

Court File No.: 29866

IN THE SUPREME COURT OF CANADA

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

IN THE MATTER OF A REFERENCE BY THE GOVERNOR IN COUNSEL  
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<sup>TH</sup> OF  
JULY 2003

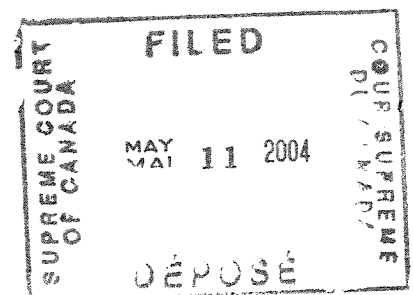
---

FACTUM OF INTERVENER,  
SEVENTH-DAY ADVENTIST CHURCH IN CANADA,

---

**Barry W. Bussey**  
**Barrister and Solicitor**  
1148 King St. East  
Oshawa, ON L1H 1H8  
Tel: (905) 433-0011  
Fax: (905) 433-0982  
Email: bbussey@sdacc.org  
Solicitor for Intervener,  
Seventh-day Adventist Church in Canada

**Jeffrey W. Beedell**  
**Lang Michener LLP**  
300 - 50 O'Connor Street  
Ottawa, ON K1P 6L2  
Tel: (613) 232-7171  
Fax: (613) 231-3191  
Email: jbeedell@langmichener.ca  
Ottawa Agent for Counsel for  
Intervener, Seventh-day Adventist  
Church in Canada



**TO: THE REGISTRAR OF THIS COURT**  
 Supreme Court of Canada  
 301 Wellington Street  
 Ottawa, Ontario K1A 0J1

**AND TO:**

<p><b>Michael H. Morris</b>  <b>Peter Hogg</b>          Attorney General of Canada          The Exchange Tower, Suite 3400          130 King Street West          Toronto, Ontario M5X 1K6          Tel: (416) 973-9704          Fax: (416) 973-5004</p>	<p><b>Graham R. Garton, Q.C.</b>          Attorney General of Canada          234 Wellington Street          Room 1212, East Tower          Ottawa, Ontario K1A 0H8          Tel: (613) 957-4842          Fax: (613) 954-1920</p>
Counsel for the Attorney General of Canada	Ottawa Agent for the Attorney General of Canada
<p><b>Alain Gingras</b>          Procureur général du Québec          1200, route de l'Église          2e étage          Ste-Foy, Quebec G1V 4M1          Tel: (418) 643-1477          Fax: (418) 646-1696</p>	<p><b>Sylvie Roussel</b>          Noël &amp; Associés          111 Rue Champlain          Hull, Quebec          J8X 3R1          Tel: (819) 771-7393          Fax: (819) 771-5397</p>
Counsel for the Attorney General of Quebec	Agent for the Attorney General of Quebec
<p><b>Robert E. Houston, Q.C.</b>          Burke-Robertson          70 Gloucester Street          Ottawa, Ontario K2P 0A2          Tel: (613) 236-9665          Fax: (613) 235-4430</p>	
Counsel for the Attorney General of British Columbia	
<p><b>Robert G. Richards, Q. C.</b>          MacPherson Leslie &amp; Tyerman          1500 – 1874 Scarth St.          Regina, Saskatchewan S4P 4E9          Tel: (306) 347-8000          Fax: (306) 352-5250</p>	<p><b>Henry S. Brown, Q.C.</b>          Gowling Lafleur Henderson LLP          2600 – 160 Elgin St.          P.O. Box 466, Stn "D"          Ottawa, Ontario K1P 1C3          Tel: (613) 233-1781          Fax: (613) 563-9869</p>
Counsel for the Attorney General of Alberta	Agent for the Attorney General of Alberta

