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. 2003-1005, DATED THE 16TH OF JULY 2003

FACTUM OF THE BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION

ELLIOTT M. MYERS, Q.C.
CRAIG E. JONES, ESQ.
Bull, Housser & Tupper
Barristers & Solicitors
Suite 3000
1055 Georgia Street West
Vancouver, BC V6E 3R3

Tel: (604) 687-6575
Fax: (604) 641-4949
E-mail: emm@bht.com

Solicitor for the British Columbia Civil Liberties Association

Raven, Allen, Cameron,
Ballantyne & Yazbeck LLP/s.r.l.
Barristers & Solicitors
Suite 1600 – 220 ave. Laurier Ave.
(West/ouest)
Ottawa, Ontario K1P 5Z9
Attention: Paul Champ

Tel: (613) 567-2901
Fax: (613) 567-2921

Ottawa Agents for the British Columbia Civil Liberties Association

ORIGINAL TO: The Registrar of this Court

AND TO: Roy Elliot Kim O'Connor LLP
10 Bay Street, Suite 1400
Toronto, Ontario M5J 2R8

Tel: 416-362-1989
Fax: 416-362-6204

Counsel for the intervener, Metropolitan Community Church of Toronto

Marie-France Major
Lang Michener
300-50 O'Connor Street
Ottawa, Ontario K1P 6L2

Tel: 613-232-7171
Fax: 613-231-3191

Ottawa agents for the intervener, Metropolitan Community Church of Toronto

AND TO: Department of Justice Canada
Michael H. Morris
130 King Street West
Suite 3400, Box 36
Toronto, Ontario M5X 1K6

Tel: 416-973-9704
Fax: 416-952-0298

Counsel for the Governor in Council

Department of Justice Canada
Christopher M. Rupar
234 Wellington Street
East Tower, Room 1216
Ottawa, Ontario K1A 0H8

Tel: 613-941-2351
Fax: 613-954-1920

Ottawa agents for the Governor in Council

AND TO: Alain Gingras
1200, route de l'Église
2e étage
St-Foy, QC G1V 4M1

Tel: 418-643-1477
Fax: 418-646-1696

Counsel for Attorney General of Québec

Sylvie Roussel
Noël & Associés
111 Rue Champlain
Hull, QC J8X 3R1

Tel: 819-771-7393
Fax: 819-771-5397

Ottawa agents for the intervener, the Attorney General of Québec

AND TO: Attorney General of British Columbia
P.O. Box 9044
Stn Prov. Government
Room 232, Parliament Building
Victoria, BC V8V 1X4

Tel: 250-387-1866
Fax: 250-387-6411

Counsel for Attorney General of British Columbia

AND TO:

Robert E. Houston, Q.C.
Burke-Robertson
70 Gloucester Street
Ottawa, Ontario K2P 0A2

Tel: 613-236-9665
Fax: 613-235-4430

Ottawa agents for the intervener, the Attorney General of British Columbia

Robert G. Richards, Q.C.
MacPherson Leslie & Tyerman
1500-1874 Scarth Street
Regina, SK S4P 4E9

Tel: 306-347-8000
Fax: 306-352-5250

Counsel for the Attorney General of Alberta

AND TO:

Henry S. Brown, Q.C.
Gowling Lafleur Henderson LLP
2600-160 Elgin St.
P. O. Box 466, Stn "D"
Ottawa, Ontario K1P 1C3

Tel: 613-233-1781
Fax: 613-563-9869

Ottawa agents for the intervener, the Attorney General of Alberta

Gerald D. Chipeur
Chipeur Advocates
2380 Ernest & Young Tower
440-2nd Avenue S.W.
Calgary, AB T2P 5E8

Tel: 403-537-6536
Fax: 403-537-6538

Counsel for The Honourable Anne Cools, Member of the Senate and Roger Gallaway, Member of the House of Commons

AND TO:

Henry S. Brown, Q.C.
Gowling Lafleur Henderson LLP
2600-160 Elgin St.
P. O. Box 466, Stn "D"
Ottawa, Ontario K1P 1C3

Tel: 613-233-1781
Fax: 613-563-9869

Ottawa agents for The Honourable Anne Cools, Member of the Senate and Roger Gallaway, Member of the House of Commons

David M. Brown
Stikeman, Elliot
5300 Commerce Court West
199 Bay Street
Toronto, Ontario M5L 1B9

Tel: 416-869-5602
Fax: 416-947-0866

Counsel for Focus on the Family (Canada) Association and Real Woman of Canada, collectively as The Associates for Marriage and the Family in Ontario

AND TO:

Nicholas Peter McHaffie
Stikemann, Elliott
1600-50 O'Connor Street
Ottawa, Ontario K1P 6L2

Tel: 613-234-4555
Fax: 613-230-8877

Ottawa agents for Focus on the Family (Canada) Association and Real Woman of Canada, collectively as The Associates for Marriage and the Family in Ontario

AND TO: Cynthia Petersen
Sack Goldblatt Mitchell
1130-20 Dundas Street, West,
Box 80
Toronto, Ontario M5G 2G8

Tel: 416-979-6440
Fax:416-591-7333

Counsel for Egale Canada Inc. and Melinda Roy, Tanya Chambers, David Shortt, Shane McCloskey, Lloyd Thornhill, Robert Peacock, Robin Roberts, Diana Denny, Wendy Young and Mary Teresa Healy (the "Egale Couples")

Pamela J. MacEachern
Nelligan O'Brien Payne LLP
1900-66 Slater Street
Ottawa, Ontario K1P 5H1

Tel: 613-231-8220
Fax: 613-788-3698

Ottawa agent for the intervener, Egale Canada Inc. and Melinda Roy, Tanya Chambers, David Shortt, Shane McCloskey, Lloyd Thornhill, Robert Peacock, Robin Roberts, Diana Denny, Wendy Young and Mary Teresa Healy (the "Egale Couples")

