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

AND 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 16 DAY OF JULY 2003.

FACTUM
of
THE ONTARIO AND QUÉBEC COUPLES

HEDY HALPERN and COLLEEN ROGERS, MICHAEL LESHNER and MICHAEL STARK, ALOYSIUS PITTMAN and THOMAS ALLWORTH, DAWN ONISHENKO and JULIE ERBLAND, CAROLYN ROWE and CAROLYN MOFFAT, BARBARA MCDOWELL and GAIL DONNELLY, ALISON KEMPER and JOYCE BARNETT ("ONTARIO COUPLES") and MICHAEL HENDRICKS and RENÉ LEBOEUF ("QUÉBEC COUPLE")

> In all respects, we feel a new sense of equal dignity and acceptance in our community. We feel an intangible sense of gain: we are theoretically fully equal persons. We have the same fundamental rights as other citizens, including the right to choose marriage. Our personal choices have been respected and validated by the government. We feel ... that our relationship now has equal respect and consideration.
>
> Affidavit of Alison Kemper, Couples' Updated Evidence, Tab 1

Martha McCarthy and Joanna Radbord
EPSTEIN COLE LLP
401 Bay Street, Suite 3200
Toronto, Ontario
M5H 2Y4

Tel: (416) 862-9888
Fax: (416) 862-2142
(e) martha@epsteincole.com

Counsel for the Ontario & Québec Couples

Eduard J. Van Bemmel
GOWLING LAFLEUR HENDERSON LLP
160 Elgin Street, Suite 2600
Ottawa, Ontario
K1P 1C3

Tel: (613) 786-0212
Fax: (613) 788-3500
(e) ed.vanbemmel@gowlings.com

Ottawa agent for the Ontario & Québec Couples

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Eduard J. Van Bemmel
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160 Elgin Street, Suite 2600
Ottawa, Ontario
K1P 1C3

Tel: (613) 786-0212
Fax: (613) 788-3500
(e) ed.vanbemmel@gowlings.com

Ottawa agent for the Ontario & Québec Couples

Peter Hogg and Michael Morris
Department of Justice Canada
130 King Street West
Suite 3400, Box 36
Toronto, Ontario M5X 1K6

Tel: (416) 973-9704
Fax: (416) 952-0298
(e) michael.morris@justice.gc.ca

Counsel for the Attorney General of Canada

Graham Garton
Department of Justice Canada
Bank of Canada Building, East Tower
234 Wellington Street, 12th floor
Ottawa, Ontario K1A 0H8

Tel: (613) 957-4842
Fax: (613) 954-1920
(e) graham.garton@justice.gc.ca

Ottawa Agent for the Attorney General of Canada

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PART I – STATEMENT OF FACTS

Overview

1. This Reference is Canada's *Loving v. Virginia.* It asks whether a class of persons is entitled to equal participation in one of our society's most significant institutions, the institution of marriage. It raises a simple question, yet a monumental one. While this decision will be historic, its answer will later appear equally obvious: the Constitution does not permit the exclusion of persons from a basic aspect of citizenship on the basis of skin colour or sexual orientation. Same-sex couples must be free to choose civil marriage.

Summary of the Facts

Adjudicative Facts

2. The Couples adopt the summary of the *Halpern* and *Hendricks* litigation found at pages 2-3 of the AGC factum, except to add that the Québec appeal was dismissed on March 19, 2004. The Court held that the other parties did not have sufficient interest to maintain an appeal and held that the issue of the common law definition of marriage was *res judicata*.

3. The "Ontario Couples" are Hedy and Colleen, Mike and Michael, Dawn and Julie, Al and Tom, C.J. and Carolyn, Barb and Gail, and Alison and Joyce. The "Québec Couple" is Michael and René. The Couples are all ordinary men and women who have had the good fortune to fall in love. Some have already shared their lives over 20 years, others more than 30. They include a nurse, a hotel receptionist, a Crown Attorney, a psychotherapist, and a church deacon. Some are Jewish, some Christian. They hail from across Canada – from Marystown, Ile du Grand Calumet, Kingston, Fredericton, and Saskatoon. Four of the couples parent children together. Two hope to rear children together in the coming years. The Couples are participating in this Reference because they had a very ordinary, usually taken-for-granted wish: to marry the person they love.

4. After years of litigation, most of the Couples have now finally and joyfully celebrated legal marriages with their families and friends. No matter how long-standing and loving their relationships, civil marriage has changed their lives for the better. It has changed their families and their children's lives for the better. It has changed Canada for the better. The Couples are proud to be Canadian. They are proud that, through our *Charter*, their rights and those of all gay and lesbian Canadians have been vindicated.

5. The Couples have filed some updated affidavits describing in their own words the effect that marriage has had upon them, their children, their families and friends. This evidence is perhaps the most compelling proof, of all of the material filed on this Reference, that the decisions below were correct. The Couples claimed, and the courts found, that the

denial of equal marriage was an affront to their dignity. Now they say, with poignant and real examples from their lived realities, that equal marriage has made them feel authentic, respected, and finally, like fully human persons. It is submitted that no amount of legal analysis can convey the powerful conclusions that arise from the Couples' own evidence.

> My relationship to Dawn has been forever changed because of our ability to marry. Our relationship is no longer a relationship that some people do not have to regard as legitimate or valid because it is a marriage that is legal. Our love is real.
>
> Affidavit of Julie Erbland, Couples' Updated Evidence, Tab 4 at para. 1

6. The AGC once argued that it was "obvious" that same-sex couples were excluded from marriage. Now, the AGC supports equality. Still, the AGC waits to pass its proposed legislation and asks whether the old common law rule might be constitutional. In the media, the AGC has taken the position that provinces ought to issue marriage licenses immediately, but it will not consent to mandamus orders for the issuance of marriage licenses until after the Reference. The government continues to discuss "alternatives" to equal marriage, and it is entirely possible that the proposed legislation will never be passed.

> Affidavit of Michael Leshner, Couples' Updated Evidence, Tab 7; Affidavit of Dr. Rayside, Electronic Record, at 575.

7. While the Couples are grateful that the government now agrees that equal marriage is required, they are members of a minority group that has been ignored by legislatures and Parliament for over thirty years. While government officials may forget the years of outright hostility and flagrant avoidance shown to gays and lesbians by lawmakers, the Couples lived in the atmosphere created by that government-sanctioned exclusion. They cannot assume that Parliament will "do the right thing" because this government has now said it will. The process of not appealing, allowing thousands of marriages to occur, initiating the Reference, and then later adding the fourth question, reinforces what history has taught the Couples: only the courts can be relied upon to provide meaningful equality to their particular minority group. Politicians have repeatedly refused to do so. The Couples therefore seek guidance from this Court that will ensure that all gays and lesbians share the freedom to marry, without further delay, and regardless of whatever steps the politicians take next.

> Affidavit of Michael Leshner, Couples' Updated Evidence, Tab 7; Affidavit of Dr. Rayside, Electronic Record, at 575.

Legislative Facts

8. The Couples have led the evidence of 19 experts. Schedule "A" is a list of their professional designations, and the subject matter of their evidence. All are highly regarded scholars with unassailable credentials. In contrast, much of the anti-marriage evidence is

pure editorial commentary. Their so-called experts offer wild speculation, irrelevant fear-mongering and legal argument, and go well beyond the scope of their qualifications.

PART II - POINTS IN ISSUE

9. The AGC asks four questions on this Reference. All have been subject to final judgments from which the government did not seek leave to appeal. The courts of British Columbia, Ontario and Québec held that the federal government has the jurisdiction to make laws regarding the capacity of same-sex couples to marry; rejected the frozen rights argument; found that an inclusive definition of marriage was consistent with the *Charter*; held that religious officials will not be required to perform a marriage contrary to their religious beliefs; and found that the opposite-sex requirement for marriage is not consistent with the *Charter*. It would be an abuse of process to re-litigate these issues. "'The orderly and functional administration of justice' requires that court orders be considered final and binding unless they are reversed on appeal." The Reference questions should be answered in light of the principles of *res judicata*, collateral attack, and abuse of process, as issues already subject to final judgments that are not open to re-litigation. After thousands of same-sex couples have already been married, an opinion of this Court that did not accord with the Court of Appeal decisions in *Halpern, Hendricks* and *EGALE* would undermine the integrity of the judicial process. It would bring the judicial system into disrepute.[1]

R. v. Litchfield [1993] 4 S.C.R. 333 at 349; *Toronto (City) v. Canadian Union of Public Employees, Local 79 (C.U.P.E.)*, [2003] 3 S.C.R. 77 at paras. 35, 37, 51; *Ligue catholique pour les droits de l'homme c. Hendricks,* [2004] J.Q. No. 2593 (Q.C.A.) at paras. 22 –23; *Halpern v. Canada (Attorney General)* (2003), 65 O.R. (3d) 161 (O.C.A.) at paras. 41, 57-142; *EGALE Canada Inc. v. Canada (Attorney General)* (2003), 225 D.L.R. (4th) 472 (B.C.C.A.) at paras. 81-100, 130, 133; *Hendricks v. Quebec (Attorney General)*, [2002] J.Q. No. 3816 (S.C.Q.) at paras. 120-122, 125-184; Affidavit of Dr. Rayside, Electronic Record, at 575.

10. Subject to the above, the Couples answer the Reference questions as follows:

Q.1 Yes, the *Proposal for an Act respecting certain aspects of legal capacity for marriage for civil purposes* ("*Proposal*") is within the exclusive legislative authority of the Parliament of Canada.

Q.2 Yes, the *Proposal* is consistent with the *Charter*.

Q.3 Yes, religious officials are protected from being compelled to perform a marriage between two persons of the same sex contrary to their religious beliefs.

---

[1] It would also encourage governments in other cases involving fundamental rights and freedoms to avoid acting with due diligence once a *Charter* right has been violated, and instead not appeal, commence a Reference, conduct various other political mechanisms such as committee hearings, and all the while leave the individuals whose rights have been infringed waiting for some final political conclusion. It would also encourage governments to avoid seeking leave to appeal to the Supreme Court after a finding of unconstitutionality from a court of appeal so that discriminatory legislation could continue in the remaining provinces. The back-door approach being taken by government since the addition of the fourth question is yet another example of government's desire to prevaricate during an election, and to do anything rather than actually deal with a politically unpopular issue. The strategy, however wise politically, is not legally viable. There are consequences flowing from the intentional decision not to appeal, upon which thousands of people have relied, that cannot be undone with so-called good intentions. The law is not a game, and the Couples and their families are not pawns. The rule of law dictates that their rights cannot be recognized, affirmed, fully realized, and then reconsidered and taken away again.

Q.4 No, an opposite-sex requirement for marriage for civil purposes, as had been established by the common law and as was set out for Québec in s. 5 of the *Federal Law - Civil Law Harmonization Act, No. 1*, was not consistent with the *Charter*, as ten Canadian judges have already concluded.

11. To ensure clarity and finality on the issue of equal marriage for same-sex couples, the Couples request the following guidance from this Court:

a. The issue of the validity of the Couples' marriages on the basis of the sex of the parties is *res judicata.* The validity of the Couples' marriages is unassailable.

b. The definition of marriage, across Canada, is "the voluntary union for life of two persons to the exclusion of all others". The Courts of Appeal of British Columbia and Ontario found the common law bar unconstitutional and reformulated; in Québec, the court struck down statutory provisions. The government chose not to appeal these rulings. As the Québec Court of Appeal concluded, there cannot be a provincial patchwork where some provinces apply federal law that the federal government itself admits is unconstitutional. Justice requires that there should be no legal impediment to the marriages of same-sex couples across Canada. As Chief Justice Robert wrote:

> S'il est vrai que, en règle générale, les jugements des tribunaux d'une province n'ont pas d'effet extraterritorial, il n'en reste pas moins qu'il serait juridiquement inacceptable que, dans une matière onstitutionnelle impliquant le Procureur général du Canada relativement une matière relevant de la compétence du Parlement fédéral, une disposition soit inapplicable dans une province et en vigueur dans toutes les autres.
>
> *Ligue catholique c. Hendricks,* [2004] J.Q. No. 2593 (Q.C.A.) at para.28.

c. "Civil unions" or other "alternatives" to equal marriage do not cure the unconstitutionality of exclusion from marriage. In Québec, Justice Lemelin specifically considered whether a "civil union" scheme which offered the benefits and obligations of marriage was sufficient to meet the equality rights of the Québec Couple. She held that it was not. This issue has been finally determined, and was not appealed. The determination that there are no constitutional "alternatives" to equal marriage is *res judicata.*

> *Hendricks v. Quebec (Attorney General),* [2002] J.Q. No. 3816 (S.C.Q.) at paras. 180,133, 134.

d. The questions posed on this Reference have been subject to full and robust debates, within the adversarial system, in three provinces. The Couples submit that the answers must reflect the finality of the correct rulings in *Halpern, Hendricks* and *EGALE*. In the alternative, the Couples ask that the Court declare any existing common law definition of marriage to be invalid across the country and reformulate the definition as "the voluntary union for life of two persons to the exclusion of all others". The Couples request that, in reformulating any common law rule, this Court consider and reject alternative schemes

that maintain exclusion from marriage. Such an approach is mandated by *Swain* and *Dagenais*, and will ensure that, failing the introduction or passage of the proposed legislation, all Canadians will have access to equal marriage without further delay.