<p><b>Gerald D. Chipeur</b> Chipeur Advocates 2380 Ernest &amp; Young Tower 440 – 2<sup>nd</sup> Ave. S.W. Calgary, Alberta T2P 5E9 Tel: (403) 537-6536 Fax: (403) 537-6538</p>	<p><b>Henry S. Brown, Q.C.</b> Gowling Lafleur Henderson LLP 2600 – 160 Elgin St. P.O. Box 466, Stn “D” Ottawa, Ontario K1P 1C3 Tel: (613) 233-1781 Fax: (613) 563-9869</p>
<p>Counsel for The Honourable Anne Cools, Member of the Senate and Roger Gallaway, Member of the House of Commons</p>	<p>Ottawa Agent for The Honourable Anne Cools, Member of the Senate and Roger Gallaway, Member of the House of Commons</p>
<p><b>David M. Brown</b> Stikeman, Elliott 5300 Commerce Ct. West 199 Bay Street Toronto, Ontario M5L 1B9 Tel: (416) 869-5602 Fax: (416) 947-0866</p>	<p><b>Nicholas Peter McHaffie</b> Stikeman, Elliott 1600 – 50 O’Connor Street Ottawa, Ontario K1P 6L2 Tel: (613) 234-4555 Fax: (613) 230-8877</p>
<p>Counsel for Focus on the Family (Canada) Association and Real Women of Canada, collectively The Association for Marriage and the Family in Ontario</p>	<p>Ottawa Agent for Focus on the Family (Canada) Association and Real Women of Canada, collectively The Association for Marriage and the Family in Ontario</p>
<p><b>Cynthia Petersen</b> Sack Goldblatt Mitchell 1130 – 20 Dundas St. West Box 180 Toronto, Ontario M5G 2G8 Tel: (416) 979-6440 Fax: (416) 591-7333</p>	<p><b>Pamela J. MacEachern</b> Nelligan O’Brien Payne LLP 1900 – 66 Slater Street Ottawa, Ontario K1P 5H1 Tel: (613) 231-8220 Fax: (613) 788-3698</p>
<p>Counsel for Egale Canada Inc. and Melinda Roy, Tanya Chambers, David Short, Shane McCloskey, Lloyd Thornhill, Robert Peacock, Robin Roberts, Diana Denny, Wendy Young and Mary Teresa Healy (the “Egale Couples”)</p>	<p>Ottawa Agent for Egale Canada Inc. and the “Egale Couples”</p>
<p><b>W. J. Sammon</b> Barnes, Sammon 200 Elgin Street Suite 400 Ottawa, Ontario K2P 1L5 Tel: (613) 594-8000 Fax: (613) 235-7578</p>	
<p>Counsel for the Canadian Conference of</p>	

Catholic Bishops	
<b>Ed Morgan</b> University of Toronto 84 Queen's Park Toronto, Ontario M5S 2C5 Tel: (416) 946-4028 Fax: (416) 946-5069	<b>Henry S. Brown, Q.C.</b> Gowling Lafleur Henderson LLP 2600 – 160 Elgin St. P.O. Box 466, Stn "D" Ottawa, Ontario K1P 1C3 Tel: (613) 233-1781 Fax: (613) 563-9869
Counsel for the Canadian Coalition of Liberal Rabbis for same-sex marriage (the "Coalition") and Rabbi Debra Landsberg, as its nominee	Ottawa Agent for the Canadian Coalition of Liberal Rabbis for same-sex marriage (the "Coalition") and Rabbi Debra Landsberg, as its nominee
<b>Leslie A. Reaume</b> Canadian Human Rights Commission 344 Slater Street Ottawa, Ontario K1A 1E1 Tel: (613) 943-9159 Fax: (613) 993-3089	
Counsel for the Canadian Human Rights Commission	
<b>James L. Lebo, Q. C.</b> McLennan Ross 1600, 500 – 3 <sup>rd</sup> Avenue SW Calgary, Alberta T2P 3C4 Tel: (403) 303-9111 Fax: (403) 543-9150	<b>Colin S. Baxter</b> McCarthy Tétrault LLP 1400 – 40 Elgin Street Ottawa, Ontario K1R 5K6 Tel: (613) 238-2000 Fax: (613) 238-9836
Counsel for the Canadian Bar Association	Ottawa Agent for the Canadian Bar Association
<b>Kathleen A. Lahey</b> 86 Beverley Street Kingston, Ontario K7L 3Y6 Tel: (613) 545-0828 Fax: (613) 533-65009	<b>Marie-France Major</b> Lang Michener 300 – 50 O'Connor Street Ottawa, Ontario K1P 6L2 Tel: (613) 232-7171 Fax: (613) 231-3191
Counsel for Dawn Barbeau, Elizabeth Barbeau, Peter Cook, Murray Warren, Jane Eaton Hamilton and Joy Masuhara (B.C. Couples)	Ottawa Agent for B.C. Couples
<b>R. Douglas Elliott</b> Elliott & Kim LLP 10 Bay Street, Suite 1400 Toronto, Ontario M5J 2R8 Tel: (416) 362-1989 Fax: (416) 591-7333	<b>Marie-France Major</b> Lang Michener LLP 300 – 50 O'Connor Street Ottawa, Ontario K1P 6L2 Tel: (613) 232-7171 Fax: (613) 231-3191
Counsel for the Metropolitan Community	Ottawa Agent for the MCCT

