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

F A C T U M
OF THE INTERVENER
THE INTERFAITH COALITION ON MARRIAGE AND FAMILY

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Introduction and Overview

1. Marriage, a foundational social and religious institution in Canadian society, was not created by law. It is a societal and, primarily, religious institution which has existed for millennia. It pre-existed the law, and its recognition by law (first by the common law and then by legislation) is comparatively recent. Unlike the legislative concept of "spouse" which was considered in *Egan v. Canada*[1] and *M. v. H.*[2], the institution of marriage was not created, nor defined, by legislation.

2. Marriage confers the status of husband and wife, and has been recognized by all major religious faiths and societal groups as existing uniquely between one man and one woman. The role of the law has been simply to acknowledge this pre-existing institution and describe its universal features. Because it was not created by law, neither the heterosexual nature of marriage nor its legal recognition can be a violation of s. 15(1) of the *Charter*.

3. Furthermore, s. 15(1) of the *Charter* does not require that government fundamentally redefine this pre-existing institution to address the needs of persons whose relationships are not marriages. Parliament and the legislatures have adopted statutory measures to protect and support spousal and same-sex domestic relationships (as they have been legislatively defined), and can adopt further legislative measures to recognize, register, and provide benefits for domestic partnerships that are not between husband and wife. The fundamental redefinition of marriage is neither constitutionally required nor necessary to accomplish these legislative objectives.

4. There will be profound consequences to the decision to redefine marriage, rather than to proceed legislatively in some other way. In the same way that the liberalization of divorce law had a profound, and destabilizing, effect on Canadian society (including the communities represented by these interveners), the proposed change to marriage can be expected to have (as yet) uncertain and unanticipated effects upon these religious

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[1] *Egan v. Canada*, [1995] 2 S.C.R. 513

[2] *M. v. H.*, [1999] 2 S.C.R. 3

communities and society as a whole. The full effects of a fundamental change to the millennia-old religious and social institution will not be immediately apparent, but they will be real, and they will be borne by these interveners. Fairness requires that the interests of these interveners be taken into account when considering a radical change to an institution in which they have a profound interest.

5. There is much at stake in this Reference for persons of religious faith, beyond the uncertain social changes that a redefinition of marriage will have for religious communities and society as a whole. They are concerned not only (or primarily) that their clergy will be required to perform same-sex marriages, but that they will be penalized by public institutions for holding to the conception of marriage mandated by their religious faith, rather than accepting same-sex unions as marriages. They are concerned that regulatory and professional governing bodies will take the position that accreditation of them and their institutions would be contrary to the public interest.[3] They are concerned about the extent to which they will be permitted to run their churches, mosques, schools, and other institutions according to their religious principles.[4]

6. Furthermore, they are concerned that they will be sanctioned by human rights commissions for, among other things, refusing to provide services ancillary to same-sex marriage ceremonies (such as pre-marriage counselling), for refusing to accept the same-sex unions of employees (and some congregants) as marriages, for proscribing homosexual acts in codes of conduct in schools and the workplace, and for refusing to solemnize same-sex marriages. They anticipate challenges to the charitable status of their institutions.

7. There is a danger that the proposed Act will remove the common law protections that have been enjoyed by these religious institutions, clergy, and lay persons, and that s.

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[3] E.g. the position taken by the BC College of Teachers in *Trinity Western University v. British Columbia College of Teachers*, [2001] S.C.R. 772.

[4] As put in issue in *Hall (Litigation Guardian of) v. Powers* (2002), 59 O.R. 423 (S.C.J.).

2(a) of the *Charter* is not currently interpreted in a sufficiently purposive manner to protect their religious freedom. The Interfaith Coalition[5] is asking this Court to hold that s. 2(a) of the *Charter* is sufficiently broad and strong to protect these interveners from the potential consequences of the proposed Act outlined above. In particular, the Interfaith Coalition is further seeking assurance that s.2(a) of the *Charter* requires that triers of fact defer to religious individuals on the question of whether their religious principles mandate that they not recognize same-sex marriage.

PART I – STATEMENT OF FACTS

8. The Interfaith Coalition intervened in each of the provincial same-sex marriage cases, and filed evidence attesting to their concerns about the impact that a legal redefinition of marriage would have on them and on others. They also attested to the significance of heterosexual marriage within four religious traditions, representing the beliefs of millions of Canadians, and explained how these theological conceptions of marriage are integral aspects of these religious faiths. A summary of the evidence is set out below.

