Court File No. 29866

IN THE SUPREME COURT OF CANADA

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

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

FACTUM OF THE INTERVENER, THE ASSOCIATION FOR MARRIAGE AND THE FAMILY IN ONTARIO

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PART I - STATEMENT OF FACTS

1. This intervener, The Association for Marriage and the Family in Ontario (the "Association"), consisting of Focus on the Family Canada and REAL Women of Canada, participated as a party intervener throughout the *Halpern* proceedings and, under a slightly different name, in the *Barbeau* case. The Association unsuccessfully sought leave to appeal the *Halpern* decision to this Court.

2. The Association agrees with and adopts the statement of facts contained in paragraphs 3 to 10 of the Factum of the Attorney General of Canada (the "AG's Factum") and paragraph 2 of the Supplementary Factum of the AG Canada (the "AG's Supplementary Factum")

PART II – POINTS IN ISSUE

3. The Association wishes to make submissions on the First, Third and Fourth Reference Questions.

PART III - ARGUMENT

Question No. 1: The Proposed Legislation is not within the exclusive jurisdiction of the Parliament of Canada

A. The Association's Basic Point

4. Clause 1 of the Proposed Legislation would radically change the legal definition of marriage by stipulating that it "is the lawful union of two persons to the exclusion of all others". The AG Canada argues that Parliament possesses the exclusive legislative jurisdiction to so change the definition of marriage pursuant to s.91(26) of the *Constitution Act, 1867*. The Association strongly disagrees. Through the Proposed Legislation Parliament would unilaterally change the meaning of a head of power under ss. 91 and thereby expand the scope of federal legislative power, a step not permitted by our Constitution. Enlarging the federal power over marriage to include an essentially different category of social relationships – those between members of the same sex – would require a constitutional amendment and cannot be accomplished by a unilateral legislative act of Parliament.

5. The Association is NOT arguing that the provincial legislatures lack the power to legislate with respect to the benefits or obligations of relationships between members of the same sex or any other non-marital, economically interdependent relationship. The provinces could legislate with respect to the appropriate civil rights, benefits and obligations of same-sex couples under section 92(13), "Property and Civil Rights in the Province". However, neither Parliament nor the provincial legislatures could enact such legislation under the heads of power dealing with "marriage" in the absence of a constitutional amendment changing the meaning of the word "marriage".

B.1 The Meaning of 'Marriage' in ss. 91 and 92 of the *Constitution Act, 1867*

6. At Confederation the legislative authority over the legal incidents of social relationships between persons was assigned to the provinces under their power to legislate in respect of "property and civil rights" under s. 92(13). There was one exception. The social relationship called "marriage" was placed under the legislative authority of Parliament in s. 91(26) – "Marriage and Divorce". As stated by Dean Hogg:

> "While most family law is within provincial jurisdiction, the Constitution Act, 1867, by s. 91(26), allocates to the federal Parliament the power to make laws in relation to 'marriage and divorce'."[1]

7. What was this "class of subject" of "marriage" over which Parliament assumed legislative authority? The answer to this question is found in the meaning of the term used in ss.91(26) and 92(12) of the *British North America Act, 1867.* Upon the passage of the *BNA Act*, the common law meaning of "marriage" (and the clearly understood cultural and social meaning of the word) as the union of a man and a woman was imported into the Canadian Constitution. This meaning of marriage in turn defined and limited the constitutional assignment of the "class of subject" in respect of social relationships as between the federal and provincial governments: Parliament gained jurisdiction over "the union of a man and a woman", and the provinces obtained jurisdiction over the civil rights associated with non-marital social relationships, including relationships between persons of the same sex.

8. The Association submits it is beyond dispute that at the time of the enactment of the BNA Act the word "Marriage" as used in section 91(26) solely referred to the union of a man and a

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[1] Peter Hogg, *Constitutional Law of Canada (Loose-leaf edition)*, at 26-1.

woman. The Confederation debates make it clear that this was the meaning of the word "marriage" as used by the drafters of the Constitution[2] (a fact accepted by the Divisional Court in the *Halpern* case)[3] and two legal decisions rendered close to Confederation – the English decision of *Hyde v. Hyde* and Quebec Superior Court decision of July 9, 1867 in *Connolly v. Woolrich* - confirm such a legal meaning of "marriage".[4]

9. The Proposed Legislation would legislate in respect of a "class of subject" that lies outside of the parameters of the "class of subject" that is the union of a man and a woman. To circumvent this obvious impediment to the Proposed Legislation, the AG Canada resorts to the "living tree" principle and doctrine of "progressive interpretation" to contend that by interpreting the word "marriage" to embrace a new meaning of unions between same-sex couples, Parliament can expand unilaterally its legislative jurisdiction over social relationships beyond those that are the "union of a man and a woman". The Association submits that the approach of the AG Canada is flawed because it misinterprets the approach of this Court to the interpretation of the meaning of words allocating powers between levels of government.

B.2 Interpreting the Meaning of Words Allocating Powers between Levels of Government

10. Viscount Sankey's famous dictum in the *Edwards* case that the *Constitution* is "a living tree" has attained mythical status, viewed by some as empowering courts to change the meaning of the *Constitution Act* as they see fit. There are two problems with the myth – it ignores what Viscount Sankey actually said and it ignores what he actually did in the *Edwards* case. As to what he said, Viscount Sankey recognized that there are "natural limits"[5] to judicial interpretation of the *Constitution* – there is only so far a court can stretch the meaning of a word