Church of Toronto ("MCCT")	
<p><b>Linda M. Plumpton</b> Torys 79 Wellington Street West Box 270, TD Centre Toronto, Ontario M5K 1N2 Tel: (416) 865-0040 Fax: (416) 865-7380</p>	<p><b>Marie-France Major</b> Lang Michener LLP 300 – 50 O'Connor Street Ottawa, Ontario K1P 6L2 Tel: (613) 232-7171 Fax: (613) 231-3191</p>
Counsel for the Foundation for Equal Families ("the FEF")	Ottawa Agent for the FEF
<p><b>Martha A. McCarthy</b> Epstein, Cole The Simpson Tower, 32<sup>nd</sup> floor 401 Bay Street Toronto, Ontario M5H 2Y4 Tel: (416) 862-9888 Fax: (416) 862-2142</p>	<p><b>Henry S. Brown, Q.C.</b> Gowling Lafleur Henderson LLP 2600 – 160 Elgin St. P.O. Box 466, Stn "D" Ottawa, Ontario K1P 1C3 Tel: (613) 233-1781 Fax: (613) 563-9869</p>
Counsel for Hedy Halpern, Colleen Rogers, Michael Leshner, Michael Stark, Michelle Bradshaw, Rebekah Rooney, Aloysius Pittman, Thomas Allworth, Dawn Onishenko, Julie Erbland, Carolyn Rowe, Caroline Moffat, Barbara McDowell, Gail Donnelly, Alison Kemper	Ottawa Counsel for Hedy Halpern, Colleen Rogers, Michael Leshner, Michael Stark, Michelle Bradshaw, Rebekah Rooney, Aloysius Pittman, Thomas Allworth, Dawn Onishenko, Julie Erbland, Carolyn Rowe, Caroline Moffat, Barbara McDowell, Gail Donnelly, Alison Kemper
<p><b>Martha A. McCarthy</b> Epstein, Cole The Simpson Tower, 32<sup>nd</sup> floor 401 Bay Street Toronto, Ontario M5H 2Y4 Tel: (416) 862-9888 Fax: (416) 862-2142</p>	<p><b>Henry S. Brown, Q.C.</b> Gowling Lafleur Henderson LLP 2600 – 160 Elgin St. P.O. Box 466, Stn "D" Ottawa, Ontario K1P 1C3 Tel: (613) 233-1781 Fax: (613) 563-9869</p>
Counsel for Joyce Barnet ("Ontario Couples") and Michael Hendricks, Rene LeBoeuf ("Quebec Couples")	Ottawa Agent for the Ontario Couples and the Quebec Couples
<p><b>Peter R. Jarvis</b> Lerners LLP 2400 – 130 Adelaide St. West Box 95 Toronto, Ontario M5H 3P5 Tel: (416) 867-3076 Fax: (416) 867-9192</p>	<p><b>Henry S. Brown, Q.C.</b> Gowling Lafleur Henderson LLP 2600 – 160 Elgin St. P.O. Box 466, Stn "D" Ottawa, Ontario K1P 1C3 Tel: (613) 233-1781 Fax: (613) 563-9869</p>
Counsel for the Islamic Society of North	Ottawa Agent for the Interfaith Coalition

America, the Catholic Civil Rights League and the Evangelical Fellowship of Canada, collectively as the Interfaith Coalition on Marriage and Family (“Interfaith Coalition”)	
<b>Mark R. Frederick</b> Miller Thomson 2500 – 20 Queen St. West Toronto, Ontario M5H 3S1 Tel: (416) 595-8175 Fax: (416) 595-8695	<b>Henry S. Brown, Q.C.</b> Gowling Lafleur Henderson LLP 2600 – 160 Elgin St. P.O. Box 466, Stn “D” Ottawa, Ontario K1P 1C3 Tel: (613) 233-1781 Fax: (613) 563-9869
Counsel for The Church of Jesus Christ of Latter Day Saints (“LDS Church”)	Ottawa Agent for LDS Church
<b>Peter D. Lauwers</b> Miller Thomson Suite 600, 60 Columbia Way Markham, Ontario L3R 0C9 Tel: (905) 415-6470 Fax: (905) 415- 6777	<b>Henry S. Brown, Q.C.</b> Gowling Lafleur Henderson LLP 2600 – 160 Elgin St. P.O. Box 466, Stn “D” Ottawa, Ontario K1P 1C3 Tel: (613) 233-1781 Fax: (613) 563-9869
Counsel for the Ontario Conference of Catholic Bishops (“OCCB”)	Ottawa Agent for the OCCB
<b>Elliott M. Myers, Q.C.</b> Bull, Housser & Tupper 3000 – 1055 West Georgia Street Vancouver, British Columbia V6E 3R3 Tel: (604) 687-6575 Extn. 4879 Fax: (604) 641-4949	<b>Paul Champ</b> Raven, Allen, Cameron & Ballantyne 1600 – 220 Laurier Avenue West Ottawa, Ontario K1P 5Z9 Tel: (613) 567-2901 Fax: (613) 567-2921
Counsel for the British Columbia Civil Liberties Association (“BCCLA”)	Ottawa Agent for the BCCLA
<b>Luc Alarie</b> Alarie, Legault, Beauchemin, Paquin, Jobin, Brisson & Philpot 1259, rue Berri 10e étage Montreal, Quebec H2L 4C7 Tel: (514) 844-6216 Fax: (514) 844-8129	<b>Richard Gaudreau</b> Bergeron, Gaudreau, Laporte 167 rue Notre-Dame-de-L’île Gatineau, PQ, J8X 3T3 Tel : (819) 770-7928 Fax: (819) 770-1424
Counsel for Mouvement laïque québécois	Ottawa Agent for Counsel for Mouvement laïque québécois

