S.C.C. FILE NO. 29866

IN THE SUPREME COURT OF CANADA

IN THE MATTER OF Section 53 of the *Supreme Court Act*, R.S.C. 1985, Chap.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 16th July, 2003

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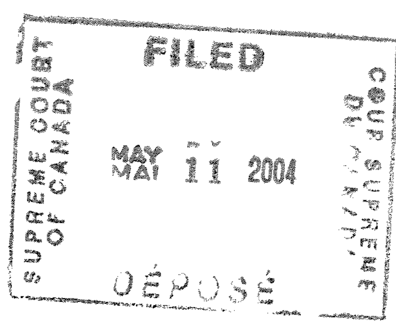

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PART I - THE FACTS

1. The questions in this Reference must be considered against the backdrop of the same-sex marriage litigation that has occurred and the legal and social changes effected by that litigation.

2. On May 1, 2003, in the case of *Egale v. Canada*, the British Columbia Court of Appeal declared that the common law definition of marriage as "the union for life of one man and one woman" was unconstitutional because it violated equality rights guaranteed by s.15 of the *Canadian Charter of Rights and Freedoms* ("*Charter*"). The Court reformulated the definition as "the lawful union of two persons to the exclusion of all others." Although the Court initially suspended the effect of its ruling until July 12, 2004, it subsequently lifted the suspension on July 8, 2003, as a result of applications brought with the consent of the Attorney General of Canada ("AGC"). The AGC did not seek leave to appeal the *Egale* decision to this Court.

> *Egale Canada Inc. v. Canada (A-G)*, 2003 BCCA 251; *Egale Canada Inc. v. Canada (A-G)*, 2003 BCCA 406

3. Similarly, on June 10, 2003, in the case of *Halpern v. Canada*, the Ontario Court of Appeal declared the common law definition of marriage to be discriminatory, contrary to s.15 of the *Charter*, and unconstitutional to the extent that it referred to "one man and one woman." The Court reformulated the definition of marriage as "the voluntary union for life of two persons to the exclusion of all others"and declared that this reformulation had immediate effect. The AGC did not seek leave to appeal the *Halpern* decision. When two interveners applied for leave to appeal, the AGC and the original applicants brought motions to quash the leave applications. This Court granted those motions to quash on October 9, 2003.

> *Halpern v. Canada (A-G)*, 172 O.A.C. 276; *Halpern v. Canada (A-G)*, [2003] S.C.C.A. No.337

4. On September 6, 2002, in the case of *Hendricks v. Quebec*, the Quebec Superior Court concluded that the opposite-sex requirement for marriage stipulated in s.5 of the *Federal Law - Civil Law Harmonization Act* ("*Harmonization Act*") was unconstitutional because it violated s.15 of the *Charter*. The court declared the impugned provision to be inoperative, but suspended the effect of its declaration for two years. The AGC initially appealed the *Hendricks* decision, but later withdrew his appeal. An intervener in the case filed a separate appeal, which was quashed by the Quebec

Court of Appeal on March 19, 2004, in a decision that also lifted the remedial suspension imposed by the Superior Court, pursuant to an application brought with the consent of the AGC.

> *Hendricks v. Quebec (A-G)*, [2002] J.Q. No.3816 (S.C.); *Ligue catholique pour les droits de l'homme v. Hendricks*, [2204] J.Q. No.2593 (C.A.)

5. In the wake of the *Egale*, *Halpern* and *Hendricks* decisions, marriage licences have been issued to thousands of lesbian and gay couples in British Columbia, Ontario and Quebec. Legally valid same-sex marriages have been solemnized pursuant to these licences and, in Ontario, pursuant to the publication of banns.

> Affidavit of Alison Kemper, sworn on April 29, 2004, Evidence Record of Hedy Halpern et al. (the "Ontario Couples") and Michael Hendricks et al. (the "Quebec Couples"), at para. 3; Affidavit of Reverend Brent Hawkes, sworn on May 6, 2004, Record of the Metropolitan Community Church of Toronto, at para. 4

PART II - THE ISSUES

6. On the first two questions in this Reference, we take the position that the proposed legislation is *intra vires* Parliament and is consistent with the *Charter*. If Parliament wishes to exercise its exclusive legislative jurisdiction regarding capacity to marry by enacting the proposed statute, we submit that this Court should affirm Parliament's constitutional ability to do so.

7. Legislation to grant same-sex couples the legal capacity to marry is, however, unnecessary since the law respecting marriage has already been changed by the decisions in *Egale*, *Halpern* and *Hendricks*. Legal restrictions against same-sex marriage no longer exist in Canada. The statutory restriction (in s.5 of the *Harmonization Act*), which once applied in Quebec, is no longer operative. The common law restriction, which once applied in the common law provinces and territories of Canada, has been reformulated. Since neither of these former laws is still in force, it would be inappropriate for this Court to answer the fourth question in this Reference, namely whether these laws were consistent with the *Charter*. In accordance with the doctrine of mootness, this Court ought not to opine on the constitutionality of now defunct laws. Moreover, given the finality of the judgments in *Egale*, *Halpern* and *Hendricks*, this Court ought to refuse to answer the fourth question on the basis of the principles of collateral attack, *res judicata* and abuse of process.

PART III - ARGUMENT

Question 1: Is the Proposal for an Act respecting certain aspects of legal capacity for marriage for civil purposes within the exclusive legislative authority of the Parliament of Canada?

8. The proposed legislation deals with the capacity of same-sex partners to marry and is within the exclusive jurisdiction of Parliament. With respect to this question, we adopt and rely on the submissions of the AGC at paragraphs 21 to 42 of his Factum, but wish to add one point.