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[2] See, for example, the following debates: *March 6, 1865*: Hon. Attorney General Cartier: "It would be proved before Parliament that the marriage contracted under these circumstances is null as regards the Canon law and the law of Lower Canada. There are ecclesiastical authorities in Upper Canada just as there are in Lower Canada, but as the Civil law there is not the same as it is here, the couple whose marriage would be void under the Canon law but not under the Civil law – *for in the eyes of the law the marriage would be valid and binding, and neither husband nor wife could remarry without having obtained a divorce – the couple, I say, would have the right of applying to Parliament, who might legally declare that marriage null which had been so declared by the ecclesiastical authorities.* " (Parliamentary Debates, 3rd session, 8th Provincial Parliament of Canada, February 3, 1865, (Compendium of Materials and Authorities filed by the Association (hereinafter "Association Compendium"), Tab 1, at p. 692) Emphasis added. See also: See also: *March 6, 1865*: Debates, pp. 691-692; *February 15, 1865*: Hon. Mr. Bureau, Debates, p. 192, and *March 9, 1865*: Hon. Mr. LaFramboise, Debates, p. 849

[3] *Halpern v. Canada (Attorney General)*, (2002), 60 O.R.(3d) 321 (Div. Ct.) (hereinafter "*Halpern* Div. Ct.") per Blair, J. at para. 40 and LaForme, J. at para. 157.

[4] *Hyde v. Hyde and Woodmansee*, [1861 – 73] All E.R. Rep. 175;(AG Canada Authorities, Tab 3); *Connolly v. Woolrich* (1867), 11 L.C.J. 197 (Que. Sup. Ct.), at 215. (Association Compendium, Tab 2)

[5] The constitution is "a living tree capable of growth and expansion within its natural limits." *Re Section 24 of the B.N.A. Act*, [1930] 1 D.L.R. 98 (P.C.), at 104, 109, 112-3 (the "Edwards case") (Association Compendium, Tab 3)

in the *Constitution* before the court changes the meaning of the word and thereby crosses the line into amending the *Constitution*. Second, as to what he did, in concluding that the words "qualified persons" in section 24 of the *Constitution Act, 1867* dealing with the appointment of Senators included women, Viscount Sankey relied on the clearly understood meaning of the word "persons" – encompassing both men and women – and its use in the text of the *Constitution*. Viscount Sankey did not go outside the text of the Constitution to find a new meaning for the word "persons",[6] but stayed within the "natural limits" of the written text to conclude that the Constitution, when read as a whole, used the word 'persons' to include women. This reasoning simply provides no support for the argument that the word "marriage" in the *Constitution* can be changed in its essential meaning by resorting to the "living tree" metaphor. To interpret the word "marriage" as including unions between persons of the same-sex would be to stretch the meaning of the constitutional term in s. 91(26) beyond its "natural limits".[7]

11. That is not to say that Parliament or the legislatures are limited to legislating in respect of those things in existence at the time of Confederation - section 92(1)(a), for example, dealing with "undertakings connecting the provinces with any other or others of the provinces", has been held to include an inter-provincial telephone system. But that is not this case – same-sex relationships certainly existed at Confederation, and they were not included in the "class of subjects" known as "marriage".

12. Nor does the constitutional term in question in this Reference - "marriage" - fall into the category of constitutional terms whose meaning is ambiguous, such as "banking", where it has been held that the scope of legislative authority in respect of banking does not depend on the extent and kind of business actually carried on by banks in Canada in 1867, but on "the *meaning* of the term itself in the Act."[8] The meaning of the word "marriage", by contrast, has been clear and unambiguous, referring only to the union of a man and a woman.

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[6] Sankey, L.C. stated that having regard: "(1)To the object of the [British North America] Act, viz., to provide a constitution for Canada, a responsible and developing State; (2) That *the word 'person' is ambiguous* and may include members of either sex; (3) That there are *sections in the Act* above referred to which show that in some cases the word 'person' must include females; (4) That *in some sections* the words 'male persons' is expressly used when it is desired to confine the matter in issue to males, and (5) To the *provisions of the Interpretation Act*; their Lordships have come to the conclusion that the word 'persons' in s. 24 includes members both of the male and female sex and that, therefore, the question propounded by the Governor-General must be answered in the affirmative and that women are eligible to be summoned to and become members of the Senate of Canada, and they will humbly advise His Majesty accordingly." *Edwards*, at 112-113 (emphasis added).

[7] Nor did the Supreme Court of Canada in *Egan* or *M. v. H.* engage in a form of "living tree" constitutional interpretation that pointed the way to a change in the meaning of marriage. On the contrary, in both cases, the Supreme Court of Canada went to great pains to emphasize that the decisions did not affect the meaning of marriage *M. v. H.*, [1999] 2 S.C.R. 3, per Cory, J. at 48, and *Egan v. Canada*, [1995] 2 S.C.R. 573, per Cory, J. at 583. (Association Compendium, Tabs 4 and 5)

[8] *Attorney-General for Alberta v. Attorney-General for Canada*, [1947] A.C. 503, at 516 and 517 (J.C.P.C.); and see *Canadian Pioneer Management Ltd. v. Saskatchewan (Labour Relations Board)*, [1980] 1 S.C.R. 433, at 449-450 (Association Compendium, Tabs 6 and 7)

13. Two decisions of this Court, and one of the Saskatchewan Court of Appeal, have held that when interpreting the class of *persons* (rather than things) over whom Parliament or legislatures possess legislative authority, an interpretation of the constitutional language should be guided by the meaning of the words describing the persons as understood at the time of enacting the constitutional document.