<p><b>Cathryn Pike</b>  Ontario Human Rights Commission  180 Dundas St. West, 8<sup>th</sup> floor  Toronto, Ontario M7A 1Z8  Tel: (416) 326-9876  Fax: (416) 326-9867</p>	<p><b>Brian A. Crane, Q. C.</b>  Gowling Lafleur Henderson LLP  2600 – 160 Elgin St.  P.O. Box 466, Stn “D”  Ottawa, Ontario K1P 1C3  Tel: (613) 233-1781  Fax: (613) 563-9869</p>
<p>Counsel for the Ontario Human Rights Commission</p>	<p>Ottawa Agent for the Ontario Human Rights Commission</p>
<p><b>Aaron L. Berg</b>  Manitoba Human Rights Commission  730 – 415 Broadway Avenue  Winnipeg, Manitoba R3C 3L6  Tel: (204) 945-2851  Fax: (204) 948-2826</p>	<p><b>Brian A. Crane, Q. C.</b>  Gowling Lafleur Henderson LLP  2600 – 160 Elgin St.  P.O. Box 466, Stn “D”  Ottawa, Ontario K1P 1C3  Tel: (613) 233-1781  Fax: (613) 563-9869</p>
<p>Counsel for the Manitoba Human Rights Commission</p>	<p>Ottawa Agent for the Manitoba Human Rights Commission</p>

**TABLE OF CONTENTS**

	<b><u>Page</u></b>
<b>PART I – THE FACTS</b>	<b>1</b>
<b>PART II – THE ISSUES</b>	<b>1</b>
<b>PART III – ARGUMENT</b>	<b>2</b>
<b>A. Introduction</b>	<b>2</b>
<b>B. Marriage is a Socio-Religious Institution</b>	<b>3</b>
<b>C. Society in Need of a Secular Institution</b>	<b>5</b>
<b>D. The Need of Protection</b>	<b>7</b>
<b>E. Third Question</b>	<b>9</b>
<b>a. Underinclusivity</b>	<b>9</b>
<b>b. Religious Freedom</b>	<b>9</b>
<b>1. Church Schools</b>	<b>10</b>
<b>2. Church Buildings and Facilities</b>	<b>11</b>
<b>3. Freedom of Religious Expression</b>	<b>12</b>
<b>c. Clash of Worldviews</b>	<b>13</b>
<b>F. Fourth Question</b>	<b>14</b>
<b>PART IV – NATURE OF ORDER SOUGHT</b>	<b>15</b>
<b>PART V – TABLE OF AUTHORITIES</b>	<b>17</b>



## **PART I - THE FACTS**

The Seventh-day Adventist Church in Canada (Church) is a Christian denomination with approximately 52,900 adult members worshipping in 407 congregations. There are members in all Canadian provinces and territories. The Church and its affiliated entities operate 52 elementary and secondary schools and one senior university – Canadian University College near Lacombe, Alberta. It owns five nursing homes, one radio station, and numerous community service centres throughout the country.

The institution of marriage forms the basis through which all Canadians are able to relate to the world around them. It frames the very identity of who we are, where we came from, and where we are going. Its basis is religious, but its effects include the secular. The redefinition of the religious institution of marriage is now being impugned by the state for secular reasons. For most religious communities, including the Seventh-day Adventist Church in Canada, secular reasons can never be acceptable basis for state interference in a religious institution.

## **PART II - THE ISSUES**

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

**B. The Fourth Question:** 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 *Federal Law – Civil Law Harmonization Act, No. 1*, consistent with the *Canadian Charter of Rights and Freedoms*? If not, in what particular or particulars and to what extent?

### **PART III – ARGUMENT**

#### **A. Introduction**

A redefinition of marriage is nothing less than a socio-cultural revolution.<sup>1</sup> It is a paradigm shift. Marriage as an institution predates law. Yet at least three courts of appeal in this country have claimed the jurisdiction to be able to redefine an institution the state did not create. Now the Parliament of Canada claims the same jurisdiction. In our submission, the state ought not to interfere with the religious institution of marriage.

