

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

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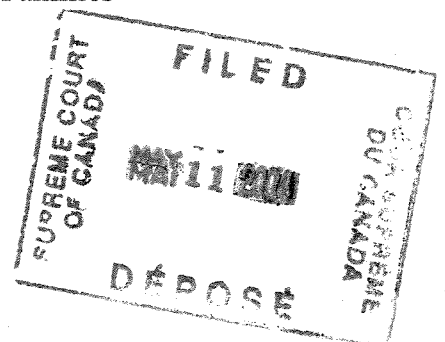
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PART I – FACTS

Overview of FEF's Position

1. Civil marriage, as three appellate courts have now confirmed, is a fundamental human right. The exclusion of lesbians and gay men from an institution which provides the social bedrock for the formation of essential family relationships should no longer be tolerated. Foundation for Equal Families (“FEF”) intervenes in this Reference to bring to the Court’s attention the fundamental incompatibility of an opposite-sex requirement for marriage with certain of the rights guaranteed in the *Canadian Charter of Rights and Freedoms*. The FEF submits that the opposite-sex definition of marriage infringes the equality, liberty, and expression rights guaranteed under ss. 15(1), 7 and 2(b) of the *Charter*.
2. *Equality*. Any definition that limits civil marriage to opposite-sex couples infringes the equality rights of both gay and lesbian couples and their children. The link between parents and children is unique and intimate. The children of same-sex couples experience substantial social stigma and prejudice as a result of their parents’ sexual orientation. They too are subject to differential, discriminatory treatment on the grounds of sexual orientation and family relationship. Excluding same-sex parents from the institution of civil marriage, the opposite-sex requirement undermines the human dignity of same-sex couples and their children. It perpetuates a view that gay and lesbian families lack legitimacy because they do not, and cannot, conform to the traditional family norm – married with children.
3. *Liberty*. The opposite-sex requirement for marriage also infringes the liberty rights of same-sex couples by denying them the ability to exercise one of life’s most fundamental and personal choices. The decision to marry strikes at the heart of the values of individual autonomy, human dignity and conscience that underlie s. 7 and the *Charter* as a whole. This deprivation of liberty is arbitrary and unfair. It does not accord with the principles of fundamental justice.
4. *Expression*. Marriage is also a form of protected expression under s. 2(b) of the *Charter*. The opposite-sex requirement restricts the ability of same-sex couples to state their love, fidelity, and commitment to each other, to their friends and families, and to society at large through the civil marriage ceremony, and to publicly assume the benefits and obligations that this entails. In so doing, it infringes s. 2(b) of the *Charter*.

PART II – QUESTIONS IN ISSUE

5. The FEF supports and adopts the submissions of the Attorney General of Canada on each of the questions posed in this Reference. The FEF directs its submissions only to the fourth question:

Is the opposite-sex requirement for marriage for civil purposes, as established by the common law and set out for Québec 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?

6. For the reasons which follow, the FEF submits that the answer to this question is clearly no. The opposite sex requirement for marriage infringes the rights to equality, liberty and freedom of expression enshrined in the *Charter*. These infringements cannot be justified under s. 1.

PART III – ARGUMENT

Opposite-Sex Requirement Infringes Equality Rights of Children of Same-Sex Couples

7. The opposite-sex requirement in the common law definition of marriage violates the substantive equality rights of gay and lesbian couples, and their children, under s. 15(1) of the *Charter*. It discriminates by fostering a perception of gay and lesbian families as inferior and less worthy of societal approval and support. This discrimination is experienced by the entire family because of the intersection between the sexual identity and relationship of the same-sex parents and the parent/child relationship.

8. Section 15(1) of the *Charter* provides:

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

9. The purpose of section 15(1) is to prevent the violation of essential human dignity and freedom through the imposition of disadvantage, stereotyping, or political or social prejudice. Section 15(1) is designed to promote a society in which all persons enjoy equal recognition

under the law as human beings, equally capable and deserving of respect, concern and consideration.

Law v. Canada (Minister of Employment and Immigration), [1999] 1
S.C.R. 497 at 529

10. The opposite-sex requirement deprives gay and lesbian families of the respect and legitimacy marriage bestows on other families. In these circumstances, it clearly conflicts with the purpose of s. 15(1).

11. The approach to s. 15(1) endorsed by this Court focuses on three issues: differential treatment; whether the differential treatment is based upon enumerated or analogous grounds; and whether the law discriminates in a substantive sense by violating essential human dignity. Each is discussed below.

Law at 548-49

Differential Treatment

12. The FEF submits that limiting civil marriage to opposite-sex couples constitutes differential treatment of same-sex couples and their children, contrary to section 15(1).

13. There is no doubt that the opposite-sex requirement for civil marriage draws a formal distinction between opposite-sex and same-sex couples on the basis of sexual orientation. Opposite-sex couples can choose to participate in civil marriage. Same-sex couples cannot.

Halpern v. Canada (A.G.) (2003), 65 O.R. (3d) 161 at 180-81 (C.A.)

EGALE Canada Inc. v. Canada (A.G.) (2003), 13 B.C.L.R. (4th) 1 at 23,
26-27 (C.A.)

14. The current definition of civil marriage also imposes differential treatment on the children of gay and lesbian families by denying them the benefits marriage provides to children of opposite-sex couples and by endorsing the view that the families of these children are less worthy. Unlike children of opposite-sex couples, children of same-sex couples are put in the position of justifying the status of their families to their friends, their friend's families, their teachers and to society at large.