14. In the 1939 case of *Re Eskimos* this Court was required to determine whether the term 'Indians' used section 91(24) of the *British North America Act, 1867*, included Eskimo inhabitants of the province of Quebec. In answering the question in the affirmative, the Supreme Court of Canada drew on a large volume of historical documents from before and at the time of Confederation to conclude that at the time of Confederation the term 'Indian' was employed by well-established usage to include Eskimos. Cannon, J. viewed the inquiry as one into "the exact meaning of the word 'Indians' at the time of Confederation." Kerwin, J. stated:

> "There are also a few other publications to which our attention has been called where 'Indians' and 'Esquimaux' are differentiated but the majority of authoritative publications, *and particularly those that one would expect to be in common use in 1867*, adopt the interpretation that the term 'Indians' includes all the aborigines of the territory subsequently included in the Dominion…
>
> That so soon after Confederation the position of Eskimos should be treated in this manner is significant. It not only more than counter-balances any reference made later as to the Department's attitude but, to my mind, is conclusive as to what was in the minds of those responsible for the drafting of the Resolutions leading to the passing of the British North America Act, at that time and shortly thereafter…
>
> The weight of opinion favours the construction which I have indicated is the proper one of head 24 of section 91 of the British North America Act but *the deciding factor, in my view, is the manner in which the subject was considered in Canada and in England at or about the date of the passing of the [British North America] Act.*" (emphasis added)[9]

15. More recently, this Court in *R. v. Blais,*[10] rejected the contention that the "living tree" principle could be used to change the meaning of terms used in the Constitution. In its *per curiam* judgment holding that Métis are not "Indians" within the meaning of the *Manitoba Natural Resource Transfer Agreement*, one of the constituent documents of the *Constitution of*

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[9] *Reference Re: British North America Act, 1867 (U.K.), s. 91*, [1939] S.C.R. 104, per Cannon, J. at 117; and Kerwin, J. at 112, 123 and 124 (hereafter "*Re Eskimos*") (Association Compendium, Tab 8)

[10] *R. v. Blais*, [2003] SCC 44 (Association Compendium, Tab 9)

Canada, the Court rejected a "living tree" argument very similar to that advanced by the AG Canada on this Reference. This Court stated:

> " We decline the appellant's invitation to expand the historical purpose of para. 13 on the basis of the "living tree" doctrine enunciated by Viscount Sankey with reference to the 1867 British North America Act... The appellant, emphasizing the constitutional nature of para. 13, argues that this provision must be read broadly as providing solutions to future problems. He argues that, regardless of para. 13's original meaning, contemporary values, including the recognition of the Crown's fiduciary duty towards Aboriginal peoples and general principles of restitutive justice, require us to interpret the word "Indians" as including the Métis.
>
> This Court has consistently endorsed the living tree principle as a fundamental tenet of constitutional interpretation. Constitutional provisions are intended to provide "a continuing framework for the legitimate exercise of governmental power": Hunter v. Southam Inc...*But at the same time, this Court is not free to invent new obligations foreign to the original purpose of the provision at issue. The analysis must be anchored in the historical context of the provision.* As emphasized above, we must heed Dickson J.'s admonition "not to overshoot the actual purpose of the right or freedom in question, but to recall that the Charter was not enacted in a vacuum, and must therefore ... be placed in its proper linguistic, philosophic and historical contexts": Big M Drug Mart, supra, at p. 344; see Côté, supra, at p. 265. Dickson J. was speaking of the Charter, but his words apply equally to the task of interpreting the NRTA. Similarly, Binnie J. emphasized the need for attentiveness to context when he noted in R. v. Marshall, [1999] 3 S.C.R. 456, at para. 14, that "'[g]enerous' rules of interpretation should not be confused with a vague sense of after-the-fact largesse." Again the statement, made with respect to the interpretation of a treaty, applies here."[11]

16. To interpret the word "marriage" in ss. 91(26) and 92(12) of the *Constitution Act, 1867* to include relationships between persons of the same-sex would constitute the invention of a new meaning for the word and would ignore the clear, unambiguous "linguistic, philosophic and historical contexts" surrounding the meaning of "marriage" in our constitutional text.

B.3 The Federal Parliament cannot unilaterally alter the division of powers

17. Parliament is not free under our Constitution to pass legislation that would change the meaning of a constitutional term, such as "marriage". In *R. v. Grumbo* the Saskatchewan Court of Appeal stated that Parliament could not alter the constitutional meaning of the word "Indian"

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[11] Ibid., at paras. 39 and 40

in the *Constitution Act, 1867* by simply changing the definition of "Indian" in the federal *Indian Act*.[12]

18. The AG Canada argues that since Parliament has legislated changes in the capacity to marry, in the sense of prohibited degrees of consanguinity, it follows the Parliament can change the "capacity" to marry to include same-sex couples. The Association submits that this argument confuses the "incidents" or "attributes" of marriage with its "essence". The union of a man and a woman comprises the essence of the legal meaning of "marriage" as that term is used in s. 91(26). The "incidents" of marriage so understood have changed over time – eg. in legislation modifying the benefits and obligations that accompany marriage or the prohibited degrees of consanguinity. But none of these changes in the legal incidents of marriage altered its constitutional essence which remained the union of a man and a woman. Similarly, while the circumstances under which a marriage can be terminated have changed over the years, the essential meaning of "divorce" in s. 91(26) remains the termination of the legal relationship, "marriage", between a man and a woman.

19. By contrast the Proposed Legislation would change the essential constitutional meaning of "marriage". Under s. 91(26) Parliament lacks the legislative authority to make this change because under s. 91(26) Parliament can only legislate in respect of the union of a man and a woman. Under the current division of powers in the *Constitution Act, 1867*, it is the provinces which possess the legislative authority to grant some legal recognition to same-sex relationships under "property and civil rights". Sections 91(26) and 92(12) remain heads of power reserved to legislation with respect unions between men and women. For Parliament to obtain the jurisdiction to pass legislation deeming same-sex unions to be marriages, the head of power contained in s. 91(26) would have to be expanded by constitutional amendment so that the meaning of the word "marriage" was changed to include same-sex unions.