9. In outlining the appropriate progressive approach to interpreting the word "marriage" in s.91(26) of the *Constitution Act, 1867*, the AGC cites the Privy Council's statement in *Edwards v. Canada* that the *Act* "planted in Canada a living tree capable of growth and expansion within its natural limits." Opposing interveners may emphasize the "natural limits" referenced in this quote, in support of an argument that the word "marriage" has inherent definitional boundaries which exclude same-sex couples. This argument is based on the erroneous assumption that words have fixed intrinsic meaning. On the contrary, words are invested with meaning through a process of social conditioning. As explained by the expert linguistics evidence in the record, the commonly accepted definitions of words typically reflect the values of dominant cultural groups, but the scope of their reference can be challenged by non-dominant groups and thereby expanded to become more inclusive over time. Thus the definitional boundaries of words evolve as laws, social customs and practices change. A progressive approach to constitutional interpretation requires this Court to recognize that the purported heterosexual limits on the word "marriage" are not *natural* but rather are the product of decades of discrimination against lesbians and gay men. Just as the word "person" in the *Constitution Act, 1867* (which was interpreted by this Court in *Edwards* to exclude women) and the word "citizen" in the United States Constitution (which was interpreted by the United States Supreme Court in *Scott v. Sandford* to exclude Black Americans[1]) were able to adapt to

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[1] "The words 'people of the United States' and 'citizens' are synonymous terms, and mean the same thing... [T]he question before us is, whether the class of persons described in the plea of abatement compose a portion of this people, and are constituent members of this sovereignty? We think they are not, and they are not included, and were not intended to be included, under the word 'citizens' in the Constitution...." *Scott v. Sandford,* 60 U.S 393; 1856 US LEXIS 472 (1856)

accommodate more inclusive gender-neutral and racially-neutral definitions, the word "marriage" in the *Constitution Act, 1867* can adapt -- indeed, *has already* adapted -- to accommodate a sexual orientation-neutral definition.

> Affidavit of Susan Ehrlich, sworn December 15, 2000, Record of Evidence Before the Court of Appeal for Ontario in *Halpern* v. *Canada* ("Record of Lower Courts"), p. 861 at 864-866, paras. 8-10 and at 867, para. 13; Affidavit of Adèle Mercier, sworn August 31, 2001, Record of Lower Courts, p. 2853 at 2857-2858, paras. 13-15 and at 2878, paras. 74-75

Question 2: Is section 1 of the proposed legislation, which extends capacity to marry to persons of the same sex, consistent with the Charter?

10. Section 1 of the proposed legislation is consistent with the values underlying the *Charter* and with the rights and freedoms guaranteed therein. On this question, we adopt and rely on the AGC's submissions at paragraphs 47 to 71 of his Factum, and add the following two points.

11. Opposing interveners argue that the proposed legislation would infringe their freedom of religion, even though it grants same-sex couples the capacity to marry only "for civil purposes". They assert that no meaningful distinction can be drawn between civil and religious marriage. On the contrary, the distinction between civil and religious marriage is well-established in the Canadian legal landscape. Indeed, the existence of the institution of civil marriage – as distinct from religious marriage -- is an integral part of the framework that allows religious pluralism to thrive in our society. It allows synagogues, mosques, churches and other temples to offer, restrict or deny access to their marital services according to their own principles. The existence of civil alternatives for contracting a legally recognized marriage ensures the freedom of religious communities to shape their own rules. Without civil alternatives, those who do not conform to the internal rules of various faiths would pressure religious organizations to change to include them. Thus the proposed legislation, which provides a civil marriage alternative to same-sex couples who do not satisfy the marriage requirements of some religious faiths, actually *enhances* religious freedom in Canada by providing an umbrella under which we all can live, despite our passionate differences.

> Affidavit of Rabbi Steven Greenberg, sworn May 31, 2001, Record of Lower Courts, p. 3178 at 3182-3183, paras. 17-18

12. Opposing interveners also claim that their equality rights would be infringed by the proposed legislation. They argue that the legal recognition of same-sex marriage will lead to the stigmatization or social ostracization of those who hold a faith-based view that lesbianism and homosexuality are sinful and/or immoral, and who oppose same-sex marriage based on that view. This argument confuses religious equality with an entitlement to have one's religious convictions reflected in secular laws. Religious equality is not infringed by the mere existence of laws that permit conduct proscribed by the tenets of particular religious faiths. As the record demonstrates, there are myriad unproblematic divergences between state laws and the internal religious laws of various faith groups. For example, Orthodox Jewish law prohibits mixed-faith marriage, marriage between a cohen and a divorcee or a convert, and marriage with the child of an adulterous union; Catholic law prohibits remarriage after divorce, the use of contraceptives, extra-marital cohabitation and masturbation. None of these is prohibited by secular Canadian laws and the religious equality of Catholics and Orthodox Jews is not thereby threatened.

> Affidavit of Rabbi Stevens, sworn June 14, 2001, Record of Lower Courts, p.4155 at 4159, para. 12; Affidavit of Rabbi Greenberg, sworn May 31, 2001, Record of Lower Courts, p. 3178 at 3180-1, para. 11; Affidavit of Dr. Hunt, sworn May 29, 2001, Record of Lower Courts, p. 3186 at 3189, para. 12, and at 3190-1, para. 15

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

13. We adopt and rely on the submissions of the AGC at paragraphs 72-75 of his Factum and submit that this question should be answered affirmatively.

Question 4: Is the opposite-sex requirement for marriage for civil purposes, as established by the common law and set out for Quebec in s.5 of the Harmonization Act, consistent with the Charter?

14. For the reasons that follow, we submit that this Court should refuse to answer this question.

Court's Discretion to Refuse to Answer the Question

15. It is well established in Canadian jurisprudence that a court may decline to answer a Reference question if the court deems it appropriate to do so, notwithstanding that the Government's statutory reference power is couched in broad terms. Courts have frequently exercised their

discretion to refuse to answer reference questions on the basis, for example, that the question was premature, speculative, non-justiciable, lacking in specificity, lacking a factual context, or framed in such a way that no useful answer could be provided.