Affidavit of Rosemary Barnes, sworn November 20, 2000, para. 5. and
attached Exhibit "B": Expert Report of Rosemary Barnes, paras. 10-

20, Record of the Intervener Foundation for Equal Families (“FEF Record”), Tabs 1, 1A

Affidavit of Jerry Bigner, sworn November 15, 2000, paras. 14-15 and attached Exhibit “B”: *Brief*, paras. III. B.1, C, FEF Record, Tabs 2, 2A

Affidavit of Miriam Kaufman, sworn November 20, 2000, paras. 14-25, FEF Record, Tab 3

Affidavit of Sarah Maya Jane Hamilton, sworn October 17, 2000, FEF Record, Tab 4

15. This differential treatment of the children in gay and lesbian families occurs because of who their parents are. But for the sexual orientation and the same-sex relationship of their parents, and but for the relationship of parent and child, it would not exist.

Analogous Grounds are the Basis for this Differential Treatment

16. The second stage of the *Law* analysis requires the differential treatment to be based on enumerated or analogous grounds. The claimant must reveal grounds based on immutable or personal characteristics, or those that are changeable only at unacceptable cost to personal identity. Personal characteristics which the government has no legitimate interest in expecting individuals to change in order to receive equal treatment under the law are also recognized as analogous grounds.

Miron v. Trudel, [1995] 2 S.C.R. 418 at 496-97

17. Factors that have been identified as *indicia* of analogous grounds include: the fact that the targeted group has suffered social or political disadvantage or vulnerability to political and social prejudice; the fact that the targeted group is a “discrete and insular minority”; and the fact that the ground has been recognized by legislators and jurists as discriminatory (for example, in human rights codes).

Miron at 496-98

Egan v. Canada, [1995] 2 S.C.R. 513 at 599-602

18. *Sexual Orientation is an Analogous Ground*. This Court has repeatedly recognized sexual orientation as an analogous ground.

Egan at 528

19. *Family or Parent-Child Relationship is an Analogous Ground.* The FEF submits that “parent-child relationship” should also be recognized as an analogous ground that protects the children of same-sex couples from discrimination based upon the sexual orientation of their parents.

20. This Court has consistently recognized the family as deserving of respect and protection under s. 15(1), as well as the *Charter* as a whole. The family is an institution that serves vital personal interests and may be linked to building a “comprehensive sense of personhood”.

Miron, at 497-99

Brossard v. Quebec, [1988] 2 S.C.R. 279 at 290-95

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

21. Children of gay and lesbian families are subjected to discrimination based upon the sexual orientation of their parents. This Court has already found the relationship between parent and child to be of a sufficiently immutable and personal nature as to invoke s. 15 protection when discrimination against the child occurs as a result of the child’s relationship with the parent. Discrimination against children arising as a result of personal characteristics of the parent that are completely beyond the control of the child and that are themselves protected under enumerated or analogous grounds should violate s. 15(1).

Benner v. Canada, [1997] 1 S.C.R. 358 at 399-401

22. The FEF submits that the ground of “parent-child relationship” intersects with and is a natural and appropriate extension of the analogous ground of sexual orientation. The extension of analogous grounds to include “parent-child relationship” accords with the purposes of s. 15, and with this Court’s direction that equality protection should extend beyond same-sex couples themselves to “treat all members of the family relationship equally and all types of family relationships equally”.

M. v. H., [1999] 2 S.C.R. 3 at 75-76, 198-200

The Existence of Discrimination

23. The FEF submits that the common law definition of civil marriage, in purpose and effect, violates the essential human dignity of same-sex couples and their children.

24. In considering this submission, the Court must consider whether the opposite-sex requirement for marriage imposes a burden upon, or withholds a benefit from, gay and lesbian couples and their children in a manner that reflects stereotypes, or that has the effect of perpetuating the view that they are less capable or worthy of recognition. The Court may examine the following factors: (a) pre-existing disadvantage; (b) correspondence between the distinction and the claimants' actual needs, capacities or circumstances; (c) ameliorative purposes or effects; and (d) the nature of the affected interests.

Law at 550-52

(A) PRE-EXISTING DISADVANTAGE, STEREOTYPING OR VULNERABILITY

25. The FEF submits that the children of gay and lesbian families experience pre-existing disadvantage, stereotyping, prejudice and vulnerability as a result of the sexual orientation of their parents and the continuing exclusion of their parents from civil marriage.

26. This Court has recognized the "significant" pre-existing disadvantage experienced by same-sex couples in Canadian society. Same-sex couples continue to be stung by stereotyping and prejudice due to their exclusion from the institution of civil marriage.

M v. H at 55

Friend v. Alberta, [1988] 1 S.C.R. 493 at 543 -44

27. For same-sex couples, this disadvantage is felt in a particularly profound way by their children. Denial of access to civil marriage fuels the stereotype that their families are somehow less permanent, less legitimate and less worthy of respect. It exacerbates the perception that gay and lesbian families are not "normal", and forces the children of same-sex couples to keep their families in the shadows.

[B]y the fifth grade my queer family had become an unmentionable. My best friend and I spent every day together for three years, skipping rope and roller-skating, before we "came out" to each other that our mothers were both gay. It had always been understood, but never spoken aloud, because to speak it aloud made it the potential property of schoolyard conversations, and of the eventual taunts from other classmates for which we were both easy targets.

Sara Hamilton Affidavit, para. 4, FEF Record, Tab 4

28. Children of same-sex couples suffer from the prevalent stereotype that their parents' relationships cannot form the basis of long-term, "real" families, and that their families are, therefore, inferior. Societal prejudice regarding the parents sexual orientation, not the sexual orientation itself, is the source of difficulty for children of same-sex couples.