20. The Association therefore submits that Question No. 1 should be answered as follows:

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[12] In *R. v. Grumbo* (1997), 159 D.L.R. (4th) 577, per Sherstobitoff, J.A., at p.588, para. 24, stated: " It seems also apparent that if the court had realized that it was interpreting a part of the constitution when it interpreted s. 12 of The Natural Resources Transfer Agreement, it would not have incorporated by reference, as it has done, as a definition of the word "Indian" in that section, the definition of that word found in an ordinary statute, the Indian Act (Canada). The result of this incorporation by reference would be that Parliament is empowered to amend the constitution by simply amending the definition of the word "Indian" in the Indian Act from time to time as it has done. This cannot be right. The constitution cannot be amended by simple Act of Parliament. Even *The Natural Resources Transfer Agreement* itself, by s. 26, says that the agreement may be varied by agreement confirmed by concurrent statutes of the Parliament of Canada and the Legislature of the province." (emphasis added) (Association Compendium, Tab 10)

> "The Proposal for an Act respecting certain aspects of legal capacity for marriage for civil purposes is not within the exclusive legislative authority of the Parliament of Canada because s. 91(26) of the *Constitution Act, 1867* only permits Parliament to legislate in respect of "marriage" understood as the union of a man and a woman.

Question No. 2:

21. The Association submits that this question should be answered in the negative because same-sex relationships are not of the same nature as marriage between men and women for the reasons given in answer to Question No. 4.

Question No. 3: Freedom of Religion

22. The Association concurs with the submissions of the AG Canada in paragraphs 72 to 74 of his Factum that s. 2(a) of the *Charter* protects religious officials from being compelled to perform a marriage between two persons of the same sex that is contrary to their religious beliefs. That there should be any need to pose such a question for this Court the Associations finds to be quite disturbing; its inclusion in the reference signals the sorts of "claims" against religions that will be made if the definition of marriage is changed. The legal implications of legalizing same-sex marriage do not stop at the issue of religious officials conducting ceremonies, but involve broader questions about the access by same-sex couples to religious facilities for the purposes of a ceremony, the qualification for public benefits or exemptions by religious institutions that decline to perform ceremonies for same-sex couples, the protection of the freedom of conscience and belief of statutorily-licensed marriage commissioners, and the freedom of parents to educate their children in accordance with their religious beliefs whether their children attend public or independent schools. While these additional issues are not formally before this Court, the Association submits that the Court must be alive to the broader implications to religious belief and practice that same-sex marriage poses, and adopt an approach to freedom of religion that is not confined solely to the issue of religious officials performing ceremonies.

Question No. 4: The opposite-sex definition of marriage does not infringe section 15(1) of the *Charter*.

A. The Legal Definition of Marriage does not Involve a Discriminatory Distinction

A.1 Overview

23. Society's need to promote marriage – the one unique union that complements nature with culture for the sake of the intergenerational cycle - has not changed. In striking down the common law definition of marriage as violating section 15(1) of the *Charter* it was a common theme of the judgments in the *Halpern* and *Barbeau* cases that the common law must evolve to reflect "contemporary social reality", that the role of the courts under the common law is to "determine existing needs and values of society" and that the common law cannot "isolate itself from the dictates and reality of modern society."[13] Those courts contended that the existing definition of marriage no longer served "contemporary social reality" because it did not grant some form of legal recognition to same-sex relationships.

24. Such an approach, the Association submits, incorrectly applies section 15 of the *Charter*. An opposite-sex legal definition of marriage obviously differentiates between opposite-sex couples and same-sex couples. Such a legal distinction has existed in Western law for millennia. The issue under section 15 of the *Charter* is whether such a distinction is discriminatory. The Association submits that it is not because the legal distinction resulting from the definition of marriage as the union of a man and a woman issue takes into account "actual needs, capacity or circumstances"[14] and is objectively justifiable.[15]

25. Marriage as the union of a man and a woman is distinctive, in an objective and non-discriminatory sense, in three ways:

(i) marriage promotes the long-term co-operation between men and women;

(ii) marriage perpetuates humanity through procreation; and,

(iii) marriage gives each child a mother and a father.

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[13] *Halpern* Div. Ct., per LaForme, J. at paras. 135 and 136; per Smith, A.C.J.S.C. at para. 16; and per Blair, J. at para. 31.
[14] *Law v. Canada*, [1999] 1 S.C.R. 497, at paragraph 70 (AG Canada, Supplementary Authorities, Tab 5)
[15] *Law*, paras. 59 to 61 and Attorney General (Nova Scotia) v. Walsh, [2002] S.C.J. No. 84 (AG Canada, Supplementary Authorities, Tab 8), paras. 36-39

These defining characteristics of heterosexual marriage are as necessary to meeting the needs of our contemporary social reality as they were in the past. Marriage as the union of a man and a woman is the only social institution that is oriented to meeting these crucial needs of society. This is a key distinction that sets marriage apart from same-sex unions within the section 15(1) purposive and contextual analysis. The union of a man and a woman acts to satisfy these needs of society in a way non-marital relationships, including same-sex relationships, are unable to do.

A.2 Marriage Promotes the Long-Term Co-Operation between Men and Women

26. Marriage, historically understood, satisfies the "existing needs and values of society" to promote a union that complements nature with culture for the sake of the intergenerational cycle. Humans continue to be a species populated by males and females (or in the words of the anthropologists, a "sexually dimorphic" species), and this characteristic of humans continues to be a key social reality of contemporary Canadian society. In her expert affidavit in the *Halpern* case, McGill Professor Katherine Young identified the universal features of marriage in the following way:

> "Marriage is supported by authority and incentives; it recognizes the interdependence of maleness and femaleness; it has a public dimension; it defines eligible partners; it encourages procreation under specific conditions; and it provides mutual support not only between men and women but also between men and women and their children (the sharing of resources, apart from anything else, or transmission of property)."[16]

27. In his affidavit, in the *Halpern* case David Coolidge observed that the "sexuality" of the human race "means the reality that all human beings are embodied as male or female: different, yet designed to complement one another".[17] Marriage, he argues, has been the unique social institution that "embodies and governs sexual community". While marriage is characterized by the biological as exemplified in the act of sexual intercourse, it also includes a strong cultural dimension providing the context for social relationships between men and women as well as the context for the socialization of children in respect to their development, including their development in the area of gender identity.[18]

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[16] Affidavit of Katherine Young Affidavit (hereafter the "Young Affidavit"), para. 2, p. 1, Evidence Before the Court of Appeal of Ontario (hereinafter simply "*Halpern* Evidence" at p.1388

[17] Affidavit of David Orgon Coolidge, Exhibit "B", "*Same-Sex Marriage? Baeher v. Miike and the Meaning of Marriage*" (1997), 38 South Texas Law Review 1 (hereafter, the "Coolidge Article"), p. 46, *Halpern* Evidence, p. 2490.