A. Roman Catholic conception of marriage

9. Catholics, in common with other members of the Interfaith Coalition, believe that including same-sex relationships in the institution of marriage would not be a matter of retaining the existing institution of marriage and simply adding something to it. It is fundamentally *changing* the existing institution for everyone.[6]

10. In Catholicism, marriage is a sacrament of the Church, and not a purely human institution despite the many variations it may have undergone through centuries. The

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[5] Constituted of the Islamic Society of North America (a society representing the interests of Muslims in Canada), the Catholic Civil Rights League (a lay Catholic organization dedicated to protecting religious rights and presenting Catholic positions in the public forum), and the Evangelical Fellowship of Canada (a national association of Evangelical Protestant churches).

[6] Affidavit of Daniel Cere, Evidence before the Court of Appeal in *Halpern v. Canada*, Part I, Affidavits, Interfaith Coalition on Marriage on Family ("Cere Affidavit"), ¶ 4, 11, 51, 69.

institution is "...prior to any recognition by public authority, which has an obligation to recognize it." The Catholic Church believes and teaches that the matrimonial covenant can only be between a man and a woman and that "God himself is the author of marriage."[7] According to Catholic thought, the nature of marriage exceeds "in an absolute and radical way, the sovereign power of the State."[8]

11. In Catholicism, the dignity of all persons is to be respected. Homosexual persons "must be accepted with respect, compassion and sensitivity. Every sign of unjust discrimination in their regard should be avoided." Respect, however, cannot require assent to same-sex marriage. The Catholic understanding of marriage is integral to Catholic theology. Recognition of same-sex marriage is not an option for Catholics because it is antithetical to the Catholic theology of marriage.[9]

12. Catholics are concerned that the proposed redefinition of marriage would "necessarily exclude us from our own institution as a result of our religious faith and traditions."[10]

B. Islamic community and marriage

13. Islamic tradition teaches that only a man and woman can unite in marriage and that the Islamic personality of each person is incomplete until they marry. This view of marriage as uniquely heterosexual and essential for the procreation and raising of children has

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[7] Cere Affidavit, ¶7; *Catechism of the Catholic Church,* ¶1131, 1601-1666, 2201 and 2202.

[8] Cere Affidavit, ¶ 7; *Family, Marriage and De Facto Unions* (July 2000) ¶ 9.

[9] Affidavit of Ernest Caparros, Evidence before the Court of Appeal in *Halpern v. Canada*, Part I, Affidavits, Interfaith Coalition on Marriage on Family ("Caparros Affidavit"), ¶14-17;
Catechism of the Catholic Church, ¶2358.

[10] Caparros Affidavit, ¶ 19.

continued for millennia and is constant in all Islamic communities around the world. It is a universal and unifying feature of Islam globally.[11]

14. Islamic tradition accepts the dignity of gay and lesbian persons. However, a legislated redefinition of marriage to include same-sex unions, would require Muslims to recognize conduct that would be contrary to Islamic religious belief. Such a fundamental redefinition of marriage would make it harder for Muslims to participate in Canadian society, particularly with respect to public education, if marriage would be redefined to directly conflict with Islamic teachings.[12]

15. Muslims are concerned about a backlash to their objection to the redefinition of marriage, and that by seeking to preserve marriage as an institution that is compatible with their tradition, they will become increasingly marginalised in Canadian society. Canadian Muslims wish to continue as a fully participating community within Canada, and they are concerned that such a fundamental redefinition of marriage would impair this.[13]

C. Orthodox or conservative Jewish community and marriage

16. Orthodox or conservative Jewish tradition recognizes marriage only as a union between a man and a woman. Marriage is regarded as an institution for all men and women under Jewish holy scriptures. This institution is the basis for the procreative family.[14]

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[11] Affidavit of Abdalla Idris Ali, Evidence before the Court of Appeal in *Halpern v. Canada*, Part I, Affidavits, Interfaith Coalition on Marriage and Family ("Ali Affidavit"), ¶ 6, 7, 8 and 9;
Affidavit of Katherine Young, Evidence before the Court of Appeal in *Halpern v. Canada*, Part I, Affidavits, Attorney General of Canada ("Young Affidavit"), ¶ 39, 45, 51, 57, 63 and 69.

[12] Ali Affidavit, ¶10 ,11 ,12, 13 and 16-21.