Barnes Affidavit, para. 5. and attached Exhibit "B": *Expert Report of Rosemary Barnes*, paras. 10-20, Record of the Intervener Foundation for Equal Families ("FEF Record"), Tabs 1, 1A

Bigner Affidavit, paras. 7-, 10-15 and attached Exhibit "B": *Brief*, paras. III.A – C, FEF Record, Tabs 2, 2A

Kaufman Affidavit, paras. 14-25, FEF Record, Tab 3

(B) CORRESPONDENCE BETWEEN DISTINCTION AND ACTUAL NEEDS, CAPACITIES OR CIRCUMSTANCES

29. There is no correspondence between the exclusionary definition and the needs, capacities or circumstances of same-sex couples and their children. Same-sex couples have shown themselves to be just as capable of forming long-lasting, loving relationships and providing healthy family environments for their children. As the Attorney-General of Canada notes in his factum, gay and lesbian families and their children are as deserving of access to foundational societal institutions, legal protection and support as married families.

M. v. H. at 75-76, 198-201

(C) AMELIORATIVE PURPOSE OR EFFECTS

30. The opposite-sex requirement of civil marriage is not necessary to ameliorate any position of disadvantage experienced by heterosexual couples and their children. Same-sex couples and their families have suffered historical discrimination and stereotyping as a result of their exclusion from civil marriage. The FEF submits that there is no question that they are in a *less* advantaged position than opposite-sex couples and their children.

Halpern (C.A.) at 187-88

EGALE (C.A.) at 26-27

(D) NATURE OF THE AFFECTED INTERESTS

31. Finally, the Court must examine the nature of the interest affected by the common law definition of civil marriage. In doing so, this Court will consider whether same-sex couples and

their children have been excluded from fundamental social institutions or from an essential aspect of full membership in Canadian society.

M. v. H. at 57-58

Miron at 500

32. Marriage is recognized almost uniformly as a fundamentally important societal institution. It is, in the words of this Court, a “good thing; to many a sacred thing”. The law bestows legal benefits on married couples. Society holds the marital relationship in high esteem. Exclusion from this institution prevents gay and lesbian families from fully participating in Canadian society by marginalizing them on the basis of stereotypes about the legitimacy and worth of their relationships. The opposite-sex requirement therefore violates the essential human dignity of same-sex couples and their children, contrary to s. 15(1) of the *Charter*.

Opposite-Sex Requirement Infringes Section 7 of the *Charter*

33. The common law definition of marriage also infringes the liberty rights of gays and lesbians guaranteed in s. 7 of the *Charter* by barring same-sex couples from making a fundamental and highly personal decision which touches the very heart of individual dignity, conscience and choice, and which profoundly affects the basis on which individuals will live their lives. This restriction does not accord with the principles of fundamental justice.

34. Section 7 of the *Charter* states:

Everyone has the right to life, liberty and security of the person
and the right not to be deprived thereof except in accordance with
the principles of fundamental justice.

35. The Court’s approach to s. 7 involves a two-step analysis. First, the Court must find that there has been a deprivation of a right guaranteed by s. 7. This involves the Court finding that (a) a s. 7 right has been engaged, and (b) this right has been deprived by the state. Second, the Court must find that this deprivation is not in accordance with the principles of fundamental justice.

Gosselin v. Quebec (A.G.), [2002] 4 S.C.R. 429 at 488-89

Deprivation of Right to Liberty

(A) LIBERTY RIGHT IS ENGAGED

36. The right to liberty in s. 7 encompasses the right to make fundamental personal choices free from state interference. The FEF submits that the right of same-sex couples to choose to marry falls within the scope of the right to liberty.

37. In interpreting liberty rights, the Court should take a broad, purposive approach in light of other provisions of the *Charter* and the essential values of the *Charter* as a whole. This approach ensures that the full context of s. 7 rights can be judicially considered, and narrowed, where necessary, at the s. 1 stage.

New Brunswick (Minister of Health and Community Services) v. G. (J.),
[1999] 3 S.C.R. 46 at 101-02

B.(R.) v. Children's Aid Society of Metropolitan Toronto, [1995] 1
S.C.R. 346 at 366-69

38. This Court has held that the values of personal autonomy, human dignity, individual conscience and judgment that underlie the *Charter* also inform the application of s. 7.

Blencoe v. British Columbia (Human Rights Commission), [2000] 2
S.C.R. 307 at 352-53

R. v. Morgentaler, [1988] 1 S.C.R. 30 at 163-67

39. When equality issues are also at play the consideration of the scope and content of s. 7 rights should be guided by s. 15. As stated by this Court in *Andrews v. Law Society of British Columbia*: “The section 15(1) guarantee is the broadest of all guarantees. It applies to and supports all other rights guaranteed by the *Charter*.” Section 15 animates s. 7 rights and helps ensure that the Court’s interpretation of s. 7 responds to the needs and realities of all members of society.

Andrews v. Law Society of British Columbia, [1989] 1 S.C.R. 143 at 185

New Brunswick at 99-101

40. With these underlying values in mind, this Court has held that s. 7 liberty rights must themselves be interpreted broadly. In *B.(R.) v. Children's Aid Society of Metropolitan Toronto*, the Court held that the right to liberty was engaged by the parental right to make medical decisions for their children. Justice La Forest, speaking for the majority, held that although liberty under s. 7 does not mean unconstrained freedom, it does mean that individuals must be

left room for personal autonomy to live their lives and to make decisions that are of fundamental personal importance:

At bottom, I think “liberty” means the ordinary liberty of free men and women in a democratic society to engage in those activities that are inherent to the individual. These may not be extensive, but where they exist, they must under the Constitution be protected from state intervention unless that intervention can be justified.