[18] Coolidge Article, at pp. 46 – 55; *Halpern* Evidence, pp. 2490-2499..

28. Marriage is a form of life geared toward managing the sexual differences between men and women. As put by David Coolidge:

> "What is the purpose of this sexual 'complementarity'...? I believe sexuality is meant to unite those different from, yet designed for, each other – males and females. It is the primordial dynamic of human society, the drive for 'community' at its most basic level...
>
> Sexual intercourse between a man and a woman exemplifies the purpose of sexuality: In this act, two people can simultaneously unite their entire persons into a dynamic sexual community..."[19]

Coolidge then points out the uniqueness of this sexual dynamic between a man and a woman:

> "No other form of sexual activity can provide this total union. For this reason, same-sex 'intercourse' is different than male-female intercourse, because it does not exemplify the reality of sexual complementarity. The bodies of same-sex partners do not complement one another or bring forth new life. This is no small thing, because a person's body is intrinsic to his or her existence. The idea of splitting sexuality into 'parts' – for instance, procreation, partnership, and pleasure – and then separating those parts in practice is inimical to a pluralist view of sexual wholeness."

Coolidge concludes:

> "...marriage can be defined as total sexual community. The institution of marriage is the social structure which embodies and governs that community...
>
> Marriage is therefore the most basic institution of society. Society depends upon men and women who make total commitments, give fully of themselves, nourish intimacy, and gift the world with children."[20]

29. Professor Katherine Young also points to the need for a cultural institution reflecting the complementarity of men and women when she deposes that "[b]ecause male and female bodies are biologically different from each other in at least a few important ways, even though it may sound counterintuitive, the fact is that a massive cultural effort is needed to bind them together, on an enduring basis, for the collective good."[21] Consequently, some of the universal features of marriage that she found as a result of her comparative studies included the recognition of the interdependence of maleness and femaleness, its public dimension, its definition of eligible partners and the mutual support it provided between men and women[22]. In sum, a key defining characteristic of marriage is that it supports the bonding of men and women and the process of

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[19] Coolidge Article, at pp. 47, 50, *Halpern* Evidence, pp. 2491 and 2494.
[20] Ibid., at pp. 51 and 53, *Halpern* Evidence, pp. 2495 and 2497
[21] Young Affidavit, p. 53, para. 103, *Halpern* Evidence, pp. 1440-1

living together notwithstanding their sexual differences in order to create a necessary unit to serve society.

30. To date Canadian provincial courts have ignored this distinctive characteristic of marriage based upon the complementarity of the sexes and, instead, have watered-down this characteristic of complementarity to one styled as "companionship".[23] This is not supported by the historical record – marriage was not an institution intended to support long-term committed relationships or companionship "per se"; it served as a cultural institution to unite members of the opposite sex in a monogamous and committed "dynamic sexual community" reflecting the sexuality of males and females and their natural complementarity of design.

31. Coolidge warned against splitting human sexuality into its parts, and instead argued that marriage reflects a holistic view of human sexuality.[24] In its decision in *Attorney General (Nova Scotia) v. Walsh*[25] this Court cautioned against conducting a section 15 analysis which relied solely on a "functional" comparison between two groups without taking into account the "full range of traits, history and circumstances".[26] The Association submits that to date provincial courts have fallen squarely into this trap of trying to reduce the comparative analysis down to one of functional similarity, instead of considering the defining characteristics of marriage in the broader context of its "full range of traits, history and circumstances". By ignoring the sexual complementarity upon which marriage is based, the provincial courts radically departed from the long-standing legal view that the capacity for heterosexual intercourse is an essential characteristic of marriage. As stated by Ormrod, J. in *Corbett v. Corbett*:

> ... sex is clearly an essential determinant of the relationship called marriage, because it is and always has been recognised as the union of man and woman. It is the institution on which the family is built, and in which the capacity for natural heterosexual intercourse is an essential element.[27]

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[22] Young Affidavit, supra., para. 2

[23] *Halpern Div. Ct.*, per Blair, J. at para. 32; and per LaForme, J. at para. 240.

[24] See paragraph 27 above

[25] *Attorney General (Nova Scotia) v. Walsh*, supra.

[26] *Walsh*, supra., at para. 39

[27] *Corbett v. Corbett*, [1970] 2 All E.R. 33, at 48 (Association Compendium, Tab 11) *Corbett* has been quoted with approval in Canada in at least three cases: *North v. Matheson* (1974), 20 R.F.L. 112, (Man. Co. Ct.) at 116, *M. v. M. (A)* (1984), 42 R.F.L. (2d) 55 (P.E.I.S.C.) at 57-58, and *C.(L) v. C. (C.)* (1992), 10 O.R. (3d) 254 at 256. (Association Compendium, Tabs 12, 13 and 14) In *M. v. M.(A.)*, at 59, McQuaid J. affirmed that "the capacity for natural heterosexual intercourse" is essential to marriage. Capacity for heterosexual intercourse was again affirmed in *Layland v. Ontario (Minister of Consumer & Commercial Relations)* (1993), 14 O.R. (3d) 658, (Div. Ct.) at 666, in which Southey J. on behalf of the majority, quoted extensively from Philp Co. Ct. J's affirmation of *Corbett* in *North v. Matheson*, (1974), 20 R.F.L. 112, and found: "...One of the principal purposes of the institution of marriage is the founding and maintaining of families in which children will be produced...That principal purpose of marriage cannot, as a general rule, be achieved in a homosexual union because of the biological limitations of such a union. It is this reality that is recognized in the limitation of marriage to persons of opposite sex." *Layland v. Ontario (Minister of Consumer & Commercial Relations)* (1993), 14 O.R. (3d) 658, at 666. (Association Compendium, Tab 15)