[13] Ali Affidavit, ¶16-21.

[14] Affidavit of David Novak, Evidence before the Court of Appeal in *Halpern v. Canada*, Part I, Affidavits, Interfaith Coalition on Marriage on Family ("Novak Affidavit"), ¶ 4 and 5;
Young Affidavit, ¶ 36, 42, 48 and 60-65.

17. Jewish tradition teaches that marriage is a natural institution that religious traditions have elevated to the level of the sacramental without changing its earlier pre-religious character. Thus Judaism (like Christianity and Islam) has preserved and protected a pre-existing institution that it did not invent. Religious traditions such as Judaism have the right to insist that the state not radically redefine an institution that the state did not invent.[15]

18. Although Jewish tradition does not accept gay and lesbian marriage, this should not be construed as a rejection of homosexuals as people. Judaism recognizes the dignity of all persons, because they are made in the image of God.[16]

19. Under Jewish tradition, Jewish marriage does not require concomitant civil marriage. For most of Jewish history Jews have lived in societies where all marriages were initiated solely under religious auspices. Civil marriage as it is known today, began in the middle of the eighteenth century in Europe, and Jews have participated in it because it does not fundamentally conflict with the requirements for Jewish marriage. If the state radically redefines marriage to include same-sex unions, many religious Jews will avoid civil marriage altogether, as its new requirements would violate principles that Jews regard as morally binding.[17]

20. Many religious Jews in Canada are concerned about legal challenges to religious institutions, which can be construed as a thinly veiled attack against their religious beliefs and principles. They view these challenges as destabilizing to the right of their religious communities to have their beliefs respected in all aspects of public life. Religious Jews are therefore extremely concerned about the impact of the redefinition of marriage in a manner inconsistent with their fundamental religious beliefs.[18]

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[15] Novak Affidavit, ¶ 9.

[16] Novak Affidavit, ¶ 4, 5, 9, 10 and 12.

[17] Novak Affidavit, ¶ 15-19.

[18] Novak Affidavit, ¶ 15-19.

21. Although a small number of reformed Rabbis have a different understanding of the Jewish faith and Jewish tradition, their views are dissentient. The vast majority of Rabbis and rabbinic teaching reject the possibility of same-sex marriage. Jewish law, according to Rabbi Novak, cannot change or develop to accept homosexual marriage.[19]

D. Protestant Evangelical Christian community and marriage

22. Conservative/Evangelical Protestants comprise approximately three million Canadians and include the fastest growing Christian churches in Canada. They believe that the scriptures expressly establish the "uniquely heterosexual nature of marriage." The evangelical understanding of marriage is as a covenant between man and woman, ordained by God. This is not an "optional" belief. More generally, the Evangelical Protestant understanding of sexual morality mandates "the celebration and protection of the marital covenant", with a corresponding proscription of the consummation of sexuality outside of marriage. This excludes, for example, homosexual relationships and polygamous and adulterous relationships. Marriage, according to Evangelical Protestants, has been made central to the created moral order, which is a universal moral order.[20]

23. A legislated redefinition of marriage to include same-sex unions could not secure recognition of such unions from Evangelicals because of their interpretation of their scriptures; it would be deconstructive of longstanding religiously-based moral tradition.[21] Evangelical Christians are concerned about state initiatives aimed at forcing them to accept the legitimacy of same-sex unions, which they experience as an unjust and illegitimate imposition upon their religious conscience.[22]

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[19] Novak Affidavit, ¶ 14.

[20] Affidavit of Craig Gay, Evidence before the Court of Appeal in *Halpern v. Canada*, Part I, Affidavits, Interfaith Coalition on Marriage on Family ("Gay Affidavit"), ¶ 4 -7.

[21] Gay Affidavit, ¶15.

[22] Gay Affidavit,¶ 8-15.

PART II - ISSUES

24. These interveners make submissions on the following issues arising from questions 3 and 4 of the Reference:

a) **question 3:** the proposed Act removes the common law protection for clergy, religious laity, and religious institutions, leaving the scope of religious freedom radically uncertain. In light of this, there is a need for the Court to affirm that s. 2(a) of the Charter provides equivalent protection for freedom of religion to that which would be lost by operation of the proposed Act; and

b) **question 4:** s. 15(1) of the Charter does not require that Parliament redefine marriage to include same-sex unions. Any violation of s. 15(1) can be remedied by Parliamentary initiative without redefining marriage.