AND TO: W.J. Sammon
Barnes, Sammon
200 Elgin Street, Suite 400
Ottawa, Ontario K2P 1L5

Tel: 613-594-8000
Fax: 613-233-7578

Counsel for Canadian Conference of Catholic Bishops

AND TO: Leslie A. Reaume
Canadian Human Rights Commission
344 Slater Street, 8th Floor
Ottawa, Ontario K1A 1E1

Tel: 613-943-9159
Fax: 613-993-3089

Counsel for Canadian Human Rights Commission

AND TO: James L. Lebo, Q.C.
McLennan Ross
1600, 500-3rd Avenue S. W.
Calgary, AB T2P 3C4

Tel: 403-303-9111
Fax: 403-543-9150

Counsel for the Canadian Bar Association

Colin S. Baxter
McCarthy Tétrault LLP
1400-40 Elgin Street
Ottawa, Ontario K1R 5K6

Tel: 613-238-2000
Fax: 613-238-9536

Ottawa agents for the intervener, Canadian Bar Association

AND TO: Ed Morgan
University of Toronto
84 Queen's Park
Toronto, Ontario M5S 2C5

Tel: 416-946-4028
Fax: 416-946-5069

Counsel for Canadian Coalition of Liberal Rabbis for same-sex marriage (the "Coalition") and Rabbi Debra Landsberg, as its nominee

Henry S. Brown, Q.C.
Gowling Lafleur Henderson LLP
2600-160 Elgin St.
P. O. Box 466, Stn "D"
Ottawa, Ontario K1P 1C3

Tel: 613-233-1781
Fax: 613-563-9869

Ottawa agents for Canadian Coalition of Liberal Rabbis for same-sex marriage (the "Coalition") and Rabbi Debra Landsberg, as its nominee

AND TO: Kathleen A. Lahey
86 Beverley Street
Kingston, Ontario K7L 3Y6

Tel: 613-545-0828
Fax: 613-533-6509

Counsel for Dawn Barbeau, Elizabeth Barbeau, Peter Cook, Murray Warren, Jane Eaton Hamilton and Joy Masuhara (B.C. Couples)

Marie-France Major
Lang Michener
300-50 O'Connor Street
Ottawa, Ontario K1P 6L2

Tel: 613-232-7171
Fax: 613-231-3191

Ottawa agents for for Dawn Barbeau, Elizabeth Barbeau, Peter Cook, Murray Warren, Jane Eaton Hamilton and Joy Masuhara (B.C. Couples)

AND TO: Linda M. Plumpton
Torys
79 Wellington Street West
Box 270, TD Centre
Toronto, Ontario M5K 1N2

Tel: 416-595-8175
Fax: 416-595-8695

Counsel for Foundation for Equal Families

Marie-France Major
Lang Michener
300-50 O'Connor Street
Ottawa, Ontario K1P 6L2

Tel: 613-232-7171
Fax: 613-231-3191

Ottawa agents for Foundation for Equal Families

AND TO: Mark M. Frederick
Miller Thomson
2500-20 Queen Street West
Toronto, Ontario M5H 3S1

Tel: 416-595-8175
Fax: 416-595-8695

Counsel for the Church of Jesus Christ of Latter Day Saints ("LDS Church")

Henry S. Brown, Q.C.
Gowling Lafleur Henderson LLP
2600-160 Elgin St.
P. O. Box 466, Stn "D"
Ottawa, Ontario K1P 1C3

Tel: 613-233-1781
Fax: 613-563-9869

Ottawa agents for the intervenor, the Church of Jesus

AND TO:

Christ of Latter Day Saints ("LDS Church")
Lerners LLP
Peter A. Jervis
2400-130 Adelaide Street West
Box 95
Toronto, Ontario M5H 3P5

Tel: 416-867-3076
Fax: 416-867-9192

Counsel for Islamic Society of North America, the Catholic Civil Rights League and the Evangelical Fellowship of Canada, collectively as the Interfaith Coalition on Marriage and Family

Henry S. Brown, Q.C.
Gowling Lafleur Henderson LLP
2600-160 Elgin St.
P. O. Box 466, Stn "D"
Ottawa, Ontario K1P 1C3

Tel: 613-233-1781
Fax: 613-563-9869

Ottawa agents for the intervener Islamic Society of North America, the Catholic Civil Rights League and the Evangelical Fellowship of Canada, collectively as the Interfaith Coalition on Marriage and Family

AND TO:

Miller Thomson
Mark R. Frederick
2500-20 Queen Street West
Toronto, Ontario M5H 3S1

Tel: (416) 595-8175
Fax: (416) 595-8695

Counsel for The Church of Jesus Christ of Latter Day Saints ("LDS Church")

Henry S. Brown, Q.C.
Gowling Lafleur Henderson LLP
2600-160 Elgin St.
P. O. Box 466, Stn "D"
Ottawa, Ontario K1P 1C3

Tel: 613-233-1781
Fax: 613-563-9869

Ottawa agents for The Church of Jesus Christ of Latter Day Saints ("LDS Church")

AND TO:

Miller Thomson
Peter D. Lauwers
Suite 600, 60 Columbia Way
Markham, Ontario L3R 0C9

Tel: (905) 415-6470
Fax: (905) 415-6777

Counsel for Ontario Conference of Catholic Bishops ("OCCB")

Henry S. Brown, Q.C.
Gowling Lafleur Henderson LLP
2600-160 Elgin St.
P. O. Box 466, Stn "D"
Ottawa, Ontario K1P 1C3

Tel: 613-233-1781
Fax: 613-563-9869

Ottawa agents for Ontario Conference of Catholic Bishops ("OCCB")

AND TO:

Bull, Housser & Tupper
Elliott M. Myers, Q.C.
3000-1055 West Georgia Street
Vancouver, British Columbia V6E 3R3

Tel: (604) 687-6575
Fax: (604) 641-4949

Counsel for British Columbia Civil Liberties Association (BCCLA)