R. v. Swain, [1991] 1 S.C.R. 933; *R. v. Dagenais* [1994] 3 S.C.R. 835; *Hill v. Scientology* [1995] 2 S.C.R. 1130.

PART III – ARGUMENT

12. Subject to the comments above, the Couples' argument will focus on Question 4.

The Anti-Marriage Argument is Based on "Definitional Preclusion"

13. The anti-marriage advocates assert that marriage *just is* the union of one man and one woman. They claim this is a "universal" definition across religions and cultures, that exists separate from and "pre-dates" the law. This theory, which we call "Definitional Preclusion," is used at every stage of the analysis – to claim that the *Charter* has no application, to assert there is no discrimination and to attempt a section 1 justification. Since all of the anti-equality arguments are reducible to Definitional Preclusion, the Couples will deconstruct it in detail. Once this is done, there is nothing left of the arguments against equal marriage.

14. The Definitional Preclusion approach is legally unsupportable, but it does have a long pedigree. Centuries of law and universal social practice established that slaves were not persons and condemned them to treatment as property. Tradition and courts "since time immemorial" defined women as chattel. The anti-marriage advocates claim that the essential meaning of "marriage" excludes same-sex relationships. They deny that gays and lesbians are fully persons in Canadian law, persons worthy of the fundamental right to marry. This exclusion of classes of people by "definitional boundaries" has been the intellectual foundation of oppression in all of the significant social struggles of our time.

Scott v. Sandford, 60 U.S 393 (1856); Reply Affidavit of Dr. Trumbach, Electronic Record, at 3035-3036; *Edwards v. Canada (Attorney General)*, [1930] A.C. 124 at 134; Kathleen Lahey, "Are We Persons Yet? Law and Sexuality at the Cusp of the Millennium C.E.," in *Are We Persons Yet* (Toronto: Law Society of Upper Canada, 1999).

The Definitional Preclusion Argument is Circular

15. The claim that same-sex couples are rightly excluded because "marriage is ... heterosexual" is "circular and unpersuasive."

Halpern v. Canada (Attorney General) (2003), 65 O.R. (3d) 161 (C.A.) at para. 71; *Baehr v. Lewin*, 852 P.2d 44 (Hawaii, 1993) at 61, 63; Reply Affidavit of Dr. Mercier, Electronic Record at 2856, 2858; *EGALE Canada Inc. v. Canada (Attorney General)* (2003),225 DLR (4th) 472 (C.A.); *Goodridge v. Department of Public Health*, 440 Mass. 309 (Massachusetts, 2003) at 25 (QL).

Definitional Preclusion is Contrary to Section 15 of the Charter

16. This Court has warned of the dangers of Definitional Preclusion. In *Egan*, *Miron* and *M. v. H.*, this Court rejected appeals to definitional imperatives, tradition, and "relevant biological differences."

> The only way to break out of the logical circle [of Definitional Preclusion] is to examine the actual impact of the distinction on members of the targeted group. This, as I understand it, is the lesson of the early decisions of this Court under s. 15(1). ...

Miron v. Trudel, [1995] 2 S.C.R. 418 at paras. 134-137; *Egan v. Canada*, [1995] 2 S.C.R. 513 at paras. 161, 165, 166; *M. v. H.*, [1999] 2 S.C.R. 3 per Gonthier J. dissenting at paras. 227, 231, per Cory J., majority at para. 73.

Definitional Preclusion is Contrary to Progressive Interpretation

17. The argument that there is a constitutionally entrenched meaning of "marriage" which reflects the framers' conceptions in 1867 is another approach to Definitional Preclusion. It is completely wrong in law and was rightly rejected by Justice Lemelin, the Ontario Divisional Court, and the Justices of the Ontario and British Columbia Courts of Appeal. A notion of "frozen rights" contravenes the basic principle of Canadian constitutional interpretation that "the *B.N.A. Act* planted in Canada a living tree capable of growth and expansion within its natural limits,"

Edwards v. Canada (A.G.), [1930] A.C. 124 (P.C.) at 136; *Reference Re: Alberta Bill of Rights Act*, [1946] 3 W.W.R. 772 at 778; *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145 at 155; P. Hogg, *Constitutional Law of Canada*, (looseleaf) (Toronto: Carswell, 1997) at 15-43 to 15-45; *British Columbia (AG) v. Ellett Estate*, [1980] 2 S.C.R. 466 at 478-9.

Definitional Preclusion is Empirically Inaccurate

18. The notion that marriage "just is" heterosexual is also empirically false. Thousands of lesbians and gay men have married in Ontario, British Columbia, Québec, Belgium and the Netherlands. Marriage for same-sex couples is not a definitional impossibility. It is a social and cultural reality.

> Strangers come up to us on the street or in the Metro and congratulate us. When Michael was at the bank, the teller suddenly slipped her hand through the tiny slot in her protective screen to shake his hand with great enthusiasm and wish us well. René's clients at the hotel tell him they are proud to know him, how happy they are for us. All kinds of people, from teenagers to senior citizens, most of whom make it very clear that they are heterosexual, are anxious to let us know that they support us. Often they say, "it is about time".

Affidavit of Michael Hendricks and René LeBoeuf, Couples' Updated Evidence, Tab 3 at para. 16; Affidavit of Alison Kemper, Couples' Updated Evidence, Tab 10 at para. 3; Reply Affidavit of Dr. Eskridge, Electronic Record at para. 3.

At Root, Definitional Preclusion is Based on Faulty Assumptions

19. Underlying the assertion that "marriage just is the union of one man and one woman," the anti-marriage forces rely on three rationales for exclusion: religion, biology and history. All are wrong in fact and law.

Religious Explanations for Definitional Preclusion Must be Rejected

20. The recognition of civil marriage in Canada is not governed by religious law, but by the Constitution and its values of religious freedom, liberty, and equality. The Couples seek civil, not religious, marriage. In any case, there are religious communities that solemnize marriages between persons of the same sex as a sacrament. Unless this Court is to prefer majoritarian faith traditions to others, it cannot rely on religious definitions as a justification for continuing exclusion.

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

Biological Explanations for Definitional Preclusion Must be Rejected

21. The claim that marriage is by definition heterosexual, because only heterosexuals procreate, is factually and legally untenable. The House of Lords, the U.S. Supreme Court, and this Court have all recognized that procreation is not the essential purpose of marriage. Access to marriage is denied on the basis of sexual orientation, not capacity or desire to procreate, since many heterosexual married couples do not or cannot have children. If the central purpose of marriage were procreation, surely this would be reflected in the law of divorce and annulment. It is not.

Baxter v. Baxter, [1948] A.C. 274 at 286 (H.L.); *Turner v. Safley*, 482 U.S. 78 (1987) at 95-96; *Moge v. Moge*, [1992] 3 S.C.R. 813 at 848; *Briese v. Briese* (1977), 82 D.L.R. 91 (Man Q.B.); *Tice v. Tice*, [1937] O.R. 233 (H.C.) at 239, aff'd [1937] 2 D.L.R. 591 (C.A.); *Norman v. Norman* (1979), 9 R.F.L. (2d) 345 (Ont. U.F.C).

22. The Law Commission of Canada, which called for equal marriage in its 2001 report, recognized the problems with relying on biological explanations for exclusion from marriage:

> [The state does not reserve] marriage to procreation and the raising of children. People may marry even if they cannot or do not intend to have children.... There is no justification for maintaining the current distinctions between same-sex and heterosexual conjugal unions in light of current understandings of the state's interests in marriage.
>
> Law Commission of Canada, *Beyond Conjugality: Recognizing and Supporting Close Personal Adult Relationships* (Ottawa, December 21, 2001), chapter 4, at 16.

23. If procreation is the purpose of marriage, many of the Ontario and Québec Couples have been wrongfully refused licenses. Six of the eight Couples have or hope to have children. When the anti-marriage advocates conceive of gays and lesbians as outsiders to "society," "procreation," "children," "marriage," the children of same-sex parents hear the message that their parents, and their families, are unworthy of equal respect.

Affidavit of Joyce Barnett, Couples' Updated Evidence, Tab 6.

Historical Explanations for Definitional Preclusion Must be Rejected

24. The claim that "marriage is heterosexual" because this represents a "universal norm" "across times and across cultures" is also deeply flawed. First, it is untrue. Hundreds of

cultures have celebrated same-sex marriages over the course of history, and there is currently legal recognition of equal marriage in Belgium, the Netherlands, Ontario, British Columbia, Québec and Massachusetts.

> Affidavit of Dr. Eskridge, Electronic Record at 347, 377-379; Reply Affidavit of Dr. Eskridge, Electronic Record at 3022-3025; Affidavit of Evan Wolfson, Couples' Updated Evidence, Tab 8 at 4.

25. Even if marriage had been heterosexual-only "since time immemorial", the mandate of human rights jurisprudence is to critically evaluate and challenge long-standing, often commonly accepted, practices. There was a long, shameful history of denying marriage on the basis that the parties were of the wrong race. In *Loving v. Virginia*, the trial court held that a marriage between two persons of different races was, by definition, not a true marriage. The anti-marriage assertion that the Couples are of the wrong sex is a parallel, equally discriminatory argument that should be rejected.

> *Loving v. Virginia*, 388 U.S. 1 (1967) at 3; Reply Affidavit of *Evan Wolfson*, Electronic Record at 3103-3104; Reply Affidavit of Dr. Koppelman, Electronic Record at 3042-3051; *Law v. Canada*, [1999] 1 S.C.R. 497 at para. 72; Affidavit of Evan Wolfson, Couples' Updated Evidence, Tab 8.

26. History is not static. Society evolves. The issue is not how "marriage" has historically been defined, no more than the Persons Case could have been correctly resolved by the fact the term "person" had been historically defined to exclude women. The issue is whether the exclusion of a historically disadvantaged group is discriminatory and, if so, whether that discrimination is justified. The *Charter* aims to protect the traditionally disadvantaged from discrimination, however deeply ingrained, seemingly natural, and longstanding.

27. In conclusion, Definitional Preclusion is no answer to the claim of discrimination. Under the equality guarantee of the *Charter*, anti-marriage advocates cannot rely on a history of discrimination, majoritarian religious views, or so-called natural imperatives to explain or justify continuing discrimination.

Exclusion of Same-Sex Couples from Marriage Infringes s.15

Distinction between Different-Sex and Same-Sex Couples

28. The Couples' applications for marriage licences would have been granted if they were different-sex, rather than same-sex, couples. As discussed at paragraphs 62-72 of the Ontario Appeal Decision, the common law draws a distinction.

Differential Treatment is on the Protected Grounds of Sex and/or Sexual Orientation

29. The bar to marriage between persons of the same sex is most obviously sexual orientation discrimination. Lesbian and gay persons are those who choose a spouse of the same sex, and who experience the discriminatory effects of the old common law rule.

Denial of equal marriage is also sex discrimination in that it rests, in large measure, on sexist stereotypes about the "essential natures" and "different roles" of men and women.

