Court File No.: 29866

IN THE SUPREME COURT OF CANADA

IN THE MATTER OF SECTION 53 OF THE *SUPREME COURT ACT*, R.S.C., 1985, C. S-26

IN THE MATTER OF A REFERENCE BY THE GOVERNOR IN COUNCIL CONCERNING THE PROPOSAL FOR AN ACT RESPECTING CERTAIN ASPECTS OF LEGAL CAPACITY FOR MARRIAGE FOR CIVIL PURPOSES, AS SET OUT IN ORDER IN COUNCIL P.C. 2003-1055, DATED THE 16TH OF JULY 2003

FACTUM OF THE ATTORNEY GENERAL OF ALBERTA

Robert G. Richards, Q.C.
MacPHERSON, LESLIE & TYERMAN LLP
1500 – 1874 Scarth Street
Regina, Saskatchewan S4P 4E9

Tel.: (306) 347-8423
Fax: (306) 352-5250
Email: brichards@mlt.com

Counsel for the Attorney General of Alberta

Henry S. Brown, Q.C.
GOWLING LAFLEUR HENDERSON LLP
Suite 2600, 160 Elgin Street
Ottawa, Ontario K1P 1C3

Tel: (613) 233-1781
Fax: (613) 563-9869
Email: henry.brown@gowlings.com

Agent for the Attorney General of Alberta

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I. FACTS

A. Overview

1. This Reference raises issues of fundamental legal and social significance.

2. The Court has already established that government benefits cannot be denied to gay and lesbian couples on the basis of their sexual orientation.[1] The large majority of programs have been brought into line with that requirement so that same-sex couples are treated the same as married heterosexual couples.[2] The legal tools are readily at hand for same-sex couples to effectively address any remaining situations where benefits are not equally available to them.

3. The central question now before the Court is whether Canadian society will be allowed to maintain the opposite-sex character of marriage itself. That character has existed almost universally and since time immemorial. Its rejection necessarily involves the extraordinary conclusion that, in the context of marriage, the unique and fundamental nature of the male-female relationship is of no consequence.

4. The basic position of the Attorney General of Alberta ("A.G. Alberta") is that "marriage" is the union of a man and a woman. The defining characteristic of marriage is the sexual complementarity specific to opposite-sex relationships.

5. A.G. Alberta's principal submissions are in relation to Question One and Question Four of the Reference.

6. With respect to Question One, A.G. Alberta submits that Parliament does not have the legislative authority to define "marriage" as including same-sex relationships. The plain and ordinary meaning of marriage, its legal definition, the intentions of the framers, and other provisions of the Constitution all indicate that section 91(26) of the *Constitution Act, 1867* confers jurisdiction only in relation to opposite-sex unions.

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[1] *Egan v. Canada*, [1995] 2 S.C.R. 513; *M. v. H.*, [1999] 2 S.C.R. 3

[2] *Modernization of Benefits and Obligations Act*, S.C. 2000, c. 12

7. The *Proposal for an Act respecting certain aspects of legal capacity for marriage for civil purposes*[3] (the *"Proposed Act"*) referred to the Court does far more than speak to an aspect of the "capacity" to marry. It fundamentally alters the very nature of marriage. In this regard, A.G. Canada's reliance on the concepts of "exhaustive distribution of powers" and "progressive interpretation" is misplaced. In essence, A.G. Canada's position involves using the *Charter*, as applied in *Halpern*[4], *EGALE*[5] and *Hendricks,*[6] to drive the outcome of a division of powers inquiry.

8. The provinces have full legislative authority in relation to non-marriage domestic relations by virtue of section 92(13) of the *Constitution Act, 1867*. That authority can be exercised to formally recognize and validate same-sex relationships.

9. With respect to the Fourth Question of the Reference, A.G. Alberta submits that the opposite-sex meaning of marriage does not offend the *Charter*. First, that meaning, in and of itself, does not involve differential treatment which engages section 15(1). A.G. Canada overlooks the distinction between the definition of marriage and the benefits and obligations which attach to marriage.

10. Second, considered in its full and proper context, the opposite-sex nature of marriage is not discriminatory within the meaning of section 15(1). It does no more than reflect the essential reality of a long-standing form of social relationship. Only the application of mechanistic reasoning leads to the result suggested by A.G. Canada.

11. Finally, any violation of section 15(1) which might arguably flow from the opposite-sex character of marriage is justifiable pursuant to section 1 of the *Charter*. Some provincial jurisdictions might need to do more to provide same-sex couples with formal recognition of their relationships. However, it does not follow that the nature of marriage itself must be fundamentally changed as a consequence.

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[3] Record of the Attorney General of Canada ("AGC Canada Record") Vol. 1, Tab 3, p. 9
[4] *Halpern v. Canada* (2003), 65 O.R. (3d) 161 (C.A.)
[5] *EGALE Canada Inc. v. Canada (Attorney General)* (2003), 13 B.C.L.R. (4th) 1 (C.A.)
[6] *Hendricks v. Quebec (Attorney General)*, [2002] J.Q. No. 3816 (QL); [2002] R.J.Q. 2506 (S.C.)

12. The Court's response to the question of whether the opposite-sex paradigm of marriage infringes the *Charter*, or can be justified under section 1 of the *Charter*, should be carefully qualified. The results of *Charter* analysis may well be different in a province with legislation which validates interdependent adult relationships (including same-sex relationships) than in a province which does not have such legislation.

B. Summary of Facts

13. The records from the *Halpern* and *EGALE* appeals are before the Court. Space does not permit a meaningful review of those materials. However, the affidavits of Katherine Young[7] and John Witte[8] are of particular assistance in gaining an understanding of the universality of the opposite-sex character of marriage and of its pre-legal nature.

II. ISSUES

14. The questions referred to the Court, and A.G. Alberta's position in relation to each of them, are set out below:

(a) Question One: Is the annexed *Proposal for an Act respecting certain aspects of legal capacity for marriage for civil purposes* within the exclusive legislative authority of the Parliament of Canada? If not, in what particular or particulars, and to what extent?

