Court File No. C-39172
Court File No. C-39174

COURT OF APPEAL FOR ONTARIO

B E T W E E N :

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

Applicants
(Respondents in Appeal)

- and -

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

Respondents
(Appellant)

- and -

EGALE CANADA INC.,
METROPOLITAN COMMUNITY CHURCH OF ONTARIO
THE INTERFAITH COALITION ON MARRIAGE AND FAMILY and
THE ASSOCIATION FOR MARRIAGE AND THE FAMILY IN ONTARIO

Interveners

FACTUM OF THE INTERVENER
THE INTERFAITH COALITION ON MARRIAGE AND FAMILY

(On Appeal from Ontario Superior Court of Justice Divisional Court)

- and -

B E T W E E N:

METROPOLITAN COMMUNITY CHURCH OF TORONTO

Applicant
(Respondent in Appeal)

- and -

ATTORNEY GENERAL OF CANADA and
THE ATTORNEY GENERAL OF ONTARIO

Respondents
(Appellant)

- and -

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THE INTERFAITH COALITION ON MARRIAGE AND FAMILY AND
THE ASSOCIATION FOR MARRIAGE AND THE FAMILY IN ONTARIO

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FACTUM OF THE INTERVENER,
THE INTERFAITH COALITION ON MARRIAGE AND FAMILY

PART I - NATURE OF THE INTERVENTION

The Interfaith Coalition represents the members of several religious faith communities in Canada, including members of the Protestant, Roman Catholic, Muslim, and Sikh communities. The communities represented by the Interfaith Coalition include millions of Canadians, with almost 50% of Canadians identifying as Roman Catholic.

For millennia, marriage has conferred a unique status of "husband and wife". The religious basis for this unique status (which is confined to heterosexual couples), has been grounded in the interpretations of the holy scriptures of the primary religions of the Western and Asiatic world - Judaism, Christianity, and Islam. It has been similarly recognized as uniquely heterosexual in other societal and religious groups. Marriage is a sacred institution within these communities. Their religiously informed conception of marriage cannot include same-sex unions.

The Interfaith Coalition was granted party intervenor status at the Divisional Court, and presented evidence and argument on the religious conceptions of marriage, and the potential impact on religious communities, including clergy, of the judicial authorization of same-sex marriage.

PART II - OVERVIEW STATEMENT

"Marriage" is not a legal construct. It is an institution that was not created by law; whether common law or statute. It is a pre-existing societal and, primarily, religious institution which has existed for millennia and has been recognized by legislation only recently. Although it has been "recognized" by the common law, it has not been defined or developed like a usual common law rule. Unlike the legislative concept of "spouse," which was considered in *Egan* and *M.* v. *H.*, the institution of marriage was neither created, nor

defined, by legislation. Marriage confers the status of "husband and wife" and has been recognized by all major religious faiths and societal groups as existing uniquely between one man and one woman. What the Applicants seek is nothing less than a fundamental redefinition and substantive change to this pre-existing religious and societal institution.

The Applicants' complaint is not of the legal recognition of marriage, but the failure of government to provide legal recognition of alternative and equivalent institutions for domestic partnering. The Applicants believe that the word "marriage" symbolizes social and religious acceptance of the legitimacy of relationships. The Applicants want the court to mandate social acceptance of a form of domestic partnership through fundamental judicial redefinition of the institution of marriage. As recognized by the Divisional Court in *Layland*, this is both unprecedented and beyond the role of courts conducting *Charter* review.[1]

This challenge is qualitatively distinct from previous legal challenges to the legislative concept of "spouse." In *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 statutory regimes contravened the *Charter* in certain respects. However, as Cory and Iacobucci JJ recognized in both *Egan* and *M*. v. *H.,* those challenges (and the reasons for judgment), did not touch upon the institution of marriage.

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 and support "spousal" and same-sex domestic relationships, as they have been defined, and can adopt further legislative measures to recognize, register and provide benefits for domestic partnerships that are not between husband and wife. Proposals for legislation are being considered by the House of Commons Standing Committee on Justice and Human Rights. The

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1 *Layland* v. *Ontario Minister of Consumer and Commercial Relations* (1993), 104 DLR (4th) 214 (Ont. Div. Ct.)

fundamental redefinition of "marriage" is neither constitutionally required nor necessary to accomplish these legislative objectives.

Marriage, as a religious and societal institution, has only conferred the status of "husband and wife" upon a man and a woman. 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 by the Applicants, does not alter the fact that major world religions do not and cannot accept a fundamental redefinition of marriage to include same-sex partnerships. [2]

Religious clergy in many denominations and 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 disruption 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." Any remedy 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 religious beliefs.

In consideration of remedy, the Court should not fundamentally redefine "marriage." This is not an incremental change but a very substantial one. This is beyond the principles established by the Supreme

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[2] Affidavit of Daniel Cere, Record of the Intervenor Interfaith Coalition, Vol 1, Tab 1 ("**Cere Affidavit**") ¶ 4, 5, 7, 8, 46, 47 and 65; Affidavit of Ernest Caparros, Record of the Intervenor Interfaith Coalition, Vol 1, Tab 2 ("**Caparros Affidavit**") ¶14, 16 and 17; Affidavit of Craig Gay, Record of the Intervenor Interfaith Coalition, Vol 1, Tab 5, ("**Gay Affidavit**"), ¶ 4-5 ; Affidavit of Rabbi David Novak, Record of the Intervenor Interfaith Coalition, Vol 1, Tab 3 ("**Novak Affidavit**"), ¶4, 5, 9 and 10; Affidavit of Abdalla Idris Ali, Record of the Intervenor Interfaith Coalition, Vol 1, Tab 4 ("**Ali Affidavit**") ¶ 6-10; Affidavit of Stephen Michael Cretney, Respondent AGC's Record, Vol 1, Tab A, ("**Cretney Affidavit**")¶ 13, 15, 17, 18, 20, 22, 26, 28, 29, 31 and 32; Affidavit of John Witte Jr. , Respondent AGC's Record, Vol 1, Tab B, ("**Witte Affidavit"**), ¶1, 4, 12, 15-25, 35 and 56; Affidavit of Edward Shorter, Respondent AGC's Record, Vol 2, Tab C-1, ("**Shorter Affidavit**") ¶28; Affidavit of Beatrice Verschraegen, Respondent AGC's Record, Vol 3, Tab G, ("**Verschraegen Affidavit**") ¶45, 72, 95, 105 and 230; Affidavit of Sanford Katz, Respondent AGC's Record, Vol 4, Tab H ("**Katz Affidavit**") ¶ 21-30 and 59-60 ; Affidavit of Katherine Young, Respondent AGC's Record, Vol 2A, Tab F, ("**Young Affidavit**") ¶ 2, 7, 34, 41-46 and 108; Affidavit of Robert Stainton, Respondent AGC's Record, Vol 5, Tab K ("**Stainton Affidavit**") ¶19 and 20.