> *Re Educational System in the Island of Montreal*, [1926] S.C.R. 246; *Re Waters and Water-Powers, [1929] S.C.R. 200; Re Authority of Parliament in Relation to the Upper House*, [1980] 1 S.C.R. 54; *Re Amendment to the Constitution of Canada* (1981), 117 D.L.R. (3d) 1, varied 125 D.L.R. (3d) 1 (Man.C.A.), at p.32; *McEvoy v. New Brunswick (A-G)*, [1983] 1 S.C.R. 704 at 708; *Re Goods and Services Tax*, [1992] 2 S.C.R. 445 at para.71; *Re Secession of Quebec*, [1998] 2. S.C.R. 217, at para.26

16. Moreover, courts have an inherent jurisdiction to prevent an abuse of their procedures. This Court may therefore decline to answer the fourth question on the basis that to do so would constitute an abuse of process, or on the basis of other well-established principles such as the doctrines of mootness, *res judicata* and collateral attack. Before considering each ground upon which this Court should refuse to answer the question, it is important to note both the finality of the *Egale*, *Halpern* and *Hendricks* decisions, and the national application of the new common law definition of marriage.

> *Toronto (City) v. CUPE, Local 79*, [2003] 3 S.C.R. 77, at paras.35 and 37

Finality of the *Egale, Halpern* and *Hendricks* Decisions

17. As this Court remarked in *Toronto v. CUPE Local 79*, a court decision "is final and binding on the parties ... when all available avenues have been exhausted or abandoned." Thus, as the Quebec Court of Appeal held in *Hendricks*, the judgment in *Egale* acquired finality once the time period for filing an application for leave to appeal to this Court expired on June 30, 2003, and the judgment in *Halpern* acquired finality when this Court quashed the interveners' applications for leave to appeal on October 9, 2003. Similarly, the decision in *Hendricks* acquired finality when the only outstanding appeal in the case was quashed.

> *Toronto (City) v. CUPE, Local 79*, [2003] 3 S.C.R. 77, at para.46; *Ligue catholique pour les droits de l'homme v. Hendricks*, [2204] J.Q. No.2593 (C.A.) at paras.21-23

National Application of the New Common Law Definition of Marriage

18. The new common law definition of marriage articulated by the courts in *Egale* and *Halpern* is a federal law that has national application (outside of Quebec, where a similar definition applies as a result of the *Hendricks* decision). In this regard, we disagree with the AGC's statement that

"[t]he law defining marriage is now different across Canada.... [The opposite sex] definition has not been judicially changed in the common law jurisdictions of Canada other than B.C. and Ontario."

Supplementary Factum of the AGC, at paragraph 3

19. The AGC was a party to both the *Egale* and *Halpern* proceedings, in which he attempted to defend the constitutionality of the common law restriction against same-sex marriage -- a matter within the exclusive legislative authority of Parliament (namely, capacity to marry). The AGC did not seek leave to appeal the court decisions, which invalidated the impugned restriction and reformulated the common law definition of marriage as a "union of two persons to the exclusion of all others". Indeed, the AGC moved to quash other applications for leave to appeal the *Halpern* decision, consented to a motion to quash an appeal of the *Hendricks* decision, and consented to motions to lift the remedial suspensions in British Columbia and Quebec. In light of the AGC's unequivocal acceptance of the court rulings, we assert that the common law with respect to marriage has effectively been reformulated in all common law jurisdictions, not only in the provinces of British Columbia and Ontario.

20. To hold otherwise would create an untenable situation in which a federal law was constitutionally valid in some provinces but not others. As the Quebec Court of Appeal unanimously ruled in the recent *Hendricks* decision:

> 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 constitutionelle impliquant le Procureur général du Canada relativement à une matière relevant de la compétence du Parlement fédéral, une disposition soit inapplicable dans une province et en vigueur dans toutes autres.

In short, where a federal law is declared to be constitutionally invalid by a court of competent jurisdiction in one province, in a proceeding to which the AGC is a party, and the AGC elects not to appeal the court's ruling, the declaration of invalidity becomes effective *in rem* and the invalidated federal law becomes inoperative in all Canadian jurisdictions.

Ligue catholique pour les droits de l'homme v. Hendricks, [2004] J.Q. No.2593, at para.28; *R.*v. *Stavert*, [2003] P.E.I.J. No. 28 (Prov.Ct.), affirmed [2003] P.E.I.J. 104 (Sup.Ct.); *R.* v. *Clarke*, [2003] N.S.J. No. 124

21. If this proposition did not hold true, then the AGC could deliberately avoid the invalidation of unconstitutional federal laws in most jurisdictions across the country simply by declining to appeal court judgments in which findings of invalidity were made in one province or territory. Litigants who successfully challenged such laws, having prevailed in their arguments, could not appeal lower court decisions in an effort to obtain a confirmatory ruling from this Court. The untenable result would be that a federal law, declared inoperative by virtue of s.52 of the *Constitution Act, 1982*, could remain in force throughout most of the country until such time as it was invalidated in each of the other provincial and territorial jurisdictions. This would encourage multiple duplicative proceedings, contrary to the policy of judicial economy. It would also bring the administration of justice into disrepute if a federal law that was known and acknowledged by the federal government to be unconstitutional were permitted to remain in force in some provinces and/or territories.

22. Moreover, in the specific context of this Reference, the AGC's failure to recognize the national application of the new common law definition of marriage is inconsistent with the purpose of s.91(26) of the *Constitution Act, 1867*, which granted Parliament the authority to legislate with respect to marriage in order to ensure the existence of a uniform law regarding capacity to marry across the country. It is absurd to suggest (for example) that same-sex couples living in Manitoba today do not have the capacity at common law to marry in their province of residence, but can legally marry in British Columbia, Ontario or Quebec. While such a confused and uncertain state of the law might have prevailed *for an interim period of time* had there been an appeal of the lower court cases by the AGC to this Court (until such time as this Court rendered a final judgment), the finality of the *Egale*, *Halpern* and *Hendricks* decisions precluded that outcome.