Answer: No. "Marriage" in section 91(26) refers to opposite-sex unions. Parliament cannot unilaterally expand that meaning to include same-sex relationships.

(b) Question Two: If the answer to question 1 is yes, is section 1 of the proposal, which extends capacity to marry to persons of the same sex, consistent with the *Canadian Charter of Rights and Freedoms*? If not, in what particular or particulars, and to what extent?

Answer: Alberta takes no position on this question.

(c) Question Three: Does the freedom of religion guaranteed by paragraph 2(a) of the *Canadian Charter of Rights of Freedoms* protect religious officials from being compelled to perform a

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[7] *Halpern*, A.G. Canada Materials, Affidavit of Katherine Young, sworn March 14, 2001
[8] *Halpern*, A.G. Canada Materials, Affidavit of John Witte, sworn March 9, 2001

marriage between two persons of the same sex that is contrary to their religious beliefs?

Answer: Yes. Religious officials cannot be compelled to perform a marriage for persons of the same sex if that is contrary to their religious beliefs.

(d) Question Four: Is the opposite-sex requirement for marriage for civil purposes, as established by the common law and set out for Quebec in section 5 of the *Federal Law – Civil Law Harmonization Act, No. 1* consistent with the *Canadian Charter of Rights and Freedoms*? If not, in what particular or particulars and to what extent?

Answer: Yes. The opposite-sex character of marriage does not offend section 15(1) of the *Charter* and, if it does, it can be justified pursuant to section 1 of the *Charter*.

III. ARGUMENT

A. Introduction

15. The issues before the Court must be considered in light of, and by reference to, the fundamental nature of marriage.

16. Marriage is understood as an opposite-sex construct. It is an historical and worldwide institution which has been consistently recognized as being the union of a man and a woman. Dr. Katherine Young provided the following summary after surveying five major world religions:

> ...I conclude that [marriage] is a culturally approved opposite-sex relationship intended to encourage the birth (and rearing) of children, at least to the extent necessary for the preservation and well-being of society. As such, marriage is a universal norm
>
> ...I have also concluded that the following features of marriage are *universal*. Marriage is supported by authority and incentives; it recognizes the interdependence of maleness and femaleness, it has a public dimension; it defines eligible partners; it encourages procreation under specific conditions; and it provides mutual support not only between men and women but also between men and women and their children (the sharing of resources, apart from anything else, or transmission of property)
>
> ...Same sex relationships are indeed worthy of respect. But, "same-sex marriage" is an oxymoron, because it lacks the universal, or *defining*, feature of

> marriage according to religious, historical and anthropological evidence. Apart from anything else, marriage expresses one fundamental and universal human need: a setting for reproduction that recognizes the reciprocity between nature (sexual dimorphism) and culture (gender complementarity).[9]
>
> (emphasis added)

17. The opposite-sex paradigm of marriage goes to the root of its ontological character:

> ...the definition of marriage is a cross-gender union. It is not merely a matter of arbitrary definition or semantic wordplay; it is fundamental to the concept and nature of marriage itself.
>
> ...The heterosexual dimension of the relationship is at the very core of what makes marriage a unique union and is the reason why marriage is so valuable to individuals and to society. The concept of marriage is founded on the fact that the union of two persons of different genders creates a relationship of unique potential strength and inimitable potential value to society. The essence of marriage is the integration of a universe of gender differences (profound and subtle, biological and cultural, psychological and genetic) associated with sexual identity...[10]
>
> (emphasis added)

18. The heart of marriage is broader than "reproduction". Its essence is the complementary character of the male-female relationship:

> ...The heterosexual union joins intrinsically different individuals. The differences between male and female transcend culture, training and environment. While they are manifest in obvious biological differences, these differences are much broader than 'he has a penis' and 'she has a vagina'. They affect how we experience the world. The degree to which these differences manifest themselves in our behaviour is largely influenced by our culture, training, and environment, yet the differences themselves cannot be entirely eradicated regardless of culture, training, or environment.
>
> The willing joinder of these inherent differences constitutes the mystery of marriage. Different as men and women are, there is an innate desire and unique capacity for union of the two. This desire and capacity is captured by the word 'complementarity'. For most men and women, their greatest fulfillment is achieved through the communion we call marriage. Their union encompasses and celebrates the diversity of their beings. While same-sex unions contain some diversity, in that they involve two unique and distinctive persons, the differences are individual rather than inherent.[11]
>
> (emphasis added)

19. Marriage is first and foremost a social construct. It has been "recognized" by the common law but it was not created by the common law.[12] The historical meaning of marriage in the Western world, beginning with its roots in Greek and Roman civilizations, through to the

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[9] Affidavit of Katherine Young, *supra*, paras. 1,2,7
[10] Wardle, "A Critical Analysis of Constitutional Claims for Same-Sex Marriage". (1996) *B.Y.U.L. Rev.*1., 38-39
[11] Colett, "Recognizing the Same-Sex Marriage: Asking for the Impossible?" (1998) 47 *Cath. U.L. Rev.* 1245, 1261-62
[12] *Hyde v. Hyde and Woodmanse* (1866), L.R. 1 P&D 130, 133

Christian era, is a special kind of monogamous opposite-sex union with spiritual, social, economic and contractual dimensions.[13]

B. Question One: The Authority of Parliament

20. Section 91(26) of the *Constitution Act, 1867* gives Parliament jurisdiction concerning "marriage and divorce". A.G. Alberta submits that such authority relates to opposite-sex unions only.

21. A.G. Canada's submission on Question One simply asserts that the *Proposed Act* relates to the "capacity" to marry. He goes on to say that: (a) the distribution of legislative power is exhaustive; (b) the Constitution should be given a "purposive" interpretation; and (c) the Constitution should be given a "progressive" interpretation. His submission then refers to the fact that Courts of Appeal in British Columbia and Ontario have held that the meaning of "marriage" includes same-sex relationships. A.G. Canada's submission concludes by saying that "marriage" contains no "internal frozen-in-time" meaning that reflects the presumed intent of the framers.

22. As is obvious, A.G. Canada's argument skirts the key issue raised by Question One. *i.e.* the meaning of "marriage" in section 91(26). It effectively *assumes* federal power rather than demonstrating the existence of that power.