Court of Canada in *Schachter*[3] 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 Parliament and the legislatures to draft an appropriate legislative response that can balance the competing interests in society, taking into account s. 27 of the *Charter* and the ss. 2(a) and 15 rights of religious faith groups in Canada.

PART III - SUMMARY OF THE FACTS

The Interfaith Coalition accepts the statement of facts given by the Attorney General of Canada, in paragraphs 8-51 of its factum. It adds the following summary of evidence on the conceptions of marriage in the Roman Catholic, Muslim, Jewish, and Evangelical Protestant religions.

i) The Roman Catholic Conception of Marriage

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." The institution is "…prior to any recognition by public authority, which has an obligation to recognize it."[4] It is a sacrament of the Church. According to Catholic thought, the nature of marriage exceeds "in an absolute and radical way, the sovereign power of the State."[5]

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[3] *R. v. Schachter* [1992] 2 S.C.R. 679

[4] Cere Affidavit, ¶7; *Catechism of the Catholic Church,* ¶1131, 1601-1666, 2201 and 2202.

[5] Cere Affidavit, ¶ 7; *Family, Marriage and De Facto Unions* (July 2000) ¶ 9.

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 recognition of the legitimacy of sexual conduct outside of its appropriate context in heterosexual marriage. Sexual desires must be evaluated by standards beyond the desires themselves. This is so for all human beings regardless of their sex or sexual orientation. 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.[6]

Catholics, in common with other members of the Interfaith Coalition, 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.[7] The accommodation of same-sex relationships within marriage, Catholics believe, would "necessarily exclude us from our own institution as a result of our religious faith and traditions."[8]

Catholics are concerned that any judicially mandated inclusion of the Applicants into the institution of marriage, would lead to the exclusion of those who disagree with the acceptability of "same-sex marriage." The language of "heterosexism" and "homophobia" is a language that attempts to turn the respectful disagreement with homosexual conduct into an "ism" akin to racism. This sort of stereotype blocks the civil discourse which is necessary to arrive at a proper accommodation of competing interests. Given the nature of the development of doctrine within the Catholic tradition, it is not possible for the Church's teaching on the exclusivity of heterosexual marriage to "develop" to include same-sex marriage.[9]

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[6] Caparros Affidavit, ¶14-17; *Catechism of the Catholic Church,* ¶2358.

[7] Cere Affidavit, ¶ 4, 11, 51, 69.

[8] Caparros Affidavit, ¶ 19.

[9] *Cere Affidavit,* ¶ 22, 24-35; G. Good, *Humanism Betrayed* (Queen's University Press, Montreal 2001) 22-38.

ii) The Islamic Conception of Marriage

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. 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.[10]

Islamic tradition accepts the dignity of gay and lesbian persons. However, were the state to redefine marriage to include same-sex unions, it would be imposing an acceptance of 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. This would cause confusion for Muslim children and youth in Canada, where marriage would be redefined to directly conflict with Islamic teachings.[11]

Muslims are concerned that a redefinition of marriage would lead to public schools teaching that same-sex marriages are morally acceptable. Muslim parents would "be forced to remove their children from public school, because such teaching would be directly contrary to their religious beliefs...", and Muslim schools would be placed in an untenable position, because they "either must counsel respect for the laws and the rationale behind the laws of our country, or respect for the laws of Islam." Muslims are very concerned that they would be increasingly marginalized. Canadian Muslims wish to continue as a fully participating community within Canada, and they are concerned that such a fundamental redefinition of marriage would impair this.[12]

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[10] Ali Affidavit, ¶6, 7, 8 and 9; Young Affidavit, ¶39, 45, 51, 57, 63 and 69.

[11] Ali Affidavit, ¶10 ,11 ,12, 13 and 16-21.

[12] Ali Affidavit, ¶16-21.

iii) The Jewish Concept of Marriage

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.[13]

Jewish tradition teaches that marriage is a natural institution that religious traditions have elevated to the level of the sacramental without changing its earlier pre-religious character. Judaism (like Christianity and Islam) has preserved and protected a pre-existing institution that it did not invent. Judaism believes it has 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 are unchanged. Although Jewish tradition does not accept gay and lesbian marriage, this should not be construed as a rejection of homosexuals as people. Judaism recognizes the dignity of all persons, because they are made in the image of God.[14]

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, and Jews have participated in it because it does 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.[15]

Many religious Jews in Canada are concerned about recent legal challenges to religious institutions, which can be construed as a thinly veiled attack against their religious beliefs and principles. They view

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[13] Novak Affidavit, ¶ 4 and 5; Young Affidavit, ¶ 36, 42, 48 and 60-65.

[14] Novak Affidavit, ¶ 4, 5, 9, 10 and 12.