Raven, Allen, Cameron, Ballantyne & Yazbeck LLP/s.r.l.
Paul Champ
1600 - 220 Laurier Ave. W
Ottawa, ON K1P 5Z9

Tel: (613) 567-2901
Fax: (613) 567-2921

Ottawa agents for British Columbia Civil Liberties Association (BCCLA)

AND TO: Alarie, Legault, Beauchemin, Paquin, Jobin, Brisson & Philpot
Luc Alaire
1259, rue Berri
10e étage
Montréal, Québec H2L 4C7

Tel: (514) 844-6216
Fax: (514) 844-8129

Counsel for Movement laïque québécois

Bergeron, Gaudreau, Laporte
Richard Gaudreau
167 rue Notre-Dame-de-l'Île
Gatineau, Québec J8X 3T3

Tel: (819) 770-7928
Fax: (819) 770-1424

Ottawa agents for Movement laïque québécois

AND TO: Ontario Human Rights Commission
Cathryn Pike
180 Dundas Street West
8th Floor
Toronto, Ontario M7A 1Z8

Tel: (416) 326-9871
Fax: (416) 326-9867

Counsel for Ontario Human Rights Commission

Brian A. Crane
Gowling Lafleur Henderson LLP
2600-160 Elgin St.
P. O. Box 466, Stn "D"
Ottawa, Ontario K1P 1C3

Tel: 613-232-1781
Fax: 613-563-9869

Ottawa agents for Ontario Human Rights Commission

AND TO: Manitoba Human Rights Commission
Aaron L. Berg
Manitoba Justice
730-415 Broadway Avenue
Winnipeg, Manitoba
R3C 3L6

Tel: (204) 945-2851
Fax: (204) 948-2826

Counsel for Manitoba Human Rights Commission

Brian A. Crane
Gowling Lafleur Henderson LLP
2600-160 Elgin St.
P. O. Box 466, Stn "D"
Ottawa, Ontario K1P 1C3

Tel: 613-232-1781
Fax: 613-563-9869

Ottawa agents for Manitoba Human Rights Commission

AND TO: Paliare, Roland, Rosenberg Rothstein LLP
Andrew K. Lokan
501-250 University Avenue
Toronto, Ontario M5H 3E5

Tel: (416) 646-4300
Fax: (416) 646-4301

Counsel for Canadian Civil Liberties Association

Brian A. Crane
Gowling Lafleur Henderson LLP
2600-160 Elgin St.
P. O. Box 466, Stn "D"
Ottawa, Ontario K1P 1C3

Tel: 613-232-1781
Fax: 613-563-9869

Ottawa agents for Canadian Civil Liberties Association

AND TO: Saint-Pierre, Grenier
Noël Saint-Pierre
460, rue Sainte-Catherine Ouest
Bureau 410
Montréal, Québec H3B 1A7

Tel: (514) 866-5599
Fax: (514) 866-3151

Counsel for Coalition pour le mariage civil des couple de même sexe

Noël & Associés
Sebastien Harvey
111 Rue Champlain
Hull, QC J8X 3R1

Tel: 819-771-7398
Fax: 819-771-5397

Ottawa agents for the intervener, Coalition pour le mariage civil des couple de même sexe

AND TO: Fasken Martineau DuMoulin
D. Geoffrey G. Cowper, Q.C.
2100-1075 Georgia Street West
Vancouver, BC V6E 3G2

Tel: (604) 631-3131
Fax: (604) 632-3232

Counsel for Working Group on Civil Unions

Henry S. Brown, Q.C.
Gowling Lafleur Henderson LLP
2600-160 Elgin St.
P. O. Box 466, Stn "D"
Ottawa, Ontario K1P 1C3

Tel: 613-233-1781
Fax: 613-563-9869

Ottawa agents for Working Group on Civil Unions

AND TO: Barry W. Bussey
1148 King Street East
Oshawa, Ontario L1H 1H8

Tel: (905) 433-0011
Fax: (905) 433-0982

Counsel for Seventh-Day Adventist Church in Canada

Lang Michener
Jeffery W. Beedell
300-50 O'Connor
Ottawa, Ontario K1P 6L2

Tel: (613) 232-7171
Fax: (613) 231-3191

Ottawa agents for Seventh-Day Adventist Church in Canada

AND TO: Smith & Hughes
Kenneth W. Smith
102-4088 Cambie Street
Vancouver, BC V5Z 2X8

Tel: (604) 683-4176
Fax: (604) 683-2621

Counsel for Canadian Unitarian Council

Nelligan O'Brien Payne LLP
Pamela J. MacEachern
1900-66 Slater Street
Ottawa, Ontario K1P 5H1

Tel: (613) 231-8220
Fax: (613) 788-3698

Ottawa agents for Canadian Unitarian Council

AND TO: Martin Dion
1225, de Sologne
Québec, Québec G1H 1L1

Tel: (418) 652-2087
Fax: (418) 652-8085

AND TO:

WeirFoulds LLP
John O'Sullivan
130 King Street West
Suite 1600
The Exchange Tower
P.O. Box 480
Toronto, Ontario M5X 1J5

Tel: (416) 365-1110
Fax: (416) 365-1876

Counsel for United Church of Canada

Lang Michener
Marie-France Major
300-50 O'Connor
Ottawa, Ontario K1P 6L2

Tel: (613) 232-7171
Fax: (613) 231-3191

Ottawa agent for United Church of Canada

AND TO:

Epstein, Cole
Martha A. McCarthy
The Simpson Tower
32nd Floor
401 Bay Street
Toronto, Ontario M5H 2Y4

Tel: (416) 862-9888 x. 241
Fax: (416) 862-2142

Counsel for Hedy Halpern, Colleen Rogers, Michael Leshner, Michael Stark, Michelle Bradshaw, Rebekah Rooney, Aloysius Pittman, Thomas Allworth, Dawn Onishenko, Julie Erbland, Carolyn Rowe, Caroline Moffat, Barbara McDowell, Gail Donnelly, Alison Kemper, Joyce Barnett ("Ontario Couples") and Michael Hendricks, Rene LeBoeuf ("Quebec Couples")