Halpern v. Canada (Attorney General) (2003), 65 O.R. (3d) 161 (C.A.) at paras. 73-76; *M. v. H.*, [1999] 2 S.C.R. 3 at paras. 62, 64; *Baehr v. Miike*, 1996 W.L. 694235 (Haw. Cir. Ct. December, 1996); Affidavit of Dr. Calhoun, Electronic Record at 550; Reply Affidavit of Dr. Koppelman, Electronic Record at para 10, 13, ftnt. 12; Reply Affidavit of *Evan Wolfson*, Electronic Record at paras. 22-24.

The Differential Treatment Discriminates in a Substantive Sense

30. The denial of the right to marry discriminates in a substantive sense, because it is inconsistent with the purpose of s. 15. Exclusion from marriage imposes burdens upon and withholds benefits from lesbians and gay men in a manner that reflects the stereotypical application of presumed group or personal characteristics, and perpetuates and promotes the view that the Couples (and other lesbians and gays) are less capable or worthy of recognition or value as human beings or as members of Canadian society, equally deserving of concern, respect, and consideration.

(i) The Couples are Denied the Equal Benefit of the Law

Denies Equal Respect to Lesbians and Gay Men

31. Exclusion from marriage withholds from gays and lesbians the equal benefit of the law. "...[M]arriage...is the institution that accords to a union the profound social stamp of approval and acceptance of the relationship as being of the highest value." The denial of marriage sanction treats the relationships of same-sex couples as inferior to those of different-sex couples. Indeed, marriage and citizenship are such intertwined notions, that it is not possible to bar a group of people from marriage without undermining their status as citizens. As long as the state denies civil marriage recognition, gay and lesbian Canadians are not treated as "equally worthy of full participation in Canadian society."

> [Our marriage] was a life-passage, a milestone in our lives, that we felt bonded us together with family and friends and the wider community. ... We feel more social confidence. We feel more legitimate as a couple and as parents. We feel more like full citizens.

Affidavit of Alison Kemper, Couples' Updated Evidence, Tab 1, at 16, 17; B. MacDougall, "The Celebration of Same-Sex Marriage" (2000) 32:2 Ottawa Law Rev. 235 at 242; *Gosselin v. Quebec (Attorney General)*, [2002] 4 S.C.R. 429 at para. 22; Affidavit of Dr. Calhoun, Electronic Record at 550; Affidavit of Dr. Adam, Electronic Record at 471; Affidavit of Dr. Lewin, Electronic Record at paras. 162,165, 189; Affidavit of Michael Leshner, Couples' Updated Evidence, Tab 7, at para. 6; Affidavit of Alison Kemper, Couples' Updated Evidence, Tab 1, at para. 18; Affidavit of Michael Hendricks and René LeBoeuf, Couples' Updated Evidence, Tab 3, paras. 10-13; Affidavit of Joyce Barnett, Couples' Updated Evidence, Tab 6.

32. This Court has recognized the status of being unmarried as a ground of discrimination. In so doing, it has acknowledged that unmarried relationships have been and continue to be treated with social disadvantage and prejudice. "The sanction of the union by the state through civil marriage" is a benefit of the law, quite apart from whether the same cluster of

material benefits and obligations otherwise applies to the couple. If heterosexuals who choose not to marry are subject to stigmatizing treatment, the discriminatory impact of an absolute marriage bar to gays and lesbians, and their "illegitimate" children, should be obvious. Gay and lesbian people are marked as individuals forbidden to marry in a society that celebrates marriage as a fundamental good. This is blatant disrespect.

Miron v. Trudel, [1995] 2 S.C.R. 418 at 467, 469-470, 474, 475, 498; *Tighe v. McGillivray Estate* (1994) 112 D.L.R. (4th) 201(N.S.C.A.);*Nova Scotia (A.G.) v. Walsh*, [2002] 4 S.C.R. 325.

Withholds Social Benefits Associated Uniquely with Marriage

33. For many individuals, marriage is a central goal in life and an essential component of identity, dignity and self-worth. There are significant personal benefits associated uniquely with the institution, including greater psychological adjustment, financial well-being, individual happiness, improved levels of physical and mental health, job satisfaction and achievement, and lower levels of domestic violence than cohabitating relationships. Civil marriage fosters stability and security in relationships.

Affidavit of Dr. Barnes, Electronic Record at 91, 100, 103, 119; Reply Affidavit of Drs. Stacey and Biblarz, Electronic Record at 2919-2120; Affidavit of Dr. Bigner, Electronic Record at 253-255; *Divorce Act*, R.S.C. 1985, c. D.3.4, s.9; Affidavit of Gail Donnelly, Electronic Record at 51-52; Affidavit of Marg Nosworthy, Electronic Record at 75; Affidavit of Dr. Lewin, Electronic Record at 140; *M. v. H.*, [1999] 2 S.C.R. 3 at para. 73; *Halpern v. Canada (Attorney General)* (2003), 65 O.R. (3d) 161 (C.A.) at para. 69; Affidavit of Alison Kemper, Couples' Updated Evidence, Tab 1, paras. 13 and 16, 18-20; Affidavit of Robert Barnett-Kemper, Couples' Updated Evidence, Tab 2, paras. 7-12; Affidavit of Julie Erbland, Couples' Updated Evidence, Tab 4, paras. 8-10; Affidavit of Joyce Barnett, Couples' Updated Evidence, Tab 6.

34. By participating equally in civil marriage, families and friends of same-sex couples come together to celebrate a familiar event that has equal status and meaning to any other marriage. Marriage makes couples' relationships visible and authentic in a manner that enhances the comprehension and acceptance of many heterosexuals. Robert Barnett-Kemper, the child of one of the Ontario Couples, deposes:

> My sense is that people now think of my mothers' relationship as a real marriage now. I feel less different than other kids. My parents are married just like most other kids' parents. ... I don't think that civil unions or anything with some other different word for marriage would have these effects. If I told my friends that my parents were getting "civilly united" they would not even understand what I was talking about. They sure wouldn't think that I was the same as them. They would think I was different and weird.

Affidavit of Robert Barnett-Kemper, Couples' Updated Evidence of the Couples, Tab 2 at paras. 14 and 15; Affidavit of Joyce Barnett, Couples' Updated Evidence of the Couples, Tab 6.

Withholds Access to Legal Rights, Obligations and Protections

35. Marriage provides access to expanded legal rights and responsibilities. Unmarried couples lack the full range of statutory safeguards for their relationships. As indicated by Schedule "B", some provinces and territories offer no recognition to same-sex couples; others provide limited, divergent benefits and obligations, flowing from differing periods of

cohabitation. Piecemeal provincial protections cannot have the same effect practically or psychologically as equal marriage. Moreover, unlike different-sex couples, same-sex couples cannot immediately access the benefits and protections, but must cohabit for varying periods of time to qualify for ascribed spousal status.

M. v. H., [1995] 2 S.C.R. 3 at paras. 59-61; *Nova Scotia (Attorney General) v. Walsh*, [2002] 4 S.C.R. 325; *Egan v. Canada*, [1995] 2 S.C.R. 513 at paras. 158-61; Schedule "B", Summary of LGBT Rights in Each Jurisdiction of Canada.

36. Marriage, uniquely, creates a status that is well understood and portable across the country. However, only British Columbia, Ontario and Québec currently grant licences to same-sex couples and it is unclear whether other provinces will recognize their marriages. This uncertainty infringes the right to mobility under the *Charter*.

Affidavit of John Fisher, Electronic Record at 778-780; *Black v. Law Society of Alberta*, [1986] 3 W.W.R. 590; Affidavit of Michael Leshner, Couples' Record, Tab 7 at para. 15; Affidavit of Alison Kemper, Couples' Record, Tab 1 at para. 7.

Promotes Harms of Social Stigma, Prejudice and Violence

37. Exclusion from marriage causes real harm. It contributes to social stigma, prejudice and violence against gays and lesbians. Gay and lesbian youth who have grown up with the same hopes and dreams to go to school, get a good job, get married and have kids, kill themselves in alarming numbers precisely because they feel like they will never have a "normal" life.

Affidavit of Dr. Kaufman, Electronic Record at 308-313; Affidavit of Dr. Barnes, Electronic Record at 123; Reply Affidavit of Drs. Stacey and Biblarz, Electronic Record at 2920-2921, 2927; Affidavit of Dr. Bigner, Electronic Record at 253-355; Affidavit of Joyce Barnett, Couples' Updated Evidence, Tab 6.

Withholds an Important Personal Choice

38. Exclusion from marriage denies personal autonomy, privacy and human dignity contrary to s. 7 of the *Charter*. This Court has affirmed "the individual's freedom to choose alternative family forms and to have that choice respected and legitimated by the state." Given the primary value of "autonomy and self-determination," individuals must have the "ability to live in relationships of their own design." If gay and lesbian individuals share the liberty to structure their personal relationships, they must be free to make the intensely private decision whether to marry. As this Court declared in *Walsh*, "limitations ... that serve to restrict this freedom of choice among persons in conjugal relationships would be contrary to our notions of liberty."

Nova Scotia (Attorney General) v. Walsh, [2002] 4 S.C.R. 325 at paras. 43, 50, 63; *Blencoe v. British Columbia (Human Rights Commission)*, [2000] 2 S.C.R. 307 at paras. 49-51.

(ii) The Denial of Equal Marriage Demeans the Dignity of Gays and Lesbians

The Contextual Approach

39. The discriminatory impact of exclusion from marriage is clearly revealed "in the context of the place of the group in the entire social, political and legal fabric of our society." This framework reveals the historic and current denigration of lesbians, gays, and their relationships; the corresponding celebration of heterosexuality as a normative ideal; the relative political powerlessness of gay and lesbian people; the changes to marriage over time; and the continuing cultural significance and privileged status of marriage. In this context, it is clear that the exclusion of same-sex couples from the institution of marriage denies equal membership and full participation in Canadian society. It attacks self-respect, self-worth, psychological integrity and empowerment.

Andrews v. Law Society of B.C., [1989] 1 S.C.R. 143 at 152, 164; *Gosselin v. Quebec (Attorney General)*, [2002] 4 S.C.R. 429 at paras. 23, 121-124; *Law v. Canada*, [1999] 1 S.C.R. 497 at paras. 25, 41, 53; *R. v. Morgentaler,* [1988] 1 S.C.R. 30 at 164-167; Affidavit of Alison Kemper, Couples' Updated Evidence, Tab 1, Paras. 13 and 16, 18-20. Affidavit of Robert Barnett-Kemper, Couples' Updated Evidence, Tab 2, paras. 7-12; Affidavit of Julie Erbland, Couples' Updated Evidence, Tab 4, paras. 8–10; Affidavit of Joyce Barnett, Couples' Updated Evidence, Tab 6.

The Correct Subjective-Objective Perspective

40. To prevent and remedy historical disadvantage, and appreciate the depth of the human dignity interest affected, the main consideration "must be the impact of the law" examined from the perspective of a reasonable person in the circumstances of the claimant. This perspective reveals that the denial of equal marriage perpetuates and promotes the view that gays and lesbians are less valuable members of Canadian society.

Andrews v. Law Society of B.C., [1989] 1 S.C.R. 143 at 165; *Law v. Canada*, [1999] 1 S.C.R. 497 at paras. 25, 51, 53, 59, 88; *Halpern v. Canada (Attorney General)* (2003), 65 O.R. (3d) 161 (C.A.) at para. 79.

41. Anti-marriage advocates suggest that the feelings of the Couples are unreasonable and illegitimate. Their approach attempts to subvert the purpose of s. 15, by using a "reasonable person" standard as a "vehicle for the imposition of community prejudices". While anti-marriage advocates assert that the exclusion of gays and lesbians is a necessary reality, the reasonable gay or lesbian person sees a history of discrimination.[2]

Law v. Canada, [1999] 1 S.C.R. 497 at para. 61; *Egan v. Canada*, [1995] 2 S.C.R.513 at para. 56.