1. Scope of Section 91(26)

23. In order to properly determine the scope of section 91(26) it is necessary to consider: (a) the plain and ordinary meaning of marriage; (b) the meaning of marriage in law; (c) the meaning of marriage that was contemplated at Confederation; and (d) other provisions of the Constitution.

(a) Ordinary Meaning of Marriage

24. There can be no doubt that the regular and ordinary meaning of marriage involves opposite-sex relationships only. The following dictionary definitions make this point:

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[13] Affidavit of John Witte, *supra*

> *Shorter Oxford English Dictionary*
> *1. the relation between married persons; wedlock;*
> *2. the action, or an act of marrying; the ceremony by which two persons are made husband and wife.*
>
> *Collins English Dictionary and Thesaurus*
> *1. the state or relationship of being husband and wife*
> *2. the legal union or contract made by a man and woman to live as husband and wife*

25. Not surprisingly, that understanding reflects the content of the records in *Halpern* and *EGALE*. Those materials clearly establish an almost universal understanding, both in historical and contemporary terms, that marriage is an opposite-sex union.[14]

26. All of this suggests that the term "marriage" in the *Constitution Act, 1867* should also be defined as referring to male-female relationships only.

(b) The Legal Meaning of Marriage

27. The legal meaning of marriage has centred on the union of a man and a woman. In 1866, in *Hyde v. Hyde and Woodmansee*, the House of Lords said:

> What, then, is the nature of this institution as understood in Christendom? Its incidents vary in different countries, but what are its essential elements and invariable features? If it be of common acceptance and existence, it must need (however varied in different countries in its minor incidents) have some pervading identity in a universal basis. I concede that marriage, as understood in Christendom, may for this purpose be defined as the voluntary union for life of one man and one woman, to the exclusion of all others.[15]

28. English law has consistently recognized that definition of marriage through to the present time.[16]

29. In Canada, the common law tradition is to the same effect. Just days after the proclamation of the *British North America Act, 1867*, the Quebec Superior Court stated:

> Before, however, proceeding any further, it may be well to state some general principles applicable to the law of marriage…
>
> By the law of nature, a man and a woman, without religion or law, have the right, it is said, to form a union upon such conditions as they may choose to impose. By the law of

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[14] See, for example: Affidavit of Katherine Young, *supra*
[15] *Hyde v. Hyde and Woodmansee*, *supra*, 133
[16] *Corbett v. Corbett*, [1970] 2 All E.R. 33, 48

> nations, all communities which observe that law, have agreed to recognize as husband and wife persons of the opposite sexes, who in their union have observed and fulfilled all the laws in force relative to matrimony, in the country which they inhabit or where the union is formed: and by the Civil law, each nation has established certain formalities upon the observance of which the validity of marriage depends. [17]

30. The recent rulings of the Ontario and British Columbia Courts of Appeal have confirmed that, since Confederation, marriage, at common law, has consistently referred to opposite-sex relationships only. [18]

31. Parliament itself has recently accepted the historical meaning of marriage by defining it in the *Modernization of Benefits and Obligations Act* as "the lawful union of one man and one woman to the exclusion of all others".[19]

32. As a result, the treatment of marriage in law suggests strongly that section 91(26) refers only to the union of a man and woman.

(c) Intention of the Framers

33. The Confederation Debates and other historical records can be used to interpret the *Constitution Act, 1867*. *Re Eskimos*[20] is an excellent illustration of this approach. In that Reference, this Court considered the question of whether the term "Indians" in section 91(24) of the then *British North America Act, 1867* included the "Eskimo inhabitants of the province of Quebec". The Court reviewed a substantial volume of historical documents from before and at the time of Confederation to conclude that, in 1867, "Indian" was used to include Eskimos. A similar approach, although perhaps not determinative, is certainly appropriate and helpful for purposes of determining the meaning of "marriage" in section 91(26).[21]

34. The Confederation Debates reveal no intention whatsoever that Parliament should have the power to define marriage itself. Rather, the reference to "marriage" in section 91(26) was repeatedly described as being designed to allow Parliament to provide that a marriage celebrated

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[17] *Connelly v. Woolrich* (1867), 11 L.C.J. 197, 215
[18] See: *Halpern, supra*, paras 35-37; *EGALE, supra*, paras 40-56; *Hendricks, supra,* para 94
[19] *Modernization of Benefits and Obligations Act, supra*, s.1.1
[20] [1939] S.C.R. 104
[21] See also: *R. v. Blais,* [2003] 2 S.C.R. 236, paras 18-31

in one province would be recognized in another. The following comment of Mr. Langevin, Solicitor General, appears to have been regarded as being authoritative:

> The word marriage has been placed in the draft of the proposed Constitution to invest the Federal Parliament with the right of declaring what marriages shall be held and deemed to be valid throughout the whole extent of the confederacy, without, however, interfering in any particular with the doctrines or rites of the religious creeds to which the contracting parties may belong.[22]

35. It is obvious that, at the time of Confederation, jurisdiction in relation to marriage was intended to relate to heterosexual unions only. A.G. Canada appears to concede that the framers did not conceive that marriage could embrace same-sex relationships. In paragraph 35 of his Factum he says, "Although same-sex relationships obviously existed at the time the Constitution was enacted, there was never the slightest contemplation of the recognition of same-sex marriage".

36. Accordingly, it is submitted that the intentions of the framers suggest that federal authority under section 91(26) relates only to male-female unions.

(d) Other Features of the *Constitution Act, 1867*

37. In considering the proper scope of a head of federal authority under section 91 of the *Constitution Act, 1867*, it is also appropriate to have regard to the effect that a particular interpretation will have on provincial authority as prescribed in section 92.

38. In the current context, it is important to recognize that, since 1867, the provinces have legislated in relation to the full range of domestic non-marriage relationships including adoption, common-law relationships and so on. Alberta's *Adult Interdependent Relationships Act* is a case in point. It legally recognizes "adult interdependent relationships" which are defined to be relationships outside of marriage in which two persons, regardless of their gender, share one another's lives, are emotionally committed to each other and function as an economic and domestic unit.