The common law definition of marriage was a result of religious influence upon our law. Redefinition presupposes the state's authority over the institution. State authority over a religious institution is problematic. However if the state seeks to recognize relationships other than heterosexual partners as defined in marriage it should do so without interfering with marriage.

---

<sup>1</sup> See Professor Nicole LaViolette's statement that on same sex marriage, "It's a veritable social revolution," declares Professor LaViolette. "Just imagine; over the course of barely thirty years, we have gone from decriminalizing homosexual relations to accepting gay marriage. By comparison, it took hundreds of years to abolish slavery." *Research Perspectives* Vol. 6 No. 4. (Fall 2003). <http://www.uottawa.ca/vr-recherche-research/perspectives/v6n4/>

Should this Court agree that Parliament has the jurisdiction to redefine marriage it is our submission that careful thought be given to the ramifications on religious communities such as the Seventh-day Adventist Church in Canada (Church) to practice their faith without fear of state coercion to comply.

In the final analysis this development is bringing to the forefront the cultural clash between people of faith and a secular society. The *Charter's* promise of a multicultural, pluralistic, and peaceful society requires a respectful distance from state interference in the religious institutions of our faith communities.

#### **B. Marriage is a Socio-Religious Institution**

The common law definition of marriage is clear:

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

*Hyde v. Hyde and Woodmansee* [1861-73] All E.R. Rep. Div. 175 at 177.

The same court quoted with approval the words of Lord Brougham from an earlier decision who stated:

But marriage is one and the same thing substantially all the Christian world over. Our whole law of marriage assumes this; and it is important to observe that we regard it as a wholly different thing – a different status-from Turkish or other marriages among infidel nations, because we clearly should never recognise the plurality of wives, and consequent validity of second marriages, standing the first, which second marriages the laws of those countries authorise and validate. ***This cannot be put on any***

*rational ground, except our holding the infidel marriage to be something different from the Christian, and our also holding the Christian marriage to be the same everywhere.* [Emphasis added.]

*Hyde v. Hyde and Woodmansee* (1866) All E.R. Rep. Div. 175 at 177.

The Ontario Court of Appeal noted:

“Marriage is, without dispute, one of the most significant forms of personal relationships. For centuries, marriage has been a basic element of social organization in societies around the world. Through the institution of marriage, individuals can publicly express their love and commitment to each other. Through this institution, society publicly recognizes expressions of love and commitment between individuals, granting them respect and legitimacy as a couple. This public recognition and sanction of marital relationships reflect society’s approbation of the personal hopes, desires and aspirations that underlie loving, committed conjugal relationships. This can only enhance an individual’s sense of self-worth and dignity.”

*Halpern v. Canada (Attorney General)* 65 O.R. (3d) 161 at para. 5.

What the Ontario Court of Appeal in *Halpern* and the other courts of appeal have failed to state is that marriage is a socio-cultural institution and marriage’s definition arises from the religious (in Canada – Judeo-Christian) context. Such an understanding is important to put into perspective what marriage is. Marriage was not created by the state though it has “civil effects.”

Redefining an institution of society, not of its own making, is a gargantuan undertaking of any state. It is a failure of the state to recognize its limits. Declaring a redefinition does not change the reality of what is. The Christian understanding of marriage has formed the basis of the foundation of our law and marriage cannot be redefined by a mere declaration of state law.

In the same way a legal declaration that a person is a mother, though the person did not bare the child in question, will not in fact make that person a mother of the child. We live in a time when such realities are being challenged. Consider the recent case where an Ontario Family Court was asked to declare a lesbian partner a “mother” – despite the fact that the partner did not give birth to the child in question. In his decision Justice David Aston stated that he was prepared to make the declaration if he had the jurisdiction to do so. In the end he decided he did not – there were no *Charter* right arguments made in the case. However one can envision in the not too distant future a *Charter* claim on that very point.

A.A. v. B.B. [2003] O.J. No. 1215

### **C. Secular Society in Need of a Secular Institution**

This Court has held that Canada’s law is no longer bound by the Christian sensibilities of the past. Rather our jurisprudence has made it clear that Canada is a secular state. As such it is submitted that the state ought to deal with secular institutions. The state should leave the religious institutions alone.

*R. v. Big M Drug Mart Ltd.* [1985] 1 S.C.R. 295, para. 134-135 (Dickson C.J.)

Our submission is not to say that the state may not create its own social structure independent of the religio-social context. Any state may grant rights and responsibilities

to whatever relationships it desires for its own secular purposes within the guidelines of the *Charter*.

Redefining words of our language deep with historical and religious significance by means of judicial fiat or legislative action is fraught with danger. It is an imposition of the secular upon the sacred. Whole books of religious significance, like the Bible and the Torah, have given meaning to certain words: "marriage" is one such word. Religious traditions have also given meaning to marriage. As Justice LaForest said in *Egan*, "... marriage has from time immemorial been firmly grounded in our legal tradition, one that is itself a reflection of long-standing philosophical and religious traditions."