[15] Novak Affidavit, ¶ 15-19.

these challenges as destabilizing to the right of their religious communities to have their beliefs respected in all aspects of public life. Religious Jews are therefore extremely concerned about the impact of the redefinition of marriage in a manner inconsistent with their fundamental religious beliefs.[16]

Although a small number of reformed Rabbis in Canada (36) have a different understanding of the Jewish faith and Jewish tradition, their views are dissentient. The vast majority of Rabbis and rabbinic teaching reject the possibility of same-sex marriage. The affidavit of Rabbi Stevens does not reflect orthodox or traditional Jewish teaching and does not speak for Jewish tradition. Jewish law, according to Rabbi Novak, cannot change or develop to accept homosexual marriage.[17]

iv) The Protestant Evangelical Christian Conception of Marriage

Conservative/Evangelical Protestants comprise approximately three million Canadians and include the fastest growing Christian churches in Canada. They believe that the scriptures expressly establish the "uniquely heterosexual nature of marriage." The evangelical understanding of marriage is as a covenant between man and woman, 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 (which excludes, for example, homosexual relationships and polygamous and adulterous relationships). Marriage, according to Evangelical Protestants, has been made central to the created moral order, which is a *universal* moral order.[18]

Professor Gay points out that a judicial redefinition of marriage to include same-sex unions could not secure recognition of such unions from evangelicals because of their interpretation of their scriptures; it would be deconstructive of longstanding religiously-based moral tradition.[19] Evangelical Christians are

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[16] Novak Affidavit, ¶ 15-19.

[17] Novak Affidavit, ¶ 14.

[18] Gay Affidavit, ¶4-7.

[19] Gay Affidavit, ¶15.

concerned about state initiatives aimed at forcing them to accept the legitimacy of same-sex unions, which are experienced as an unjust and illegitimate imposition upon religious conscience.[20]

PART IV - STATEMENT OF ISSUES AND ARGUMENT

The Divisional Court erred in law in the following ways:

(i) it mischaracterized, misapprehended, or failed to properly consider the evidence presented by the Interfaith Coalition on the role played by marriage in their communities, and the effects of a change to the institution of marriage on the members of their communities, in its s. 15(1) and s. 1 analysis;

(ii) it mischaracterized and misapprehended the relationship between the common law and the institution of marriage;

(iii) it failed to apply the s. 15(1) test correctly, and in particular failed to properly consider, in the context of the Applicants' s. 15(1) claim, the interests of the members of the Interfaith Coalition in receiving equal concern, respect, and consideration from government;

(iv) it wrongly concluded that a full s. 1 analysis was not required, and did not adequately address the evidence of the AGC or the Interfaith Coalition on the interests of preserving the traditional conception of marriage in a free and democratic society. It therefore wrongly concluded that maintaining the opposite-sex nature of marriage is not demonstrably justified in a free and democratic society;

(v) in granting its remedy to the Applicants, it failed to leave the appropriate legislative bodies significant scope to fashion institutions that would respond to the need of gays

[20] Gay Affidavit,¶ 8-15.

and lesbians and needs of members of religious communities and the broader society. It also failed to sufficiently attend to the needs of religious communities (including clergy) to be protected from any discrimination consequential to their disagreement with same-sex marriage.

(i) FIRST ISSUE - THE IMPACT ON RELIGIOUS COMMUNITIES OF REDEFINING MARRIAGE

The Divisional Court erred by concluding that the fundamental redefinition of marriage sought by the Applicants would have comparatively little impact on these Interveners.[21] The remedy sought by the Applicants is not simply a matter of extending the existing conception of marriage. It is a matter of *replacing* the existing conception with another conception which is fundamentally at odds with it.[22] While all the consequences flowing from such a change cannot be stated with certainty, the proposal is both radical and profound.

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[21] *Halpern v. Canada (Attorney General)* (2002) 60 O.R. (3d) 321, ¶ 262-64 (LaForme J).

[22] Cere Affidavit, ¶ 51.

An entirely redefined conception of marriage would have a significant effect on these Interveners and their religious communities. All cultural change permeates through religious communities. In particular, all citizens live in civil society and share, and are shaped by civil society's institutions, which is particularly evident in the case of public education.[23] The wider culture of easily available divorce, for example, although consciously rejected by these communities, nevertheless influences (and undermines) them.[24] The judiciary ought to be very cautious about acceding to changes which will undermine the identity and practices of religious communities.

The forced inclusion of same-sex unions in marriage could only be accomplished by specifically excluding or bracketing out elements of marriage central to these Interveners. This new form of civil marriage would fundamentally undermine these Interveners' values and beliefs and their ability to participate fully in civil society.[25]

(ii) SECOND ISSUE - THE ORDER SOUGHT REQUIRES AN ILLEGITIMATE USE OF COMMON LAW PRINCIPLES TO ACCOMPLISH RADICAL LAW REFORM

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[23] *Chamberlain v Surrey School District No. 36*, 2002 SCC 86;*Trinity Western University v British Columbia College of Teachers* [2001] S.C.R. 772, 2001 SCC 31; Cere Affidavit, ¶ 51, and 66; Caparros Affidavit ¶7-11; Christopher Gray, "Marriage, the Law, and Same-sex Unions" (1999/2000) 30 R.G.D. 583-605.

[24] Craig Gay**,** Answers to Written Interrogatories, Record of the Intervener Interfaith Coalition, vol 2, tab 3, ("**Gay Answers"**) answers 1(a) and (b); Cere Answers, answer 1 (a); Cere Affidavit, ¶ 62-63; Ernest Caparros, Answers to Written Interrogatories, Record of the Intervener Interfaith Coalition, vol 2, tab 5., ("**Caparros Answers"**) answer 1 (a).

[25] Cere Affidavi,t ¶ 6-11.

The Applicants seek a fundamental remaking of the institution of marriage, as recognized by the common law. However, while the role of the common law in recognizing marriage could plausibly be described as a common law rule, it is not a common law rule in the ordinary sense. With respect to marriage, the role of the common law is *sui generis*. Because the social and religious institution of marriage is not a legal construct, and because it pre-exists the law, the common law rule which recognizes marriage is unlike the usual category of common law rules which are within the special competence and responsibility of the judiciary to develop and change over time. While the Divisional Court was correct to hold that there is a common law prohibition against same-sex marriages in Canada, it failed to distinguish sufficiently between the role of the common law in the ordinary course, and the role of the common law in identifying or recognizing this fundamental social institution.