23. The national application of the new common law definition of marriage is supported by the principle of comity that is fundamental to our justice system. As this Court noted in *Morguard v. De Savoye*,

> [t]he Canadian judicial structure is so arranged that any concerns about differential quality of justice among the provinces can have no real foundation. All superior

> court judges ... are subject to final review by the Supreme Court of Canada, which can determine when the courts of one province have appropriately exercised jurisdiction in an action and the circumstances under which the courts of another province should recognize such judgments.... [These] constitutional arrangements ... make unnecessary a "full faith and credit" clause such as exists in ... the United States and Australia. The existence of these clauses, however, does indicate that a regime of mutual recognition of judgments across the country is inherent in a federation.

In *Morguard*, this Court ultimately held that the courts in one province should give "full faith and credit" to the judgments given by a court of competent jurisdiction in another province or a territory. The AGC cannot be permitted to undermine this principle of comity inherent in our country's constitutional structure -- and thereby create differential quality of justice among the provinces – simply by not appealing the *Egale*, *Halpern* and *Hendricks* decisions to this Court.

> *Morguard Investments v. De Savoye*, [1990] 3 S.C.R. 1077, at paras.35-38 and 41

<u>The Question is Moot</u>

24. Given that the opposite-sex requirement for marriage has been declared invalid in *Egale*, *Halpern* and *Hendricks* -- and its invalidity has national application -- there is no point in this Court opining on its constitutionality. Courts have consistently found appeals to be moot if the law under review has been repealed or judicially struck down prior to the hearing. While the issue of same-sex marriage may remain a controversial matter in social and political debate, there is no longer any live *legal* controversy for this Court to resolve in respect of the constitutional validity of the former restriction against same-sex marriage.

> *Borowski v. Canada (A-G)*, [1989] 1 S.C.R. 342 at pp.353-365; *Moir v. The Corporation of the Village of Huntingdon* (1891), 19 S.C.R. 363; *Albert (A-G) v. Canada (A-G)*, [1939] A.C. 117 (P.C.); *Borowski v. Canada (A-G)*, [1989] 1 S.C.R. 342 at pp.354 and 357

25. While this Court has discretion to answer a moot question, we submit that it would constitute a waste of judicial resources to do so. There are no compelling factors in this case that override public policy in favour of judicial economy. The Court's opinion will not have practical effects on the rights of lesbian and gay couples, the issues raised are not of a recurring nature, and there is no need to obviate the social cost of uncertainty in the law, because there is no uncertainty — courts of

competent jurisdiction in three separate provinces have ruled unanimously on the *Charter* issues raised by the fourth question. This Court ought therefore to decline to answer the question.

Borowski v. Canada (A-G), [1989] 1 S.C.R. 342 at pp.360-364

The Question Constitutes an Impermissible Collateral Attack

26. Another reason why this Court should refuse to answer the fourth question is because it constitutes an impermissible collateral attack on the judgments in *Egale*, *Halpern* and *Hendricks*. As this Court noted in *R. v. Wilson*, there

> has long been a fundamental rule that a court order, made by a court having jurisdiction to make it, stands and is binding and conclusive unless it is set aside on appeal or lawfully quashed. It is also well settled in the authorities that such an order may not be attacked collaterally – and a collateral attack may be described as an attack made in proceedings other than those whose specific object is the reversal, variation, or nullification of the order or judgment.
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> *R. v. Wilson*, [1983] 2 S.C.R. 594 at p.599; *Toronto (City) v. CUPE Local 79*, [2003] 3 S.C.R. 77, at para.33; *R. v. Litchfield*, [1993] 4 S.C.R. 333 at 349

27. The doctrine of collateral attack ensures the integrity of the judicial process by requiring that judicial decisions only be challenged through proper mechanisms, namely by means of judicial review or appeal. As this Court noted in *CUPE Local 79*, "proper review by way of appeal increases confidence in the ultimate result and affirms both the authority of the process as well as the finality of the result." By contrast, collateral attacks on court judgments diminish the authority of judicial decisions, calling into question the integrity of the administration of justice. Since the issues raised by the fourth question did not come before this Court by way of appeal, it would not be appropriate to address them in the context of this Reference. Answering the fourth question would effectively permit the opposing interveners to challenge the correctness of the lower court decisions collaterally.

Toronto (City) v. CUPE Local 79, [2003] 3 S.C.R. 77, at para.46 and 52

The Issues Raised by the Question are *Res Judicata*

28. Yet another reason why the Court should decline to answer the fourth question is because the issues raised by the question are *res judicata* (i.e., they have already been finally decided in another proceeding involving the same parties). The AGC and interveners should therefore be estopped from attempting to relitigate the issues in the context of this Reference. The *rationale* underlying the "issue estoppel" branch of the doctrine of *res judicata* is the principle that there must at some point be an end to litigation. The original applicants in the proceedings in *Egale*, *Halpern* and *Hendricks* are entitled to rely on the finality of the court judgments in those cases. They should not be required to relitigate the issues in this Reference.

> *Duhamel v. The Queen*, [1984] 2 S.C.R. 555; *Grdic v. The Queen*, [1985] 1 S.C.R. 810; *Danyluk v. Ainsworth Technologies Inc.*, [2001] 2 S.C.R. 460

29. The principle of finality is fundamental. As the Ontario Court of Appeal commented in *Tsaoussis v. Baetz*,

> Finality is an important feature of our justice system, both to the parties involved in any specific litigation and on an institutional level to the community at large. For the parties, it is an economic and psychological necessity. For the community, it places some limitation on the economic burden each legal dispute imposes on the system and it gives decisions produced by the system an authority which they could not hope to have if they were subject to constant reassessment and variation.
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> *Tsaoussis v. Baetz* (1998), 165 D.L.R. (4th) 268 at 275 (Ont.C.A.)

30. There are three preconditions to the operation of issue estoppel: (1) the same question has been decided in earlier proceedings by a court of competent jurisdiction; (2) the earlier judicial decision was final; and (3) the parties to the earlier decision or their privies are the same in both proceedings. All three of these conditions are met in this case.