B.(R.) at 367-9, 389

Blencoe at 340-43

41. The Court’s determination as to whether s. 7 liberty rights are at issue should be informed by whether the decision itself was made in the context of other intimately personal decisions, aspirations, values and priorities. For instance, in *Godbout v. Longueuil (City)*, this Court held that the connection between the applicant’s choice of where to live and other highly personal considerations highlighted the inherently personal character of the decision and emphasized the fact that it should not be interfered with by the state absent compelling reasons.

Godbout v. Longueuil (City), [1997] 3 S.C.R. 844 at 893-95

42. Taking a broad and purposive approach to s. 7, it is clear that the freedom to decide whether to marry engages liberty rights. This decision is, as this Court noted in *Miron v. Trudel*, one of the most fundamental, momentous and personal decisions an individual can make in his or her life. For an individual, it engages a complex interplay of societal, political and financial considerations.

Miron at 471

Nova Scotia (A.G.) v. Walsh, [2002] 2 S.C.R. 325 at 355, 364

43. The significance of the decision to marry, not only for same-sex couples themselves, but also for their families, cannot be overemphasized.

Sarah Hamilton Affidavit, paras. 9-11, FEF Record, Tab 4

Affidavit of Jane Hamilton, sworn December 16, 2000, paras. 25-47, FEF Record, Tab 5

44. Denying gays and lesbians the ability to make this fundamental decision is demeaning and contrary to the underlying *Charter* value of human dignity. The overlap of the decision to

marry with other deeply personal and fundamental decisions – such as family life, finances, and child-rearing – further reinforces the conclusion that liberty rights are engaged in these circumstances.

(B) RIGHT TO LIBERTY HAS BEEN DEPRIVED BY THE STATE

45. The FEF submits that not only does the right to marry engage s. 7 liberty rights, but these rights are clearly deprived by the state under a common law or statutory definitions of marriage which exclude same-sex couples.

Modernization of Benefits and Obligations Act, S.C. 2000, c.12, s.1.1

Federal Law - Civil Law Harmonization Act, No. 1, S.C. 2001, c. 4, s. 5

Civil Code of Quebec, S.Q., 1991, c. 64, Article 365

46. In *Gosselin v. Quebec (Attorney General)*, this Court held that the circumstances in which the state will be found to have “deprived” an individual of his or her liberty rights are not closed. The liberty right guaranteed under s. 7 may be deprived by the state’s administration of justice, and can also be implicated by state actions outside of this sphere.

Gosselin at 488-92, 600-1

47. In *Winnipeg Child and Family Services v. K.L.W.*, this Court held that an individual’s liberty interest had been deprived by the implementation of a legislative provision by a government clerk. Similarly, same-sex couples have been deprived of their right to participate in civil marriage by bureaucratic refusals to issue marriage licenses (in reliance on the common law definition of marriage), and, more broadly, by the legislative and judicial refusal to extend to them the myriad of rights and obligations that accompany the institution of marriage. This constitutes sufficient state action to implicate s. 7 liberty rights.

Winnipeg Child and Family Services v. K.L.W., [2000] S.C.R. 519 at 568-70

Gosselin at 600-01

48. The state has also deprived same-sex couples of their right to liberty by failing to define civil marriage in a manner that includes same-sex. The concept of deprivation is wide enough to embrace withholding that has the effect of erecting barriers. Indeed, as found in the context of sections 2(b), 2(d) and 15 of the *Charter*, a decision by the state to extend a choice to some

groups and not others can constitute an affirmative interference with an individual's rights, such that the state is under a positive obligation to extend those rights further.

Gosselin at 596-97, 604-9, 625-28, 635-36

Vriend at 541

Dunmore v. Ontario (A.G.), [2001] 3 S.C.R. 1016 at 1043-49, 1051-2, 1077-79

49. Laws which are under-inclusive are not the exclusive domain of s. 15. Where an under-inclusive law engages a fundamental right and the exclusion causes substantial interference with its exercise or fulfillment, the state can be held responsible for an individual's inability to exercise that right whether or not the state bears responsibility for it. Were this not the case, s. 7 would hold very little meaning within the context of the *Charter*.

Gosselin at pp. 603, 618-19, 625-29

Dunmore at pp. 1043-49, 1051-52, 1077-79

50. Civil marriage has been extended by the common law and by the Québec provincial legislature to opposite-sex couples, but not to same-sex couples. At its core, civil marriage engages rights that are fundamental to an individual's exercise of liberty. The restriction on the ability of same-sex couples to marry has a significant impact on the personal identity and dignity of gay men and lesbians and their children. Therefore, not only is the state depriving same-sex couples of a fundamental liberty right, but the state is under a positive obligation to redress this deprivation by extending the definition of civil marriage to include same-sex couples.

Deprivation Not in Accordance with Principles of Fundamental Justice

51. The second part of the test under s. 7 is to determine whether or not the deprivation of the liberty right accords with the principles of fundamental justice. This requires a balancing of the constitutional right of the individual against the countervailing interests of the state.

Godbout at 898-902

52. The FEF submits that the exclusion of same-sex couples from civil marriage defies rational justification.

53. The state's interest in promoting procreation, the justification most frequently advanced for limiting civil marriage to heterosexual couples, has been rejected as "too narrow, and too shaky...to be tenable as the legal basis for such a foundational institution in society as marriage".