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[22] Parliamentary Debates on the Subject of the Confederation of the British North American Provinces, 3rd Session, 8th Provincial Parliament of Canada (Quebec: Hunter, Rose & Co., 1865), pp. 579, 888-9

39. It is not necessary to interpret section 91(26) as allowing Parliament to legislate in relation to same-sex "marriage" in order to bring same-sex relationships within the ambit of legislative authority. Such relationships are already under provincial jurisdiction.

40. Admittedly, the fact of provincial authority over same-sex relationships might ultimately mean that there is some variation in their treatment from province to province. However, the situation in that regard would be no different than the one which now operates, for example, with respect to opposite-sex common-law relationships. Their formal status, as well as the nature of the rights and obligations which attach to that status, is not identical in every jurisdiction. The same holds true for the rights and obligations which attach to marriage itself. Such variations flow from the nature of federalism.

41. There is no legitimate legal argument that possible provincial variations in the recognition of common-law relationships are a reason for reading the Constitution as giving jurisdiction in relation to them to Parliament. The same logic ultimately applies to same-sex relationships. The possibility of differential provincial treatment of such relationships is not a rationale for finding that they fall within federal jurisdiction.

42. In the result, the overall organization of sections 91 and 92 of the *Constitution Act, 1867* also indicates that section 91(26) relates only to male-female unions.

2. Response to A.G. Canada's Argument

43. A.G. Alberta respectfully submits that the argument advanced by A.G. Canada in his Factum is flawed and unpersuasive.

44. The Court should be alert to the extent to which the *Charter* effectively drives the interpretation of section 91(26) of the *Constitution Act, 1867* advanced by A.G. Canada. The concept of marriage, both in law and in common usage, has always referred to an opposite-sex union. Only recently has there been a suggestion that marriage could include a same-sex relationship. In the present context, that proposal has been directly tied to *Halpern, EGALE* and *Hendricks*. In other words, the idea that the opposite-sex character of marriage offends equality guarantees under the *Charter* has driven the view that Parliament should be able to define marriage to include both same-sex and opposite-sex relationships.

45. The *Charter* cannot be used to amend the terms of the *Constitution Act, 1867*. In *Reference re Roman Catholic Separate High Schools Funding*, Wilson J. said, "It was never intended, in my opinion, that the *Charter* could be used to invalidate other provisions of the Constitution".[23] Similarly, in *New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly)*, McLachlin J. stated, "It is a basic rule...that one part of the Constitution cannot be abrogated or diminished by another part of the Constitution."[24]

46. In *Halpern,* the Ontario Court of Appeal dismissed this line of concern with extremely abbreviated reasoning. In relation to the *Nova Scotia Speaker* case, for example, it merely said, "the exercise of a constitutionally recognized parliamentary privilege to exclude strangers from the legislature is not analogous to a law excluding persons from marriage".[25] That sort of analysis confines the cases to an unreasonably narrow compass and ignores the larger principles which they establish.

47. The division of powers in the *Constitution Act, 1867* must stand and operate independently of the *Charter*. As Professor Hogg has noted, "...the provisions of the Constitution distributing powers to the federal Parliament and the provincial Legislatures are logically prior to the *Charter of Rights*".[26] The *Charter* cannot be used to justify an interpretation of federal or provincial legislative power which would not apply in the absence of the *Charter*.

48. Although A.G. Canada is careful to avoid acknowledging the effect that the *Charter* has on his reading of section 91(26), that effect is nonetheless apparent. The Court must be careful not to allow *Charter* considerations to sway its analysis of Question One.

(a) "Capacity" to Marry

49. In his Factum, A.G. Canada characterizes the *Proposed Act* as being concerned merely with "one aspect of the legal capacity to marry". He then points to the accepted legal view that

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[23] [1987] 1.S.C.R. 1148, 1197-48
[24] [1993] 1.S.C.R. 319, 373
[25] *Halpern v. Canada, supra*, para 177
[26] Hogg, *Constitutional Law of Canada*, (loose-leaf ed.), 15-3

Parliament has jurisdiction over "capacity" and says it follows that Parliament has jurisdiction to enact the legislation.

50. A.G. Canada's line of argument in this regard is self-evidently misplaced. The legislation under review does not simply change a feature of the capacity to marry. The first clause of the *Proposed Act* reads as follows:

> 1. "Marriage, for civil purposes, is the lawful union of two persons to the exclusion of all others."

51. By defining marriage to include same-sex unions, the *Act* fundamentally alters the very nature of marriage itself. The real question before the Court is not whether Parliament can legislate in relation to the capacity to marry. It is whether, relying on its authority over "marriage and divorce", Parliament can transform the very concept of marriage.

52. The cases recognizing Parliament's jurisdiction over "capacity" concern federal laws which respect the opposite-sex character of marriage. They deal with matters such as prohibited degrees of consanguinity and the existence of prior marital relationships. They take the historical concept of marriage as given and, therefore, offer no support for the proposition that redefining the central meaning of the institution of marriage is an exercise relating merely to capacity.

53. As explained above, marriage is deeply rooted in the complementary character of the male-female relationship. It has been understood across time, cultures and religions to be opposite-sex in nature. That understanding has been consistently reflected in the common law and in statute. Fundamentally redefining the meaning of marriage goes far beyond the question of "capacity". The Trial Judge in *EGALE* correctly assessed the situation as follows:

> "In my opinion, the fact that persons of the same sex may not legally marry is not a question of capacity. Rather the inability of same-sex couples to marry results from the fact that, by its legal nature, marriage is a relationship which only persons of opposite sex may formalize. The requirement that parties to a legal marriage be of opposite sex goes to the core of the relationship and has nothing to do with capacity." [27]
>
> (emphasis added)

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[27] *EGALE Canada Inc. v. Canada (Attorney General),* [2001] 11.W.W.R.685 (B.C.S.C.), para. 119

(b) Exhaustive Distribution of Powers

54. A.G. Canada bases his argument, in part, on the proposition that the distribution of powers in the Constitution is exhaustive. He states that "either Parliament or the provincial legislatures must have the power to extend marriage to include same-sex couples."