> *Danyluk v. Ainsworth Technologies Inc.*, [2001] 2 S.C.R. 460

31. The fact that some parties who were not involved in the *Egale*, *Halpern* and *Hendricks* proceedings have been granted leave to intervene in this Reference should not preclude the

application of the doctrine of *res judicata*, since all of the original parties to the lower court proceedings have status in the Reference.[2] The principle of finality would be eviscerated if the mere presence of such additional "newcomers" to the litigation frustrated the application of issue estoppel.

32. Moreover, the *res judicata* requirement that the parties to both proceedings be the same exists in order to ensure that parties who had no involvement in earlier court proceedings can pursue their own litigation when their rights and interests are at stake. In this case, the new opposing interveners' rights and interests are in no way engaged by the fourth question. The validity of their marriages is not at issue and their religious freedom and religious equality rights will be addressed in this Court's answers to the second and third Reference questions.

33. Furthermore, this Court has previously ruled that the concept of "privity" as it relates to issue estoppel is "somewhat elastic". Its elasticity is particularly notable in cases involving constitutional law, as opposed to private litigation, where an Attorney General represents the public interest when s/he defends the constitutionality of a government's laws. In such circumstances, the Attorney General is presumed to share privity with any party who subsequently seeks to relitigate the issues with the intention of upholding the validity of a previously invalidated law. Such parties may be estopped by the application of the doctrine of *res judicata* and we submit that they should be in this case, notwithstanding that the AGC has reversed his position on the constitutionality of the restriction against same-sex marriage. In the courts below, the AGC presented evidence and made full argument in defence of the constitutional validity of the impugned restriction. The opposing interveners should not be permitted to relitigate that issue now.

> *Danyluk v. Ainsworth Technologies Inc.*, [2001] 2 S.C.R. 460 at para.60; *Ligue catholique pour les droits de l'homme v. Hendricks*, [2204] J.Q. No.2593 (C.A.) at para.25; Henri Brun & Guy Tremblay, *Droit constitutionnel*, 4th ed., (Cowansville: Editions Yvon Blais Inc., 2002), at p.21

34. Moreover, the AGC (as representative of the Governor General in Council), who was a party

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[2]Except for the Attorney General of British Columbia, who withdrew his intervention.

in all three lower court proceedings, should be estopped by the doctrine of *res judicata* from referring the fourth question to this Court. If the question cannot be referred, then it cannot be answered.

The Question Constitutes an Abuse of Process

35. The final and perhaps most compelling reason why this Court should decline to answer the fourth question is because it would constitute an abuse of process. As this Court explained in *CUPE Local 79*, "the doctrine of abuse of process engages the inherent power of the court to prevent the misuse of its procedure, in a way that would be manifestly unfair to a party to the litigation before it or would in some other way bring the administration of justice into disrepute." In our submission, since the AGC did not seek leave to appeal the lower court decisions (and, indeed, moved to quash opposing interveners' attempts to appeal the *Halpern* decision), it would constitute an abuse of this Court's procedures to permit the AGC to raise the very issues decided in those earlier proceedings before this Court through the mechanism of this Reference.

> *Toronto (City) v. CUPE Local 79*, [2003] 3 S.C.R. 77, at paras.29, 35 and 37

36. The doctrine of abuse of process is flexible and unencumbered by specific requirements. Unlike the doctrines of mootness, collateral attack and *res judicata*, abuse of process has "no hard and fast institutionalized rules." It is an intangible principle that is used to bar proceedings that are inconsistent with the objectives of public policy. It is established where proceedings "violate the fundamental principles of justice underlying the community's sense of fair play and decency."

> *Solomon v. Smith*, [1988] 1 W.W.R. 410 at 431 (Man.C.A.); *R. v. Scott*, [1990] 3 S.C.R. 979 at p.1007; *Canam Enterprises Inv. v. Coles* (2000), 51 O.R. (3d) 481 (C.A.) at paras.31 and 55, rev'd on other grounds [2002] 3 S.C.R. 307; *Toronto (City) v. CUPE Local 79*, [2003] 3 S.C.R. 77, at paras.35, 37 and 42

37. In this case, it would be grossly unfair to the original applicants in *Egale, Halpern* and *Hendricks* for this Court to engage the issues raised by the fourth question. The applicants expended considerable resources challenging the restriction against same-sex marriage that existed at common law and in s.5 of the *Harmonization Act*. As a result of their litigation efforts, the restriction was held to be unconstitutional by courts of competent jurisdiction in three separate provinces. Since the

AGC did not appeal those decisions, the applicants are entitled to rely on the finality of the results. They have done so. Indeed, most of the applicant same-sex couples have married since the court rulings. It would be contrary to any reasonable sense of fair play for this Court to now revisit the merits of the lower court judgments in the context of this Reference, particularly since the original applicants do not have the standing of parties in this proceeding and must therefore limit their role in the litigation to that of interveners, with concomitant restrictions on their rights (eg. page length restrictions for their factums, no right of reply, and no right to co-counsel for oral submissions).

38. Answering the fourth question would not only be unfair to the original applicants, but would also be contrary to the public interest in maintaining the integrity of the judicial process. Regardless of the outcome, any answer to the fourth question would undermine the fundamental principle of finality and thereby bring the administration of justice into disrepute. If this Court were to reach the same conclusion as the courts below, the exercise would prove to have been a waste of judicial resources and an unnecessary expense for all of the parties. If this Court were to reach a different conclusion than that of the courts below, its decision would create tremendous confusion about the state of the law in Canada, since a ruling in this Reference (as an advisory opinion) would not have the effect of overturning the lower court decisions, but the inconsistency of results would cast doubt upon the authority of the earlier judgments. As this Court noted in applying the doctrine of abuse of process in *CUPE Local 79*, "the inconsistency, in and of itself, will undermine the credibility of the entire judicial process, thereby diminishing its authority, its credibility and its aim of finality."