PART III - ARGUMENT

A. Question 3 - the proposed Act leaves the scope of religious freedom radically uncertain

25. By recognizing marriage as an institution between one man and one woman, the common law has been consistent with the conceptions of marriage held by the religious communities represented by the Interfaith Coalition. As a result of the convergence between the common law and the conceptions of the marriage held by religious communities, religious clergy, individuals, and institutions in Canada have never faced the threat of legal compulsion to solemnize or otherwise recognize same-sex marriages.

26. The proposed Act would remove this broad protection for clergy, lay persons, and religious institutions, and would replace it with a weak and narrow declaration that '(n)othing in this Act affects the freedom of officials of religious groups to refuse to perform marriages that are not in accordance with their religious beliefs.'

27. For religious groups and individuals, the operation of the proposed Act generates great uncertainty about their legal obligations and the scope of their religious freedom. The proposed Act *assumes* that notwithstanding the stipulated change to the definition of marriage, religious officials will (somehow) remain shielded by the operation of some other statute or legal principle, and they will retain a right to refuse to perform marriages that are inconsistent with their religious principles. The proposed Act does not itself purport to provide this protection.

28. Not only does section 2 of the proposed Act not provide any protection for clergy, but these interveners question whether the Federal Government even has the jurisdiction to protect the religious freedom of clergy as it relates to the solemnization of marriage. The solemnization of marriage is a matter of provincial jurisdiction.

29. Even if the proposed Act provided protection for clergy, it makes no such promises for religious lay persons and religious institutions, who will also lose the benefit of the common law definition of marriage. For these interveners, the proposed Act does not (and because of the division of powers, likely cannot) provide the necessary assurance that the persons and groups that they represent will be able to continue to live their lives with authenticity, following the principles of their religious faiths, without facing discrimination.

30. It is uncertain what protection is afforded by s. 2(a) of the *Charter*. Despite the apparently broad protection of religious freedom under s. 2(a) of the *Charter*, contemporary jurisprudence has made its protection radically uncertain. Without specific assurances from this Court affirming that s. 2(a) of the *Charter* provides protection from the discriminatory acts set out in para. 31 below, religious clergy, individuals, and institutions will be at risk of a serious loss of religious freedom as a consequence of the proposed Act.

1. The loss of common law protection has a direct impact on these interveners

31. The redefinition of marriage stipulated by the proposed Act exposes the religious groups and individuals represented by the Interfaith Coalition to the potential of being compelled to violate their religious principles in the several ways, including:

a) religious persons and institutions could be denied public benefits (including a loss of charitable status), memberships, accreditations, licences, and other regulatory approvals from public institutions because the conception of marriage mandated by their religious faith (which rejects same-sex unions as marriages) is deemed to be contrary to the public interest;

b) religious clergy may be required to perform marriages between persons of the same sex contrary to the principles of their religions;

c) religious institutions may be required to make their physical facilities (including houses of worship, schools, recreational halls, camps) available for use for the celebration of same-sex weddings, or for services ancillary to these such as wedding receptions;

d) clergy and religious institutions that perform other services ancillary to performing marriages, such as pre-marriage counselling, could be required to provide these services to facilitate same-sex marriages;

e) lay persons who are authorized to perform marriages in their capacities as provincial marriage commissioners may be compelled to perform same sex marriages, contrary to the principles of their religion and contrary to their religiously informed conscience;

f) religious institutions could be required by human rights commissions to recognize the same-sex marriages of any of their members or employees; and

g) parents may be compelled to acquiesce in their children being inculcated in a doctrine of marriage contrary or hostile to their religious faith.

32. The proposed Act will thus have significance beyond simply enabling persons of the same sex to marry. Furthermore, like all statutory law, it will become a legal norm; it will contribute to the "background" morality that judges, tribunals, and professional governing bodies draw on when engaging in common law reasoning such as assessing standards of 'reasonableness', or the 'public interest', or the standards of 'a free and democratic society'. In this context, these interveners need a robust articulation of s. 2(a) of the *Charter*, to reflect the continued importance of religious freedom in Canadian society.