A.3 Marriage serves the continuing societal need for a cultural institution dedicated to the perpetuation of humanity

32. It is a truism that any society requires the regeneration of its population to survive and flourish. Canada is no different: such a need exists today just as it has throughout the history of Canada. Marriage has served as the cultural institution dedicated to creating the conditions in which Canadian society is perpetuated. Although the provincial courts below have not disagreed with this fact, they have minimized the importance of the fact by contending that the presence of technological means of conception no longer means that natural procreation is a defining characteristic of marriage. As put by one judge, "procreation through heterosexual coupling, as the source of the "reality" of children being born into a family, and therefore as the characteristic giving marriage its principal rationale and unique heterosexual nature, is becoming an increasingly narrow and shaky footing for the institution of marriage."[28] Why? Because, he wrote, that in view of modern medical technology the production of children "is presently attainable through means other than heterosexual intercourse." The Association submits that this reasoning is deeply flawed.

33. Demographic statistics continue to show that marriage remains the most stable unit for family formation[29]. In *Egan* Justice LaForest observed that the family unit based on father, mother and child "is the only unit in society that expends resources to care for children on a routine and sustained basis."[30] Public policy should be based on the norm and not the exception, because public policy should strive for the ideal. As put by Professor Young:

> "Marriage has never been defined merely as one context for producing or rearing children, both of which can occur – and often do – without marriage. Marriage has always been defined as the *ideal* context for producing and rearing children. That is because marriage, at least in theory, provides them with parents of both sexes on an intimate and enduring basis (although it does not always work out this way due to death, divorce or abandonment).[31]

34. The courts below unilaterally shifted one of the principal purposes of marriage away from procreation to simply the raising or nurturing of children. Although such a shift was necessary in order to advance the argument that the definition of marriage is discriminatory, the Association submits that the reasoning underlying the shift was flawed. If child-raising is a principal purpose

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[28] *Halpern Div. Ct.*, per Blair, J. at para. 69
[29] Affidavit of Edward Shorter, paras. 2, 3, 35-36, 98, *Halpern* Evidence, 933-4, 948 and 981
[30] *Egan v. Canada*, [1995] 2 S.C.R. 513, at p. 537, para. 25.
[31] Young Affidavit, *supra.*, para. 110; *Halpern* Evidence, pp. 1444-5

of marriage, then *a priori*, procreation, as its antecedent cause, must also be a principal purpose, otherwise public policy is inverting the pyramid and giving priority to the effect over the cause.

35. If procreation is dismissed as a "shaky footing for the institution of marriage", what replaces it? An adult-centred conception of marriage based on personal sexual choice appears to ground the conclusions of the provincial courts that the exclusion of same-sex couples from marriage constitutes discrimination. E.J. Graff, one of the strongest advocates of same-sex marriage, rests her case for same-sex marriage squarely on the principle of personal sexual choice. She writes:

> "...western marriage today is a home for the heart: entering furnishing, and exiting that home is your business alone...each individual should – no, must – be free to choose his or her life course rather than following a path laid out by tradition."[32]

The Ontario Court of Appeal in *Halpern* echoed Graff when it held: "The question to be asked is whether the law takes into account the actual needs, capacities and circumstances of same-sex couples, not whether the law takes into account the needs, capacities and circumstances of opposite-sex couples."[33] If this Court follows the provincial courts in holding that section 15(1) of the *Charter* requires the recognition of same-sex marriage because to exclude same-sex couples would make them feel less worthy and offend their personal dignity, then this Court will be adopting a constitutional principle that requires public recognition as marriage of any relationship of choice between or amongst adults including, for example, polygamy. Once the law constitutionally mandates the public recognition of personal sexual choices that do not harm any other person, the law has lost the ability to draw any line around "marriage".

36. Moreover, adopting a constitutional conception of marriage based on personal sexual choice would signal that Canadian law and public policy regards marriage solely as an adult-centred concept and that Canadian constitutional law would be indifferent as to whether or not marriages result in children. Put more bluntly, Canadian constitutional law would be indifferent as to whether Canadian society contains children or not; all that would matter is that adults are free in the eyes of the law to make the sexual choices they desire, and that any such choice would receive public recognition.

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[32] E.J. Graff, *What is Marriage For?* (Boston: Beacon Press, 1999), at 251 and 253; (Association Compendium, Tab 16)
[33] *Halpern v. Canada(Attorney General)* (2003), 65 O.R.(3d)161(C.A.) at para.91

37. An interpretation of equality which would result in an adult-centred conception of marriage would reduce marriage to mere subjective desire and emotionalism and ignore the crucial contribution of marriage to society. Marriage based on a notion of self-centred equality would push children to the margins. It would signal that Canadian law is indifferent to the presence or absence of a social institution oriented to produce children and, as will be argued below, it would signal that Canadian law is prepared to ignore the rights of children when dealing with the issue of marriage.

A.4 Marriage Gives Children Both a Mother and a Father

38. Adopting an interpretation of section 15(1) of the *Charter* that constitutionally requires the recognition as "marriage" of adults' sexual preferences and choice of life-styles would discard one of the other distinctive characteristics of marriage as the union of a man and a woman: marriage, so understood, gives a child both a mother and a father. Same-sex marriage cannot do that and consequently cannot be about that. As a result, same-sex marriage radically changes marriage.[34]

39. Put another way, to adopt a constitutional principle that requires public recognition of same-sex marriages means accepting as a society that children have no right to both a father and a mother; no right to know who their biological parents are; and no right to be reared by their biological father and mother. Marriage between a man and a woman is the societal institution that symbolizes and institutionalizes and thereby establishes those rights. In this regard marriage is unique and no alternative or replacement institution exists. Constitutionally recognizing same-sex marriage necessarily means that marriage would no longer fulfill any of those functions.