42. While the Couples' perspectives are the central consideration under s. 15, proof of the offence to dignity also follows from the precedent of *M. v. H.* and is established by the

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[2] In the courts below, the Couples asked that the court "walk a mile in our shoes." They illustrated that the proper perspective makes the pain of exclusion obvious: marriage is the "cornerstone of civilization" says the government, but you gays and lesbians are not allowed in; everyone's mantels have pictures of their weddings, but you will never be allowed to have such a picture; popular television features the choice of a marriage partner as a game show, but Michael and René who have been together for 30 years cannot declare their love through civil marriage. Now that they are no longer excluded, the Couples' evidence provides many examples of the simple dignity-affirming benefits of inclusion in society's most fundamental institution.

expert evidence. The opinion of Dr. Barnes, psychologist, is unchallenged in the record. Almost the entirety of her affidavit deals with the harms to psychological integrity and emotional well being caused by the denial of equal marriage. Drs. Eichler, Lewin, Kaufman, Bigner, Stacey, Biblarz, Adam, Ehrlich and Mercier are among the other experts who depose that the denial of equal marriage demeans the dignity of lesbians and gays.

Sauvé v. Canada (Chief Electoral Officer), [2002] S.C.C. 68 at para. 59; Affidavit of Dr. Barnes, Electronic Record at 102, 115-118, 124-125; Reply Affidavit of Drs. Stacey and Biblarz, Electronic Record at 2920; Affidavit of Dr. Adam Electronic Record at 472-474; Affidavit of Dr. Kaufman, Electronic Record at 312-313; Affidavit of Dr. Ehrlich, Electronic Record at 869-870; Affidavit of Dr. Lewin, Electronic Record at 139-140; Affidavit of Dr. Eichler, Electronic Record at 208-209; Reply Affidavit of Dr. Mercier, Electronic Record at 2878-2882; Affidavit of Dr. Bigner, Electronic Record 254-255.

Pre-existing Disadvantage

43. Gays and lesbians "have suffered and continue to suffer from serious social, political and economic disadvantage". This is a key marker that their differential treatment is likely discriminatory in a substantive sense.

> Denying same-sex couples the right to marry perpetuates the [] view ... that same-sex couples are not capable of forming loving and lasting relationships, and thus same-sex relationships are not worthy of the same respect and recognition as opposite-sex relationships.

Halpern v. Canada (Attorney General) (2003), 65 O.R. (3d) 161 (C.A.) at paras. 83-87, 94; *M. v. H.*, [1999] 2 S.C.R. 3 at paras. 3, 64, 68-69, 73; B. MacDougall, "The Celebration of Same-Sex Marriage" (2000) 32:2 Ottawa Law Rev. 235; D. Cruz, "'Just Don't Call It Marriage': The First Amendment and Marriage as an Expressive Resource", 74 So. Cal. Law Rev. 925 at 942 (2001).

Relationship Between Grounds and Claimant's Characteristics or Circumstances

44. A second contextual factor is whether the impugned law takes into account the claimant's actual situation. At this stage of the analysis, the anti-marriage advocates will again call on Definitional Preclusion as their answer, arguing that marriage is uniquely heterosexual and so only relates to the needs of heterosexuals. The error is easily corrected by approaching the analysis from the requisite subjective-objective perspective.

45. From the reasonable perspective of persons in the circumstances of the Couples, the denial of equal marriage fails to take into account their capacities, needs, and circumstances. The Couples reasonably do not consider the circumstances of their families as essentially different from those of their heterosexual neighbours. When Alison and Joyce turn to each other in moments of crisis and despair, or joy and celebration, and find the enduring love to which they have committed themselves and shared with their children, they know that they are human beings equally capable of the love and commitment of marriage.

Affidavit of Dr. Eichler, Electronic Record at 207-209; Affidavit of Dr. Eskridge, Electronic Record at 382; Affidavit of Dr. Kaufman, Electronic Record at 307; Affidavit of Joyce Barnett, Couples' Updated Evidence, Tab 6.

46. The Couples have the same desire to marry, in the same manner and for the same reasons, as their heterosexual friends and family members. They and their children also have the same need for the myriad of benefits that flow from participation in the institution.

Affidavit of Dr. Barnes, Electronic Record at 92; Affidavit of Gail Donnelly, Electronic Record at 51; *Law v. Canada*, [1999] 1 S.C.R. 497 at para. 59, 70; Affidavit of Aloysius E. Pittman, Electronic Record at 62; Affidavit of Barbara McDowall, Electronic Record at 40; Affidavit of Alison Kemper, Couples' Updated Evidence, Tab 1, para. 20; Affidavit of Dawn Onishenko, Couples' Updated Evidence, Tab 5, para. 8; Affidavit of Joyce Barnett, Couples' Updated Evidence, Tab 6.

Ameliorative Purpose or Effects

47. The denial of marriage to gays and lesbians has no ameliorative purpose whatsoever, but instead causes serious harms. This Court has held that an underinclusive law that "excludes from its scope the members of a historically disadvantaged group will rarely escape the charge of discrimination".

Law v. Canada, [1999] 1 S.C.R. 497 at para. 72; *M. v. H.*, [1999] 2 S.C.R. 3 at para. 71; *Halpern v. Canada (Attorney General)* (2003), 65 O.R. (3d) 161 (C.A.) at para. 99.

Nature of the Interest Affected

48. The freedom to marry is so central to our understanding of humanity that a marriage ban against an entire class of people necessarily implicates other *Charter* rights and freedoms. It offends human dignity by withholding liberty and security, and infringes the freedoms of expression, conscience, and association.

Law v. Canada, [1999] 1 S.C.R. 497 at para. 74; *Egan v. Canada*, [1995] 2 S.C.R. 513 at para. 64; *New Brunswick (Minister of Health and Community Services) v. G.(J.)*, [1999] 3 S.C.R. 46 at paras. 59-61, 112; Kenneth L. Karst, "The Freedom of Intimate Association", 89 Yale L.J. 624 (1980); *Blencoe v. British Columbia (Human Rights Commission)*, [2000] 2 S.C.R. 307 at paras. 49-57, 68-73, 82; D. Cruz, "'Just Don't Call It Marriage': The First Amendment and Marriage as an Expressive Resource", 74 So. Cal. Law Rev. 925 at 942 (2001); *R. v. Morgentaler*, [1988] 1 S.C.R. 30 at 169-172, 175-180; *Irwin Toy v. Quebec (A.G.)*, [1989] 1 S.C.R. 927 at 968-969; *Reference re: Public Service Employee relations Act (Alberta)*, [1987] 1 SCR 313 at 334; *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295 at 336-337, 350; *R. v. Edward Books and Art Limited*, [1986] 2 S.C.R. 713 at 759; *Jones v. The Queen*, [1986] 2 SCR 284 at 318-319; *Godbout v. Longueuil*, [1997] 3 SCR 844 at para. 66.

49. Marriage is a fundamental right, acknowledged by this Court, the U.S. Supreme Court and international law. The withholding of such a fundamental right and personal choice is a denial of the equal benefit of the law. As the Chief Justice has written:

> [T]he decision of whether or not to marry can, indeed, be one of the most personal decisions an individual will ever make over the course of his or her lifetime. It can be as fundamental, as momentous, and as personal as a choice regarding, for instance, one's citizenship or even one's religion.

Miron v. Trudel, [1995] 2 S.C.R. 418 at paras. 46, 95, 150; *Nova Scotia (Attorney General) v. Walsh*, [2002] 4 S.C.R. 325 at para. 63; *R. v. Morgentaler*, [1988] 1 S.C.R. 30 at 169 citing with approval *Loving v. Virginia*, 388 U.S. 1 (1967) at 12; *M. v.H.*, [1999] 2 S.C.R. at paras. 73, 228; *Halpern v. Canada (Attorney General)*, [2002] 60 O.R. (3d) 321 (Div. Ct.), at para. 199, per LaForme J.; *Moge v. Moge*, [1992] 3 S.C.R. 813 at 848; *Halpern v. Canada (Attorney General)* (2003), 65 O.R. (3d) 161 (C.A.) at para. 107; Reply Affidavit of Evan Wolfson, Electronic Record at 3091-3092; Updated Affidavit of Evan Wolfson, Couples' Updated Evidence, Tab 8; Article 16(1)

of the Universal Declaration of Human Rights, 10 December 1948, G.A. Res. 217A, 3 U.N. GAOR., Pt. I, U.N. Doc. A-810, Art. 16, at 71; Article 23 of the International Covenant on Civil and Political Rights, 16 December 1966, G.A. Res. 2200A (XXI), 21 U.N. GAOR, Supp. No. 16, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, 6 I.L.M. 368.

50. In conclusion, the denial of equal marriage violates s. 15 of the *Charter*. It draws a distinction on the basis of sex and sexual orientation that withholds the equal benefit of the law in a manner that offends the human dignity of gays and lesbians. It exacerbates pre-existing disadvantage by deeming same-sex relationships less worthy of respect and recognition, fails to recognize the lived realities of gay and lesbian commitments, and completely denies a fundamental constitutional and societal interest. The law has the power to send a meta-message of full inclusion in society or to perpetuate discrimination against gay men and lesbians. Same-sex couples must be free to marry if the promise of substantive equality is to have meaning.

The Infringement Is Not Demonstrably Justified

The Analytical Framework for Section 1 of the Charter

51. Since this Court is considering the constitutionality of the common law, rather than a legislative provision,[3] it is not necessary for this Court to conduct the s.1 analysis. Indeed, the government supports a change to the discriminatory common law rule. The task of this Court, then, is to craft a new legal principle that complies with constitutional requirements.

R. v. Swain, [1991] 1 S.C.R. 933 at 978; *R. v. Dagenais* [1994] 3 S.C.R. 835; *Hill v. Scientology* [1995] 2 S.C.R. 1130.

52. Even if this Court proceeds with the s.1 analysis, there is no requirement of deference because no legislation has been impugned. As then Chief Justice Lamer stated, "while decisions of our legislatures may be entitled to judicial deference under s.1 as a matter of policy, such deference is not required where we are being asked to review a law that we as judges have established."

R. v. Robinson, [1996] 1 S.C.R. 683 at 708-709; *Halpern v. Canada (Attorney General)*, [2002] 60 O.R. (3d) 321 (Div. Ct.), per Blair R.S.J. at para. 85-86; per LaForme J., at para. 227-228.

The Courts' Statement of the Objective

53. The focus under the first step of the *Oakes* analysis is whether the limit on *Charter* rights and freedoms furthers a pressing and substantial purpose. Since the impugned rule existed at common law, the task of this Court is to discern the rationale of courts that crafted the rights limitation. A review of the cases does not reveal a pressing and substantial objective to the exclusion of same-sex couples. The cases rely on Definitional Preclusion, a

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[3] Question 4 includes a reference to the constitutionality of s. 5 of the *Harmonization Act*. After the question was posed, this provision was struck down by a final judgment of the Québec Court that the federal government chose not to appeal. The government cannot commence a collateral attack on a final judgment. The purpose of s. 5 was to bring the common law definition into civil law. As Justice Lemelin found (at paras. 100.101), the issue at the core is still the constitutionality of the common law rule.

foundation that is intellectually empty, legally wrong and discriminatory. Ultimately, the cases demonstrate that the common law bar is an artifact of a time when same-sex relationships were not considered to have equal worth.

Layland v. Ontario (1993), 14 O.R. (3d) 658 (Div. Ct.); *Re North and Matheson* (1975), 52 D.L.R. (3d) 280 at 285 (Man. Co. Ct.); *EGALE Canada Inc. v. Canada* (2003), 225 D.L.R (4th) 472 (C.A.).

Purpose of the Infringing Measure: Discrimination

54. The anti-marriage advocates remain motivated by the belief that heterosexual relationships are uniquely worthy of participation in marriage, and argue that equal marriage for same-sex couples would "undermine" a foundational social institution. To these individuals, the value of the marital bond rests on the ability to privilege heterosexuality. This is not a justification for discrimination, but the antithesis of equality. It is a discriminatory purpose. Since a discriminatory objective cannot be pressing and substantial, there should be no need to proceed with the remainder of the s. 1 analysis.

Rosenberg v. Canada (A.G.) (1998), 38 O.R. (3rd) 577 (C.A.) at 586; *Vriend v. Alberta*, [1998] 1 S.C.R. 493 at para. 116; *R. v. Oakes*, [1986] 1 S.C.R. 103 at 136.