*Egan v. Canada*, [1995] 2 S.C.R. 513 at para. 21 (LaForest, J.)

The Federal Government's Reference and the decisions of the three Courts of Appeal, is far more radical than our Western legal tradition has seen to date. If this Court supports the Federal Government's Reference and the decisions of the three Courts of Appeal, there will be sweeping and uncontrollable legal repercussions.

Far more egregious claims of sexual equality and redefinition are about to swamp our society's structural mores. Legal recognition of such changes will only exacerbate the strains society is already experiencing between the religious and the secular. We are facing unprecedented times. Professor Bruce MacDougall states:

"...the controversy that attended gay and lesbian issues only a decade ago is now beginning to turn to *other issues of sexuality*. No doubt much of the litigation in

those areas will follow the pattern of the gay and lesbian cases and those cases will be relied on. The early cases *in each new category of sexuality* will tend to be ones of definition or assignment of status; the later cases will tend to be about place in institutions and social participation. As *Hall* deals to a certain extent with the issue of childhood homosexuality, so *other issues of sexuality and children* are being debated, most controversially recently in the *Sharpe* case. *As gay and lesbian unions are being legally recognized, so rules respecting other forms of unions, polygamous, incestuous, and so on will be re-examined.* As cases like *Egan* open s. 15 to protect against discrimination on the basis of sexual orientation, meaning gays and lesbians, *so its scope will be challenged by others such as transsexual and other transgendered persons.* [Emphasis added.]

Bruce MacDougall, "The Separation of Church and State: Destabilizing Traditional Religion-based Legal Norms on Sexuality," (2003) 36 U.B.C.L. Rev. 1-27 at para. 7.

The redefinition of "marriage" as suggested by the Courts of Appeal and Parliament is in fact a new institution. It is simply not marriage. As the above quote suggests there is every indication that "new categories" of sexuality will be making the rounds of legal argument for societal acceptance – and again the challenge of "redefining" marriage will be up for discussion. New relationships and combinations of individuals will challenge even the state's new institution at issue here. Thus the state will require an institution that is subject to change. For the religious community – marriage – its composition and its goals – has not changed for thousands of years. We simply do not want the state to impose its shifting views on the people of faith.

#### **D. The Need of Protection**

The forthcoming social upheaval resulting from this redefinition of marriage ought to be considered very carefully by this Court. While the secular state advances this new type

of marriage there will be groups, such as the Seventh-day Adventist Church in Canada, who will in no way recognize or accept this new institution as "marriage".

Inevitably the state's new institution of "marriage" will conflict with the Church. For example the Church may have to face state pressure over such issues as Church membership; Church employment; Church school teachers; those who can and cannot hold Church office; rental of Church buildings and facilities; freedom of expression of Church members and clergy.

The fact that the Church will continue its religious practice in this regard will be seen by some as repugnant and intolerant. Justice L'Heureux-Dubé stated:

"I am dismayed that at various points in the history of this case the argument has been made that one can separate condemnation of the "sexual sin" of "homosexual behaviour" from intolerance of those with homosexual or bisexual orientations. This position alleges that one can love the sinner, but condemn the sin. But, in the words of the intervener EGALÉ, "[r]equiring someone not to act in accordance with their identity is harmful and cruel. It destroys the human spirit. Pressure to change their behaviour and deny their sexual identity has proved tremendously damaging to young persons seeking to come to terms with their sexual orientation" (factum, at para. 34). The status/conduct or identity/practice distinction for homosexuals and bisexuals should be soundly rejected, as per Madam Justice Rowles: "Human rights law states that certain practices cannot be separated from identity, such that condemnation of the practice is a condemnation of the person" (para. 228). She added that "the kind of tolerance that is required [by equality] is not so impoverished as to include a general acceptance of all people but condemnation of the traits of certain people" (para. 230). This is not to suggest that engaging in homosexual behaviour automatically defines a person as homosexual or bisexual, but rather is meant to challenge the idea that it is possible to condemn a practice so central to the identity of a protected and vulnerable minority without thereby discriminating against its members and affronting their human dignity and personhood."



*Trinity Western University v. British Columbia College of Teachers* [2001] 1 S.C.R. 772 at pars. 69 (L'Heureux-Dubé, J.)

A redefinition of marriage, within the context of the socio-cultural revolution that is now taking place, is bound to increase litigation over the parameters of equality and religious freedom.

In essence we are facing a clash of world views. The challenge before us is how can we live in a society that accepts and tolerates these views without destroying the cultural dignity and the social peace of our society?