Henry S. Brown, Q.C.
Gowling Lafleur Henderson LLP
2600-160 Elgin St.
P. O. Box 466, Stn "D"
Ottawa, Ontario K1P 1C3

Tel: 613-233-1781
Fax: 613-563-9869

Ottawa agents for Hedy Halpern, Colleen Rogers, Michael Leshner, Michael Stark, Michelle Bradshaw, Rebekah Rooney, Aloysius Pittman, Thomas Allworth, Dawn Onishenko, Julie Erbland, Carolyn Rowe, Caroline Moffat, Barbara McDowell, Gail Donnelly, Alison Kemper, Joyce Barnett ("Ontario Couples") and Michael Hendricks, Rene LeBoeuf ("Quebec Couples")

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TABLE OF CONTENTS TO THE FACTUM OF THE BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION

PART 1 - STATEMENT OF FACTS

1. The Intervener, the British Columbia Civil Liberties Association ("BCCLA"), agrees with the statement of facts set out in the Attorney General of Canada's ("AGC") factum.

PART 2 - ISSUES ON APPEAL

2. The issues on appeal are the questions referred to this Court by the Governor General in Council in the matter of a Reference 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 July 16, 2003, and as amended by Order in Council P.C. 2004-28, dated January 26, 2004.

PART 3 - ARGUMENT

I. Introduction – Questions Addressed by the BCCLA

3. The BCCLA agrees with the position advanced by the AGC with respect to the first two questions of the Reference and does not advance any further argument on these points. In addition to addressing questions three and four of the Reference, the BCCLA will address the issue raised by the Working Group on Civil Unions, namely, whether a relationship termed "civil union" would comply with the *Charter* as, in effect, a substitute for same sex marriage.[1]

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[1] Although this was not a question that was referred to the Court, it is the only issue raised by the Working Group, which was granted to leave to intervene. The BCCLA therefore presumes that the Court is willing to entertain argument on the point.

4. With respect to the fourth question, the BCCLA adopts the submissions of the AGC and the reasoning of the Courts of Appeal in all three appeals concerning the definition of marriage's infringement of section 15. The BCCLA's submissions will be almost exclusively limited to section 1.

5. The BCCLA proposes to address the fourth question before the third, since it is the central issue.

II. Question 4: Is the opposite-sex requirement for marriage for civil purposes, as established by the common law, consistent with the Canadian Charter of Rights and Freedoms*? If not, in what particular or particulars and to what extent?*

6. As stated above, the BCCLA does not intend to argue whether the common law definition of marriage violates section 15. It adopts the AGC's submissions and the reasoning of the Courts of Appeal on this issue, and limits its submissions on this question to the applicability and effect of section 1. The BCCLA's submissions with respect to section 1 are summarised as follows:

(a) The Court should not undertake a section 1 analysis when a common law rule is found to infringe section 15(1) of the *Charter*, because any singling out of a disadvantaged minority so as to diminish its members' essential human dignity, which is not at least authorized by legislation, cannot be demonstrably justifiable in a free and democratic society. Where a common law rule is in conflict with section 15, the Court should simply change the rule to conform with section 15.

(b) In the alternative, if a section 1 analysis need be undertaken with respect to a common law rule that breaches section 15(1), *Oakes* ought not to be the test employed. This is especially the case where the origin of the common law rule is so distant that its original purpose cannot be discerned, as in this case. An alternative, more stringent, standard is proposed. The common law

definition of marriage does not meet this standard, and, in any event, does not even meet the *Oakes* standard.

R. v. *Oakes*, [1986] 1 S.C.R. 103 at 138-39, 26 D.L.R. (4th) 200 [*Oakes*].

(a) *Approaching Section 1 and Section 15 With Respect to a Common Law Rule*

7. Section 15 reflects the delicate balance between government involvement in upholding moral values while leaving room for development of alternative conceptions of morality.

8. The *Charter* does not impose specific final ends or ways of life for its citizens. This is evident in the Court's articulation of the purpose of section 15 of the *Charter*, which is to permit individual development and pursuit of personal goals that are deemed as worthy as other goals of concern, respect, and consideration. The essence of the section's purpose – to safeguard human dignity – recognizes equality as essential to realize personal autonomy and self-determination. Canadians must be free to "pursue their and their families' hopes and expectations of vocational and personal development" without state interference.

Law v. *Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497 at paras. 43 and 53, 170 D.L.R. (4th) 1.

9. The *Charter* also recognizes that in a democracy, majoritarian views of moral or social norms can be the catalysts for depriving members of certain groups of their dignity, autonomy, and opportunity for development. It recognizes that in a democracy this deprivation might sometimes be justifiable, but from its itemization of protected categories of persons it is clear that such distinctions are offensive.

10. It is imperative when dealing with the interplay between section 1 and section 15 in the context of a common law rule or definition that particular regard be given to the words "democratic society" when considering justification.

(b) A Section 1 Analysis is Not Necessary

11. The applicability of section 1 to a common law rule found to violate a *Charter* right is presently unsettled. This case presents the Court with an opportunity to clarify the law.

12. In *Swain*, Lamer J stated, with respect to a rule that violated section 7:

> If a new common law rule could be enunciated which would not interfere with an accused person's right to have control over the conduct of his or her defence, I can see no conceptual problem with the Court's simply enunciating such a rule to take the place of the old rule, without considering whether the old rule could nonetheless be upheld under s. 1 of the *Charter*. Given that the common law rule was fashioned by judges and not by Parliament or a legislature, judicial deference to elected bodies is not an issue. If it is possible to reformulate a common law rule so that it will not conflict with the principles of fundamental justice, such a reformulation should be undertaken.

However, he went on to apply the *Oakes* test, since it had been fully argued in the case and because the *Oakes* test provided a familiar analytical structure.