"Procreation" is not the Objective of Exclusion

55. The anti-marriage advocates argue that the purpose of privileging heterosexuality through the exclusion of same-sex couples is not discriminatory. Different-sex relationships are more deserving of state support and sanction, they say, because only heterosexuals have the capacity for heterosexual procreation. This is, again, Definitional Preclusion. Not only is the defining purpose of marriage not procreation, under s. 1 the central question is whether the exclusion of same-sex couples serves any pressing and substantial purpose. As the Ontario Court of Appeal wrote:

> We fail to see how the encouragement of procreation and childrearing is a pressing and substantial objective of maintaining marriage as an exclusively heterosexual institution. Heterosexual married couples will not stop having or raising children because same-sex couples are permitted to marry. Moreover, an increasing percentage of children are being born to and raised by same-sex couples.

Halpern v. Canada (Attorney General) (2003), 65 O.R. (3d) 161 (C.A.) at paras. 121-123.

The Laudatory Purpose of Marriage

The Requisite Approach: A Functional Objective

56. If this Court also wishes to consider the overall objective of civil marriage, care must be taken to avoid any circular or discriminatory articulation of the purpose. The pressing and substantial objective of marriage cannot be to affirm or benefit heterosexuals alone. The proper approach to determining the salutary objective of a law is to consider its underlying purposes or functions. This approach is well illustrated by the decision in *M. v. H.* The Court examined the functional objective of the impugned provision, rather than defining the objective in terms of heterosexuality, and held that it is not proper to attempt to define the

purpose of the law by reference to the terms of discrimination itself. Rather, "[w]hen characterizing the objective ... for the purposes of s. 1 analysis, it is important to adopt a functional and pragmatic approach which frames that purpose neither too broadly nor too narrowly."

M. v. H., [1999] 2 S.C.R. 3 at paras. 82-107, 156; *Miron v. Trudel*, [1995] 2 S.C.R. 418 at paras. 109, 164.

57. The anti-marriage advocates do not adopt the requisite functional and pragmatic approach to the articulation of the objective. They suggest that the purpose of marriage is related to heterosexuals-only because marriage is related to heterosexuals-only. Attempting to define the purpose of marriage by reference to the discriminatory ground itself, they are forced to argue that the birthing and parenting of children is neither necessary nor sufficient, as same-sex couples are capable of these functions. Instead, they claim that the key component of marriage is the "naturalness" and uniqueness of the manner in which children may be produced within heterosexual relationships. Marriage is ultimately distinguished by the procreative potential of some heterosexual spouses through "natural" penile-vaginal intercourse. This is both untrue and offensive. It is wrong because it is contrary to the purposes of marriage reflected at law. Intercourse is not an essential marker of marriage. Married persons are not required to, nor required to intend to, nor required to have the ability to, engage in any sexual relations, including heterosexual intercourse. The anti-marriage focus on "natural" procreation through penile-vaginal intercourse is merely another attempt to justify discrimination by reinforcing the terms of the discrimination. This is not a reasoned demonstration of a valid and compelling purpose.

Halpern v. Canada (Attorney General) (2003), 65 O.R. (3d) 161 (C.A.) at paras. 128-129. See *supra* paras. 21-23.

58. The anti-marriage advocates implicitly suggest that society must privilege a link between intercourse and children. This view is also discriminatory. The State does not and cannot create classes of "legitimate" and "illegitimate" children to determine which class of parents would have access to marriage. The children of same-sex or opposite-sex couples who are adopted, conceived by donor sperm, or otherwise not biologically related to both parents, are not irrelevant to the social good, nor should they be excluded from public consideration. All children are entitled to the support and the accompanying social benefits that would come from the marriage of their parents.

Tighe v. McGillivray Estate (1994), 112 D.L.R. (4th) 201 (N.S.C.A.); *Halpern v. Canada (Attorney General)* (2003), 65 O.R. (3d) 161 (C.A.) at para. 134.

59. Finally, the anti-marriage advocates raise the spectre that same-sex parenting may have negative consequences for children. There is no evidence or theory to support this discriminatory suggestion. Instead, the anti-equality advocates rely on irrelevant research

and discredited research literature, including work by an author expelled from the American Psychological Association.

Reply Affidavit of Drs. Stacey and Biblarz, Electronic Record at 2902-2928; Cross-examination of Dr. Stacey, Electronic Record, Q. 149-152, 238; Affidavit of G. Cacciola, Couples' Updated Evidence, Tab 9.

60. Contrary to stigmatizing stereotypes, the fact remains that same-sex couples are parenting children. They will continue to do so with or without the protections and benefits of marriage recognition. It therefore cannot be argued that it is demonstrably justified to withhold marriage recognition to same-sex couples, because there is a pressing and substantial objective of protecting children. The real question is whether or not same-sex couples will have to parent in an environment in which the state discriminates against their relationships.

The True Functional Purpose of Marriage

61. Canadian courts and legislatures have recognized that the central function of marriage is to recognize the commitment of two persons and provide a framework for public and legal support for the relationship. As the Law Commission concluded:

> The secular purpose of marriage is to provide an orderly framework in which people can express their commitment to each other, receive public recognition and support, and voluntarily assume a range of legal rights and obligations.

As required, this articulation of the objective focuses on the function of the relationship, rather than defining it based on the ground of discrimination.

Law Commission of Canada, *Beyond Conjugality: Recognizing and Supporting Close Personal Adult Relationships* (Ottawa, December 21, 2001), chapter 4, at 17;*Moge v. Moge*, [1992] 3 S.C.R. 813 at 848.

62. The functional objective of recognizing and supporting committed conjugal unions is not fulfilled by denying marriage to same-sex couples. Excluding same-sex couples frustrates the functional purpose of marriage recognition and including them furthers that purpose. Even if the purpose of civil marriage were to support parents or encourage procreation, the exclusion of same-sex spouses, but inclusion of different-sex spouses, would be under- and over-inclusive. Accordingly, limiting marriage recognition to heterosexuals-only is not justified under s.1 of the *Charter*.

M. v. H., [1999] 2 S.C.R. 3 at para. 114; see *supra*, para. 38-43.

There Is No Alternative to Equal Marriage

63. The Couples request a clear statement from this Court that segregated status is unacceptable. Rather than fulfilling the *Charter's* mandate of substantive equality and promoting full inclusion in Canadian society, any "alternative" to civil marriage would foster

the discriminatory idea that gays and lesbians do not and cannot enjoy real marriages, and do not have just as loving and important relationships, entitled to equal concern and respect.

> For no rational reason the marriage laws of the Commonwealth discriminate against a defined class; no amount of tinkering with language will eradicate that stain. The bill [proposing an "equivalent" civil union status] would have the effect of maintaining and fostering a stigma of exclusion that the Constitution prohibits.
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> *Opinions of the Justices to the Senate*, 440 Mass. 1201 (Massachusetts, 2004) at 5(QL); *M. v. H.*, [1999] 2 S.C.R. 3 at para. 73, 124; *Law v. Canada*, [1999] 1 S.C.R. 497 at para. 53; *Egan v. Canada*, [1995] 2 S.C.R. 513 at para. 161.

64. Language is imbued with power. Gays and lesbians were excluded from the term "marriage" because words are more than just labels. Words are embedded with statements of value, with accepted societal significance. Different nomenclature, imposed in the social context of widespread homophobia, would function as a powerful symbol of deemed inferiority. This is discrimination in its most fundamental form.

> "Marriage" is imbued with unique cultural meaning that cannot be replicated by some other means of partnership recognition. Given the history of oppression of gay and lesbian people, the denial of the freedom to marry perpetuates and promotes stigma and invisibility. The creation of a separate regime marks lesbian and gay relationships as inherently different from and inferior to the relationships of heterosexuals.
>
> Affidavit of Dr. Eichler, Electronic Record at 209-210; Affidavit of Dr. Ehrlich, Electronic Record at 872; Affidavit of Dr. Barnes, Electronic Record at 117-118; Reply Affidavit of Dr. Mercier, Electronic Record at 2879; Affidavit of Colleen Rogers, Electronic Record at 8. Affidavit of Dr. Lewin, Electronic Record at 187-189; Affidavit of Marg Nosworthy, Electronic Record at 76; Cross-Examination of Dr. Eskridge, Electronic Record, Q. 208, 209.

65. Segregated status in the form of an "alternative" to marriage does not satisfy *Charter* scrutiny. There is overwhelming evidence that segregated status would deny equal respect and dignity, and the purpose of maintaining exclusion from marriage could only be discriminatory. A parallel to the interracial marriage context makes this crystal clear. After *Loving*, sending the issue back to the legislature with permission to create an "alternative" status for interracial marriages (calling these "interracial unions", for example) would only have continued the harms to dignity. It would have been motivated by discriminatory objectives and would have been unconstitutional.

> To separate ... generates a feeling of inferiority as to ... status in the community that may affect ... hearts and minds in a way unlikely ever to be undone.
>
> *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954) at 494; Reply Affidavit of Dr. Koppelman, Electronic Record at 3045-3048; Reply Affidavit of Wolfson, Electronic Record at 3101-3103; Cross-Examination of Dr. Calhoun, Electronic Record, Q.57; *Loving v. Virginia*, 388 U.S. 1(1967); Affidavit of Robert Barnett-Kemper, Couples' Updated Evidence, Tab 2, para. 15; Affidavit of Evan Wolfson, Couples' Updated Evidence, Tab 8, at para. 27.

66. In conclusion, the Couples request that this Court make it clear, to prevent any further litigation of these issues, that there is no alternative that would meet the equality guarantee

except equal marriage.

> We are on our way towards equality. Julie and I feel that our humanity and our dignity has been finally recognized by Canadian society and by our own government that now supports our freedom to marry. We feel like equally important and legitimate citizens, like members of the Canadian family in a way that we had never felt was possible until now.
>
> Affidavit of Dawn Onishenko, Couples' Updated Evidence, Tab 5, para. 10.

PART IV - SUBMISSIONS CONCERNING COSTS

67. The Couples, private citizens of ordinary means, were forced to commence litigation against the federal government to vindicate their right to marry. They were successful. The government chose not to appeal. The Couples expected their litigation to be finally over. This Reference effectively invites re-litigation of the Couples' victories and permits a renewed attack on their marriages. Unlike all of the other Interveners, the original Couples' participation in this Reference was not "optional" to them. Their marriages and the success of their cases hang in the balance.

68. The costs of a proceeding such as this are enormous and prohibitive to average citizens. Were it not for the *pro bono* contributions of the profession, public interest litigation of this magnitude and significance could never be litigated. It would be a grave injustice if the Couples and their counsel were required to fund the government's political agenda. The Couples respectfully request an order for substantial indemnity costs payable by the Attorney General. The Couples repeat and rely on their cost submissions on their motion for leave to intervene and subsequent correspondence. These are included at Schedule C.