40. Good reasons exist for marriage retaining, as one of its primary purposes, giving children both mothers and fathers. First, children need the complementarity of male and female parenting. David Coolidge put the matter this way:

> "Sexuality involves socialization. This cultural dynamic affects the development of gender identity in children. The patterns of gender formation differ between boys and girls, based on separation from or identification with their mothers. In

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[34] For a fuller argument see Margaret Sommerville, "Every Child deserves one mom, one dad", The Ottawa Citizen, September 29, 2003;(Association Compendium, Tab 17)

> order to avoid either misogyny or passivity, children need mothers and fathers, regardless of their parents' specific gender roles."[35]

In his affidavit in the *Halpern* case Professor Craig Hart deposed that there is a body of scientific evidence indicating that "natural family" structures which include married mothers and fathers living under the same roof are more likely to provide more stable and secure environments for children to flourish in. Research has documented that natural family structures benefit nearly every aspect of children's well being, including greater educational opportunities, better emotional and physical health, less substance abuse, lower incidences of early sexual activity for girls, and less delinquency for boys.[36]

41. According to Professor Hart, other studies indicate that fathers and mothers contribute to child development in ways that are different from, yet complementary to, one another. For example, evidence indicates that the most important factor that is more relevant than family income for diminishing delinquent behaviour is the presence of the father in the home.[37] A significant body of research indicates that fathers are more oriented towards being physically playful with their children than mothers; greater playfulness, patience and understanding with children on the part of fathers was associated with less child-aggressive behaviour with peers at school.[38] A father's presence also can provide daughters with a stable relationship with a non-exploitive adult male who loves and respects them. In light of the data at hand many scholars have concluded that fathers contribute to core aspects of children's stability, self-confidence, self-regulation and self-identity.[39]

42. In other domains of parent-child interaction, mothers seem to matter more. There is evidence of stronger mother effects for children's pro-social behaviour compared to fathers in the domain of reasoning with children about consequences for their actions, and that children who had more reasoning-oriented mothers engaged in more pro-social, cooperative play with peers. They were also more accepted by peers. [40]

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[35] Coolidge Article, p. 48, *Halpern Evidence*, p. 2492..
[36] Affidavit of Craig Hart, paras. 4 –5 *Halpern Evidence*, pp. 2567-8, and the studies cited therein. See also the summary of current social science literature in, "Why Marriage Matters: Twenty-One Conclusions from the Social Sciences" (2002: Institute for American Values, New York) and "The State of Our Unions 2003; The Social Health of Marriage in America", The National Marriage Project, Rutgers University, June, 2003, at p.6 (Association Compendium, Tabs 18 and 19)
[37] Hart Affidavit, *Halpern Evidence*, p. 2568, para. 5 and the studies cited therein.
[38] Hart Affidavit, *Halpern Evidence*, pp. 2568-9 para. 6, and the studies cited therein
[39] Hart Affidavit, *Halpern Evidence* p.2569, para. 7 and the studies cited therein
[40] Hart Affidavit, *Halpern Evidence*, para. 8 and the studies cited therein;

43. Taken together, these findings of social science suggest that mothers and fathers do indeed make unique contributions to children's development. In his affidavit, Dr. Hart opined:

> ... both mothers and fathers play vital roles in the healthy development of children. Same sex marriages (and partnerships) simply cannot possess the gender-based complementary quality of the heterosexual marriage union. The heterosexual marriage union holds the greatest potential for optimum child development due to the complementarity of mothering and fathering occurring together in an explicitly committed relationship.[41]

44. In the *Halpern* case the applicants submitted an affidavit from Professor Jerry Bigner reviewing the literature on same-sex parenting and concluding that no difference existed between the parenting of same-sex parents and a family consisting of a mother and father.[42] Professor Steven Nock filed a responding affidavit that examined the methodologies employed in the articles reviewed by Professor Bigner. Nock concluded that not a single one of the articles was conducted according to generally accepted standards of scientific research and that "we simply do not yet know how the children of homosexual and heterosexual parents compare at this point of time."[43]

45. The Association recognizes that people who are not married and occupy non-traditional relationships endeavour to raise the children in their care properly and lovingly, and that there are differing views as to the probabilities of achieving socially important goals in traditional and non-traditional relational settings. However, the evidence submitted indicates that the traditional institution of marriage has real life virtues and benefits that address needs of contemporary Canadian society and that these benefits should not be disturbed or obscured by changing the institution's core definition. To have marriage represent only a commitment between two adults would mean a major departure from its original and primary purpose in relation to children and a radical change in its nature. Or in the words of a 2003 study supported by Rutgers University:

> "Indeed, if there is a story to be told about marriage over recent decades, it is not that it is withering away for adults but that it is withering away for children".[44]

A.5 Marriage is not Discriminatory

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[41] Hart Affidavit, *Halpern Evidence*, p.2570, para. 9.
[42] Binger Affidavit, para. 16, *Halpern Evidence*, p. 254
[43] Nock Affidavit, paras. 115 and 119, *Halpern Evidence*, pp. 2275-6.
[44] *"The State of our Unions 2003: The Social Health of Marriage in America"*, The National Marriage Project, Rutgers, The State University of New Jersey, June, 2003, at p.7 (Association's Compendium, Tab 19)

46. Marriage as the union of a man and a woman therefore possesses three distinctive characteristics: (i) it complements the sexes; (ii) produces children; and (iii) gives a child a mother and a father. Same sex relationships lack these characteristics. These differences are actual and real; they are not stereotypical. Consequently, marriage as the union of a man and a woman is not discriminatory within the meaning of section 15(1) of the *Charter.*

47. To hold that section 15(1) of the *Charter* mandates changing the meaning of marriage to include same-sex relationships would send a message to Canadian society, especially the young, that they should hereafter approach marriage in new, very different ways. Marriage would reflect personal sexual choice of any kind; not the complementing of the sexes. And marriage would no longer involve children – the Canadian constitution, as a consequence of its equality mandate, would be indifferent as to whether marriages produce children or as to whether children have both a mother and a father. Such as result, the Association submits, would make for bad public policy that would irreparably harm the fabric of Canadian society. For the reasons given above, the Association submits that section 15(1) of the *Charter* does not require making such a bad public policy choice. To the contrary, the Association submits that public policy should affirm the necessary social institution of marriage as the union of a man and a woman.