55. The error in A.G. Canada's argument is obvious. It is not proper to characterize same-sex "*marriage*" as a matter which must be within either federal or provincial legislative authority. Rather, it is same-sex *relationships* which must fall under such authority; *ie.* it is the ability to legislate with respect to the status of same-sex relationships and their incidents which cannot be beyond the reach of all legislative power. By framing the question as being concerned about the regulation of same-sex "marriage", A.G. Canada has determined the outcome of the division of powers inquiry before embarking upon it.

56. As noted, the provinces have historically regulated the full range of non-marriage domestic relationships pursuant to their jurisdiction over civil rights as provided in section 92(13) of the *Constitution Act, 1867.* There can be no doubt as to the validity of provincial legislation in relation to matters such as adoption, dependent adults and common-law relationships. Legislation prescribing the rights and obligations of individuals in same-sex relationships, and prescribing the legal status of such relationships, is also well within provincial authority.

57. Accordingly, it can be seen that the principle of exhaustive distribution of legislative powers offers no basis for finding that federal jurisdiction in relation to marriage must extend to same-sex relationships. Those relationships will not fall into a jurisdictional gap if section 91(26) is read as referring only to opposite-sex unions.

(c) "Progressive" Interpretation

58. A.G. Canada also suggests that the doctrine of "progressive" interpretation of the Constitution requires that section 91(26) be read as extending federal jurisdiction to same-sex relationships. He warns against "originalism" and "frozen concepts".

59. The flaw in this line of argument is also apparent. Each head of authority under section 91 and section 92 confers finite authority and has a limited meaning such that some matters fall within its scope and others fall outside of its scope. The notion of "progressive" interpretation of

the Constitution does not involve the idea that the language of sections 91 and 92 is infinitely malleable or that it has no inherent meaning.

60. The limits of "progressive" interpretation were recognized by Lord Sankey himself in the famous passage from his judgment in *Edwards v. Attorney General for Canada.* He observed that "the British North America Act planted in Canada a living tree capable of growth and expansion *within its natural limits*".[28]

61. The same point was recently underlined in *Blais* where the Court acknowledged the living tree principle but emphasized that it was "not free to invent new obligations foreign to the original purpose of the provision at issue."[29]

62. This is not a case where a development like television or aviation has to be fitted into a division of powers drafted before such matters existed. Same-sex relationships were obviously known to the Fathers of Confederation. If they had considered the matter directly, it seems apparent that the framers would have seen jurisdiction over such relationships as falling within provincial authority over "civil rights" rather than within the scope of federal jurisdiction over "marriage".

3. Summary on Question One

63. Question One essentially asks whether federal jurisdiction over "marriage" includes same-sex relationships. The views advanced by A.G. Canada are heavily, if quietly, influenced by section 15(1) of the *Charter*. An assessment of the factors which this Court normally considers in relation to problems concerning the scope of federal and provincial powers strongly indicates that marriage refers only to opposite-sex unions.

64. A.G. Alberta's conclusion on Question One is not "originalism" and does not require a "frozen-in-time" view of the Constitution. It simply reflects the fact that, like any other head of power in sections 91 and 92, "marriage" ultimately has a limited meaning.

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[28] *Edwards v. Attorney General for Canada,* [1930] A.C. 124, 136
[29] *R. v. Blais, supra,* para. 40

C. Question Two: Charter Impact of Extending Rights

65. A.G. Alberta takes no position in relation to Question Two.

D. Question Three: Charter Protection for Religious Officials

66. A.G. Alberta submits that a religious official cannot be compelled to perform a marriage between two persons of the same sex if that is contrary to the religious beliefs of the official. He adopts the submissions at paragraphs 73 and 74 of A.G. Canada's Factum.

E. Question Four: Opposite Sex Requirement and the Charter

1. Introduction

67. Question Four asks whether the opposite-sex requirement of marriage is consistent with the *Charter*. A.G. Alberta submits that the question should be answered in the affirmative. The opposite-sex character of marriage does not offend the *Charter*.

68. The analysis of the issues raised by Question Four must be considered against the background of several overarching considerations.

69. First, it should be noted that the wording used in Question Four speaks of the opposite-sex "requirement" of marriage. That terminology suggests or implies that the male-female character of marriage can be changed without affecting the meaning of marriage. As explained above, this is a false assumption. The opposite-sex paradigm lies at the heart of marriage. The argument of A.G. Canada does not involve the mere identification of a defect in one of the "requirements" of marriage. It entails changing the nature of marriage itself.

70. Second, A.G. Canada asks the Court to involve itself deeply in issues of social ordering and social status. At its heart, the argument advanced by A.G. Canada is about giving same-sex couples a particular kind of social standing and social validation on the strength of a change in the common law meaning of marriage. The Court has previously expressed reluctance to change the common law in ways that involve significant social ramifications.[30] Revising the nature of

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[30] *R. v. Salituro,* [1991] 3 S.C.R. 654, 675; *Watkins v. Olafson,* [1989] 2 S.C.R. 750, 761

marriage is surely a classic example of a situation where significant judicial caution is appropriate.

71. Third, and on a related note, marriage is essentially a pre-legal or social institution. Its opposite-sex character is reflected in the common law and recognized by it. However, marriage was not "created" by the common law in the usual sense. Accordingly, the Court's traditional reluctance to effect major changes in the common law should be engaged here with extra force and meaning.