PART V - NATURE OF THE ORDER SOUGHT

69. The Couples seek the following orders and guidance,

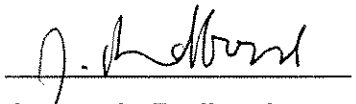
a. that the first three questions be answered in the affirmative;

b. with respect to question 4, that these matters have been resolved by final judgments from which the government did not appeal and that the common law has already changed across the country;

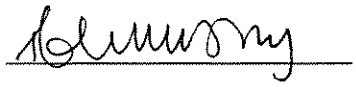
c. if necessary, striking down the former common law rule and reformulating it as the other lower courts have: marriage is the lawful union of two persons. As part of that reformulation, and consistent with caselaw, the Couples ask that this Court make it perfectly clear that this case is about marriage itself, and that there is no "alternative".

d. The Couples also seek an Order that the question of the validity of their marriages is *res judicata*, as are the marriages of other same-sex couples in Ontario, British Columbia and Québec.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 9th day of May, 2004



Joanna L. Radbord



Martha A. McCarthy

Epstein Cole LLP
Barristers
3200-401 Bay Street
Toronto, ON
M5H 2Y4
(416) 862-6208
(416) 862-2142

Solicitors for the Ontario & Québec Couples

PART VI

TABLE OF AUTHORITIES

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1. *Andrews v. Law Society of B.C.*, [1989] 1 S.C.R. 143 at 152, 164, 165
2. *Baehr v. Lewin*, 852 P.2d 44 (Hawaii, 1993) at 61, 63
3. *Baehr v. Miike*, 1996 WL 694235 (Haw. Cir. Ct. Dec.3, 1996)
4. *Baxter v. Baxter*, [1948] A.C. 274 (H.L.) at 286
5. *Black v. Law Society of Alberta,* [1986] 3 W.W.R. 590
6. *Blencoe v. British Columbia (Human Rights Commission)*, [2000] 2 S.C.R. 307 at paras. 49-57, 68–73, 82
7. *Briese v. Briese* (1977), 82 D.L.R. 91 (Man Q.B.)
8. *British Columbia (AG) v. Ellett Estate*, [1980] 2 S.C.R. 466 at 478-479
9. *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954) at 483
10. *Edwards v. Canada (A.G.),* [1930] A.C. 124 (P.C.) at 134, 136
11. *EGALE Canada Inc. v. Canada (Attorney General)* (2003), 225 DLR (4^{th}) 472 (B.C.C.A.) at paras. 81-100, 130, 133
12. *Egan v. Canada*, [1995] 2 S.C.R. 513 at paras. 56, 64, 90, 158-161, 165-166
13. *Godbout v. Longueuil (City)*, [1997] 3 S.C.R. 844 at para. 66
14. *Goodridge v. Department of Public Health*, 440 Mass. 309 (Massachusetts, 2003) at 25 (QL)
15. *Gosselin v. Quebec (Attorney General),* [2002] 4 S.C.R. 429 at paras. 22-23, 121-124
16. *Halpern v. Canada (Attorney General),* [2002] 60 O.R. (3d) 321 (Div. Ct) at per LaForme at paras. 199, 227-228, per Blair at paras. 85-86
17. *Halpern v. Canada (Attorney General)* (2003), 65 O.R. (3d) 161 (C.A.) at paras. 41, 57-142
18. *Hendricks v. Quebec (Attorney General)*, [2002] J.Q. No. 3816 (S.C.Q.) at paras. 120-122, 125-184
19. *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145 at 155

20. *Irwin Toy Ltd. v. Quebec (A.G.),* [1989] 1 S.C.R. 927 at 968-969

21. *Jones v. The Queen,* [1986] 2 S.C.R. 284 at 318-319

22. *Law v. Canada*, [1999] 1 S.C.R. 497 at paras. 25, 51, 53, 59, 61, 72, 74, 88

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25. *Loving v. Virginia*, 388 U.S. 1 (1967) at 3

26. *M. v. H.*, [1999] 2 S.C.R. 3 at paras. 3, 62, 64, 68-69, 71-73, 82, 107, 114, 124, 156, 227-228, 231, 261

27. *Miron v. Trudel*, [1995] 2 S.C.R. 418 at paras. 46, 95, 109, 134-137, 164,150 and at 467, 469-470, 474-475, 498

28. *Moge v. Moge*, [1992] 3 S.C.R. 813 at 848

29. *New Brunswick (Minister of Health and Community Services) v. G.(J.)*, [1999] 3 S.C.R. 46 at paras. 59-61, 112

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31. *Nova Scotia (Attorney General) v. Walsh*, [2002] 4 S.C.R. 325 at paras. 43, 50, 63

32. *Opinions of the Justices to the Senate*, 440 Mass. 1201 (Massachusetts, 2004)

33. *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295 at 336-337, 350

34. *R. v. Daviault*, [1994] 3 S.C.R. 63 at 93

35. *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713 at 759

36. *R. v. Litchfield,* [1993] 4 S.C.R. 333 at 349

37. *R. v. Morgentaler,* [1988] 1 SCR 30 at 169-172, 175-180

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39. *R. v. Robinson*, [1996] 1 S.C.R. 683 at 708-709

40. *R. v. Sarson*, [1996] 2 S.C.R. 223

41. *R. v. Swain*, [1991] 1 S.C.R. 933 at 978

42. *Re North and Matheson* (1975), 52 D.L.R. (3d) 280 (Man. Co. Ct.) at 285

43. *Reference Re: Alberta Bill of Rights Act*, [1946] 3 W.W.R. 772 at 778

44. *Reference re Public Service Employee Relations Act (Alberta)*, [1987] 1 S.C.R. 313 at 334

45. *Rosenberg v. Canada (A.G.)* (1998), 38 O.R. (3rd) 577 (C.A.) at 586

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50. *Toronto (City) v. C.U.P.E, Local 79*, [2003] 2 S.C.R. 77 at paras. 35, 37, 51

51. *Turner v. Safley*, 482 U.S. 78 (1987) at 95-95

52. *Vriend v. Alberta*, [1998] 1 S.C.R. 493 at para. 116

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53. D. Cruz, "'Just Don't Call It Marriage': The First Amendment and Marriage as an Expressive Resource", 74 So. Cal. Law Rev. 925 (2001) at 942

54. P. Hogg, *Constitutional Law of Canada*, (looseleaf) (Toronto: Carswell, 1997)

55. Kenneth L. Karst, "The Freedom of Intimate Association", 89 Yale L.J. 624 (1980)

56. Kathleen Lahey, "Are We Persons Yet? Law and Sexuality at the Cusp of the Millennium C.E.," in *Are We Persons Yet* (Toronto: Law Society of Upper Canada, 1999

57. Law Commission of Canada, *Beyond Conjugality: Recognizing and Supporting Close Personal Adult Relationships* (Ottawa, December 21, 2001), chapter 4 at 16

58. B. MacDougall, "The Celebration of Same-Sex Marriage" (2000) 32:2 Ottawa Law Rev. 235 at 242

59. Article 16(1) of the Universal Declaration of Human Rights, 10 December 1948, G.A.Res. 217A, 3 U.N. GAOR., Pt. I, U.N. Doc. A-810, Art. 16

60. Article 23 of the International Covenant on Civil and Political Rights, 16 December 1966, G.A. Res. 2200A (XXI), 21 U.N. GAOR, Supp. No. 16, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, 6 I.L.M. 368

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61. *Dagenais v. Canadian Broadcasting Corporation*, [1994] 3 S.C.R.835

62. *Hill v. Church of Scientology*, [1995] 2 S.C.R. 1130

TAB A

Schedule "A"

Expert Evidence of the Ontario and Québec Couples

Dr. Barry Adam Affidavit sworn November 15, 2000

Dr. Adams is a sociology professor at the University of Windsor. He specializes in the study of the dynamics of subordination and empowerment, the developments of popular mobilization and the social status of lesbians and gays. Dr. Adams discusses the history of same-sex relationships, the existence of continuing prejudice and forced invisibility of lesbians and gay men, and the impact of language on perpetuating stigma, from a sociological perspective.

Dr. Katherine Arnup Affidavit sworn November 16, 2000

Dr. Arnup is an Associate Professor of Canadian Studies at Carlton University and holds a PhD in History from the University of Toronto. Dr. Arnup has researched the areas of history, ideology and experience of motherhood, and changing definitions and experiences of the family, and has been published extensively in the area of lesbian motherhood in Canada. Dr Arnup discusses the ever-changing and contested nature of the "family" in Canada.

Dr. Rosemary Barnes Affidavit sworn November 20, 2000

Dr. Barnes holds a PhD in psychology from McMaster University and is an associate member of the Graduate Department of Education at the University of Toronto. Dr. Barnes is a psychologist with a private practice, in which she treats patients referred from psychiatry, medicine, family practice, sexual assault care centers and neurology. She discusses the adverse psychological impact of the denial of freedom to marry.

Dr. Jerry Bigner Affidavit sworn November 15, 2000

Dr. Bigner holds a PhD from Florida State University and is a professor of child and family development and early childhood education at Colorado State University. Dr. Bigner surveys the research on outcomes for children of gay and lesbian parents and describes the benefits of freedom to marry for these children.

Dr. Bettina Bradbury Reply affidavit sworn August 17, 2001

Dr. Bradbury holds a PhD in history from Concordia University and is an Associate Professor in the Department of History at York University. Her affidavit responds to Professor Shorter's evidence on the history of the family.

Dr. Cheshire Calhoun Affidavit sworn November 15, 2000

Dr. Calhoun holds a PhD from the University of Texas at Austin and is a professor of philosophy at Colby College. She has researched the status of lesbian and gay persons with an emphasis on marital and familial issues. Dr. Calhoun discusses the particular importance of securing the freedom to marry in ensuring the equality of gay men and lesbians.

Dr. Margrit Eichler Affidavit sworn November 15, 2000

Dr. Eichler holds a PhD from Duke University and is a professor of Sociology and Equity Studies in Education at the University of Toronto. She has expertise in family policy and the evolution of the family in Canada and other industrialized countries. Dr. Eichler discusses the diversity of family forms in Canada and the importance of equal marriage to same-sex spouses from a sociological perspective.

Dr. William Eskridge Jr. Affidavit sworn November 14, 2000
Reply Affidavit sworn May 29, 2001

Dr. Eskridge received a juris doctorate from Yale University and has professional education in history and law. He has studied extensively in the areas of religion and sexual orientation. Dr. Eskridge's affidavit is a cross-cultural and historical review of the recognition of marriages between same-sex couples. Dr. Eskridge establishes that the recognition of marriage for same-sex couples fits the contemporary purposes of marriage. In his reply evidence, Dr. Eskridge responds to the Attorney General of Canada's witnesses on the cross-cultural history of marriages between persons of the same sex.

Dr. Miriam Kaufman Affidavit sworn November 20, 2000

A mother, a lesbian and a pediatrician, Dr. Kaufman addresses the importance of securing the freedom to marry to protect the best interests of children.

Dr. Andrew Koppleman Reply affidavit sworn April 26, 2001

Dr. Koppleman holds a PhD in political science from Yale University and is a professor of law and political science at Northwestern University. Dr. Koppleman's affidavit is a response to Professor Katz's evidence and provides evidence of foreign law. Dr. Koppleman explains that the denial of marriage to different-race couples is perfect parallel to the denial of marriage to same-sex couples.

Dr. Ellen Lewin Affidavit sworn November 14, 2000

Dr. Lewin holds a PhD in Anthropology from Stanford University. She is a professor of Anthropology and Women's Studies at the University of Iowa, with special emphasis on lesbian cultures, kinship, and motherhood. In her affidavit she describes the importance of commitment ceremonies and marriage to same-sex spouses.

Dr. Adele Mercier Reply affidavit sworn August 31, 2001

Dr. Mercer holds a PhD in both philosophy and linguistics from the University of California at Los Angeles. She is a professor at Queen's University. Dr. Mercer responds to Professor Stainton's evidence on the meaning of the word "marriage".

Marg Nosworthy Affidavit sworn November 14, 2000

Ms. Nosworthy is the former President and current board member of Parents, Families and Friends of Lesbians and Gays (PFLAG) and the mother of a lesbian. Her affidavit describes the importance of equal marriage to the families and friends of lesbians and gay men.

Dr. David Rayside Affidavit sworn November 14, 2000

Dr. Rayside holds a PhD from the University of Michigan and is a political scientist professor at the University of Toronto. Dr. Rayside describes the political realities impeding legislative change in regards to marriage for same-sex couples.

Dr. Judith Stacey and Dr. Timothy Biblarz Reply affidavit sworn June 6, 2001

Drs. Stacey and Biblarz are sociologists and professors at the University of Southern California. Their affidavit is a reply to Professor Nock's affidavit, analyzing research on gay and lesbian parenting. They also demonstrate the serious flaws in the evidence of Craig Hart. Drs. Stacey and Biblarz are the authors of the most current and comprehensive study on same-sex parenting.

Dr. Randolph Trumbach Affidavit sworn November 20, 2000
Reply Affidavit sworn June 1, 2001

Dr. Trumbach holds a PhD from John Hopkins University and is a professor with the department of history at the City University of New York. He is an expert on the history of the modern family and marriage since the 18th century and on the history of sexual relations in Western cultures since the 1700's. Dr. Trumbach's affidavit deals with the history of marriage in Western civilization and demonstrates that the nature of marriage has changed drastically over time. In Dr. Trumbach's reply,

he demonstrates that the Attorney General of Canada's historians actually advance his point that marriage has changed over time.

Dr. Robert Wintemute Reply affidavit sworn May 29, 2001

Dr. Wintemute holds a PhD in Law from the University of Oxford and is a professor of European Community Law, Human Rights Law and Anti-Discrimination Law, at the University of London, England. Dr. Wintemute's affidavit responds to the evidence of Bea Verschraegen. Dr. Wintemute states that equal marriage in the Netherlands is not an anomaly, but the direction of legal change across many nations.