**E. Third Question:**

**a. Underinclusivity**

The proposed “protection” is vastly underinclusive and leaves unanswered many questions about the extent of religious freedom in a society which accepts same sex marriages. Underinclusivity in legislation has been found by this Court to be subject to *Charter* review.

*Vriend v. Alberta* [1998] 1 S.C.R. 493, para. 60-61 (Cory, J.)

**b. Religious Freedom**

Section 2(a) of the *Charter* protects against even indirect coercion by the state. Unless the proposed legislation is carefully crafted to impact only the secular aspects of marriage, the legislation will have a negative effect on the practice and beliefs protected under section 2(a) of the *Charter*.

*R. v. Edwards Books and Art Ltd.* [1986] 2 S.C.R. 713, para. 96-97 (Dickson C.J.)

The state's recognition of a "marriage" between other than a man and a woman will be supported by the coercive power at its disposal. It's virtually unlimited resources to inculcate and promote such an institution will drift into the domain of religious institutions. While such impact cannot be accurately predicted it can nevertheless be reasonably anticipated as substantial.

### **1. Church Schools**

There are numerous examples where freedom of expression and religion may be compromised. Consider Church schools. Currently our schools offer courses on family planning taught in the Christian worldview. The state's support of a different definition of "marriage" may well result in provincial curriculum requirements that Church schools teach courses recognizing "same-sex marriage". Church schools that would refuse may face decertification from the provincial departments of education. Students would then face a problem with being accepted into post-secondary education without a recognized Grade Twelve diploma.

The reasoning in a recent Ontario case involving a Catholic school and a student who obtained a court injunction to take his gay partner to the graduation prom could potentially be applied to schools who did not accept the state's new institution of "same-sex marriage." Justice MacKinnon stated:

“The proper approach is to look at the rights as they existed in 1867 but then to apply 2002 common sense. In 2002, a School Board's legal authority (whether public or separate) is part of our provincial public educational system which is publicly funded by tax dollars and publicly regulated by the province.... In Trinity Western (supra), our Supreme Court acknowledged the right of provincial governments to insist on a policy of non-discrimination, including non-discrimination on the basis of sexual orientation, in provincially regulated schools in British Columbia. Unlike the private university in that case, the defendant Board is, in law, a religious government actor. ***Even schooling that is not funded by the government must still respect the right of the province to insist on certain minimal requirements in the education of all students.***” [Emphasis added.]

*Hall (Litigation guardian of) v. Powers*, 59 O.R. (3d) 423, para. 43 (R. MacKinnon J.)

In commenting on the *Hall* case, Professor MacDougall states:

“In the context of an accredited school or college, however, the state is lending or transferring its authority -- and duties -- to such institutions. The constitutional obligations of the state ought to be transferred with that authority and duty. Otherwise, as R. MacKinnon J. suggested, the state could handily avoid many of its Charter obligations by transferring its duties to religious organizations which could claim religious immunity from compliance with Charter guarantees of equality.”

Bruce MacDougall, “The Separation of Church and State: Destabilizing Traditional Religion-based Legal Norms on Sexuality,” (2003) 36 U.B.C.L. Rev. 1-27 at para. 37.

It is such reasoning that truly concerns the Church as it looks down the road to state power and influence being exerted on those groups who conscientiously cannot adhere to the state's recognition and promotion of same sex relationships as “marriage.”

## 2. Church Buildings and Facilities

The proposed legislation makes no provision for religious groups who are careful to ensure that the use of their buildings and facilities are in keeping with their faith. One can reasonably expect that without protection, religious communities will be under

increasing pressure to permit same-sex couples use their church buildings for “same-sex marriage” ceremonies. Will protection be limited to human rights legislation? Will such legislation now be interpreted to require an accommodation of same-sex couples using church buildings for same-sex marriage ceremonies and receptions over the Church’s protest?

### 3. Freedom of Religious Expression

There is no provision protecting ministers of religion, or other religious persons in expressing their views on the morality of “same-sex marriages.”

Personal religious freedom is often difficult to balance with equality rights. This was illustrated in the recent case of *Brockie v. Ontario (Human Rights Commission)*. With an ever increasingly complex society such challenges in balancing personal religious freedoms with equality rights will become common place.

*Brockie v. Ontario (Human Rights Commission)*, [2002] O.J. No. 2375

With the onset of “same-sex marriage” as a further evolution of our law it is our submission that religious people ought not to be “ghettoized” or forced out of the public forums because religious views are no longer accepted by the state as the “norm”. Yet that is what is being advocated in legal circles today. Professor Robert Wintemute argues:

“Although religious individuals may find it hard to put their religious beliefs aside when they enter the public sphere, a liberal democracy cannot function in any other way. This also means that religious individuals who accept employment in the public sector cannot insist on being exempted from serving LGBT individuals

or same-sex couples, whether this involves selling them stamps, teaching them, or a few years from now, marrying them.”