R. v. *Swain*, [1991] 1 S.C.R. 933 at 978, 125 N.R. 1 [*Swain* cited to S.C.R.].

13. In *Daviault*, Cory J. (L'Heureux-Dube, McLachlin and Iacobucci concurring) quoted the above passage from Lamer J. and stated : "This then is the approach that should be adopted when a common law principle is found to infringe the Charter." The *Oakes* test was not employed. The case therefore arguably stands as authority for the proposition that an *Oakes* analysis is not to be employed where a common law rule is involved, at least one which violates section 11(d), which was the section in issue in *Daviault*.

R. v. *Daviault*, [1994] 3 S.C.R. 63 at 94, 118 D.L.R. (4^{th}) 469.

14. The later decisions of *Hill* and *Dagenais* dealt with the application of section 1 to the common law in private litigation. But with respect to government action, *Hill* appears to suggest that the government should be permitted to justify a common law rule that

breaches the *Charter*. Cory J (La Forest, Gonthier, McLachlin and Major JJ concurring) said:

> In the ordinary situation, where government action is said to violate a *Charter* right, it is appropriate that the government undertake the justification for the impugned statute or common law rule.
>
> *Dagenais* v. *Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835, 120 D.L.R. (4th) 12.
>
> *Hill* v. *Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130 at para. 98, 126 D.L.R. (4th) 129.

15. Whatever might be the role of section 1 to violations of sections of the *Charter* apart from section 15, the BCCLA submits that it has no applicability where the common law is in violation of section 15(1).

16. Section 15(1) is only engaged when the impact of a distinction deprives members of a disadvantaged group of the law's protection or benefit in a way which negatively affects their essential human dignity and personhood. When this standard is kept in mind, it follows that an unequal application of the law, in breach of section 15, could never be demonstrably justified in a free and democratic society without legislative authorization. If society would tolerate such discriminatory law at all, it must be enacted by an elected legislative body responding to a pressing concern in a balanced, minimally intrusive way. The legislature would then face both judicial review and public scrutiny of its decision.

17. While there is no hierarchy of Charter rights, most rights guaranteed in the Constitution are in a sense conditional. For example, any free and democratic society would perceive freedom of expression as less than an absolute right. Most rights, while expressed in absolute terms, are understood to require a balancing under section 1 to accord them their proper nuance and contour.

18. But this is not universally so. In considering this Court's jurisprudence on section 7, Cory, J., in *Heywood*, said:

> This Court has expressed doubt about whether a violation of the right to life, liberty or security of the person which is not in accordance with the principles of fundamental justice can ever be justified, except perhaps in times of war or national emergencies: *Re B.C. Motor Vehicle Act*, *supra*, at p. 518. In a case where the violation of the principles of fundamental justice is as a result of overbreadth, it is even more difficult to see how the limit can be justified. Overbroad legislation which infringes s. 7 of the *Charter* would appear to be incapable of passing the minimal impairment branch of the s. 1 analysis.

R. v. *Heywood* [1994] 3 S.C.R. 761 at para 69, 120 D.L.R. (4th) 348.
Godbout v. *Longueuil (City)*, [1995] 3 S.C.R. 844 at 909, 152 D.L.R. (4th) 577.

19. Section 15(1) of the *Charter* has a unique role both within the constitution and in Canadian society. Its purpose is not to permit a reasonable level of inequality. In the same way that 'fundamental justice' can be said to be a minimum, rather than approximate, standard of government conduct in a free democracy, so too can the preservation of basic standards of equality.

20. The position advanced here accords with the special place in Canada's democratic system afforded to the protection of minority groups, which this Court recognized as one of the fundamental principles of the Canadian constitutional order in the *Secession Reference.*

Reference Re: Secession of Quebec, [1998] 2 S.C.R. 217, 161 D.L.R. (4th) 385 at para. 80.

21. In paragraph 10 above we referred to the particular significance which should be paid to the words "democratic society" from section 1 in this context. By definition, common law is established by the court. It does not accord with democratic ideals to allow the courts to perform a section 1 analysis on rules made by itself.

22. When faced with a rule that offends the essential dignity of members of protected or analogous groups, the BCCLA submits that the Court should refine the rule as much as necessary so that section 15 is no longer offended. Anything less cannot be justified. In the present context, this analysis leads inescapably to the conclusion that the common law definition of marriage must be changed to include same-sex couples.

(c) *If a Section 1 Analysis of Common Law Rules is Necessary, Oakes is Not the Appropriate Test*

23. In the alternative, if the Court decides to apply section 1 in this case, the BCCLA submits that the *Oakes* test is not the appropriate section 1 test to apply to the common law in general, and in particular to the common law definition of marriage.

24. The *Oakes* test was formulated specifically for a legislative context. The first part of the test focuses on the objective of the impugned law. As difficult as it might be to determine the objective of a legislative measure, this pales in comparison to the difficulty in divining the objective of a common law rule. Legislation arises out of a particular social and historical context. It arises at a particular time, and often in response to particular events. The same is not generally true for the common law. The common law may arise out of habit and social custom. It is informed by norms of social interaction that may not be subject to close examination as to their purpose. Moreover, in the case of common law rules of long-standing tradition, their objective may be shrouded in the mists of time. Further, in response to evolving social norms, the objective, such as it is, of a common law rule may shift over time, undergoing many subtle permutations.

25. In the present case, the common law definition of marriage is a rule that has its origins in ancient, Western, social norms. As such, it is difficult to determine its original purpose, as is the requirement in the first stage of the *Oakes* test. Further, even if the Court could determine its original purpose, it is irrelevant. The *Oakes* test is premised on the belief that the goals and concerns of Parliament must be accorded sufficient

respect, as they represent an attempt to balance social goals in a democratic society. There has been no such measured and balanced approach to the formulation of the common law definition of marriage; rather, it exists as a reflection of the historical norm, manifested through a multitude of judicial decisions but with reference only to the particular facts of each case. As a result, the definition of marriage is offered almost as tautology – marriage is the union of a man and a woman, because that is what it has always been.