33. For some tribunals and professional governing bodies, approval of same-sex marriage is becoming a litmus test for permission for full participation in all aspects of public life. This results in the exclusion and marginalization of those persons and religious institutions whose religious principles will not allow them to recognize same-sex marriage. In this mode, Trinity Western University faced tenacious opposition from the BC College of Teachers to the certification of its teacher training program, simply because its religiously inspired code of conduct required observance of a Christian sexual morality which excluded, among other things, homosexual acts.[23] The communities represented by the Interfaith Coalition are at risk of losing the ability to fully participate in public life in Canada.

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[23] *Trinity Western University v. British Columbia College of Teachers*, [2001] 1 S.C.R. 772.

2. A broad, authoritative interpretation of s. 2(a) of the Charter is needed

34. The AGC has taken the position that the proposed Act does not violate s. 2(a) of the *Charter*.[24] However, the Interfaith Coalition is concerned that unless this Court addresses some problematic aspects of contemporary s. 2(a) *Charter* jurisprudence that are set out below, the proposed Act will have the effect of eviscerating existing legal protections, and that the protection currently available under s. 2(a) will be insufficient to remedy this.

a) Conduct/belief distinction - a push towards mere freedom to hold beliefs

35. The AGC, in his factum, characterizes the 'interest engaged and protected by s. 2(a) of the *Charter*' as 'freedom to hold one's religious beliefs.'[25] In fact, this Court has held that the right means much more than that, encompassing not only a right to hold religious beliefs, and not only a 'right to declare religious beliefs openly and without fear of hindrance or reprisal', but also a 'right to *manifest religious belief* by worship and practice or by teaching and dissemination.'[26] This manifestation of belief - a right to action - is an intensely personal act of the free person as a moral and religious being.

36. A right to religiously motivated action, like most other rights, must be exercised within limits. In *Big M Drug Mart,* this Court held that courses of action motivated by religious principles are bounded only by 'such limitations as are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others'.[27] Mindful of these limitations on action, this Court noted in *Trinity Western* that the 'freedom to hold beliefs is broader than the freedom to act on them.'[28]

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[24] Factum of the Attorney General of Canada, ¶ 47-62.

[25] Factum of the Attorney General of Canada, ¶ 48.

[26] *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295 at 336 (emphasis added).

[27] Ibid, at 337.

[28] *Trinity Western University v. British Columbia College of Teachers*, [2001] 1 S.C.R. 772 at ¶ 36.

37. The AGC, however, has misstated *Trinity Western* as holding that 'the core value protected in s. 2(a) is freedom of belief'.[29] Such a reading is inconsistent with *Big M*, and with *Trinity Western*, neither of which purport to reduce freedom of religion to a core matter of private belief.

38. The AGC's submission illustrates the impulse to narrow freedom of religion, and illustrates the risk faced by these interveners when the protection of the common law is removed. These interveners can expect that courts and human rights tribunals will be urged to interpret s. 2(a) along restrictive lines, such that wherever the rights of religious groups conflict with the demands of others, freedom of religion will be reduced to a "core" right merely to hold one's own beliefs.

b) "Core" beliefs and "peripheral" beliefs - failure to consider religion from the practitioners' point of view

39. This Court clearly held in *R. v. Jones* that 'a court is in no position to question the validity of a religious belief...'[30] But even when judges do not question the *validity* of a religious belief, and accept that it is sincerely held, there is a danger that they will nevertheless make significant errors in understanding how religious principles govern the conduct of religious persons (ie of how individuals work to bring their lives into more perfect harmony with their religion).

40. In *R. v. Videoflicks*, Tarnopolsky J.A. cautioned emphasized the necessity of proceeding to an analysis of a person's religious beliefs (and what practices those beliefs require) from the perspective of the individual religious practitioner:

> includes the right to observe the essential practices demanded by the tenets of one's religion and, in determining what those essential practices are in any given case, *the analysis must proceed not from the majority's perspective of*

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[29] Factum of the Attorney General of Canada, ¶ 48.

[30] *R v. Jones*, [1986] 2 S.C.R. 284 at 295.

> *the concept of religion but in terms of the role that the practices and beliefs assume in the religion of the individual or group concerned.*[31]

While Tarnopolsky J.A. erred, it is submitted, in reducing freedom of religion to a right to observe only 'essential practices', he correctly assessed the *subjective* nature of a court's enquiry when determining what a person's religious practices are.