The role of the common law in simply recognizing, rather than creating, the institution of marriage is clear from the case law. Courts have recognized marriage as a uniquely heterosexual institution which confers the status of "husband and wife".[26]

Justice LaForme misapprehended the nature of the common law recognition of marriage when he held that it was open to the court to reformulate the common law rule to render it consistent with "Charter values".[27] LaForme J.'s approach is unsound for two reasons. First, it fails to attend to the distinction between the nature of the common law rule recognizing marriage, and the nature of ordinary common law rules which are judicial creations and deal with matters within the special competence of the judiciary.

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[26] *Layland v. Ontario* (1993) 104 D.L.R. (4th) 214, 219 and 222-23 (Ont Div Ct); *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; *Re North et al and Matheson* [1974] 52 D.L.R. (3rd) 280, 284-85.

[27] *Halpern,* ¶288-308 (LaForme J)

Second, LaForme J.'s "Charter values" approach is unstable in its distinctions between Charter rights and Charter values, and threatens to pre-empt a thorough, structured s.15(1) and s.1 Charter analysis by replacing it with an intuitive and *ad hoc* approach to equality. In contrast to the elaborate structure for the resolution of s. 15(1) rights claims under the *Law* and *Oakes* tests, the "Charter values" approach to equality is unstructured and inherently malleable. Professor Jamie Cameron has criticized this approach in other contexts, describing it as "an *ad hoc* concept of equality ... not based on doctrine but rooted, instead, in instinct and perception."[28] It would be inappropriate for an issue of far-reaching social significance to be resolved outside of the legal doctrine established to restrain subjectivity and guide the exercise of judicial authority.

The Supreme Court has held that the development of the common law must only be incremental, and that any changes to "general principles", or having significant or complex legal ramifications, should be left to Parliament.[29] In *Watkins v. Olafson*, the Supreme Court articulated several factors which determine whether a proposed change to the common law is incremental: (1) the change is to specifically *legal* principles; (2) the change is to principles historically within the special competence of the judiciary, such as the admissibility of evidence, or the law of tort, or the law of contract, or civil procedure; (3) the change does not involve significant social or legal ramifications; and (4) the change does not involve adopting an entirely new principle.[30]

Significantly, those developments in the common law which the Supreme Court has accepted as incremental, have been developments to those aspects of law which are particularly within the

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[28] J. Cameron, "Dialogue and Hierarchy in Charter Interpretation: A Comment on *R. v Mills*", (2001) 38 Alberta LR 1051-68, ¶ 31

[29] *Watkins v. Olafson* [1989] 2 S.C.R. 750, 760-64 (McLachlin J.)

[30] *Watkins v. Olafson* [1989] 2 S.C.R. 750, (McLachlin J.), pp. 760-764; *R v. Salituro* [1991] 3 S.C.R. 654, pp 670, 675, 677 (Iacobucci J.), ; *Hill v. Church of Scientology* [1995] 2 S.C.R. 1130, pp 1164-1169 (Cory J)

competence of judges, such as changes to legal procedure or traditionally judge-made substantive law such as contract and tort.

The Supreme Court elaborated on *Watkins* in *R v. Salituro*, holding that courts should not change a common law rule where this would "upset the proper balance between judicial and legislative action":

> ... there are significant constraints on the power of the 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.[31]

In contrast to making changes to those types of common law rules which are historically judicial creations, purporting to alter the nature of marriage is *not* a matter of applying legal technique to adapt rules to new circumstances, but is a matter of judgment informed by moral and political philosophy, religious insight, anthropology, sociology, and many other disciplines. Judges can claim no special insight into these matters.

In the companion case from BC, *Egale Canada Inc. v. AG (Canada)*, Pitfield J., held that the remedies sought went beyond the concept of common law incremental change:

> [93] The change would affect a deep-rooted social and legal institution. The fact that marriage and divorce are specific matters assigned to Parliament by the Constitution Act, 1867 attests to the importance of marriage in our society and suggests that a change to accommodate gay and lesbian relationships should be made by the Parliament or provincial legislatures, if a change is to be made at all....
>
> [97] 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.[32]

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[31] *R. v. Salituro* [1991] 3 S.C.R. 654, 675 (Iacobucci J) (emphasis added); and *Hill v. Church of Scientology* [1995] 2 S.C.R. 1130, 1164-69 (Cory J).

[32] *EGALE Canada Inc. v. AG (Canada)*, 2001 BCSC 1365, 88 C.R.R. (2d) 322, ¶ 93, 97 (Pitfield J)

Similarly, Blair, R.S.J. held that "(t)o say that altering the common law meaning of marriage to include same-sex unions is an incremental change, in my view, is to strip the word 'incremental' of its meaning."[33]

(iii) THIRD ISSUE - THERE IS NO DISCRIMINATION IN THE CONTEXT OF THE S. 15(1) CLAIM

[33] *Halpern,* ¶ 99.

With respect to the development of s. 15(1) doctrine generally, the Interfaith Coalition agrees with the arguments of the Attorney General Canada at paragraphs 56 - 135 of its factum. The Interfaith Coalition wishes to make the following additional arguments on the doctrine and application of s. 15(1). As the Supreme Court held in *Egan v. Canada*, *M. v. H.*, *Law v. Canada*, and other cases, s. 15 analysis is not formulaic. It is contextual, and s. 15 claims must be considered in the legal, political, social, and religious contexts in which they arise.[34]

The Supreme Court has held that the "semi-objective" nature of the *Law* test requires that judges start with the perspective of the applicants, and then *evaluate the reasonableness* of the applicants' perspective given the context: "(t)his subjective view must be examined in context, that is, with a view to determining whether a rational foundation exists for this subjective belief."[35]

The pre-existing, fundamental character of the institution of marriage forms part of the context of these claims. First, marriage is necessarily exclusive. Not being a product of law, marriage itself cannot be found to be discriminatory towards those who do not come within its parameters. Second, government's recognition of marriage is not, in itself, discriminatory. On behalf of all Canadians, government has an obligation to take those steps necessary to promote social stability and well-being; the recognition of marriage is such a step. Neither the nature of marriage nor the legal recognition of marriage can be said to be discriminatory. Nevertheless, it may be discriminatory for government *not* to provide institutional recognition of other relationships which are not marriages, once it has decided to legally recognize marriage. When viewed contextually, it is this omission which can found a complaint of discrimination.