> *Toronto (City) v. CUPE Local 79*, [2003] 3 S.C.R. 77, at paras.15, 37 and 51

39. For these reasons, Canadian courts have applied the doctrine of abuse of process to bar proceedings that are in essence an attempt to relitigate a claim that has already been determined by another court. Allowing such litigation to proceed would violate the principles of judicial economy, consistency, finality and the integrity of the administration of justice.

> *Toronto (City) v. CUPE Local 79*, [2003] 3 S.C.R. 77, at paras.37; *Canam Enterprises Inc. v. Coles* (2000), 51 O.R. (3d) 481 (Ont. C.A.), Goudge J.A.dissenting, app'd [2002] 3 S.C.R. 307 at paras.55-56; *F.(K.) v. White* (2001), 53 O.R. (3d) 391 (C.A.); *Bjarnarson v. Manitoba* (1987), 38 D.L.R. (4th) 32 (Man. Q.B.), aff'd

(1987), 21 C.P.C. (2d) 302 at 312 (Man.C.A.); *Bomac Construction Ltd. v. Stevenson*, [1986] 5 W.W.R. 21 (Sask. C.A.)

40. The fact that the AGC is no longer attempting to defend the constitutionality of the restriction against same-sex marriage and is therefore not challenging the correctness of the lower court decisions does not render the referral of the fourth question to this Court any less an abuse of process. As this Court has repeatedly emphasized, the motives of the party who seeks to relitigate a question are irrelevant to the issue of whether the litigation constitutes an abuse of the court's procedure. The focus of the inquiry must be on the impact of the proceeding on the integrity of the adjudicative process and not on the motives of the parties.

Toronto (City) v. CUPE Local 79, [2003] 3 S.C.R. 77, at paras.43, 45, 46 and 51; *Danyluk v. Ainsworth Technologies Inc.*, [2001] 2 S.C.R. 460 at para.20

41. For all of the above reasons, we urge this Court decline to answer the fourth question. In the alternative, if this Court deems it appropriate to engage the issues raised by the fourth question, then we make the following submissions.

Any Restriction Against Same-Sex Marriage is Unconstitutional

42. We agree with the AGC that the opposite sex requirement for marriage (which existed at common law and in s.5 of the *Harmonization Act*) discriminates on the basis of sexual orientation and therefore violates equality rights guaranteed by s.15 of the *Charter*. This was the unanimous finding of all five courts that considered this issue in the *Egale*, *Halpern* and *Hendricks* cases (i.e., B.C. Supreme Court, B.C. Court of Appeal, Ontario Superior Court, Ontario Court of Appeal and Quebec Superior Court). We rely on the reasoning and findings of those courts.

43. Furthermore, we agree with the AGC's submission that the violation of s.15 is not justifiable pursuant to s.1 of the *Charter* because the opposite sex requirement for marriage does not have a pressing and substantial objective. We disagree, however, with the AGC's characterization of the objective as being "rooted in the physical sexual component of the [heterosexual] union and the

resulting potential for procreation". Fostering procreation is not the true objective of the restriction against same-sex marriage, but rather is a "mere pretext used to rationalize discrimination against lesbians and gays."

> *Halpern v. Canada* (2002), 215 D.L.R. (4th) 223 (Ont.Div.Ct.) at 351, para. 242 per LaForme, J.

44. This Court cannot simply accept the AGC's proffered objective, but rather must carefully consider all of the parties' submissions in order to identify the genuine purpose of the impugned law. It is important to define accurately and precisely the objective in question because a mis-characterization of the objective will compromise the s.1 analysis.

> *M. v. H.*, [1999] 2 S.C.R. 3 at paras 93-99; *Thomson Newspapers Co. v. Canada (A-G)*, [1998] 1 S.C.R. 877 at para.98; *RJR-MacDonald Inc. v. Canada (A-G)*, [1995] 3 S.C.R. 199 at 335

45. In this case, since the source of the restriction against same-sex marriage is the common law,[3] the objective of the restriction must be gleaned from the jurisprudence in which the rules regarding capacity to marry were developed. That jurisprudence does not support the AGC's contention that the primary purpose of marriage and/or of the restriction against same-sex marriage is the establishment of an institution within which procreation is fostered.

46. It was only relatively recently, when same-sex couples began to advance claims for equal recognition of their conjugal relationships (including equal access to marriage) that some judges began to identify procreation as the principal purpose of marriage, as a way of rationalizing the exclusion of same-sex partners. In earlier cases, courts did not regard procreation as the purpose of marriage. Indeed, in the 1948 case of *Baxter v. Baxter*, the House of Lords explicitly held that it was not the purpose of marriage:

> In any view of Christian marriage the essence of the matter, as it seems to me, is that the children, <u>if there be any</u>, should be born into a family, as that word is understood

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[3]Even in Quebec, the purpose of the restriction in s.5 of the *Harmonization Act* was simply to harmonize federal law in that province with the common law restriction that prevailed in other provinces.

> in Christendom generally, and in the case of a marriage between spouses of a particular faith that they should be brought up and nurtured in that faith. But this is not the same thing as saying... that procreation of children is the principal end of marriage.
>
> *Baxter v. Baxter,* [1948] A.C. 274 at 286 (H.L.) (emphasis added)

47. In *Baxter,* a man sought to annul his marriage on the ground of non-consummation because his wife refused to have sexual intercourse with him unless he used a condom. The House of Lords denied the annulment, relying on the following passage from Lord Stair's *Institutions*:

> So then, it is not the consent of marriage as it relateth to the procreation of children that is requisite; for it may consist, though the woman be far beyond that date; but it is the consent, whereby ariseth that conjugal society, which may have the conjunction of bodies as well as of minds, as the general end of the institution of marriage, is the solace and satisfaction of man [sic].
>
> *Baxter v. Baxter,* [1948] A.C. 274 at 286 (H.L.) at 289 (emphasis added)

48. There are numerous other cases in which English and Canadian courts (and American courts) consistently held that a heterosexual marriage was valid and could not be annulled despite the fact that one spouse refused to have sexual intercourse, was infertile, or insisted on using contraceptives. It can reasonably be inferred from this jurisprudence that courts have not regarded actual procreation nor the ability to procreate as the purpose of the matrimonial contract. The same inference can be drawn from the annulment cases involving husbands who were unable to consummate their marriage due to impotence resulting from advanced age. Courts have repeatedly ruled that the purpose of such marriages is "companionship" and they are therefore valid and not voidable, notwithstanding the spouses' inability to have sexual intercourse and, evidently, their inability to procreate. Similarly, in *Aisaican v. Kahnapace*, the Saskatchewan Court of Queen's Bench found that a marriage was valid and non-voidable where, owing to the husband's pre-marital disability, there was no possibility of heterosexual intercourse or procreation.