26. The second stage of the *Oakes* analysis, the proportionality test, likewise was developed to accord the appropriate deference to legislative objectives.

27. In the present case, the impugned law neither has a clear objective in the sense anticipated by the *Oakes* test, nor is its purpose, if one exists, rational. It is not founded upon a careful consideration of both those included and excluded from its application; rather, it is founded upon social custom. The case which is recognised as defining marriage as a heterosexual institution, *Hyde*, makes this clear. The court in that case stated:

> I conceive that marriage, as *understood* in *Christendom*, may for this purpose be defined as the voluntary union for life of one man and one woman, to the exclusion of all others.

And:

> Our whole law of marriage assumes this; and it is important to observe that we regard it as a wholly different thing, a different status from Turkish or other marriages among infidel nations, because we clearly should never recognise the plurality of wives, and consequent validity of second marriages, standing the first, which second marriages the laws of those countries authorize and validate. *This cannot be put on any rational ground*, except our holding the infidel marriage to be something different from the Christian, and our also holding the Christian marriage to be the same everywhere.
>
> (emphasis added)
>
> *Hyde* v. *Hyde and Woodmansee* (1866), L.R. 1 P. & D. 130 at 133 and 136.

28. Should this Court decide that it should apply section 1 to a common law rule that offends section 15(1), the BCCLA submits that the Court should formulate a new approach to its scrutiny of the justification for a discriminatory law; an approach that recognizes the unique nature of the common law, and its differences from legislative law. This approach should be less deferential, since, unlike most legislation, the common law does not have a rational, balanced basis, and is not the product of the legislature. Such an approach should recognize that the purpose, if any, of the common law should be a factor, but should also recognize the context of that purpose, and the manner in which social ideas are translated into common law rules. This latter aspect means that the common law may contain fossils of prejudices unacceptable in our modern liberal democracy.

(d) Proposed Test

Stage One

29. The BCCLA submits that rather than engage in an examination of a common law rule's objective, it is more appropriate to look at its *present* beneficial *effects*.

30. With this in mind, the first stage of an appropriate test, modifying *Oakes*, would be determine the present beneficial effects of the law, and whether these effects address a concern that is, today, pressing and substantial.

Stage Two: Reasonable alternatives

31. In the second stage of the traditional *Oakes* approach to section 1, the Court determines whether the objectives of the impugned legislation are appropriate to the means chosen to further those objectives, which infringe the *Charter* right. This proportionality test was developed to accord the appropriate deference to legislative objectives. The deferential approach the courts take to legislative objectives recognizes the high value placed on the democratic process.

32. In the case of a *Charter* challenge to the common law, the Courts owe no such deference. As stated by Chief Justice Lamer (as he then was), "Given that the common law rule was fashioned by judges and not by Parliament or a legislature, judicial deference to elected bodies is not an issue." This displaces much of the rationale for the second stage of the *Oakes* test.

Swain, *supra* at 978.

33. When the common law infringes a constitutionally guaranteed right or freedom by discriminating on a prohibited ground, the Court has a duty to subject it to stricter scrutiny than it would afford a law which was enacted through a process of democratic debate.

34. In American jurisprudence, the general rule is that legislation is presumed to be valid, and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest. But a stricter test is applied to a law that infringes the Equal Protection Clause of the Fourteenth Amendment, which guarantees equal protection of the laws, and which is analogous to our section 15, although it has a much broader application. The U.S. courts have held that, when a statute makes a distinction based on a "suspect" ground (i.e. race, alienage, national origin, or gender), the court applies a "strict scrutiny" test to the legislation.

> These factors are so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy – a view that those in the burdened class are not as worthy or deserving as others. For these reasons and because such discrimination is unlikely to be soon rectified by legislative means, these laws are subjected to strict scrutiny and will be sustained only if they are suitably tailored to serve a compelling state interest.

City of Cleburne, Texas, et al. v. *Cleburne Living Centre, Inc., et al.*, 87 L. Ed. 2d 313 at 320, 473 U.S. 432 (1985).

Goodridge v. *Dep't of Pub. Health* (2003), 440 Mass. 309 at 330, 798 N.E.2d 941 (Sup. J. Ct. 2003) [*Goodridge* cited to Mass.]

35. The suspect grounds identified in the American jurisprudence are equivalent or analogous to the grounds enumerated in section 15. Applying the same analysis in Canada, sexual orientation would be a suspect classification which would trigger the strictest degree of scrutiny of a law that infringes a fundamental right.

36. The judgment of Justice Greaney in the *Goodridge* case, where the Supreme Judicial Court of Massachusetts scrutinized Massachusetts's ban on same-sex marriage under that State's Constitution, applied the strict scrutiny test to the impugned law after finding that the law infringed a fundamental right based on a sex-based classification. In those circumstances, under this test, the ban on same-sex marriage would be unjustified unless the State or person relying on the common law rule where government action is involved could demonstrate that the law in question had a compelling beneficial effect that could be accomplished *in no other reasonable manner.* The BCCLA submits that a similar test should be applied where a common law rule violates section 15.

Goodridge, *supra* at 347.

37. This proposed test has an aspect similar to the minimal impairment aspect of the *Oakes* test, but is stricter. Under *Oakes*, if an alternative to an impugned law impairs the *Charter* right less than the existing law does, but the existing law also qualifies as a minimal impairment, the law will pass the minimal impairment test. Whereas *Oakes* permits a spectrum of impairment that might still be considered "minimal", the "strict scrutiny" test the BCCLA advocates here demands the very least impairing alternative, or, if it exists, an alternative that does not impair a *Charter* right at all.

38. The proposed second branch does not incorporate the aspect of the *Oakes* test which weighs the salutary effects of the infringing law against its deleterious effects. When the deleterious effect is a section 15(1) breach, i.e. the diminishment, dehumanizing or humiliation of a disadvantaged minority, the Court should not decide, in an inevitably subjective way, that such an infringement is somehow worthwhile.