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[34] *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497at ¶ 30, 39 and 41 (Iacobucci J.**)**; *M. v. H.* [1999] 2 S.C.R. 3, 45-47; *Granovsky v. Canada* [2000] 1 S.C.R. 703, 735*; Corbiere v. Canada* [1999] 2 S.C.R. 203, 250; *Lovelace v. Ontario* [2000] 1 S.C.R. 950, 984*; Winko v. British Columbia* [1999] 2 S.C.R. 625, 675*;* 735; *Egan v. Canada* [1995] 2 S.C.R. 513, ¶ 41 (LaForest J.); *Miron v Trudel* [1995] 2 S.C.R. 418.

[35] *Lavoie v. Canada*, 2002 SCC 23, ¶ 46 (Bastarache J)

The "reasonable applicant" of *Law*, in determining whether his or her initial feelings of discrimination were reasonable, would have to take into account the pre-existing nature of the institution of marriage, its fundamental religious character, and the legitimate need for society to recognize marriage through law. A reasonable applicant would have to consider the government's responsibilities for maintaining, in the language of *R. v. Butler*, a properly functioning society.[36] In the present context, the reasonable person in the Applicants' position would not feel diminished by virtue of the fact that marriage is legally recognized, nor at the fact that his or her relationship is not a marriage. The reasonable applicant could, however, take offence at the fact that while marriage has been legally recognized, there has been no legal recognition of an equivalent institution in which same-sex partners can express monogamous, committed relationships.

There is a second contextual aspect to this claim. Section 15(1) doctrine is still relatively undeveloped with respect to competing equality rights claims.[37] The approach to s. 15(1) in *Law v. Canada* was developed in the context of claims brought by a person or group against the state, where there is *little or no direct impact* on third parties ("a state claim").

However, in seeking to redefine a fundamental social institution, the Applicants' claim has a relatively *direct impact* on others ("an intergroup claim"). As the Supreme Court held in *Lovelace*, one of the contextual factors that establishes whether a distinction is discriminatory is "the correspondence, or lack thereof, between the ground on which the claim is based, and *the actual need, capacity, or circumstances of the claimant or others*."[38] In an equality claim which affects the needs of other persons, the Court needs to be sensitive to competing interests at the s. 15(1) stage, and particularly (but not exclusively) those interests identified by other sections of the Charter such as s. 2(a) and s. 27.

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[36] *R. v. Butler* [1992] 1 SCR 452, 485.

[37] B. McLachlin CJC, "Equality: The Most Difficult Right" (2001), 14 Supreme Court LR (2d) 17.

[38] *Lovelace v. Ontario*, 2000 SCC 37, [2000] 1 S.C.R .150, ¶68 (Iacobucci, J.) (italics added)

Additionally, as Arbour, J. noted in her concurring reasons in *Lavoie,* rights claims are "bilateral"; they are "a legally binding demand for recognition of, and respect for, one's interests on the part of others." Given the nature of this demand, these claims ought not to be considered in isolation from their impact on the rest of society:

> "(f)or if others are to be duty-bound to respect ones' rights, fairness requires that they be given some say, that their own interests be taken account of, in determining those rights."[39]

In the context of the current applications, the Applicants' request to fundamentally redefine the institution of marriage creates a "collision of rights" and a "collision of dignities" (as that phrase was recently used by Gonthier J. in *Chamberlain*)[40] between the Applicants and these Interveners and others. The redefinition of marriage proposed by the Applicants would violate the s.15 and s.2(a) rights of many Canadians of religious faith who would be alienated from the institution which they helped to shape.[41] Some of these religious minorities, such as the Jewish and Muslim communities, are particularly concerned about the impact of such a fundamental redefinition of marriage on the rejection and stereotyping historically suffered by them in Canadian society.[42]

With respect to these Applicants, the demand for social recognition which is at the root of this application is a demand from those who do not accept same-sex relationships as marriages. It is, in part, a claim for recognition from those whose religious convictions will not permit them to recognize same-sex "marriage".

As a claim for recognition, the Applicants' claim goes beyond a mere "intergroup claim." It is a demand for a particular action, or response; it is a demand made of private parties - these Interverners. The Applicants are asking the Court, in a manner criticized by Professor of Jurisprudence, Timothy Macklem, "to extend the Charter to the private actions of private actors, and thus to silently overrule *Dolphin*

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[39] *Lavoie v. Canada*, 2002 SCC 23, ¶ 88 (Arbour, J.)

[40] *Chamberlain v. Surrey School District No. 36*, 2002 SCC 86, ¶ 132 (Gonthier J, dissent).

[41] Caparros Affidavit, ¶12, 14, 19 and 20; Cere Affidavit, ¶65-68; Gay Affidavit, ¶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.

[42] Novak Affidavit, ¶16-19; Ali Affidavit, ¶1, 13 and 21.

Delivery."[43] To hold that the "Charter value" of equality required a transformation in societal attitudes, would be inconsistent with other principles which underlie the Charter, namely those which uphold multiculturalism, and the protection of religious beliefs and community.

(iv) FOURTH ISSUE - ANY INFRINGEMENT OF S. 15 IS JUSTIFIED UNDER S. 1

(a) The necessity of s. 1 analysis

Justice LaForme in the Divisional Court misapprehended the nature of the common law rule respecting the capacity to marry (failing to distinguish it from purely judge-made common law rules), and thus incorrectly held that a s. 1 analysis was not required.[44] Omitting a s. 1 analysis in a case with such broad social implications will, inevitably, lead the Court to a partial reading of the interests which the Constitution is meant to protect. As the Supreme Court held in *Miron v. Trudel*:

> section 15(1) and s. 1 of the Charter must be read together. Neither in itself is complete. Together, they provide a comprehensive equality analysis that provides effective remedies against discrimination while preserving the power of the State to deny protection and benefits to individuals where differences between them justify it.[45]

Section 1 of the Charter, like the rest of the Charter, is to be interpreted purposively, with regard to the needs and interests that it is meant to protect.[46] It is directed towards securing, on behalf of all Canadians, the social conditions necessary to promote the good of individuals and groups. It is thus an "unavoidably normative inquiry"[47] into the institutions which are needed for the common good. Section 1 analysis in this case is indispensable. In this instance, any limitations placed on the Applicants' s. 15(1)

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[43] *RWDSU v Dolphin Delivery Ltd.* [1986] 2 S.C.R. 573, 603; T Macklem, "Vriend v. Alberta: Making the Private Public" (1999) 44 McGill LJ 197-230, ¶ 55.