> *L. v. L.* (1922), 38 T.L.R. 697; *Hale v. Hale*, [1927] 2 D.L.R. 1137 at 1138-39 (Alta S.C.), aff'd [1927] 3 D.L.R. 481 (C.A.) at 482; *Fleming v. Fleming*, [1934] O.R. 588 (C.A.) at p.592; *Tice v. Tice,* [1937] O.R. 233 (H.C.) at 239, aff'd [1937] 2 D.L.R. 591 (C.A.); *Heil v. Heil,* [1942] S.C.R. 160; *W. v. W.*, [1950] 1 W.W.R. 981 (B.C.C.A.) at 985-6; *Foster v. Foster,* [1953] 2 D.L.R. 318 (B.C.S.C.); *D. v. D.* (1973), 3 O.R. 82 (H.C.J.); *Norman v. Norman* (1979), 9 R.F.L. (2d) 345 (Ont. U.F.C); *Aisaican v. Kahnapace*, [1996] S.J. No. 539 (Sask. Q.B); Affidavit of E. Wolfson, sworn August 20, 2001, Record of Lower Courts, p. 3088 at 3094, paras. 13-21

49. In order to identify the real objective of the restriction against same-sex marriage, it is useful to examine the 1866 decision of *Hyde v. Hyde & Woodmansee*, since it is routinely cited by Canadian courts as the original source of the impugned common law restriction.

> *Hyde v. Hyde & Woodmansee* (1866), L.R. 1 P&D 130; *Re North et al. and Matheson* (1975), 52 D.L.R. (3d) 280 (Man. Co. Ct), followed in *C.(L.) v. C.(C.)* (1992), 10 O.R. (3d) 254 (Gen.Div.); *Layland v. Ontario* (1993), 14 O.R. (3d) 658 (Div.Ct.)

50. The *Hyde* case involved a heterosexual Mormon couple who were married in 1853 in Salt Lake City. Their marriage was actually monogamous, but solemnized in a jurisdiction that permitted polygamy (i.e. the Territory of Utah). The couple eventually separated and the man moved to England. The woman remained in Utah, divorced him "in accordance with the law obtaining among the Mormons," and subsequently married another man. The first husband -- not acknowledging the Mormon divorce -- petitioned the English Matrimonial Court for dissolution of the marriage on the ground that his wife had committed adultery. His petition was denied. The court ruled that it did not have jurisdiction over the couple's union because the union did not constitute a valid marriage under British law. Lord Penzance framed the issue as "whether the [potentially polygamous] union of man and woman as practised and adopted among the Mormons was really a marriage in the sense understood in this, the Matrimonial Court of England." In concluding that it was not, he made the often quoted remark that "marriage, as understood in Christendom, may ... be defined as the voluntary union for life of one man and one woman to the exclusion of all others."

> *Hyde v. Hyde & Woodmansee* (1866), L.R. 1 P&D 130, at p.132-133 and 138

51. Clearly, the original objective of this opposite sex definition of marriage was to invest majoritarian religious views with the force of law. Lord Penzance explicitly equated the definition of marriage in British common law with the definition of marriage "in Christendom". He concluded that the petitioner's marriage was not recognized as valid in British law because it did not correspond to the "Christian conception of marriage." He thereby took "religious values rooted in Christian morality and, using the force of the state, translate[d] them into a positive law binding on believers and non-believers alike," which this Court in *R. v. Big M Drug Mart* denounced as "a form of coercion inimical to the spirit of the *Charter* and the dignity of all non-Christians." Thus if this

Court looks to the original purpose of the common law opposite-sex definition of marriage -- a purpose which appears to underlie many of the opposing intervener's arguments in this Reference -- it clearly does not constitute a pressing and substantial objective within the meaning of s.1.

> *R. v. Big M Drug Mart*, [1985] 1 S.C.R. 295 at p.337; *Hyde v. Hyde & Woodmansee* (1866), L.R. 1 P&D 130,at pp.130-132, 134-35 and 137-138

52. Thus contrary to the AGC's assertion, procreation was not the original purpose of the heterosexual common law definition of marriage. Nor did it subsequently become the purpose of marriage or of excluding same-sex couples from marriage. Although this Court held in *Big M Drug Mart* that, in the context of a s.1 analysis, the objective of legislation cannot be found to have "evolved" over time, there has been some suggestion in more recent jurisprudence that a "shifting emphasis" may be recognized. Regardless of how this Court ultimately approaches the s.1 analysis in respect of legislation, we submit that the principle against a "shifting objective" should not apply to a common law rule. The common law, by definition, evolves over time. It is therefore inappropriate to narrow the focus of the s.1 inquiry to the earliest identifiable objective that can be gleaned from the jurisprudence. Particularly in the circumstances of this case, in which the earliest decision (*Hyde*) was a case about polygamy that referenced the sex of the parties ("one man and one woman") as a mere *obiter* remark, it is appropriate to examine later cases in which courts actually turned their minds to the issue of same-sex marriage (eg. *North and Matheson*, *Layland*) in order to determine why those courts maintained the restrictive (heterosexual) definition of marriage.

> *Gosselin v. Quebec*, [2002] 4 S.C.R. 429, at paras.263-265, per L'Heureux-Dube dissenting, but not on this point; *Re North and Matheson* (1975), 52 D.L.R. (3d) 280 (Man. Co. Ct), followed in *C.(L.) v. C.(C.)* (1992), 10 O.R. (3d) 254 (Gen.Div.); *Layland v. Ontario* (1993), 14 O.R. (3d) 658 (Div.Ct.)