Robert Wintemute, “Religion vs. Sexual Orientation: A Clash of Human Rights?” (2002) 1 J.L. & Equality 125 at para. 33.

**c. Clash of Worldviews**

The Church submits that the present case exemplifies two competing world views. One suggests that regulation of sexuality is an issue of morality. This is a religious moral world view. The other suggests that morality and religion have no place in the law of a secular liberal democracy. It is submitted that the only way our society can survive the clash of these views is to allow both views to occupy their own distinct space in society. It is a clash of absolutes. A compromise on either side will not be acceptable.

Therefore, while the state creates a new definition of marriage unacceptable to a number of religious groups, those religious groups will require exemption and protection from state intervention. Likewise the secular will require its own place and sphere of influence that must be respected. Each group ought to have the freedom to express and practice their peculiar worldviews.

Once the court redefines marriage, the people in Canada will adopt the mantra that “if it’s legal it must be moral” and those who hold otherwise may very well face pressure from society to conform to the prevailing world view reflected in the legislation.

**F. Fourth Question**

The Church asks that marriage be protected not as against individual conduct, but as against state action that would undermine and redefine the institution.

Marriage in Canada is a religious institution that was adopted by our common law. It is obvious that the state saw the benefits of such an institution as the basis of our society and sought to protect it. Today however, with the advent of the *Charter*, Canada has become secular in its focus. The state is now asked to deal with the alleged inequality of treatment as a result of the common law definition of marriage.

It is submitted that the common law definition is not inconsistent with s. 15(1) it is simply an acceptance of a religious institution that heavily influenced our civilization. To redefine the common law definition would be an attempt to redefine the religious understanding of marriage. The state has the wherewithal to create a totally new institution, independent of the religious, and provide whatever status upon individuals it desires.

The state has power to coerce conformity. It is that power from which we ask for protection.

The word “marriage” therefore belongs not in the secular but the sacred. For the state to impose the word “marriage” for relationships other than its historical, social, and religious understanding is to usurp the rightful role of the religious community.

The Church does not seek to restrict individual liberty by resisting the redefinition of marriage. Rather it insists that individuals, whatever their sexual orientation, are free to engage in monogamous relationships of their choosing without re-defining marriage. To the extent that the law should protect and encourage such stable relationships - all are free to obtain such legal protections. The Church does not oppose the state recognizing such relationships, even though the Church’s moral view may be distinct from the view of many in society.

The Church is not asking the state to promote the historical and existing definition of marriage as a religious institution. The Church, and its adherents, seek state protection of marriage as a religious institution. Such protection is not as against individuals, but as against the state redefining marriage that will negatively impact on the liberty of the Church and its members to freely express and practice its faith.

#### **PART IV – NATURE OF ORDER SOUGHT**

Question 3 on the Reference should be answered “no, because it is underinclusive with respect to s. 2(a) and cannot be justified under s. 1 of the *Charter of Rights and Freedoms*.”

Question 4 on the Reference should be answered “yes, because the opposite sex requirement is consistent with s. 15(1) of the *Charter* and the state may provide remedial action without redefining marriage.”

**ALL OF WHICH IS RESPECTFULLY SUBMITTED**

Dated at the City of Oshawa this 10<sup>th</sup> day of May, 2004

A handwritten signature in black ink, appearing to read "Barry W. Bussey", is written over a solid horizontal line.

**Barry W. Bussey**  
Counsel for the Intervener, Seventh-day  
Adventist Church in Canada



**PART V – TABLE OF AUTHORITIES**

1. *A.A. v. B.B.* [2003] O.J. No. 1215 (Ont. Sup. Ct. Jus.).
2. *Brockie v. Ontario (Human Rights Commission)*, [2002] O.J. No. 2375 (Ont. Sup. Ct. Jus.).
3. *Egan v. Canada*, [1995] 2 S.C.R. 513 at para. 21.
4. *Hall (Litigation guardian of) v. Powers*, 59 O.R. (3d) 423 (Ont. Sup. Ct. Jus) at para. 43.
5. *Halpern v. Canada (Attorney General)*, 65 O.R. (3d) 161 (Ont. C.A.), at para. 5.
6. *Hyde v. Hyde and Woodmansee*, [1861-73] All E.R. Div. 175 at 177.
7. *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295 at para. 134-135.
8. *R. v. Edwards Books and Art Ltd.* [1986] 2 S.C.R. 713 at para. 96-97.
9. *Trinity Western University v. British Columbia College of Teachers*, [2001] 1 S.C.R. 772 at para. 69.
10. *Vriend v. Alberta*, [1998] 1 S.C.R. 493 at para. 60-61.