[44] *Halpern*,¶ 222-228 (LaForme J.)

[45] *Miron v. Trudel* [1995] 2 S.C.R. 418, 493 (McLachlin, J.)

[46] R. Sullivan, *Driedger on the Contruction of Statutes* (3rd ed. Butterworths, Toronto, 1994) 43-44

[47] *R.J.R.- MacDonald Inc. v. Canada (Attorney General),* [1995] 3 S.C.R. 199, ¶ 62.

rights are a matter of a reasoned judgment that our free and democratic society has an obligation to families to continue to recognize the institution of marriage.

The Court has held that where the limitation of Charter rights raises complex social policy issues and competing societal interests, incremental legislative initiatives can satisfy s. 1 requirements.[48] This is such a situation. Parliament and the legislatures have substantially amended benefit conferring legislation to include gays and lesbians in the legislatively-created category of spouse. Parliament is pursuing the issue of developing institutional recognition of same-sex unions, through the Department of Justice's discussion paper, "Marriage and Legal Recognition of Same-sex Unions", and the work of the House of Commons Standing Committee on Justice and Human Rights. Just as the Supreme Court recently adjourned the hearings on the constitutionality of marijuana possession laws on the basis that the matter was actively being reviewed by Parliament, (where it was expected that 'the examination and discussion' of the issues would later 'provide guidance to the Court'[49]), so should the Court exercise deference in this situation.

(b) Characterization of the objective of the impugned law

The Divisional Court erred in its articulation of the purpose of the common law recognition of marriage. Justice LaForme sought out a "purpose" for marriage inappropriate for the nature of the subject matter, and his description of recent judicial articulations of the common law's longstanding recognition and support of a fundamental social unit as "a mere pretext used to rationalize discrimination against lesbians and gays", is incorrect.[50]

As a millennia old, pre-existing social and religious institution, the purpose of the common law's recognition of marriage is not analogous to the purpose of a statute. Parliament's purpose, and the common law's purpose, in *recognizing* marriage, has been to discharge the state's obligation to support

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[48] *Egan v. Canada,* [1995] 2 S.C.R. 513, ¶ 29 (LaForest J.), ¶ 105-08 (Sopinka J).

[49] *Malmo-Levine v. Canada*, *Caine v. Canada*, and *Clay v. Canada*, December 13, 2002, (S.C.C.) (McLachlin CJ).

[50] *Halpern,* ¶ 235, 238, 242 (LaForme J)

fundamental, pre-existing social institutions, such as the family and religious institutions. Government's obligation to support and facilitate the existence of this social unit, is recognized in *Egan*, *Miron*, and *Layland*.[51]

(c) The Proportionality Test

(i) Rational Connection

The common law 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.

(ii) Minimal Impairment

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. This is not a case where the legislature has engaged in "line drawing" by including one group and excluding others from a legislative definition as was the case with spousal benefits legislation in *M. v. H.* and *Egan*.[52]

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[51] *Egan v. Canada*, [1995] 2 S.C.R. 513, ¶ 21 (La Forest J); *Miron v. Trudell* [1995] 2 S.C.R. 418 at pp. 448-452 (Gonthier J); *Layland v. Ontario Minister of Consumer and Commercial Relations* (1993) 104 D.L.R. (4th) 214 (Ont. Div. Ct.) pp. 217-19, 223-3 (Suthey J).

[52] *Marriage Act, R.S.O.* 1990, c.M.3 as amended; *M. v. H*. [1999] 2 S.C.R. 3, ¶ 82-107 (Cory and Iacobucci JJ).; *Vriend v. Alberta* [1998] 1 S.C.R .493, ¶ 109-16 (Cory and Iacobucci JJ).

(iii) Proportionality

As required by the *Oakes* test, the Court must determine whether the overall benefits of the infringing provisions outweigh their deleterious effects. The legislation, recognizing, registering, and regulating the solemnization of marriage, has significant salutary benefits. It supports the conception of marriage which is a constituting feature of the culture and religious faiths of many peoples. The law recognizes that the existence of the religious conceptions of marriage is integral to the well-being of these people.

Where the s.1 analysis is undertaken in a context involving competing s. 15(1) and s. 2(a) rights, the proportionality analysis should also consider the impact on these other rights.[53]

The proportionality analysis must take into account that the "benefit" sought by the Applicants is, in reality, a bare claim for recognition. This is not a benefit that the law can confer on same-sex couples through the redefinition of marriage. The benefit sought is, in reality, unavailable to the Applicants, while its deleterious effect on these Interveners, though uncertain in its extent, is real.

(v) FIFTH ISSUE - PARLIAMENT RETAINS PRIMARY RESPONSIBILITY FOR LAW REFORM

c) The complementary roles of the courts and legislatures

As stated by McLachlin J in *Watkins v. Olafson*, courts, by their nature, are not well-suited to drafting policy solutions where there are many competing interests.[54] Thus in cases such as *M. v. H.,* the Supreme Court found it appropriate to leave it to the legislature to craft policy solutions to constitutional problem identified by the Court.[55] The Court appropriately expressed faith that the democratic process is capable of crafting solutions which come within a margin of constitutionality. It further recognized that democratic debate is needed in order to arrive at a legislative solution which takes all needs into account, particularly where there are competing visions of social and political good, and where any solution chosen needs to respect the philosophical and religious traditions which underlie our law.

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

[54] *M. v. H.* [1999] 2 S.C.R .3, ¶ 59-62; *Thomson Newspapers Co. v. Canada (AG)*, [1998] 1 S.C.R. 877, ¶ 87-88; *Watkins v. Olafson* [1989] 2 S.C.R. 750, pp. 760-61.

