religious Exemption:

59. 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. The concern by religious groups before the courts over the years has been that same-sex claims would eventually be directed towards the religious view of marriage as limited to male and female marriages. Now it is

argued by the Appellants and the liberal Rabbi Intervenor that the claim is only limited to civil (but not religious marriages – or, *pace*, the liberal Rabbi's Intervention, some religious marriages but not others). With respect, the court must take a broader view and recognize that this case is ultimately about what kind of pluralism is to be furthered in Canadian society;

> No one would think it right to place a priest or clergyman in a position to be compelled to celebrate a marriage which the doctrine, belief and discipline of his church forbade him to celebrate
>
> *In Re: Marriage Laws* (1912) 6 D.L.R. 588 at 721 per Davies J. (SCC).

60. As the place of such religious and conscience profession (and objections) is now the subject of frequent litigation in Canada, it is submitted that it would be prudent and just, should this court extend the recognition of marriage to same-sex couples, to provide, as a condition of any order, conscience and religious protections for those whose beliefs, while respecting persons, dissent as to endorsing contested views of human sexuality (implicit in "marriage"). Here, justice compels, in any order made in the direction of "same-sex marital recognition", an express affirmation of the rights of conscience and religious freedom in relation to the new concept of marriage. There are risks to genuine pluralism, tolerance, diversity and liberty before the court in this case and it is no exaggeration to say that part of what is at issue is whether claims that our country stands for pluralism, tolerance and diversity are true. Freedom requires a respect for diverse beliefs, and it is with the greatest respect, this court's responsibility to say so.

> Whyte, John D., "Is the Private Sector Affected by the *Charter*?" in *Righting the Balance: Canada's New Equality Rights*, L. Smith, ed., (Saskatoon: The Canadian Human Rights Reporter Inc., 1986) p. 145 at pp. 174-179; John Gray, *The Two Faces of Liberalism*, (New York: The New Press, 2000), p. 105; Affidavit of Daniel Cere, A.B. Vol. XV, p. 2180; Jean Bethke Elshtain, *Democracy on Trial* (New York: Basic Books), 1996, pp. 1- 20, 52 –68 and notes.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

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LIST OF AUTHORITIES

CASE LAW

	PAGE(S)
Adler v. Ontario, [1996] 3 S.C.R. 609	12; 19
Barbeau et al. v. AG of Canada et al. 2002 BCCA 425	Opening Statement
Bellinger v. Bellinger, [2002] 1 All E.R. 311 (C.A.); [2001] E.W.C.A. Civ. 1140	3; 5; 13; 23; 26
Brillinger v. Brockie, [1999] O.H.R.B.I.D. No. 12, Decision No. 99-012	5; 9; 14; 16; 27
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Corbiere v. Canada (Minister of Indian and Northern Affairs), [1999] 2 S.C.R. 203	21
Dagenais v. Canadian Broadcasting Corp., [1994] 3. S.C.R. 835	19
Edwards Books and Art Limited v. The Queen, [1986] 2 S.C.R 713;	19
Egan and Nesbit v. Canada, [1995] 2 S.C.R.	1; 20; 23
Eldridge v. British Columbia (Attorney General), [1997] 3 S.C.R. 624	22
Hyde v. Hyde and Woodmansee (1866), L.R. 1 P&D 130; L.J. P&M 57	13; 18
In Re: Marriage Laws (1612), 6 D.L.R. 588 (SCC)	28
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Law v. Canada (Minister of Employment and Immigration), [1999] 1 S.C.R. 497	20
Layland v. Ontario (Minister of Consumer & Commercial Relations) (1993), 14 O.R. (3d) 658 (Ont. Gen. Div.)	1
Lovelace v. Ontario, [2000] 1 S.C.R. 950	21
M. v. H, [1999] 2 S.C.R. 3	1; 20; 23; 25; 26
McKinney v. University of Guelph, [1990] 3 S.C.R. 229	22

R. v. Big M. Drug Mart, [1985] 1 S.C.R. 295	5; 14; 16; 17; 18
R. v. Jones, [1986] 2 S.C.R. 284	17
R. v. Mills, [1999] 3 S.C.R. 668	21
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R. v. Swain, [1991] 1 S.C.R. 933	21
R. v. Zundel, [1992] 2 S.C.R. 731	24
Reference Re Bill 30, An Act to Amend the Education Act (Ont.), [1987] 1 S.C.R. 1148	12
Smitherman v. Powers and Durham Catholic District School Board (May 10, 2002) (Ont. Sup.Ct.) No. 02-CV-227705CM3	5, 14; 27
Tetreault-Gadoury v. Canada (Employment and Immigration Commission), [1991] 2 S.C.R. 22	22
Tremblay v. Daigle (1989), 62 D.L.R. (4th) 634 (SCC)	26
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Vriend v. Alberta, [1998]1 S.C.R. 493	1; 20; 22; 25; 26; 27
Winko v. British Columbia (Forensic Psychiatric Institute), [1999] 2 S.C.R. 625	21
Zylberberg v. Sudbury Board of Education (1988), 65 O.R. (2d) 641	18

STATUTES

Constitution Act 1982	Opening Statement; 12
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Marriage (Prohibited Degrees) Act, S.C. 1990, c.46; Divorce Act, R.S.C., c.3 (2nd Supp); Criminal Code, R.S.C. 1985, c. C-46, ss. 2145, 290-295; Marriage Act, R.S.O. 1990, c. M.3, as amended; Vital Statistics Act R.S.B.C. 1996, c. 479.	16
Modernization of Benefits and Obligations Act, S.C. 2000, c.12	26; 27
The Canadian Charter of Rights and Freedoms	1; 4; 12; 13; 20; 21; 22; 23; 25; 26; 27

TEXTS AND ARTICLES

Gray, Christopher, *Marriage, the Law, and Same-sex Unions* (1999/2000) 30 R.G.D. 583-605	5
A Practical Guide to the Code of Canon Law (1995)	7
Brown, David M., *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	22
Catechism of the Catholic Church, Family	7; 8
Elshtain, Jean Bethke, *Democracy on Trial* (New York: Basic Books), 1996, pp. 1- 20, 52 –68 and notes	28
Family, Marriage and De Facto Unions (July 2000)	7; 8
Good, G., *Humanism Betrayed* (Montreal: Queen's University Press, 2001)	6

Gray, John, *The Two Faces of Liberalism*, (New York: The New Press, 2000), p. 105 — 28

Hittinger, Russell, *Natural Rights, Under Specific Rights and the Bill of Rights* (1998) 29 RGD — 16; 31

Law Commission of Canada, *Beyond Conjugality: Recognizing and Supporting Close Personal Relationships Between Adults*, Discussion Paper (May 2000); Law Commission of Canada (Ottawa: December 21, 2001) — 24

Martin, *Balancing Individual Right to Equality and Social Goals* (March-June 2001) 80 (1 & 2) Canadian Bar Rev 299 — 21

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 — 21

Net Commentary on the Code of Canon Law (2000) — 7

The Code of Canon Law, Canon #1059 — 7

Whyte, John D., *Is the Private Sector Affected by the Charter? in Righting the Balance: Canada's New Equality Rights*, L. Smith, ed., (Saskatoon: The Canadian Human Rights Reporter Inc., 1986) p. 145 — 28