53. We submit that procreation is not the true contemporary purpose of the restriction against same-sex marriage. The real purpose is to entrench and preserve the exclusive privileged status of heterosexual conjugal relationships in society. In that regard, the restriction against same-sex marriage is analogous to the historical prohibition against inter-racial marriages that was struck down by the United States Supreme Court in *Loving v. Virginia*. Since the objective of privileging heterosexual relationships is itself discriminatory and contrary to *Charter* values, it cannot be

construed as pressing or substantial under s.1. Any justification based upon the belief that heterosexual relationships are superior to same-sex relationships must be rejected as being "fundamentally repugnant, because it would justify the law upon the very basis upon which it is attacked for violating" the *Charter* right.

> *Loving v. Virginia*, 388 U.S. 1 at 11 (1967); *Big M Drug Mart Ltd. v. Canada*, [1985] 1 S.C.R. 295 at 336, 352-353; *McKinney v. University of Guelph*,[19990] 3 S.C.R. 229 at 303; *Egan v. Canada*, [1995] 2 S.C.R. 513 at 558 and 616; *R. v. Oakes*, [1986] 1 S.C.R. 103 at 136; *R. v. Keegstra*, [1990] 3 S.C.R. 697 at 736 and 756; *Andrews v. Law Society of B.C.*, [1989] 1 S.C.R. 143 at 171; *R v. Morgentaler*, [1988] 1 S.C.R. 30 at 164-167 and 161; *Nova Scotia v. Walsh*, [2002] 4 S.C.R. 325, at para.179-183

PART IV – COSTS

54. We seek an order that the AGC pay our costs (fees and disbursements) of this Reference, including the costs of our motion for leave to intervene, on a full indemnity solicitor-client scale (not in accordance with the tariff of fees and disbursements set out in Schedule B to the *Rules of the Supreme Court of Canada*). Our submissions with respect to costs have already been made in our Memorandum of Argument filed in support of our motion for leave to intervene and in letters to the Registrar of this Court dated November 27, 2003 and February 11, 2004. In her ruling in this matter dated February 19, 2004, the Chief Justice reserved on the issue of costs. We would ask that this Court now make the aforementioned order of costs in our favour.

ALL OF WHICH IS RESPECTFULLY SUBMITTED,

Dated this 10th day of May, 2004,

Cynthia Petersen

for Joseph J. Arvay

Counsel for the Interveners
Egale and Egale Couples

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PART VI - TEXTS

Henri Brun & Guy Tremblay, *Droit constitutionnel*, 4th ed., (Cowansville: Editions Yvon Blais Inc., 2002)

PART VII - STATUTES

Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act, 1982 (U.K.), 1982, c. 11, s. 15

15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

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15. (1) La loi ne fait acception de personne et s'applique également à tous, et tous ont droit à la même protection et au même bénéfice de la loi, indépendamment de toute discrimination, notamment des discriminations fondées sur la race, l'origine nationale ou ethnique, la couleur, la religion, le sexe, l'âge ou les déficiences mentales ou physiques.

(2) Le paragraphe (1) n'a pas pour effet d'interdire les lois, programmes ou activités destinés à améliorer la situation d'individus ou de groupes défavorisés, notamment du fait de leur race, de leur origine nationale ou ethnique, de leur couleur, de leur religion, de leur sexe, de leur âge ou de leurs déficiences mentales ou physiques.

Constitution Act, 1867, (U.K.), 30 &31 Vict., c. 3, reprinted R.S.C. 1985, App. II, No. 5, s. 91

91. It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater Certainty, but not so as to restrict the Generality of the foregoing Terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say,

....

26. Marriage and Divorce.

...

And any Matter coming within any of the Classes of Subjects enumerated in this Section shall not be deemed to come within the Class of Matters of a local or private Nature comprised in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.

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91. Il sera loisible à la Reine, de l'avis et du consentement du Sénat et de la Chambre des Communes, de faire des lois pour la paix, l'ordre et le bon gouvernement du Canada, relativement à toutes les matières ne tombant pas dans les catégories de sujets par la présente loi exclusivement assignés aux législatures des provinces; mais, pour plus de garantie, sans toutefois restreindre la généralité des termes ci-haut employés dans le présent article, il est par la présente déclaré que (nonobstant toute disposition contraire énoncée dans la préésente loi) l'autorité législative exclusive du parlement du Canada s'étend àà toutes les matières tombant dans les catégories de sujets ci-dessous énumérés, savoir:

...

26. Le mariage et le divorce.

...

Et aucune des matières énoncés dans les catégories de sujets énumérés dans le présent article ne sera réputée tomber dans la catééegorie des matières d'une nature locale ou privée comprises dans l'énumération des catégories de sujets exclusivement assignés par la présente loi aux législatures des provinces.

Constitution Act, 1982, being Schedule B to the Canada Act, 1982 (U.K.), 1982, c. 11, s. 52

52. (1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

(2) The Constitution of Canada includes

(*a*) the *Canada Act 1982*, including this Act;

(*b*) the Acts and orders referred to in the schedule; and

(*c*) any amendment to any Act or order referred to in paragraph (*a*) or (*b*).

(3) Amendments to the Constitution of Canada shall be made only in accordance with the authority contained in the Constitution of Canada.

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52. (1) La Constitution du Canada est la loi suprême du Canada; elle rend inopérantes les dispositions incompatibles de toute autre règle de droit

(2) La Constitution du Canada comprend :

a) la *Loi de 1982 sur le Canada*, y compris la présente loi;

b) les textes législatifs et les décrets figurant à l'annexe;

c) les modifications des textes législatifs et des décrets mentionnés aux alinéas *a*) ou *b*).

(3) La Constitution du Canada ne peut être modifiée que conformément aux pouvoirs conférés par elle.