[55] *Egan* v. *Canada*, [1992] 2 S.C.R. 513*,* ¶ 29 (LaForest J), and at ¶ 105-08 (Sopinka J) ; *M.* v. *H*., [1999] 2 S.C.R. 3, p. 79 (Cory and Iacobucci JJ); *Irwin Toy* v. *Quebec Attorney ,* [1989] 1 S.C.R. 927, pp. 993-994, (Dickson CJ and Lamer, Wilson JJ).

The Court should be wary of creating a confusing tapestry of different conceptions of marriage which could include a redefined "civil marriage", which is not only different from, but *contradicts* the institution of religious marriage. 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 disruption.[56]

The Supreme Court of Canada held in *Sauvé v. Canada (Chief Electoral Officer)* that the mere fact that an issue is controversial does not mean that courts ought therefore to defer to Parliament's determinations.[57] Deference is appropriate, not because of controversy, but where there are many competing interests which need to be accommodated, and because of the many possible legislative regimes which could accommodate them in different ways.

With these issues in mind, Blair RSJ held that:

> ...the ramifications of the change required to bring the law into conformity with Charter rights and values are potentially extensive and, to some extent, uncertain. They will evoke robust socio-political, cultural, economic, religious and moral debate. In short, *democratic* debate will ensue. Parliament is the forum for that kind of discussion and for the balancing of such conflicting societal interests. It should be accorded some flexibility in dealing with contentious and morally-laden issues...[58]

Facilitating democratic debate was identified by the Supreme Court in the *Secession Reference*, as being part of the constitutional principle of democracy. The principle of democracy, the Court held, entails a 'continuous process of discussion.' 'Inevitably there will be dissenting voices. A democratic system of government is committed to considering those dissenting voices, and seeking to acknowledge and address those voices in the laws by which all in the community must live.'[59]

The Court ought to defer any legislative initiative to Parliament and the legislatures, given that the House of Commons Standing Committee on Justice and Human Rights is studying various legislative alternatives to meet the needs of gays and lesbians in a manner which respects these Interveners' s. 15 and s. 2(a) rights, and respects the multicultural interpretative requirements of s. 27 of the Charter.

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[56] Cere Affidavit, ¶ 65; Gay Affidavit, ¶ 15; Revised Caparros Affidavit, ¶14 and19; Novak Affidavit, ¶ 16, 17, 18, 19; Ali Affidavit, ¶ 11,13, 21; Scorsone Affidavit, ¶ 39, 40 and Exs. 3 and 4.

[57] *Sauvé v. Canada (Chief Electoral Officer)* 2002 SCC 68, ¶ 8-13 (McLachlin CJ).

[58] *Halpern*, ¶ 132 (Blair RSJ).

[59] *Secession Reference* [1998] 2 S.C.R. 217, ¶ 68.

Contrary to what the MCCT asserted at the Divisional Court, it is not at all clear that Parliament and the legislatures would choose to remake marriage in the manner sought by the Applicants, rather than choose from constitutionally appropriate legislative alternatives. 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,[60] and the House of Commons Standing Committee on Justice and Human Rights is currently analysing this issue.

In *Egan, M.v.H.*, and *Vriend*, the Court determined that a legislative lacunae or omission was constitutionally vulnerable.[61] The present case is fundamentally different. This is not an instance of the Court being asked to modify a judicial, or even parliamentary, creation. The issue here is whether the Court should engage in a process of rejecting the legal recognition of a fundamental religious and social institution and replace it with a different social institution of the Court's making, and this in the face of a clear rejection from all major religious communities in Canada, and in the face of good faith Parliamentary efforts to address the needs of both the Applicants and these Interveners through the House of Commons Standing Committee on Justice and Human Rights. The Court is being asked to go far beyond anything that it has done before pursuant to s. 15(1) in respect of any spousal benefits claim raised by same-sex applicants.[62]

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[60] Verschraegen Affidavit, ¶ 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

[61] *Vriend v. Alberta,* [1998] 1 S.C.R. 493, at ¶ 80 (Cory and Iacobucci JJ); *M. v. H.* [1999] 2 S.C.R. 3, 45-47; *Egan v. Canada* [1995] 2 S.C.R. 513.

[62] Cere Affidavit, ¶ 12-35; 65; Gay Affidavit, ¶ 15; Novak Affidavit , ¶ 16-19; Ali Affidavit, ¶ 13, 21.

b) Remedy - allowing for disagreement in the public sphere

In considering what remedy, if any, should be granted, the Court should consider the impact of any remedy on those religious communities which are opposed, on religious grounds, to the remaking of marriage. It will further alienate religious communities from the wider Canadian culture. While some of these communities are large, some are small, and historically ostracized, minority religious communities. The evidence indicates that the Catholic, Orthodox and Traditional Jewish communities, Muslims, and Evangelical Protestants 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 which has such a fundamental role in the definition of their communities, but will very likely lead to further legal and political challenges to their institutions, and to the exercise of the rights of religious adherents in Canada.[63]

Legal challenges to religious educational institutions, and to the exercise of religiously-informed conscience in the workplace, are already proliferating. As *Trinity Western University v. British Columbia College of Teachers*, *Chamberlain v. Surrey School District*, and *Brillinger v. Brockie* demonstrate, there is, at times, little understanding in administrative and human rights tribunals of the rights of persons and organizations who, on religious grounds, dissent from the Applicants' view of human sexuality.[64]

Accordingly, it is imperative that any relief granted to the Applicants contain cautionary language that such relief does not amount to a declaration that religious persons must abandon the public manifestation of their views regarding the true nature of marriage and sexual morality. Any remedy granted by the Court will be pressed into service by others in the legal campaign to eradicate all public manifestation of the position that to call a same-sex relationship "marriage" is to endorse an important falsehood about human relationships and sexuality.