(e) Analysis of the Same-Sex Marriage Bar Under the Proposed Test

39. The BCCLA submits that the bar to same-sex marriage contained in the common law definition of marriage is not justified when this proposed section 1 analysis is applied.

The law has present beneficial effects that address a concern that is, today, pressing and substantial

40. The first stage of the proposed test is whether the law has present beneficial effects that address a current pressing and substantial concern.

41. The "objectives" of marriage as it is currently defined have been discussed by the lower courts in the three Canadian same-sex marriage cases. It was argued in these cases that the objectives include the following:

(i) uniting the opposite sexes;
(ii) encouraging procreation;
(iii) companionship;
(iv) upholding the social significance of marriage (i.e. preventing the institution of marriage from being devalued or undermined); and
(v) creating the ideal environment in which to raise children.

For the purposes of the BCCLA's argument, these objectives will be adopted as the purported present beneficial effects of marriage.

42. Under the first branch of the test, the Court must determine whether there is, in the present day, a beneficial effect that results from the restriction of marriage to opposite-sex couples under the common law, and if this beneficial effect addresses a concern that is pressing and substantial. In other words, whether it is important enough to justify infringing a Charter right.

(i) Uniting the opposite sexes

43. The BCCLA adopts the reasoning on this point of the Court in *Halpern*, which correctly determined that this purpose is contrary to the values of a free and democratic society and cannot be considered to be pressing and substantial. This is because it blatantly favours heterosexual relationships over same-sex relationships, implying that the latter is less important or worthy of respect, which demeans the dignity of same-sex couples.

Halpern v. *Canada (Attorney General)* (2003), 65 O.R. (3d) 161 at para. 119, 225 D.L.R. (4th) 529 (C.A.) [*Halpern*].

(ii) procreation

44. The BCCLA submits that encouraging procreation and childrearing cannot be regarded as the *sine qua non* of marriage, heterosexual or otherwise. Although many children are born into marriages, others are not. Procreation is encouraged mainly by the desire of individuals and couples to raise a family, an urge to which marriage may or may not be central. Moreover, today children are born to and adopted by same-sex couples, unmarried opposite couples, or single parent households. Couples who are incapable of procreation, or who choose not to have children, also may marry. Neither marriage nor procreation is a necessary or sufficient precondition of the other. And of course, the right to marry is extended to some couples, such as the elderly, who are unable to have children under any circumstances. This is tacit recognition of the fact that the institution's value is entirely separate from the social utility of childbearing.

(iii) companionship

45. Precisely because the beneficial effect of companionship is an important effect of marriage, it is not logically connected with maintaining the current, restrictive definition of marriage. To the extent that marriage promotes companionship, the broadening of the marriage franchise can only increase this effect.

(iv) upholding the social significance of marriage (i.e. preventing the institution of marriage from being devalued or undermined)

46. It may be argued that a beneficial effect of restricting marriage to opposite-sex couples is to uphold the value and social significance of the institution of marriage. However, there is no evidence to support the contention that marriage would be devalued by extending it to same-sex couples. As noted in *Halpern*, same-sex couples "are not seeking to abolish the institution of marriage; they are seeking access to it".

Halpern, *supra* at para. 129.

47. The 'devaluation' argument is particulary distasteful because it treats human rights as scarce commodities, which have value to their possessors only to the extent that they are denied to others. This is at best an impoverished view of society, at worst a counsel of despair. In the BCCLA's submission, the effect of rights allocation is exactly the opposite: they become, in fact, *more* valuable the more widely and justly that they are distributed.

(v) creating the ideal environment in which to raise children

48. The argument that a beneficial effect of opposite-sex marriage is to provide the optimal environment in which to raise children is likewise unsupportable. If marriage does indeed improve the environment in which children are raised, then it makes sense to include more families under its umbrella, not fewer. It is a fact that many same-sex couples have children. As noted in *Halpern* and *Goodridge*, there are many tangible and intangible benefits flowing both to married couples and their children – benefits to which children of same-sex couples have not previously had access.

Halpern, *supra* at paras. 107 and 136.
Goodridge, supra at 322.

49. In conclusion on the first stage of the section 1 analysis, the BCCLA submits that none of the purported present beneficial effects of heterosexual marriage, even if they were considered valid social or governmental objectives generally, are properly

connected to the *restriction* of marriage to opposite-sex couples. They therefore cannot be considered to be beneficial effects of the impugned rule.

There exists a reasonable alternative to the rule, whereby the present beneficial effects of the rule would not be detrimentally affected

50. In the alternative, should the Court find that there is a present beneficial effect sufficiently important to pass the first branch of the test, the BCCLA submits that the restrictive definition of marriage would fail the second branch.

51. Under the second branch of the proposed test, an impugned common law rule will not be justified under section 1 if there exists a reasonable alternative to the rule, whereby the present beneficial effects of the rule would not be detrimentally affected.

52. The alternative to the current common law definition of marriage is a definition that does not restrict marriage to opposite-sex couples, but expands to include same-sex couples. This inclusive definition would not detrimentally affect the purported beneficial effects of promoting uniting the opposite sexes, encouraging procreation, or companionship, because permitting same-sex couples to marry would have no effect on the ability of individuals of the opposite sex to unite, would not prevent or inhibit procreation, and would in fact promote companionship.

53. Likewise, there is no evidence that the alternative would detrimentally affect marriage's social significance. Same-sex couples want access to the institution of marriage precisely because of its social significance. They are interested in attaining the socially significant status of a married couple, not in devaluing that institution. Their very interest is evidence that marriage would continue to be socially significant, and reinforces the importance of marriage to individuals and communities. Throughout the ages, marriage has undergone many significant changes – the proliferation of interfaith marriages, the repeal of miscegenation laws, and so forth. Each, like same-sex marriage, was once decried as tearing at the very moral fabric of society; each has in the end not served to diminish marriage's value or status in our society.