72. Fourth, A.G. Canada's approach to Question Four is very formulaic and does not fit comfortably with the Court's injunction that the approach outlined in *Law* must not be applied in a mechanical fashion. In reference to the guidelines quoted and applied by A.G. Canada in his Factum, Iacobucci J., stated as follows in *Law*:

> In accordance with McIntyre J.'s caution in *Andrews, supra,* I think it is sensible to articulate the basic principles under s. 15(1) as guidelines for analysis, and not as a rigid test which might risk being mechanically applied. Equality analysis under the *Charter* must be purposive and contextual. The guidelines which I review below are just that – points of reference which are designed to assist a court in identifying the relevant contextual factors in a particular discrimination claim, and in evaluating the effect of those factors in light of the purpose of s. 15(1).
>
> ...these guidelines should not be seen as a strict test, but rather should be understood as points of reference for a court that is called upon to decide whether a claimant's right to equality without discrimination under the *Charter* has been infringed. Inevitably, the guidelines summarized here will need to be supplemented in practice by the explanation of these guidelines in these reasons and those of previous cases, and by a full appreciation of the context surrounding the specific s.15(1) claim at issue. It goes without saying that as our s.15 jurisprudence evolves it may well be that further elaborations and modifications will emerge.[31]
>
> (emphasis added)

2. Section 15(1) of the Charter

73. With the above qualifications in mind, it is useful to consider the three stage approach to section 15(1) analysis spelled out in the *Law* decision.

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[31] *Law v. Canada* [1999] 1 S.C.R. 487, paras 6, 88

(a) Distinction or Differential Treatment

74. The issue on this branch of the section 15(1) analysis is whether the opposite-sex character of marriage, in and of itself, makes a distinction or creates a kind of differential treatment which attracts the protection of the *Charter*. A.G. Alberta submits that it does not.

75. The mere fact that marriage is an opposite-sex institution does not distinguish among individuals in the sense described in *Law*. For example, the fact that women are not "men" cannot amount to a proscribed distinction. Nor, presumably, can the reality that male persons cannot be "sisters" or "wives" and *vice versa*. Similarly, the inability of two committed and cohabitating persons of the same sex to claim the status of being "married", in and of itself, does not amount to differential treatment between same-sex and opposite-sex couples.

76. The mere existence of a social status or social designation defined by reference to a matter such as gender is not, without more, differential treatment in the relevant sense. The real question concerns the consequences or effects of being a "man", a "sister", a "wife" or of being "married". Section 15(1) of the *Charter* provides for equality under the law. It does not demand the obliteration of every social and legal construct defined by the grounds enumerated in section 15(1) or by grounds analogous to them.

77. In his Factum, A.G. Canada points to two ways in which benefits and obligations are said to attach to same-sex and opposite-sex couples in a fashion amounting to differential treatment. First, he notes that, by virtue of statutes such as the *Modernization of Benefits and Obligations Act*, same-sex couples have to cohabit for a specified time period before benefits and obligations attach but that opposite-sex couples have access to benefits and obligations immediately upon marriage.

78. That argument lacks merit because it is readily apparent that the differential effect noted by A.G. Canada arises from the terms of the programs in question and not from the nature of marriage or from the status of being married. The distinction noted by A.G. Canada between same-sex couples and married couples could be eliminated entirely by either requiring that opposite-sex couples must be married for a period of time before qualifying for benefits or, alternatively, by specifying that same-sex couples can qualify for benefits without a waiting period. Both alternatives illustrate that the distinction referred to by A.G. Canada is not a function of marriage itself.

79. Second, A.G. Canada says that marriage draws a distinction between same and opposite-sex couples by denying the former "access to the social institution of marriage and the value and worth of their unions that is bestowed by marriage". That line of argument invites the Court to reach well beyond the legitimate boundaries of *Charter* concerns. Section 15(1) guarantees equality before and under "the law" and the equal protection and benefit of "the law". It is not a vehicle through which the courts can or should seek to remake fundamental social institutions in an effort to manage questions of social status and approval.

(b) Enumerated or Analogous Grounds

80. If the Court concludes that marriage, in and of itself, imposes differential treatment on same-sex couples, A.G. Alberta concedes that sexual orientation is the basis of such treatment. Sexual orientation is an analogous ground under section 15(1) of the *Charter*.

(c) Discrimination

81. The Court has recognized the need to establish discrimination in a substantive or purposive sense, beyond mere proof of a distinction on enumerated or analogous grounds. As McLachlin J. said in *Miron v. Trudel*, "distinctions made on enumerated or analogous grounds may prove to be, upon examination, non-discriminatory".[32] The basic question, as described in *Law*, is as follows:

> "... does the differential treatment discriminate in a substantive sense, bringing into play the *purpose* of s. 15(1) of the *Charter* in remedying such ills as prejudice, stereotyping, and historical disadvantage?"[33]

82. The "discrimination" analysis in this case turns significantly on the characterization of the nature or purpose of the institution of marriage. The identification of a section 15(1) problem becomes possible only by jettisoning the notion that the defining characteristic of marriage is a male-female union. As explained by Professor F.C. DeCoste:

> [The argument that the opposite-sex nature of marriage is discriminatory] is only made possible by ignoring, by defining away, the meaning of marriage at law and as cultural practice, namely, that marriage is a practice that creates a specific, sexed form of life, the form of life that subsists in the relationship, not otherwise extant, between husband and

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[32] *Miron v. Trudel*, [1995] 2 S.C.R. 418, para. 132
[33] *Law v. Canada*, *supra*, para 39

> wife. Only once this understanding is banished does the inability of homosexuals to marry one another – like everyone else they *can* marry persons of the opposite sex – become a matter that goes to equality and not to (in) capacity. Only thus, by elevating incapacity to inequality through editing out status, culturally and legally, does the entire structure of this judgment and of the gay marriage movement more generally have any coherence.[34]
>
> (emphasis added)

83. In *Halpern*, Blair R.S.J. candidly acknowledged that the result of the section 15(1) analysis turned on the characterization of the nature of marriage. He wrote as follows:

> Whether one approaches "marriage" from the classical perspective based upon the narrow basis that heterosexual procreation is its fundamental underpinning and what makes it "unique in its essence, that is, its opposite sex nature", or whether one approaches it from a different perspective, is pivotal to the s.15 analysis; however; if one accepts the former view as the starting premise there is little debate, it seems to me. The institution of marriage is inherently and uniquely heterosexual in nature. Therefore, same-sex couples are not excluded from it on the basis of a personal characteristic giving rise to differential treatment founded upon a stereotypical difference. Same-sex couples are simply *incapable* of marriage because they cannot procreate through heterosexual intercourse. That is the distinction created by the nature of the institution itself which precludes homosexuals from access to marriage, not a personal characteristic or stereotypic prejudice...[35]

84. A.G. Alberta submits that no proper basis has been established for abandoning the conception of marriage as an opposite-sex institution. Several points must be underlined in this regard.