Halpern v. Canada (A.G.) (2002), 60 O.R. (3d) 321 at 357-58 (Div. Ct.)

54. Marriage in modern Canadian society, as the Government of Canada now acknowledges, is characterized by its pivotal child-rearing role, by a long-term conjugal relationship between two individuals, with all of its attendant obligations and benefits, and by love. Given the state objective of promoting marriage as a stable unit for family formation, there can be no compelling justification, and no valid purpose, for depriving gays and lesbians from participating in this institution.

Miron at 471

55. This deprivation is arbitrary and unfair. It does not accord with the principles of fundamental justice.

Rodriguez v. British Columbia (Attorney General), [1993] 3 S.C.R. 519
at 594-95

Opposite-Sex Requirement Infringes Freedom of Expression

56. The opposite-sex requirement for marriage also infringes upon the freedom of expression of same-sex couples contrary to s. 2(b) of the *Charter*. The civil marriage ceremony allows individuals to express their love, commitment and fidelity to one another. It provides a medium through which this message is communicated to a spouse, to friends and family, and to society at large. Precluding gays and lesbians from communicating messages of such profound meaning infringes some of the most fundamental values underlying s. 2(b), including self-actualization, self-fulfilment and human flourishing.

57. Section 2(b) of the *Charter* states that everyone has the freedom of thought, belief, opinion and expression. An analysis of whether s. 2(b) has been infringed involves two steps. The Court must first determine whether the activity at issue conveys or attempts to convey meaning. If it does, the Court must determine whether the impugned government action had the purpose or effect of infringing upon an individual's expressive rights.

Irwin Toy Ltd. v. Quebec (A.G.), [1989] 1 S.C.R. 927 at 968-70, 973-77

Civil Marriage Conveys Meaning

58. The ritual of state-sanctioned civil marriage represents a unique and essential medium through which couples can express their love and commitment for one another to each other, and to society. The meaning conveyed by the act of civil marriage, however, is more profound than simply a public statement to a chosen partner, as lower court decisions have suggested. Instead, civil marriage is a powerful and universally recognized symbol of expression through which individuals communicate that they wish to identify with each other, and that they willingly accept all of the legal, social and moral responsibilities that accompany marriage. Marriage is deeply infused with historic, social and symbolic meaning which cannot be communicated or replicated through other forms of expression of love and commitment.

EGALE Canada v. Can. (A.G.), [2001] 11 W.W.R. 685 at 712-13
(B.C.S.C.)

Halpern (Div. Ct.) at 433-34

Kenneth Karst, *The Freedom of Intimate Association*, 89 Yale L.J. 624 at 636-7, 653-54 (1980)

David Cruz, *Just Don't Call it Marriage: The First Amendment and Marriage as an Expressive Resource*, 74 S. Cal. L. Rev. 925 at 928-9, 933-45 (2001)

Affidavit of Ellen Lewin, sworn November 14, 2000, paras. 3-7, and attached *Exhibit "B": You'll Never Walk Alone: Lesbian and Gay Weddings and the Authenticity of the Same Sex Couple*, pp. 2-5, 9-13, FEF Record, Tab 6 and 6A

59. The decision to marry or not marry also can provide individuals with a means to engage in a political discourse. The active rejection of the institution of civil marriage may represent a disavowal of its patriarchal roots. Opposite-sex couples may deliver this message by refusing to marry and electing to live common law. For gays and lesbians, this repudiation has no meaning if the choice to marry is never available. Civil marriage also offers a medium through which to deliver a powerful statement about the ability of the marital institution, and society, to be transformed:

[A] marriage between CJ and I would challenge, rather than reinforce patriarchal ideas. It would make a powerful statement of lesbian and bisexual visibility. Our marriage would celebrate

women's capacity to live separate from men and to nurture each other. In our view, the current institution of marriage is hierarchical and oppressive, but it has the capacity to be transformed...By allowing us to marry as a queer couple, we hope to free people from the traditional paradigms of a male-female marriage.

Affidavit of Carolyn Moffatt, sworn July 13, 2000, para. 10, FEF Record, Tab 7

60. This Court has adopted a broad, liberal and purposive approach to the freedom of expression accorded under s. 2(b). Section 2(b) protects all non-violent messages, even those that some might disagree with or find morally offensive. Increased vigilance to protect the s. 2(b) right is required where the claimants are affected by a potential s. 15 infringement.

R. v. Sharpe, [2001] 1 S.C.R. 45 at 70

Irwin Toy at 969-71

Little Sisters Book and Art Emporium v. Canada (Minister of Justice), [2000] 2 S.C.R. 1120 at 1152

61. In rejecting arguments regarding marriage as a form of protected expression, the lower courts appeared to hold that the freedom of expression of same-sex couples was not affected because they were able to express their thoughts or opinions orally or in writing. This is an unduly restrictive interpretation of this essential freedom. Any activity is expressive if it conveys or attempts to convey meaning. This Court has held that the types of activity that attempt to convey meaning are infinite, and not limited to those in written or oral form.

R. v. Butler, [1992] 1 S.C.R. 452 at 487, 489-90

Irwin Toy at 968-71

62. If an individual chooses a particular medium through which to express him or herself, meaning is derived from deliberately choosing that particular form of expression. Even physical gestures, such as casting a ballot, can constitute expression if they convey or attempt to convey meaning.