41. Too often, courts and tribunals do not assess the mandatory nature of religious practices from the perspective of the religious beliefs of the individual before them. They refuse to accept the explanations from individuals as to the religious principles and practices that they understood to be binding on themselves, and in some instances, the trier of fact applied false stereotypes about what did and did not constitute a mandatory religious practice for him,[32] or wrongly attributed to the individual the practices and beliefs of other, superficially similar, religious faiths.[33]

42. Thus in *Brillinger v. Brockie*, the adjudicator refused to accept that a printer who described himself as an Evangelical Christian had a valid religious objection to printing materials for a gay and lesbian advocacy organization. The adjudicator, relying on evidence from an official of the United Church (a religious body wholly unrelated to the printer, and whose religious beliefs differed substantially) rejected the evidence of the printer as to the significance of his own beliefs, and dismissed his convictions as being "peripheral" to his faith.[34]

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[31] *R. v. Videoflicks Ltd.* (1984), 14 D.L.R. (4th) 10 (Ont. C.A.) at 35 (emphasis added).

[32] *R. v. Laws* (1998), 41 O.R. (3rd) 499 (C.A.) at 502-504, 508, holding a trial judge to be in error for excluding a Muslim spectator from a trial for refusing to remove his headdress. The trial judge had refused to accept that the wearing of the headdress was, for the spectator, a Muslim act of religious devotion.

[33] *Brillinger v. Brockie*, [2000] OHRBID No. 3, Feb. 24, 2000 (Ont. Board of Inquiry), overturned in part in *Ontario Human Rights Commission v. Brillinger,* [2002] O.J. No. 2375 (Div. Ct.).

[34] Ibid.

43. When triers of fact in this fashion inaptly draw distinctions between "core" and "peripheral" aspects of religious practice, they deny constitutional protection to acts that are an integral component to a person's freedom and well-being.[35] Religion is, in part, an attempt to ascertain whether there is a universal order of reason and human freedom, and to align oneself with that order. Where a person is prevented from carrying out actions that he or she believes to be necessary to bring that order to his or her life, that person's integrity and moral character are harmed. For the state to force a person to carry out actions which are contrary to that order, is to force the person to forego the benefits from acting according to conscience, and to instead alienate that person from their actions.

44. The communities represented by the Interfaith Coalition are concerned that courts and tribunals may characterize the religiously informed conviction that marriage cannot be celebrated between persons of the same sex, as a "peripheral" aspect of their religious faith, and one which is not entitled to legal or constitutional protection.

45. Courts may come to such a conclusion on the issue of whether the heterosexual nature of marriage is a "core" aspect of any religious faith in question because of a lack of appreciation of the great diversity that exists among religious institutions, and because they fail to assess religious practice from the participant's point of view. As was the case in *Brillinger v. Brockie*, wrongly interpret the existence of divergence of belief within religions (conceived of broadly) as meaning that areas where there is no consensus must be evidence that a belief is "optional", "peripheral", or "trivial".

46. The great diversity among religious bodies (including denominations and other subgroups within single religious faiths) extends not only to theology but to governing structure and sources of recognized authority. Some religious bodies, such as the Catholic Church are hierarchically structured, with clearly defined offices that are authorized to state their doctrines on behalf of the entire church. The situation is more complex when dealing

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[35] See also *R. v. Jones*, [1986] 2 S.C.R. 284 at 287, where Wilson J. held that no breach of freedom of religion would issue from 'legislative or administrative action whose effect on religion is trivial or insubstantial', begging the question that a court can determine that there are aspects of religious practice that are trivial or insubstantial.

with non-hierarchical bodies which do not have a single leader or office. However, even when dealing with a hierarchically structured church (where it is relatively simple to determine, by deference to an authoritative interpretation of the religious principles in question, whether same-sex marriage is incompatible with its theology of marriage), courts have failed to defer and have made errors.[36]

47. Therefore, it is essential that when determining whether a person's actions are protected by s. 2(a) of the *Charter*, that courts are strongly deferential to the person before them as to the obligations imposed on him or her by his or her religious beliefs.

48. Without an affirmation from this Court on s. 2(a) of the *Charter*, the proposed change to the definition of marriage will suddenly thrust religious clergy, institutions, and lay persons in Canada into a radically uncertain environment, in which they will not be able to predict the consequences of their principled refusals to perform same-sex marriages.