85. First, A.G. Canada, like the Ontario Court of Appeal, characterizes the traditional male-female nature of marriage as turning on "procreation" and "child rearing". This is an overly narrow and rigid conception of the matter. As noted above, the essence of marriage is properly seen as being more broadly rooted in the *complementarity* of males and females.

86. Second, A.G. Canada, again like the Ontario Court of Appeal, seems to reason that the male-female relationship cannot be a defining feature of marriage because marriage also involves companionship, mutual care and support, shared social activities and so forth. This is curious logic. The fact that married couples interact in ways that are not purely sexual ultimately says nothing about whether the male-female paradigm of marriage should be abandoned. Marriage,

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[34] DeCoste, "The Halpern Transformation: Same-sex Marriage, Civil Society, and the Limits of Liberal Law", (2003) 41 *Alta. L. Rev.* 619, 628

as an institution, has always been about more than just heterosexual sex. It is surely no revelation that married couples provide each other with companionship and support.

87. Third, the reality that Canadian family structures have changed and are changing does not inform the meaning of marriage. Indeed, A.G. Canada's acknowledgement of the existence of "a growing acceptance of a wide variety of family forms, including households comprised of common-law opposite-sex couples and same-sex couples" suggests that preserving the opposite-sex character of marriage will increasingly involve fewer problems for couples who are not married.

88. Fourth, arguments based on racial analogies are unfortunate and inapt. The law at issue in *Loving v. Virginia*[36] did not proscribe all interracial marriages and it was self-evidently driven by racial prejudice against blacks. More to the point, considerations like race are irrelevant to the meaning and status of marriage, historical or otherwise. Barring access to the institution of marriage by reference to such matters is discriminatory by definition. The same cannot be said of sexual orientation because the notion of a male-female union undeniably goes to the core of marriage. The idea that *Loving* is a useful precedent in the debate about same-sex marriage has been discredited by numerous writers.[37]

89. Fifth, the Court must be alert to the "constructionist" perspective of the proponents of same-sex marriage and the extent to which their arguments deny the meaning of the language which surrounds marriage. The affidavits of Daniel Cere[38] and Robert Stainton[39] are helpful in this regard.

90. Sixth, the companionate model of marriage advanced by A.G. Canada is troublingly overinclusive. For example, the arguments made in favour of same-sex marriage can also be made in favour of the recognition of polygamy and polyandry. There are a wide variety of

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[35] *Halpern v. A.G. Canada*, (2002) 215 D.L.R. (4th) 223, para 80
[36] *Loving v. Virginia*, 388 U.S.1 (1967)
[37] See, for example: Wardle, "Legal Claims for Same-Sex Marriage: Efforts to Legitimate or Retreat from Marriage by Redefining Marriage", (1998) 39 *S. Tex. L. Rev.* 735, 752-3; Dent, "The Defence of Traditional Marriage", (1999) *J.L & Politics* 581, 614 *et seq*
[38] *Halpern*, Interfaith Coalition on Marriage and Family materials, Affidavit of Daniel Cere sworn July 14, 2001
[39] *Halpern*, A.G. Canada materials, Affidavit of Robert Stainton sworn March 27, 2001

relationships which involve intimacy and commitment. The definition of marriage advanced by A.G. Canada is so broad that it risks depriving "marriage" of any real meaning in the longer term and, in a perverse way, risks denying the advocates of same-sex marriage the social validation they seek.[40]

91. Seventh, and finally, the analysis of the discrimination issue must not lose sight of the objective-subjective inquiry required by *Law*. It is not enough for A.G. Canada to assert that the dignity of same-sex couples is adversely affected by the male-female character of marriage. The question is whether, seen objectively and in the full context of the matter, a reasonable gay or lesbian person would find the differential treatment in question demeaning to his or her dignity.

92. The Court must ask whether a reasonable person, understanding the history, the religious dimensions and universally recognized character of marriage would feel demeaned by its opposite-sex paradigm. In this regard, it may well be that Canadian society needs to devise better ways of formally recognizing and giving social validation to committed same-sex relationships. However, it does not follow that the fundamental meaning of marriage should be abandoned as a result.

93. A.G. Alberta suggests that the real complaint of same-sex marriage advocates should not be lodged against the institution of marriage. It should be lodged more generally against the absence, in some jurisdictions, of an alternate means of providing formal and respectful validation and recognition of their relationships.

94. In summary, A.G. Alberta says that the opposite-sex character of marriage is not discriminatory within the meaning of section 15(1) of the *Charter* and that it does not offend section 15(1).

3. Section 1 of the Charter

95. Any violation of section 15(1) which might arguably be found to result from the opposite-sex nature of marriage is readily justifiable pursuant to section 1 of the *Charter*.

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[40] See, for example: Dent, "The Defence of Traditional Marriage", *supra,* 627 *et seq.*

96. A.G. Canada's assessment of the section 1 issue ignores the reality that marriage is essentially a social construct. It also ignores the reality that the opposite-sex character of marriage has been recognized on an effectively universal basis across time and cultures. His submission masks the extraordinary significance of finding that the defining feature of a basic social institution of the longest standing is not "reasonable and demonstrably justifiable".

97. A key and overriding aspect of the section 1 analysis in this case concerns the degree of deference that the Court should accord to the traditional meaning of marriage. In this regard, the Court is not faced with the same exercise as is involved in determining the reasonableness of a statutory enactment. As noted, marriage is a social construct of ancient lineage. It is reflected in the common law but was not created by the common law. As a result, it is submitted that a formalistic application of the *Oakes* test is simply not appropriate. The circumstances call for a very large measure of flexibility and judicial deference.