Professor Evan Wolfson Reply affidavit sworn May 29, 2001

Professor Wolfson is an American attorney specializing in constitutional and anti-discrimination law. Professor Wolfson responds to Professor Katz's affidavit on the state of equal marriage law in the United States.

TAB B

Schedule "B"

SUMMARY OF LGBT RIGHTS IN EACH JURISDICTION OF CANADA*

	Marriage**	Same-sex adoption	Spousal support	Matrimonial property division	Dependents' relief	Inheritance without a will	Sexual orientation discrimination prohibited	Pensions***	Same-sex immigration
Federal	(✓)1	n/a	n/a	n/a	n/a	n/a	✓	✓	✓
Alberta1	(×) 5	(✓)3	✓	×	✓	✓	✓2	✓4	n/a
British Columbia	✓	✓	✓	×	✓	✓	✓	✓	n/a
Manitoba (registered partnership or common law)1	–	✓	✓	(✓)2	✓	(✓)3	✓	✓	n/a
New Brunswick	–	×1	✓	×	×	×	✓	×	n/a
Newfoundland & Labrador	–	✓	✓	×	×	×	✓	✓	n/a
Northwest Territories	–	✓	✓	✓	×	×1	✓	×	n/a
Nova Scotia (registered partnership)	–	✓1	✓	✓	✓	✓	✓	✓	n/a
Nova Scotia (common law)	–	✓1	✓	×	×	×	✓	(✓)2	n/a
Nunavut	–1	×	×	×	×	×	✓	×	n/a
Ontario	✓	✓	✓	×	✓	×	✓	✓	n/a
Prince Edward Island	–	×	✓	×	×	×	✓	×	n/a
Québec (civil union)	✓	✓	✓	✓	✓	✓	✓	✓	n/a
Québec (conjoint de fait)	✓	✓	×	×	×	×	✓	✓	n/a
Saskatchewan	–	✓	✓	✓	✓	✓	✓	✓	n/a
Yukon Territory	–	?1	✓	✓	✓	×2	✓	×	n/a

Notes:

* In some jurisdictions, words like "spouse" are used in a law, without any definition clarifying whether this is, or is not, intended to cover a same-sex partner. If the particular province or territory does not generally recognize same-sex partners as spouses, it is assumed that same-sex partners are not included. Courts can, however, interpret such expressions more broadly, and any denial of equality can be challenged as a violation of the Charter of Rights.

** The capacity of same-sex couples to marry is an area of exclusively federal jurisdiction, while the issuing of marriage licences is the responsibility of the provinces and territories. As a result of court cases, British Columbia, Ontario, and Quebec now issue marriage licences to same-sex couples.

***In the case of *Hislop* the court held that survivor pension rights applied prospectively in accordance with the *Modernization of Benefits Act*, but struck down retrospective survivor pension rights. The case is under appeal to the Court of Appeal for Ontario.

No other province or territory yet issues marriage licences to same-sex couples, and all Canadian jurisdictions should in theory apply the federal definition.

If you have married in British Columbia, Ontario or Quebec, your marriage may be recognized in other Canadian jurisdictions for some purposes, although many provincial and territorial statutes which confer benefits on married couples still use language that refers to opposite-sex married spouses only.

Federal:

1. The federal government has announced its support for allowing same-sex couples to marry, has chosen not to appeal court decisions in favour of same-sex marriage and has introduced draft legislation to allow same-sex couples to marry across the country. This draft legislation has not been put to a vote, however, so is not yet law.

Alberta:

1. Most partnership rights and responsibilities in Alberta are recognized as a result of recent legislation dealing with 'adult interdependent relationships'.

2. Sexual orientation was added to Alberta's human rights legislation by the Supreme Court of Canada, although Alberta has yet to explicitly amend its legislation to reflect this.

3. Alberta permits step-parent adoption by same-sex couples, but does not permit same-sex couples to jointly adopt the child of a third party.

4. Pension benefits are available to conjugal partners who have cohabited for 3 years or have a child together. To ensure consistency with federal law, this definition includes same-sex partners but does not include non-conjugal partners.

5. Alberta purports to prohibit same-sex marriage, even though this is a matter outside provincial jurisdiction.

Manitoba:

1. Manitoba has enacted registered partnership legislation recognizing same-sex couples, but the legislation is not yet in force. Many of the rights and responsibilities of marriage have, however, already been extended to same-sex couples under other legislation.

2. Manitoba has enacted legislation recognizing same-sex couples for the purposes of matrimonial property division, but this legislation is not yet in force.

3. Manitoba has enacted legislation recognizing same-sex couples for inheritance purposes, but this legislation is not yet in force.

New Brunswick:

1. The restriction on same-sex adoption is being challenged in a case currently before the courts. Also, the wording of New Brunswick's adoption statute would appear to allow adoption by a couple who are legally married.

Northwest Territories:

1. Although a same-sex partner in the Northwest Territories has no general right to inherit if his or her partner dies without a will, the surviving partner does have a right to receive the same half-share of the net family property that he or she would have received if they had separated.

Nova Scotia:

1. Although the Government of Nova Scotia did not extend same-sex adoption rights to either registered domestic partners or common-law couples, the equal right to adopt has now been extended by the courts.

2. Common-law partners in Nova Scotia are recognized under the Pension Benefits Act, but do not have the recognition conferred on registered domestic partners under the Public Service Superannuation Act and Teachers' Pension Act.

Nunavut:

1. Although Nunavut does not yet issue marriage licences to same-sex couples, the Premier of Nunavut has indicated that his government will recognize same-sex marriages validly performed elsewhere (e.g. in Ontario, British Columbia, or Quebec).

Yukon:

1. The adoption legislation of the Yukon permits "spouses" to adopt, but does not define "spouse".

2. A "spouse" is eligible to inherit, but this appears to contrast with the term "common-law spouse" in other parts of the statute.

TAB C

Schedule "C": Submissions Re: Costs From Applicant Couples' Motion to Intervene

1. The Ontario & Quebec Couples have no choice but to seek leave to intervene in the Reference and are seeking their costs of the intervention payable by the government.

2. As in *Little Sisters*, *Horsefield*, *Schachter* and *M v. H.*, the litigants in this case are private citizens of ordinary means. They do not have the ability to fund the legal fees and disbursements in this matter. The cost of this important case is not one that should be borne by them, and in fact can be more easily borne by the government. The Ontario & Quebec Couples are responsible for initiating Court challenges to the opposite-sex definition of marriage in Ontario and Quebec, in which all three questions in this Reference were debated, and where the government unsuccessfully argued in favour of judicial deference. The government now seeks "judicial guidance" on issues that are, in the cold light of day, inevitable and academic, and the opposing interveners seek to make the same arguments as in the Courts below. The Ontario & Quebec Couples are pleased that the government has changed positions; however, they submit that if the government wishes to receive the Court's guidance, it should not obtain it at their personal expense.

   Little Sisters Book and Art Emporium v. Canada (Minister of Justice) (1996), [1996] B.C.J. No. 670 (B.C.S.C.), *Schacter v. Canada*, [1992] 2 S.C.R. 679, *Horsefield v. Ontario*, [1999] O.J. No. 967 (Ont. C.A.), *M. v. H.*, [1997] S.C.C.A. No. 101

3. The cases cited above, in which the Courts have granted costs to an intervener or party litigant whose case addresses the greater public interest, are directly on point. In *M. v. H.*, the Ontario government was granted leave to appeal to this Court on the condition that it pay costs to the individual M., who had started the litigation and who had settled the issues with her former partner at the time of the appeal. This case presents very similar facts.

4. If anything, this case presents stronger facts than those in *M.* v. *H.* In that case, M. no longer had any personal interest in obtaining spousal support, as her own case was settled and she had waived support. The Ontario & Quebec Couples have married or wish to preserve their freedom to marry, something that all three Canadian courts have described as a fundamental right. They perceive that their marriages, and their dignity, are directly on the line in this Reference.

5. Indeed, the Ontario & Quebec Couples submit that if there ever was a case in which individuals should have costs of an intervention payable by government, this is it. They won their cases; the government did not appeal; and yet this Reference could have significant impact on their lives. The case is, in some respects, an end-run around an appeal, and a political manoeuver to make it easier for the government to uphold the rights of this minority group. The case is of great public interest, and its importance goes far beyond the marriages of these eight couples. The Ontario & Quebec Couples respectfully request that they receive an order for substantial indemnity costs as part of the order granting them intervention.

EPSTEIN COLE LLP
Barristers

401 Bay Street
32nd Floor, P.O. Box 52
Toronto, ON M5H 2Y4
Tel: 416 862 9888
Fax: 416 862 2142

Martha A. McCarthy
Direct: 416 862 6226
Email: martha@epsteincole.com

February 6, 2004

Sent via Fax

Louise Meagher
Supreme Court of Canada
301 Wellington Street
Ottawa, Ontario
K1A 0J1

Dear Madame:

Re: 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 July 16, 2003
Court File No. 29866
Our File No. 11448

We are counsel to the Ontario & Quebec Couples, the original moving parties.

This letter is responsive to the Court's request for our views of the adjournment. In addition, we had anticipated writing to the Court to request other relief in response to the AGC's proposed additional reference question, and so we are taking this opportunity to set out these requests as well.

Our clients perceive unfairness arising from the addition of the new reference question, but we acknowledge the government's jurisdiction to ask questions of this Court. In the circumstances, we do not oppose the adjournment. It seems impossible that the matter could proceed on the old timeline given the additional question.

Further, we would request that the Court impose additional terms on the AGC in favour of the original moving parties. We understand that the three other groups of marriage applicants in the cases below [who together form the "Original Parties": the MCCT (from the Ontario case,

Philip M. Epstein, Q.C., L.S.M. Kenneth A. Cole Richard W. Greene Martha A. McCarthy
Anne Marie Horne Melanie Kraft Nancy J. Iadeluca Andrea J. Caskey
Roslyn M. Tsao Jennifer Samara Shuber Aaron Franks Sharon R. Shore
Ilana I. Zylberman Joanna L. Radbord Allison M. Kotler Nikki Gershbain
Miko Fournier Kirsten M. Chapman Lene F. Madsen Counsel: Malcolm C. Kronby,

represented by Mr. Elliott) and the two groups of B.C. couples (represented by Prof. Lahey and Ms. Petersen)] seek the same terms.

As the original moving parties, and the only individuals with direct interest in the proceedings, we believe that we can be easily distinguished from the other interveners in this matter, and given the new question, we respectfully request that we be granted certain terms that will both recognize our interest in the proceeding and maximize the assistance that we may provide to the Court.

Background

On June 10, 2003, the Ontario Court of Appeal released its decision in our Ontario case, *Halpern*. As the Court is aware, the judgment of the Ontario Court of Appeal had immediate application and one of our couples was married that very day. The AGC did not move for a stay.

The AGC announced on June 17, 2003 that it would not be appealing the Ontario decision.

The Quebec judgment of Justice Lemelin reached the same result as the other courts, although like the other cases before her she too suspended the operation of her judgment until September 6, 2004. The AGC, which initially appealed in Quebec (as it did in the other provinces), withdrew its appeal by notice dated July 8, 2003.

The Quebec case has not been heard by the Quebec Court of Appeal. On January 26, five judges of the Court heard a motion to quash the appeal, in which the sole appellant is La Ligue Catholique. The panel has reserved. The Quebec Couple requested an order lifting the suspension if the appeal is dismissed.

The suspended judgment imposed by the British Columbia Court of Appeal was lifted on July 8, 2003. The AGC, having announced its intention not to appeal, consented to the lifting of the suspension. Since the Ontario Court of Appeal decision on June 10, 2003, and the B.C. lifting of the suspension, more than 2,500 same-sex marriages have been registered in Canada. On June 17, 2003, the former Minister of Justice, Martin Cauchon, invited all provinces to being issuing marriage licences immediately.

It is common ground that what was at issue in this case, capacity to marry, is a matter solely within federal jurisdiction. In Ontario and British Columbia, the source of the unconstitutional restriction was the common law. In Quebec, it is in a federal law, s. 5 of the *Harmonization Act*, itself designed to "recognize" a Quebec Civil Code provision that has now been repealed.