B. Question 4 - Section 15(1) does not *require* a redefinition of marriage

1. The context - marriage as pre-existing, religious institution

49. As this Court held in *Egan v. Canada*, *M. v. H.*, *Law v. Canada*, and other cases, s. 15 analysis is contextual and not formulaic - s. 15 claims must be considered in the legal, political, social, *and religious* contexts in which they arise.[37]

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[36] E.g. courts have erred by not accepting the statements of a Bishop of the Catholic Church as an authoritative interpretation of church doctrine, and by ascribing significance to the contrary positions held by individuals who self-identify as Catholic but have no authority to speak for the Catholic Church, *Hall (Litigation Guardian of) v. Powers* (2002), 59 O.R. 423 (S.C.J.).

[37] *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497 at ¶ 30, 39 and 41 (Iacobucci J.); *M. v. H.*, [1999] 2 S.C.R. 3 at 45-47; *Granovsky v. Canada (Minister of Employment and Immigration)*, [2000] 1 S.C.R. 703 at 735; *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203 at 250; *Lovelace v. Ontario*, [2000] 1 S.C.R. 950 at 984; *Winko v. British Columbia (Forensic Psychiatric Institute)*, [1999] 2 S.C.R. 625 at 675 at 735; *Egan v. Canada*, [1995] 2 S.C.R. 513 at ¶ 41 (LaForest J.); *Miron v. Trudel*, [1995] 2 S.C.R. 418.

50. Part of the context in which question four must be answered is that the institution of marriage, historically, is a product of religious traditions, and that marriage continues to play a significant role in the religious lives of the communities represented by these interveners and others. The pre-existing, fundamental and religious character of the institution of marriage forms part of the context of these claims.

51. Second, marriage is necessarily exclusive. Not all committed relationships will be marriages. On 'a core of consistent Western understanding', according to the AGC's affiant Dr. John Witte, marriage has always been understood 'as a special kind of monogamous heterosexual union.'[38]

52. Third, government's *recognition* of marriage is not, in itself, discriminatory. On behalf of all Canadians, government has an obligation to take those steps necessary to promote social stability and well-being; the recognition of marriage is such a step. Neither the nature of marriage nor the legal recognition of marriage can be said to be discriminatory.

53. Nevertheless, it may be discriminatory for government *not* to provide institutional recognition of other relationships which are not marriages, given that it has decided to legally recognize marriage. When viewed contextually, it is this *omission* which can found a complaint of discrimination, and not the heterosexual nature of marriage, nor government's recognition of it.

2. In this context, the distinction is not discriminatory

54. The Supreme Court has held that the "semi-objective" nature of the *Law* test requires that one take an applicant's perspective of whether his or her dignity has been violated, and then *evaluate the reasonableness* of this perspective given the context: "(t)his

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[38] Affidavit of John Witte Jr., AGC Record, Vol II, Tab 25, ¶ 3.

subjective view must be examined in context, that is, with a view to determining whether a rational foundation exists for this subjective belief."[39]

55. The "reasonable applicant", in determining whether his or her feelings of discrimination were reasonable, would have to take into account the pre-existing nature of the institution of marriage, its fundamental religious character and continued importance within some religious communities, and the legitimate need for society to recognize marriage through law. In the present context, a reasonable person advocating same-sex marriage ought not to feel diminished by the fact that marriage is legally recognized, nor that his or her relationship cannot be a marriage.

56. The reasonable advocate of same-sex marriage could, however, take offence that while marriage has been legally recognized, there has been no legal recognition of an institution in which same-sex partners can express monogamous, committed relationships. This does not entail the redefinition of marriage, if some other remedy is available.

57. There is another contextual aspect to this claim. Section 15(1) doctrine is still relatively undeveloped with respect to competing equality rights claims. The approach to s. 15(1) in *Law v. Canada* was developed in the context of claims brought by a person or group against the state, where there is *little or no direct impact* on third parties ("a state claim").

58. However, in seeking to redefine a fundamental social institution, the Applicants' claim has a relatively *direct impact* on others ("an intergroup claim"). As the Supreme Court held in *Lovelace*, one of the contextual factors that establishes whether a distinction is discriminatory is "the correspondence, or lack thereof, between the ground on which the claim is based, and *the actual need, capacity, or circumstances of the claimant or others.*"[40] In an equality claim which affects the needs of other persons, the Court needs to be

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[39] *Lavoie v. Canada*, [2002] S.C.R. 769 at ¶ 46 (Bastarache J)

[40] *Lovelace v. Ontario*, [2000] 1 S.C.R .150 at ¶ 68 (Iacobucci, J.) (italics added).

sensitive to competing interests at the s. 15(1) stage, and particularly (but not exclusively) those interests identified by other sections of the Charter such as s. 2(a) and s. 27.