As Gonthier J noted in his dissent in *Chamberlain*, Canadians can and do make distinctions between persons and their behaviour, such that disagreeing with the morality of homosexual acts (or, these Interveners would add, disagreeing with the possibility of same-sex marriage), and publicly manifesting these views in a respectful manner, is not tantamount to denying the dignity of gays and lesbians.[65]

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[63] Cere Affidavit ¶ 65; Gay Affidavit ¶ 15; Novak Affidavit ¶ 16-19; Ali Affidavit ¶ 13, 21.

[64] *Trinity Western University v. British Columbia College of Teachers* 2001 SCC 31, [2001] SCR 772; *Chamberlain v. Surrey School District No. 36,* 2002 SCC 86*; Smitherman v. Powers and Durham Catholic District School Board* (May 10, 2002) (Ont Sup Ct); *Brillinger v. Brockie* (June 17, 2002) (Ont Sup Ct - Div Ct).

[65] *Chamberlain v. Surrey School District No. 36,* 2002 SCC 86, ¶ 127-28 (Gonthier J, dissent)

What is needed, as part of any order, is express language that respectful expression of disagreement with same-sex "marriage" and homosexual acts is not contrary to "Charter values", but is protected expression under a robust pluralism.[66]

c) The need for a specific exemption for clergy and religious organizations

Should the Court choose to extend marital recognition to gay and lesbian partnerships, it is essential that it be made explicit that any order made by the Court does not derogate from the rights of clergy, and of religious organizations, to refuse to participate in the solemnization of any marriage over which they have religious/conscientious objections, specifically of any marriage which is premised on a view of human sexuality which the tenets of their religious faith does not permit them to accept.

PART V - ORDER REQUESTED

These Interveners request that the two appeals be allowed, and that the definition of marriage recognized by the common law be upheld.

In the alternative, these Interveners request that if the Court finds a constitutional violation, any remedy should be suspended to allow Parliament and the legislatures to establish an alternative legislative scheme for the recognition of same-sex partnerships.

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[66] Cere Affidavit, ¶ 65; Gay Affidavit, ¶15; Caparros Affidavit, ¶14 and19; Novak Affidavit, ¶ 16-19; Ali Affidavit, ¶11, 13, 21.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Date: January 20, 2003

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SCHEDULE “A”

LIST OF AUTHORITIES

Bellinger v. Bellinger [2002] 1 All E.R. 311, (CA) [2001] E.W.C.A. Civ. 1140

Brillinger v. Brockie (June 17, 2002) (Ont Sup Ct - Div Ct)

Caine v. Canada, December 13, 2002, SCC

Chamberlain v Surrey School District No. 36*,* 2002 SCC 86

Clay v. Canada, December 13, 2002, SCC

Corbett v. Corbett (otherwise Ashley)*,* [1970] 2 All E.R. 33

Corbiere v. Canada**,** [1999] 2 S.C.R. 203

EGALE Canada Inc. v. AG (Canada)*,* 2001 BCSC 1365, 88 C.R.R. (2d) 322

Egan v. Canada**,** [1995] 2 S.C.R. 513

Eldridge v. British Columbia (Attorney General), [1997] 3 SCR 624

Granovsky v. Canada, [2000] 1 S.C.R. 703

Halpern v. Canada (Attorney General)*,* (2002) 60 O.R. (3d) 321 (Div Ct)

Hill v. Church of Scientology, [1995] 2 S.C.R. 1130
Hyde v. Hyde and Woodmansee (1866), L.R. 1 P & D 130

Irwin Toy **v.** ***Quebec Attorney****,* [1989] 1 S.C.R. 927

Lavoie v. Canada, 2002 SCC 23

Law v. Canada (Minister of Employment and Immigration), [1999] 1 S.C.R. 497

Layland* v. *Ontario Minister of Consumer and Commercial Relations (1993), 104 D.L.R. (4th) 214 (Gen. Div.)

Lovelace v. Ontario [2000] 1 S.C.R. 950, 2000 SCC 150

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

McKinney* v. *University of Guelph, [1990] 3 S.C.R. 229

Malmo-Levine v. Canada, December 13, 2002, SCC

Miron v Trudel [1995] 2 S.C.R. 418

R v. Salituro [1991] 3 S.C.R. 654

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

R. v. Butler [1992] 1 S.C.R. 452

R. v. Zundel, [1992] 2 S.C.R. 731

R.J.R.- MacDonald Inc. v. Canada (Attorney General), [1995] 3 S.C.R. 199
Re North et al and Matheson [1974] 52 D.L.R. (3rd) 280

Reference re Secession of Quebec [1998] 2 S.C.R. 217

RWDSU v Dolphin Delivery Ltd. [1986] 2 S.C.R. 573

Sauvé v. Canada (Chief Electoral Officer) 2002 SCC 68

Schachter v. Canada [1992] 2 S.C.R. 679

Smitherman v. Powers and Durham Catholic District School Board (May 10, 2002) (Ont Sup Ct)

Tetreault-Gadoury* v. *Canada (Employment and Immigration Commission), [1991] 2 S.C.R. 22

Thomson Newspapers Co. v. Canada (AG), [1998] 1 S.C.R. 877

Trinity Western University v British Columbia College of Teachers [2001] S.C.R. 772, 2001 SCC 31

Vriend v. Alberta, [1998] 1 S.C.R. 493

Watkins v. Olafson [1989] 2 S.C.R. 750

Winko v. British Columbia [1999] 2 S.C.R. 625

AUTHORS CITED

D. Brown, “Freedom From of Freedom For? Religion as a Case Study in Defining the Content of Charter Rights” (2000) 33 UBCLR 551

J. Cameron, “Dialogue and Hierarchy in Charter Interpretation: A Comment on *R. v Mills*”, (2001) 38 Alberta LR 1051

Canada, Department of Justice, “Marriage and Legal Recognition of Same-sex Unions: A Discussion Paper”, November 2002

Catechism of the Catholic Church

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

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

B. McLachlin, C.J.C., "Equality: The Most Difficult Right" (2001), 14 Supreme Court LR (2d) 17

T. Macklem, “*Vriend v. Alberta*: Making the Private Public” (1999) 44 McGill LJ 197-230

R. Sullivan, *Driedger on the Contruction of Statutes* (3rd ed. Butterworths, Toronto, 1994)

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