B. Section 15 cannot alter or derogate from the Opposite-Sex Constitutional Meaning of "Marriage" in s. 91(26) of the Constitution Act, 1867

48. A second reason why the definition of marriage as the union of a man and woman does not infringe section 15(1) of the *Charter* lies in the structure of the Constitution of Canada. If this Court accepts the submissions of the Association in respect of Question No. 1 that ss.91(26) and 92(12) constitutionally enshrine a meaning of "marriage" that is opposite-sex in nature, then the principle of constitutional interpretation first articulated in the *Bill 30* case comes into play: the provisions of the *Charter* cannot be used to alter or cut down the powers granted to legislatures under sections 91 and 92 of the *Constitution Act, 1867.*

49. In the *Bill 30* case, Madame Justice Wilson (with whom four other judges concurred) wrote: " It was never intended, in my opinion, that the Charter could be used to invalidate other provisions of the Constitution, particularly a provision such as s. 93 which represented a

fundamental part of the Confederation compromise..."[45] Later, in the *Nova Scotia Speaker's* case, the Chief Justice applied the principles set out in the *Bill 30* case stating:

> "It is a basic rule, not disputed in this case, that one part of the Constitution cannot be abrogated or diminished by another part of the Constitution: *Reference re Bill 30, An Act to amend the Education Act (Ont.),* [1987] 1 S.C.R. 1148...(p. 373)
>
> *In this case, the issue is not the fruit of the constitutional tree (the exercise of a power), but the tree itself (the existence of the power).... The issue is – indeed the issue can only be – whether the Assembly has a constitutional power to exclude strangers from its deliberations...*" (pp. 392-393) (emphasis added)[46]

50. In the language of the *Nova Scotia Speaker's* case, does the legislative power granted to Parliament by s. 91(26) of the Constitution Act, 1867 – the "constitutional tree" - exclude same-sex couples from the definition of "marriage", or differentiate between groups in respect to marriage? For the reasons given above the Association submits that it does. Section 91(26) of the *Constitution Act, 1867* only permits Parliament to legislate in respect of a union between a man and a woman – that is the "constitutional tree" enshrined in s. 91(26) which cannot be altered, abrogated or diminished by the *Charter*. The constitutional allocation of legislative powers between Parliament and the provinces over social relationships cannot be altered by the court or Parliament changing the meaning of a head of power under section 91 or 92, for that would involve changing the "constitutional tree". While a term such as "marriage" that constitutionally assigns legislative powers between the levels of government certainly can be "reformulated" or its meaning changed, the process which must be used is that contained in the amending formula for the Constitution set out in section 38 of the *Constitution Act, 1982.* Neither the courts nor Parliament possess the constitutional jurisdiction to make unilaterally such a change.

51. The opposite-sex definition of marriage constitutionally enshrined in s. 91(26) therefore cannot infringe section 15(1) of the *Charter.* For these reasons, the Association submits that

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[45] *Reference Re Bill 30, an Act to Amend the Education Act (Ont.)*, [1987] 1 S.C.R. 1148, at 1197g – 1198h, per Wilson, J. In the other judgment Estey, J. wrote: "The role of the Charter is not envisaged in our jurisprudence as providing for the automatic repeal of any provisions of the Constitution of Canada which includes all of the documents enumerated in s. 52 of the Constitution Act, 1982." (at 1206i – 1207d)(Association Compendium, Tab 20)

[46] *New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly)*, [1993] 1 S.C.R. 319, at 373, 392 and 393. (Association's Compendium, Tab 21). In *Adler v. Ontario*, [1996] 3 S.C.R. 609, per Iacobucci, J at p. 642, para. 35 and 649, para. 49, the Supreme Court of Canada reaffirmed that one section of the Constitution cannot be held to be violative of another. (Association's Compendium, Tab 22). The Ontario Court of Appeal followed the *New Brunswick Broadcasting* case in *Ontario (Speaker of the Legislative Assembly) v. Ontario (Human Rights Commission)*, (2001), 146 O.A.C. 125 (C.A.), at pp.134-135, paras. 29 – 33. Per Finlayson, J.A., at para. 32 (Association's Compendium, Tab 23)

Question No. 4 should be answered as follows: "The opposite-sex definition of marriage does not infringe section 15(1) of the *Charter*."

PART IV – SUBMISSIONS CONCERNING COSTS

52. In the event this Court grants costs to any intervener, the Association requests that it be granted costs on the same basis.

PART V – ORDER REQUESTED

53. The Association respectfully requests that this Court answer the questions referred by the Governor in Council as follows:

Question No. 1:	No
Question No. 2:	No
Question No. 3:	Yes
Question No. 4:	Yes

May 10, 2004

ALL OF WHICH IS RESPECTFULLY SUBMITTED,

David M. Brown

Counsel for the Intervener,
The Association for Marriage and the Family in Ontario

SCHEDULE "A"

ARTICLES/OTHERS

Court File No. 29866

IN THE SUPREME COURT OF CANADA

In the Matter of Section 53 of the Supreme Court of Canada Act, R.S.C. 1985, c. S-26

In the Matter of a Reference by the Governor in Council Concerning the Proposal for an Act Respecting Certain Aspects of Legal Capacity for Marriage for Civil Purposes, as set out in Order in Council P.C. 2003-1055, dated the 16th of July 2003

FACTUM of the Intervener

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