98. In a similar vein, this is not the sort of case where the Court should demand evidence which strictly "proves" the various aspects of the *Oakes* test. It is enough that there is a reasonable basis for defining marriage as including male-female unions only.[41]

99. Finally, the reasonableness of the opposite-sex character of marriage should not be determined without reference to provincial legislation with respect to adult interdependent relationships. The restriction of marriage to male-female unions may well have a different complexion under section 1 of the *Charter* in provinces, such as Alberta, where there is a legal regime which formally recognizes same-sex unions than it has in provinces which do not provide such recognition. The Court should take care not to deal with the section 1 analysis in a way which precludes or cuts off development of alternative ways of validating same-sex relationships.

(a) Objective

100. A.G. Canada defines the objective of the opposite-sex character of marriage as being narrowly related to procreation. However, for purposes of the section 1 analysis, the objective of

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[41] See, generally: *Irwin Toy v. Quebec*, [1989] S.C.R. 927, 993-4

the opposite-sex feature of marriage should properly be stated more broadly than simple "reproduction" and "child-rearing". It relates to the fundamental *complementarity* of males and females. Reproduction is an aspect of that complementarity but is not exhaustive of it.

101. It is important that society be able to recognize and sustain the social institution which embodies sexual complementarity. The significance of that objective is manifest from the fact that the opposite-sex character of marriage is both ancient and world-wide in its reach. Social institutions do not exist without a reason. Surely the universality and durability of the male-female paradigm of marriage speaks conclusively to its importance.

(b) Rational Connection

102. The outcome of the "rational connection" analysis in any case is, of course, closely tied to the identification of the objective of the law in issue. Narrowly framing the objective of the traditional meaning of marriage as "procreation" or "companionship" helps set the stage for failure on this aspect of the *Oakes* test. Significantly, that was the approach taken by the Ontario Court of Appeal in *Halpern*. However, if that objective is properly and more broadly stated by reference to the *complementarity* of the male-female relationship, the rational connection requirement of the *Oakes* analysis is readily met.

103. Nonetheless, even if the purpose of the male-female character of marriage is reduced to matters concerning procreation, it still clears the rational connection hurdle. First, the simple fact that children are conceived outside of marriage does not mean that it is irrational for society to recognize marriage as an institution which is a standard or ideal-type forum for procreation.

104. Further, it is not legally problematic that some married heterosexual couples do not procreate either because of age, choice or infertility. In broad terms, male-female couples are linked generally to procreation. Same-sex couples are not so linked and are categorically incapable of procreation. Further, it would be unjustifiably invasive for the state to inquire of people entering marriage whether they intend to have children or are capable of doing so. As well, male-female couples who choose not to have children can change their minds and infertile couples can become fertile with advances in science. Finally, and in any event, there should be no requirement in complex social situations of this kind that there be an absolutely perfect fit between the law and social interest.

105. Finally, the fact that some same-sex couples can procreate either by having sexual intercourse with someone of the opposite sex or by means of artificial reproductive technologies is not significant to the rational connection assessment. In the larger scheme of things, this sort of procreation is so statistically insignificant that it cannot have the effect of controlling the overall legal-social analysis. In any event, the real point is that, in cases of medically assisted conception or conception by way of intercourse with someone of the opposite sex, same-sex couples are not procreating with each other. They can have children only by going outside of the same-sex relationship.

(c) Minimum Impairment

106. In considering the "minimum impairment" wing of *Oakes*, it is important to bear three points in mind.

107. First, the broader implications of changing the root meaning of marriage are possibly very significant. As A.G. Canada stressed in arguing *Halpern,* great caution is warranted in this regard. No-fault divorce is an example of where a change in one of the features of marriage, its permanence, had a highly destabilizing effect on the institution of marriage itself.[42] The Ontario Court of Appeal summarily dismissed this concern on the basis that it was "speculative". With respect, that is not a meaningful response to the point. It will likely never be possible to prove matters of this sort in advance of the fact. If the community has a rational basis for its concerns, as it obviously does here, that should be sufficient, particularly when the matter being defended is a core social institution of universal currency.[43]

108. Second, the root concern of same-sex marriage advocates appears to be ensuring that their relationships are formally and respectfully recognized by the larger community and by the state. There are ways of doing that which do not involve altering the core meaning of marriage. Most obviously, legislation can be enacted which validates non-marriage relationships. This approach has been followed in a number of jurisdictions. By contrast, the idea that gay and

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[42] *Halpern*, *supra*, para 133
[43] See, for example: *Irwin Toy v. Quebec, supra*, 993-4

lesbian relationships should be recognized by changing the meaning of marriage has had extremely limited international acceptance.[44]

109. Third, not all of the attributes of marriage are appropriate in the context of same-sex relationships. For instance, the rules concerning consanguinity serve an obvious purpose in connection with opposite-sex couples. They would appear to have no utility in relation to same-sex relationships because same-sex partners cannot produce children.

110. Accordingly, in all of the circumstances, the minimum impairment feature of the *Oakes* test can be readily satisfied in relation to the male-female nature of marriage.

(d) Proportionality

111. Same-sex couples are entitled to the same government benefits as are opposite-sex couples. They are protected by the *Charter*. If necessary, they can take advantage of human rights legislation at both the federal and provincial levels. In at least some jurisdictions, they are entitled to have their relationships formally recognized under provincial law.

112. In light of all of this, and in light of the ancient and universal understanding of marriage as a male-female union, A.G. Alberta submits that the "proportionality" wing of the *Oakes* test is also satisfied in the circumstances at hand.

113. As a consequence, even if the opposite-sex character of marriage is found by the Court to be inconsistent with section 15(1) of the *Charter*, it can be justified and sustained pursuant to section 1.

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[44] *Halpern*, A.G. Canada materials, Affidavit of Bea Verschraegen, sworn April 2, 2001, paras. 109-193, 233

IV. RELIEF REQUESTED

114. It is respectfully submitted that the Reference questions be answered as described above. Parliament does not have the authority to define marriage to include same-sex relationships. The male-female character of marriage is consistent with the *Charter*.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

DATED at the City of Regina, in the Province of Saskatchewan, this 10th day of May, 2004.

MacPHERSON LESLIE & TYERMAN LLP

Per: Robert G. Richards

Robert G. Richards, Q.C.

Counsel for the Attorney General of Alberta

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