Halpern v. *Canada (A.G.)* (2002), 60 O.R. (3d) 321 at para. 49, 215 D.L.R. (4th) 223 (Sup. Ct. of Justice) [*Halpern 2002 decision*]

54. Finally, implementing an inclusive definition of marriage would not detrimentally affect the last purported beneficial effect, which is to foster the ideal environment in which to raise children. On the contrary, by making available to children of same-sex partnerships the myriad tangible and intangible benefits that flow from marriage, the alternative would further this beneficial effect.

55. Since these beneficial effects would continue if the rule restricting marriage to opposite-sex couples was expanded to include same-sex couples, clearly there is a reasonable alternative to the present law that would not impinge on these effects and would not infringe on same-sex couples' *Charter* rights. As such, the inevitable conclusion is that the current common law definition of marriage, which restricts the institution to opposite-sex couples, is not justified under section 1. The appropriate remedy is to modify the definition to remove the requirement that couples who marry be of the opposite sex.

56. This analysis is entirely consistent with the broader philosophical framework of the *Charter* as an umbrella under which individuals can strive for self-realization free from the imposition by the state of a comprehensive moral order. Maintaining the exclusively heterosexual definition of marriage would represent an official rejection of ways of being that have been recognized as being entitled to protection. It would be an attempt by public authorities to impose a certain comprehensive moral vision of marriage, family, and companionship. This is fundamentally inconsistent with the values of equality, pluralism, and respect for the dignity of persons that underlie the *Charter.*

57. It is likely that the current definition of marriage would not be justifiable under the *Oakes* test, using the same arguments advanced here with respect to the proposed stricter test. Nevertheless, It is easy to conceive of situations where the *Oakes* test will

be met but the stricter test would not, and it is submitted that the Court should make it clear that in this situation, the *Oakes* test should not be employed.

III. ***Question 3: Does the freedom of religion guaranteed by paragraph 2(a) of the Canadian Charter of Rights and Freedoms protect religious officials from being compelled to perform a marriage between two persons of the same sex that is contrary to their religious beliefs?***

58. As noted above, the purpose of the *Charter* and the principles underlying our modern liberal democracy require that the plurality of opinion and belief about same-sex marriage be respected. Thus, while same-sex couples should not be excluded from the institution of marriage because one group's conception of morality does not include same-sex marriage, the principles prohibiting the government from imposing one conception of morality on all Canadians also mandate that religious officials must be entitled to their beliefs, even if those beliefs prevent them from marrying same-sex couples.

59. Secular society does not require that religious officials be barred from performing marriages. Our aspirations for an equal society have never objected to a refusal, for instance, of a Catholic priest to marry a Protestant or Jewish couple. Religions are, by their nature, discriminatory, and to deny them the right to be so in the context of choosing which marriages to solemnize would be to effectively bar them from performing licensed marriage. Such a solution seems neither necessary (given the broad availability of marriage officials of every religious and secular stripe), nor desirable.

60. It seems apparent that it is only through this paradigm – in which marriage is extended to same sex couples, but church officials are not required to solemnize marriages which their religion does not condone – that the *Charter*'s aspirations to provide a shelter within which citizens can develop their own comprehensive morality can be realized.

IV. Civil Unions are not an acceptable alternative to changing the common law definition of marriage to permit same-sex couples to marry

61. The Working Group on Civil Unions has been given leave to argue that a relationship termed "Civil Union" would comply with *Charter* as, in effect, a substitute for same sex marriage. The BCCLA submits that this is not an acceptable alternative to extending the definition of marriage to include same-sex couples. The issue is addressed here without the benefit of the Coalition's factum on the issue.[2]

62. Creating a separate category of relationships, which extends the benefits and protections available to married couples to those who enter a 'civil union', does not change the fact that maintaining marriage as the sole preserve of opposite-sex couples is unconstitutional. To limit same-sex couples to entering 'civil union', rather than extend the definition of marriage to allow them to marry, continues to maintain a distinction between same- and opposite-sex couples which violates the essential dignity of same-sex couples.

63. Offering same-sex couples the 'civil union' "alternative" to marriage circumvents the fundamental issue, which is that same-sex couples are not treated equally to their opposite-sex counterparts. It also presupposes that a "civil union" can duplicate the many intangible benefits that flow from participation in marriage, which, as the record from the courts below demonstrate, has a long and revered tradition, and is of fundamental importance in our society. As Mr. Justice LaForme remarked, this issue is about "equal participation in the activity, expression, security, and integrity of marriage. Any 'alternative' to marriage ... simply offers the insult of formal equivalency without the *Charter* promise of substantive equality."

Halpern 2002 decision at para. 282.

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[2] Interveners' factums were ordered to be filed simultaneously, with no right of reply granted.

64. It was of no comfort to African-Americans in 1956 Birmingham, Alabama, to be told that the back of the bus was just as comfortable as the front, that it cost no more, that it travelled as quickly. As history has demonstrated again and again, discrimination that promises 'separate but equal' facilities for privileged and non-privileged groups delivers on only the first half of that promise. Separate in such cases *means* unequal.

PART 4 - NATURE OF ORDER SOUGHT

65. The BCCLA submits that the Reference questions be answered as follows:

(a) Question 1: Yes
(b) Question 2: Yes
(c) Question 3: Yes
(d) Question 4: No

66. If the Court is disposed to consider the issue of whether a 'civil union' is an alternative to same-sex marriage which is consistent with the *Charter*, the BCCLA submits that the issue be answered in the negative.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated at Vancouver, British Columbia, May 7, 2004.

Elliott M. Myers, Q.C.
Counsel for the Intervener
British Columbia Civil Liberties Association

Craig E. Jones, Esq.
Counsel for the Intervener
British Columbia Civil Liberties Association

PART 5 - LIST OF AUTHORITIES