59. Additionally, as Arbour, J. noted in her concurring reasons in *Lavoie,* rights claims are "bilateral"; they are "a legally binding demand for recognition of, and respect for, one's interests on the part of others." Given the nature of this demand, these claims ought not to be considered in isolation from their impact on the rest of society:

> "(f)or if others are to be duty-bound to respect ones' rights, fairness requires that they be given some say, that their own interests be taken account of, in determining those rights."[41]

60. A proposal to fundamentally redefine the institution of marriage creates a "collision of rights" and a "collision of dignities" (as that phrase was recently used by Gonthier J. in *Chamberlain*)[42] between advocates of same-sex marriage and these interveners. The redefinition of marriage proposed is not required by s.15(1), and could have the effect of alienating many religious communities from the institution which they helped to shape.[43] Some of these religious minorities, such as the Jewish and Muslim communities, are particularly concerned about the impact of such a fundamental redefinition of marriage on the rejection and stereotyping historically suffered by them in Canadian society.[44]

61. The demand for social recognition which is at the root of proposed Act is a claim for recognition from those whose religious convictions will not permit them to recognize same-sex marriage.

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[41] *Lavoie v. Canada*, [2002] 1 S.C.R. 769 at ¶ 88 (Arbour, J.).

[42] *Chamberlain v. Surrey School District No. 36*, [2002] 4 S.C.R 710 at ¶ 132 (Gonthier, J. dissenting).

[43] Caparros Affidavit, ¶ 12, 14, 19 and 20; Cere Affidavit, ¶ 65-68; Gay Affidavit, ¶ 15; Ali Affidavit, ¶ 16 - 21; Novak Affidavit, ¶ 15 - 19.

[44] Novak Affidavit, ¶16-19; Ali Affidavit, ¶ 1, 13 and 21.

62. As a claim for recognition, the proposed Act goes beyond a mere "intergroup claim." It is a demand for a particular action, or response; it is a demand made of private parties - these Interveners.

PART IV - NATURE OF ORDER SOUGHT

63. The Interfaith Coalition respectfully requests that this Court answer the questions referred by the Governor in Council as follows:

Question 3: If the assurances sought are granted, Yes. Otherwise no.

Question 4: Yes. The opposite sex requirement of marriage is consistent with s. 15(1) of the Charter. Even if it were not, s. 15(1) could be satisfied by remedial action other than changing the definition of marriage.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Dated at Toronto, this 7th day of May, 2004.

Peter R. Jervis

Bradley W. Miller
Counsel for the Intervener The Interfaith Coalition on Marriage and Family

PART VI - AUTHORITIES

TAB:	AUTHORITIES:
1	*Brillinger v. Brockie*, [2000] OHRBID No. 3, Feb. 24, 2000 (Ont. Board of Inquiry)
2	*Chamberlain v. Surrey School District No. 36*, [2002] 4 S.C.R. 710
3	*Corbiere v. Canada (Minister of Indian and Northen Affairs)*, [1999] 2 S.C.R. 203
4	*Egan* v. *Canada*, [1995] 2 S.C.R. 513
5	*Granovsky v. Canada (Minster of Employment and Immigration)*, [2000] 1 S.C.R. 703
6	*Hall (Litigation Guardian of) v. Powers* (2002), 59 O.R. (3d) 423 (S.C.J.)
7	*Lavoie v. Canada*, [2002] 1 S.C.R. 769
8	*Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497
9	*Lovelace v. Ontario*, [2000] 1 S.C.R. 950
10	*M.* v. *H.*, [1999] 2 S.C.R. 3
11	*Miron v. Trudel*, [1995] 2 S.C.R. 418
12	*Ontario Human Rights Commission v. Brillinger*, [2002] O.J. No. 2375 (Div. Ct.)
13	*R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295
14	*R. v. Jones,* [1986] 2 S.C.R. 284
15	*R. v. Laws* (1998), 41 O.R. (3rd) 499 (C.A.)
16	*R. v Videoflicks* (1984), 14 D.L.R. (4th) 10 (Ont. C.A.)
17	*Trinity Western University v. British Columbia College of Teachers,* [2001] 1 S.C.R. 772
18	*Winko v. British Columbia (Forensic Psychiatric Institute)*, [1999] 2 S.C.R. 625