Butler at 487

Haig v. Canada (Chief Electoral Officer), [1993] 2 S.C.R. 995 at 1034

63. In the same way as the act of casting a ballot provides an avenue through which individuals can express their political views, the act of marriage provides an essential means through which individuals can express their love and commitment to one another, and their willingness to assume the consequential obligations that result from the decision to marry.

Legal marriage speaks to the gravity of commitments; because legal marriage is the expressive vehicle that is most generally recognized in mainstream cultures, it is fair to say that it is potentially more powerful than other symbolic apparatuses in conferring a sense of dignity and value on gay and lesbian relationships.

Exhibit "B" to Lewin Affidavit, p. 5, FEF Record, Tab 6A

64. Accordingly, civil marriage, with its symbolic significance and its engagement of fundamental values such as self-fulfillment, conveys meaning, and therefore constitutes expression which is entitled to protection under s. 2(b) of the *Charter*.

Effect of the Opposite-Sex Requirement is to Restrict Expression

65. The FEF submits that the effect of the opposite-sex requirement for civil marriage is to restrict the freedom of expression of gays and lesbians. It is not enough that same-sex couples may state their love and commitment to one another in some public forum. This is not a substitute for civil marriage as a symbolic and expressive resource. It does not convey the same meaning as state-sanctioned civil marriage.

66. In seeking to participate in civil marriage, same-sex couples are seeking to express their messages of love and fidelity, and their willingness to accept the benefits and burdens of marriage, in a manner that has unparalleled symbolic significance in our society. The opposite-sex requirement deprives same-sex couples from expressing themselves in this essential way, undermines the *Charter* values of self-fulfillment and human flourishing, and clearly infringes s. 2(b).

Charter Infringements Cannot be Justified Under Section 1

67. The FEF submits that these infringements of ss. 15(1), 7 and 2(b) of the *Charter* cannot be justified under section 1. The FEF repeats and relies upon the submissions of the Attorney General of Canada in this regard.

PART IV – SUBMISSIONS ON COSTS

68. The FEF seeks no order as to costs.

PART V – NATURE OF ORDER SOUGHT

69. The FEF repeats and relies upon the answers of the Attorney General of Canada to questions one to three of the Reference. Question four should be answered: “No, because it is inconsistent with sections 2(b), 7 and 15(1) of the *Charter of Rights and Freedoms* and cannot be saved under section 1.”

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Maie-France Nuyi, as Ottawa Agent for
Linda M. Plumpton

Maie-France Nuyi, as Ottawa Agent for
Kathleen E.L. Riggs

Of counsel for Foundation for Equal Families

PART VI - TABLE OF AUTHORITIES

Cases	Cited at Paragraphs
1. <i>Law v. Canada (Minister of Employment and Immigration)</i> , [1999] 1 S.C.R. 497	8, 11, 24
2. <i>Halpern v. Canada (A.G.)</i> (2003), 65 O.R. (3d) 161 (C.A.)	13
3. <i>EGALE Canada Inc. v. Canada (A.G.)</i> (2003), 13 B.C.L.R. (4th) 1 (C.A.)	13
4. <i>Miron v. Trudel</i> , [1995] 2 S.C.R. 418	16, 17, 20, 31, 42, 54
5. <i>Egan v. Canada</i> , [1995] 2 S.C.R. 513	17, 18
6. <i>Brossard v. Quebec</i> , [1988] 2 S.C.R. 279	20
7. <i>Moge v. Moge</i> , [1992] 3 S.C.R. 813	20
8. <i>Benner v. Canada</i> , [1997] 1 S.C.R. 358	21
9. <i>M. v. H.</i> , [1999] 2 S.C.R. 3	22, 26, 29, 31
10. <i>Vriend v. Alberta</i> , [1988] 1 S.C.R. 493	26, 48
11. <i>Gosselin v. Quebec (A.G.)</i> , [2002] 4 S.C.R. 429	35, 46, 47, 48, 49
12. <i>New Brunswick (Minister of Health and Community Services) v. G (J.)</i> , [1999] 3 S.C.R. 46	37, 39
13. <i>B.(R.) v. Children's Aid Society of Metropolitan Toronto</i> , [1995] 1 S.C.R. 346	37, 40
14. <i>Blencoe v. British Columbia (Human Rights Commission)</i> , [2000] 2 S.C.R. 307	38, 40
15. <i>R. v. Morgentaler</i> , [1988] 1 S.C.R. 30	38
16. <i>Andrews v. Law Society of British Columbia</i> , [1989] 1 S.C.R. 143	39
17. <i>Godbout v. Longueuil (City)</i> , [1997] 3 S.C.R. 844	41, 51
18. <i>Nova Scotia (A.G.) v. Walsh</i> , [2002] 2 S.C.R. 325	42