The New Question

The new question amounts to a re-litigation of the three cases that the AGC decided not to appeal. While it is not an appeal, it does engage the freedom to marry of those who have not married or have not yet had their right to do so crystallize. Unlike any others of the Interveners, the proposed additional question *directly engages* the rights of the Original Parties. It is on this

basis that we ask that the Court consider us to be quasi-parties, in the nature of Respondents, on the Reference.

The AGC has indicated that he will argue in favour of equal marriage in response to the new question. However, it bears mention for a moment that the matter, at least between the AGC and the Original Parties, is *res judicata.* The doctrine of res judicata precludes a party from relitigating a question, where that question was decided in a final judicial decision in earlier proceedings between the same parties. If one of the parties chooses not to appeal, the parties are bound by those findings. (*McQuillan v. Native Inter-Tribal Housing Co-Operative,* [1998] O.J. No. 4361 (C.A.), *Alloy Wheels International (Canada) Ltd.,* [2002] O.J. No. 632 (S.C.J.), *Bramalea Inc. Senior Debenture Holders (Trustee for) v. KMPG,* [2001] C.C.S. No. 10327 (S.C.J.))

The Original Parties are now truly caught in the middle. The intervener groups opposite seek to prevent their marriages, and the AGC while it has decided to proceed with the draft bill, is asking for this Court's assistance in the process of legislative reform. This is the same situation M. found herself in when her case was settled but Ontario sought to have the issues determined in the public interest. In fact, the original moving parties suggest that their case for costs is stronger than M.'s was, since they, with the addition of the new question, continue to have a direct interest in the proceeding.

The Original Moving Parties' Requests

In our leave to intervene materials and our reply to the AGC's response on the intervention, we asked for various relief reflecting the fact that our clients were the original moving parties in the Courts below, and because their rights were, if only theoretically, on the line in the Reference. We submit that the additional of the new question makes our previous requests for relief all the more necessary, and we respectfully hope all the more compelling.

As a result of the addition of these questions, the Reference has become a *de facto* appeal of the central issues in the cases below. The interveners from the Courts below will be effectively the appellants. This is precisely the scenario we thought we had avoided successfully last October when the *Halpern* interveners' effort to seek leave to appeal was quashed by this Court.

Our clients were the parties in *Halpern* and *Hendricks.* We are now in the invidious position of having a *de facto* appeal while having no more rights than the interveners who are new to the matter, interveners whose interests are not directly affected and who have never been involved in the extensive litigation of this matter in the lower courts. The Court will note that, at the moment, there are approximately ten interveners who wish to present arguments and evidence supporting their opposition to equal marriage. The Original Parties' direct interest in this litigation is the basis for distinguishing them from the other interveners in this matter.

We respectfully request an order for substantial indemnity costs payable by the AGC. The addition of the new question expands the legal analysis significantly and places a significant burden on the original moving parties, who are private citizens of ordinary means. Some have

married, some have not; they have families and mortgages. They thought that the litigation was over. The AGC not only did not appeal their case, but openly adopted their arguments, drafted legislation supporting them which it referred to this Court, moved to quash the appeal by the religious interveners who sought to have this question answered, consented to marriage being opened up in B.C. – and now suddenly seeks to re-open the debate.

We appreciate that this Court considered our requests for costs on the intervention motion. However, we submit that the addition of the new question makes our request for costs absolutely critical. The Reference now directly engages our clients' rights and places their dignity up for discussion and debate again. Not only is this an unwanted turn of events for the original moving parties on an emotional level, it also practically requires a much greater volume of work.

Our arguments and the caselaw that supports granting costs to individuals who are in the nature of parties, or are unwilling participants in parliamentary *Charter* "education," are set out in our leave to intervene materials. The Original Parties' request is based on identical facts to those in *M. v. H*, in which this Court ordered the Ontario government to pay M.'s costs of the appeal as a condition of granting leave to appeal. (*M. v. H.*, [1997] S.C.C.A. No. 101)

If anything, this case presents stronger facts than those in *M. v. H.* In that case, M. no longer had any personal interest in obtaining spousal support, as her own case was settled and she had waived support. The Original Parties have married or wish to preserve their freedom to marry, something that all three Canadian courts have described as a fundamental right. They perceive that their marriages, and their dignity, are directly on the line in this Reference.

As for more administrative detail, the Court's intervention order, which allows interveners to file relevant evidence if it will assist the Court, may complicate matters now that the equality rights of our clients will be open to debate. We therefore suggest that a further order be made that all interveners must file their evidence at the same time as their facta. This will prevent later filings and will allow the Original Parties to limit their evidence to be responsive to the evidence filed by those who oppose us, and not simply re-file.

The Attorney General of Alberta proposes to bring up all of the records from the three cases below. The Original Parties seek to bring up all of their records from the courts below, at the expense of the AGC. However, the Original Parties have some difficulty with the AGC's former materials, filed when it opposed equal marriage, now being filed by others. Until now, that had not been contemplated or requested by any of the proposed interveners.

In the circumstances, we respectfully make the following requests:

1. That we be permitted to file a factum of 50 pages in length (we are covering both the Ontario and Quebec issues);

2. That we be permitted to file our factum at the same time as the AGC's Reply factum is due, and thus after the opposing Intervener viewpoints have been presented (we could be

simply inserted at, or before, item (7) in the AGC's proposed timetable as found in AGC's Schedule A);

3. That our oral argument be slotted after the opposing interveners and before the AGC's reply;

4. That all interveners be required to file their evidence at the same time as their facta;

5. That we be paid our costs of participation on a solicitor and client scale by the Attorney General of Canada; and

6. That the case be set down for hearing for two days on the earliest possible date.

All of which is most respectfully submitted,

Yours very truly,
Epstein Cole LLP

Martha A. McCarthy

c.c.
Mr. Michael H. Morris - 416-952-0298
Mr. Robert E. Houston - 1-613-235-4430
Mr. Robert G. Richards, Q.C. - 1-303-352-5250
Mr. Gerald D. Chipeur - 1-403-537-6538
Mr. David M. Brown - 416=947-0866
Ms. Cynthia Peterson - 416-591-7333
Mr. W.J. Sammon - 1-613-235-7578
Mr. Ed Morgan - 416-946-5069
Mr. James L. Lebo, Q.C. 1-403-543-9150
Ms. Kathleen A. Lahey - 1-613-533-6509
Mr. R. Douglas Elliott - 416-591-7333
Ms. Linda M. Plumpton - 416-865-7380
Mr. Peter Jarvis - 416-867-9192
Mr. Alain Gingras - 1-418-646-1696
Ms Sylvie Roussel - 1-819-771-5397
Mr. Brian A. Crane Q.C. - 1-613-563-9869
Mr. Mark R. Frederick - 416-595-8695
Mr. Peter D. Lauwers - 905-415-6777
Mr. Elliott M. Myers, Q.C. - 1-604-641-4949
Ms. Cathryn Pike - 416-326-9867
Mr. Aaron L. Berg - 1-204-948-2826
Mr. Christopher Rupar - 1-613-954-1920
Mr. Henry Brown - 1-613-563-9869
Mr. Peter Hogg - 416-863-2653
Mr. Graham R. Garton, Q.C. - 1-613-954-1920
Mr. Nicholas Peter McHaffie - 1-613-788-3698
Mr. Colin S. Baxter - 1-613-563-9386
Ms Marie-France Major 1-613-231-3191
Mr. Paul Champ - 1-613-567-2921
Mr. Luc Alarie - 1-514-844-8129
Mr. Richard Gaudreau - 1-819-770-1424

EPSTEIN COLE LLP
Barristers

401 Bay Street
32nd Floor, P.O. Box 52
Toronto, ON M5H 2Y4
Tel: 416 862 9888
Fax: 416 862 2142

Martha A. McCarthy
Direct: 416 862 6226
Email: martha@epsteincole.com

February 16, 2004

Sent via Fax

Anne Roland
Registrar
Supreme Court of Canada
301 Wellington Street
Ottawa, Ontario
K1A 0J1

Dear Madam:

Re: 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 July 16, 2003
Court File No. 29866
Our File No. 11448

We are counsel to the Ontario & Quebec Couples.

In response to the various positions taken by the intervener groups, we have the following brief comments:

1. The proposed schedule set out in Ms. Roland's letter dated February 11, 2004 is agreeable.

2. The MCCT was an Applicant in the Ontario case. The MCCT sought declarations of the validity of the two same-sex marriages of Kevin Bourassa and Joe Varnell and Anne and Elaine Vautour. The Ontario & Quebec Couples suggest with great respect that the MCCT is an "original party" as much as we are. The MCCT is distinguishable from all of the other interveners, and in particular the other intervener groups that have a religious

Philip M. Epstein, Q.C., L.S.M. | Kenneth A. Cole | Richard W. Greene | Martha A. McCarthy
Anne Marie Horne | Melanie Kraft | Nancy J. Iadeluca | Andrea J. Caskey
Roslyn M. Tsao | Jennifer Samara Shuber | Aaron Franks | Sharon R. Shore
Ilana I. Zylberman | Joanna L. Radbord | Allison M. Kotler | Nikki Gershbain
Miko Fournier | Kirsten M. Chapman | Lene F. Madsen | Counsel: Malcolm C. Kronby,

interest, since they were original parties, applicants, and included couples whose marriages are engaged by the Reference.

3. The Canadian Conference of Catholic Bishops ("CCCB") has asked to be given party status because it suggests that it is the only one that advocates the views opposed to equal marriage. We have two responses to this suggestion:

   a. CCCB has not been involved in any of these cases to date. The Ontario Conference of Catholic Bishops is part of the Interfaith Coalition in the Ontario case and the B.C. Conference was part of the Interfaith Coalition in the B.C. case. They are interveners on this Reference. The CCCB is entirely new to the scene.

   b. As is apparent from the draft bill and the Reference questions, the very purpose of this proceeding is to allow for discussion of religious viewpoints that are opposed to marriage. There is no need in our respectful submission to have one group appointed as a party in these circumstances.

4. The CCCB and the Attorney General of Alberta suggest that it would not be appropriate for the Couples to file their materials after the other interveners. Our request for this relief is based on two propositions: (1) those whose rights are being challenged should have an ability to see the evidence that they are required to answer; and (2) we wish to to reduce our own materials to that which is responsive rather than filing materials that speculate about what those opposite might file.

5. Now that the Court has indicated that it is considering a costs award, various interveners are now suggesting that they too should receive a costs award. Two interveners that were originally involved in the Ontario case, the Association of Marriage and the Family (AMF) and the Interfaith Coalition (IFC), now request costs and broader terms of intervention. The Couples submit that this Court has already recognized the status of the AMF and IFC as non-parties when it quashed their applications for leave to appeal. The Couples reiterate their submissions that the Couples are distinct from all of the other interveners in that they were the moving parties below; they are the only ones directly affected by the Reference; they are the only ones who claim that their rights have been infringed; and they are private citizens of ordinary means whose earlier case is now effectively continuing.

In response to the positions taken by the AGC in its letter of today's date, we have the following comments:

1. The Ontario & Quebec Couples agree with the AGC's submissions with respect to the evidence from the cases below.

2. The AGC argues that it would be inappropriate for any costs award to be made in advance or on an interim basis. The AGC's change in position and plan of drafting a bill and posing these reference questions (and in particular the fourth question) creates

enourmous costs and very significant financial disadvantage to the individual couples. The AGC's request that the costs be paid at the end of the proceeding is tantamount to suggesting that the lawyers should fund the AGC's chosen course of action.

3. The settlement of costs for the cases below was pursuant to the order of the courts' below for costs. The aggregate amount set out in Mr. Morris' letter was divided by the four parties in the three provinces, with different amounts paid to each group. The amounts paid to the Ontario & Quebec Couples for costs was settled, on a without prejudice and confidential basis, and for an amount that was far less than the actual time spent and bills of costs submitted. Also, the Ontario & Quebec Couples submit that the AGC expended massive resources on this case. It has disclosed that it spent more than $350,000 on expert evidence alone, and throughout the case the AGC had a dozen lawyers working full-time on the Ontario case alone. The amount paid to the couples in settlement of the costs award was not only far less than their own costs, but far less than those incurred by the AGC before it changed positions in this matter.

All of which is most respectfully submitted,

Yours very truly,
Epstein Cole LLP

Martha A. McCarthy

c.c. All counsel as per fax cover sheet