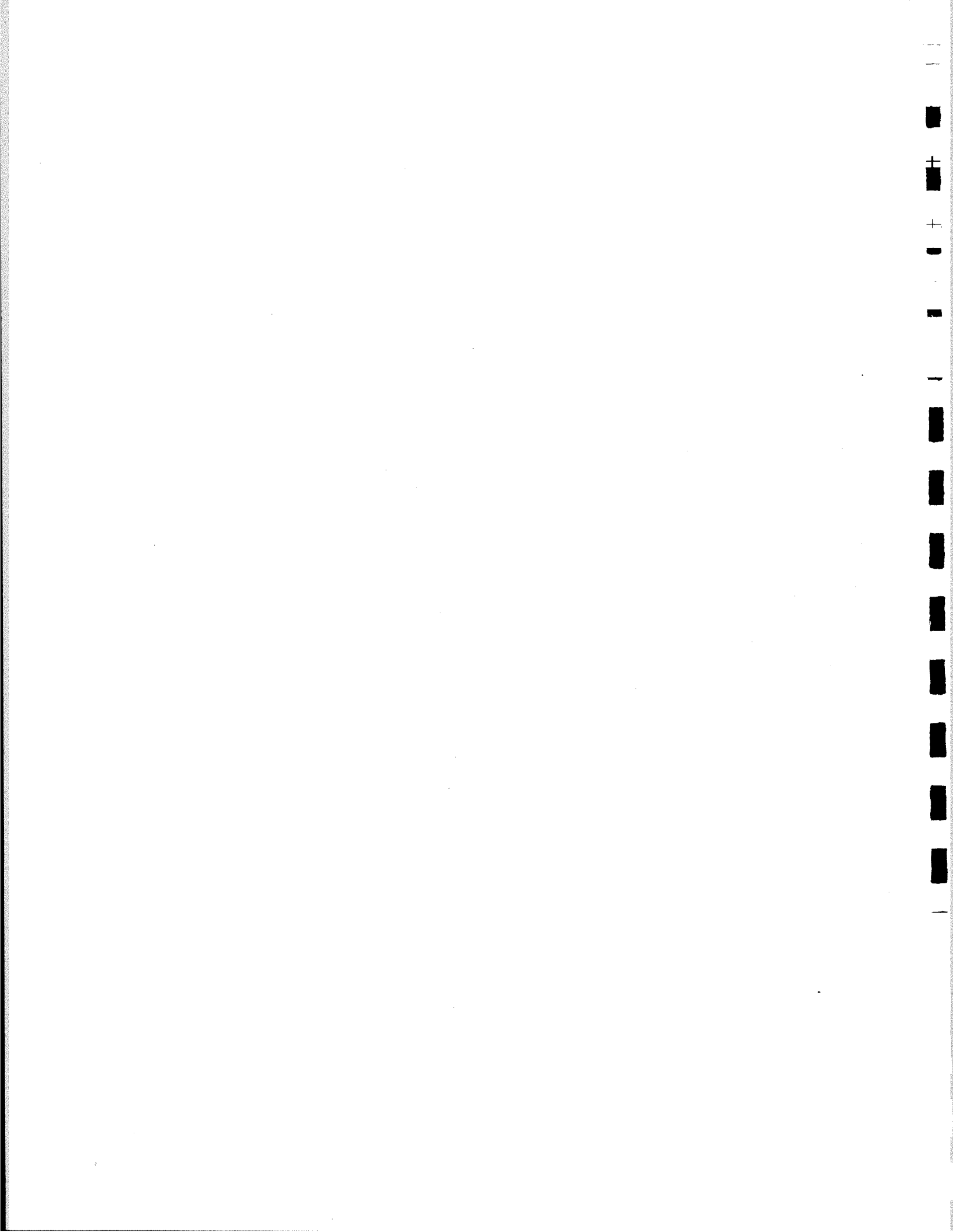
19.	<i>Winnipeg Child and Family Services v. K.L.W.</i> , [2000] S.C.R. 519	47
20.	<i>Dunmore v. Ontario (A.G.)</i> , [2001] 3 S.C.R. 1016	49, 50
21.	<i>Halpern v. Canada (A.G.)</i> (2002), 60 O.R. (3d) 321 (Div. Ct.)	53, 58
22.	<i>Rodriguez v. British Columbia (Attorney General)</i> , [1993] 3 S.C.R. 519	55
23.	<i>Irwin Toy Ltd. v. Quebec (A.G.)</i> , [1989] 1 S.C.R. 927	57, 60, 61
24.	<i>EGALE Canada v. Can. (A.G.)</i> , [2001] 11 W.W.R. 685 (B.C.S.C.)	58
25.	<i>R. v. Sharpe</i> , [2001] 1 S.C.R. 45	60
26.	<i>Little Sisters Book and Art Emporium v. Canada (Minister of Justice)</i> , [2000] 2 S.C.R. 1120	60
27.	<i>R. v. Butler</i> , [1992] 1 S.C.R. 452	61, 62
28.	<i>Haig v. Canada (Chief Electoral Officer)</i> , [1993] 2 S.C.R. 995	62

Articles

1.	David Cruz, <i>Just Don't Call it Marriage: The First Amendment and Marriage as an Expressive Resource</i> , 74 S. Cal. L. Rev. 925 (2001)	58
2.	Kenneth Karst, <i>The Freedom of Intimate Association</i> , 89 Yale L.J. 624 (1980)	58

PART VII - STATUTES RELIED ON

1. *Canadian Charter of Rights and Freedoms, Part 1 of the Constitution Act, 1982, being Schedule B to the Canada Act, 1982 (U.K.), 1982, c. 11, s. 15*
2. *Modernization of Benefits and Obligations Act, S.C. 2000, c.12, s.1.1*
3. *Federal Law - Civil Law Harmonization Act, No. 1, S.C. 2001, c. 4, s. 5*
4. *Civil Code of Quebec, S.Q., 1991, c. 64, Article 365*



Modernization of Benefits and Obligations Act

2000, c. 12

An Act to modernize the Statutes of Canada in relation to benefits and obligations

INTERPRETATION

Interpretation

1.1 For greater certainty, the amendments made by this Act do not affect the meaning of the word "marriage", that is, the lawful union of one man and one woman to the exclusion of all others.

Modernisation de certains régimes d'avantages et d'obligations, Loi sur la

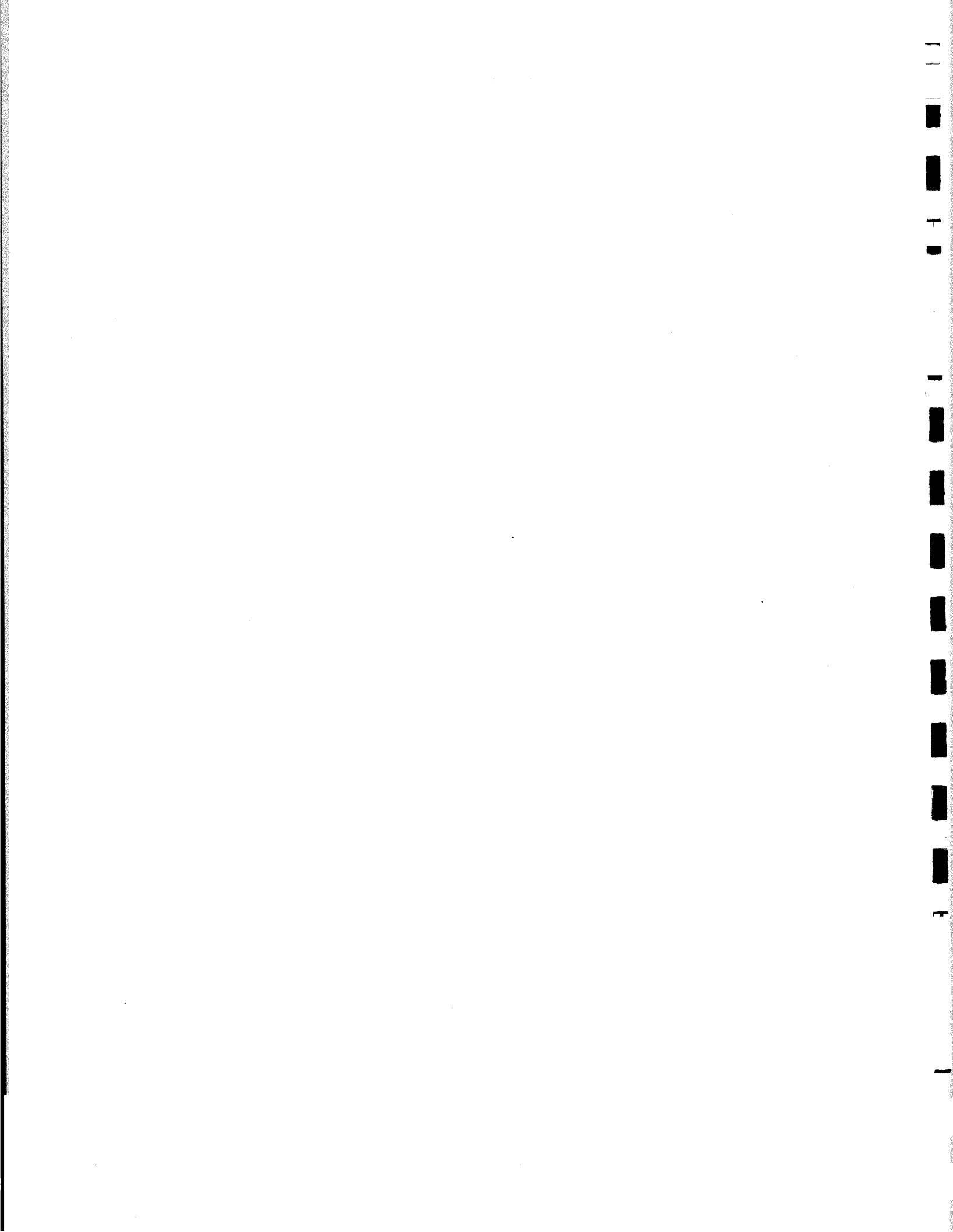
2000, ch. 12

Loi visant à moderniser le régime d'avantages et d'obligations dans les Lois du Canada

RÈGLE D'INTERPRÉTATION

Règle d'interprétation

1.1 Il demeure entendu que les modifications que la présente loi apporte ne changent pas le sens du terme « mariage », soit l'union légitime d'un homme et d'une femme à l'exclusion de toute autre personne.



Federal Law--Civil Law Harmonization Act, No. 1

2001, c. 4

A First Act to harmonize federal law with the civil law of the Province of Quebec and to amend certain Acts in order to ensure that each language version takes into account the common law and the civil law

5. Marriage requires the free and enlightened consent of a man and a woman to be the spouse of the other.

Harmonisation no1 du droit fédéral avec le droit civil, Loi d'

2001, ch. 4

Loi n° 1 visant à harmoniser le droit fédéral avec le droit civil de la province de Québec et modifiant certaines lois pour que chaque version linguistique tienne compte du droit civil et de la common law

5. Le mariage requiert le consentement libre et éclairé d'un homme et d'une femme à se prendre mutuellement pour époux.



CIVIL CODE OF QUÉBEC

S.Q., 1991, c. 64.

MARRIAGE AND SOLEMNIZATION OF MARRIAGE

365.

Marriage shall be contracted openly, in the presence of two witnesses, before a competent officiant.

1991, c. 64, s. 365; 2002, c. 6, s. 22.

CODE CIVIL DU QUÉBEC

L.Q., 1991, c. 64.

DU MARIAGE ET DE SA CÉLÉBRATION

365.

Le mariage doit être contracté publiquement devant un célébrant compétent et en présence de deux témoins.

1991, c. 64, a. 365; 2002, c. 6, a. 22.