

IN THE SUPREME COURT OF CANADA

IN THE MATTER of Section 53 of the *Supreme Court Act*, R.S.C.
1985, Chap. S-26,

AND IN THE MATTER of a Reference by the Governor in
Council concerning the Proposal for an Act respecting certain
aspects of legal capacity for marriage for civil purposes, as set out
in Order in Council P.C. 2003-1055, dated the 16th day of July
2003.

**FACTUM OF THE INTERVENER,
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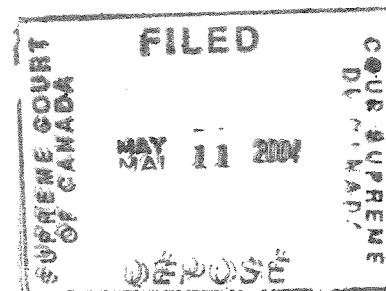
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PART I – STATEMENT OF FACTS

A. Overview

1. The intervener, the United Church of Canada (the "**United Church**"), is the largest Protestant denomination in Canada, with approximately 650,000 members and 200,000 adherents. It has been in existence since 1925. It is a member of the World Council of Churches. The United Church can therefore be considered a mainstream, established Christian church. However, unlike some other mainstream, established Christian churches which are interveners in this Reference, the United Church both supports same-sex marriage and makes same-sex marriage ceremonies available to its members. The United Church further believes that such support for same-sex marriage does not conflict with the religious freedom guaranteed by the *Canadian Charter of Rights and Freedoms*. It is this perspective which informs the Church's position on this Reference.

Affidavit of Ian Fraser, sworn March 31, 2004, para. 1-7, 16, 21-23, 25-27, 29, 34

2. The United Church agrees with the position of the Attorney General of Canada ("AGC") that the common law opposite-sex requirement for marriage violates section 15 of the *Canadian Charter of Rights and Freedoms*, and is not saved by section 1 of the *Charter*. The United Church further agrees with the AGC's position that section 1 of the proposed legislation conforms to the *Charter*. In addition to supporting the constitutionally protected right of same-sex couples to have the same access to marriage as opposite-sex couples, the United Church also supports the constitutionally protected right of religious officials and congregations to decide for themselves whether they will make religious marriage services available to same-sex couples. By recognizing the right of religious communities to make those decisions, the proposed legislation complies with section 2(a) of the *Charter*. More importantly, however, the proposed legislation recognizes, as does the United Church, that protection for those who object to same-sex marriage on religious grounds does not conflict with respect for the equality rights of same-sex couples.

B. The United Church's View of Marriage and Homosexuality

3. Marriage is not a sacrament in the United Church; rather, it is a union in which the covenant between God and humanity is mutually expressed and experienced:

...marriage is a gift of God through which Christians make a covenant with one another and with God. In marriage we offer one another the promise of a lifelong companionship, rich expression of human affections and sexuality, and nurture for the children. Marriage as an institution can undergird each relationship and provide stability for society.

Gift, Dilemma and Promise: A Report and Affirmations on Human Sexuality, p. 36

4. Although marriage is not a sacrament in the United Church, the United Church does place an extremely high value on the seriousness of the vows made in the presence of God and witnesses. The United Church supports all life-long relationships of care, justice, mutuality and faithfulness. This applies to same-sex couples as well as to opposite-sex couples.

Of Love and Justice: Toward the Civil Recognition of Same-Sex Partnerships, p. 29

Affidavit of Ian Fraser, sworn March 31, 2004, para. 14

5. Theologically and liturgically, the United Church understands both opposite-sex and same-sex couples as sharing the same human dignity of being made in the image of God. There is therefore no theological impediment that would prevent same-sex couples from participating in this union, which is one of the fullest expressions of the covenant between God and humanity. To the contrary, excluding same-sex couples from this expression of the covenant relationship undermines their basic human dignity.

Gift, Dilemma and Promise: A Report and Affirmations on Human Sexuality, pp. 24-25

Affidavit of Ian Fraser, sworn March 31, 2004, para. 8, 34(b)

6. As a result of this understanding, some United Church congregations began offering services of covenant for same-sex couples in the early 1990s. Since the decisions of the Ontario, British Columbia and Quebec Courts of Appeal, some congregations have begun

performing same-sex marriages. The United Church is one of only three Christian churches which perform same-sex marriages, the others being the Universal Fellowship of Metropolitan Community Churches and the Religious Society of Friends (Quakers). As of February 2004 the United Church had reported 120 same-sex marriages in thirteen congregations. Since July 2003, well over 1000 ceremonies have been performed, if one includes same-sex blessings of union in provinces where same-sex marriage is not yet legal.

Affidavit of Ian Fraser, sworn March 31, 2004, para. 20, 21, 26, 27

Affidavit of James Sinclair, sworn May 7, 2004, para. 4

C. Adjudicative Facts

7. The United Church accepts the adjudicative facts as set out in paragraphs 1 through 19 of the factum of the AGC and in paragraphs 1 through 4 of the supplementary factum of the AGC.

PART II – QUESTIONS IN ISSUE

8. The four questions on this Reference are as follows:
- (a) Is the proposed legislation within the exclusive legislative authority of the Parliament of Canada?
 - (b) Is Section 1 of the proposed legislation, which extends the capacity to marry to persons of the same sex, consistent with the *Canadian Charter of Rights and Freedoms*?
 - (c) Does the freedom of religion guaranteed by section 2(a) of the *Canadian Charter of Rights and Freedoms* protect religious officials from being compelled to perform a marriage between two persons of the same sex that is contrary to their religious beliefs?
 - (d) Is the opposite sex requirement for marriage for civil purposes, as established by the common law and set out for Quebec in s. 5 of the

Federal Law – Civil Law Harmonization Act, consistent with the *Canadian Charter of Rights and Freedoms*?

9. The United Church does not propose to address the first question and adopts and relies upon the submission of the AGC in that respect.

PART III – ARGUMENT

A. The common law opposite-sex requirement for marriage violates section 15 of the Charter

10. The United Church substantially supports and relies upon the submissions of the AGC in respect of this question. The United Church's additional submissions on this question are set out below.

(i) The exclusion of same-sex couples from marriage is discriminatory

11. It must be remembered that the rights enshrined in s. 15 are fundamental, both to human dignity and to Canadian society. As this Court stated in *Vriend v. Alberta*:

The rights enshrined in s. 15(1) of the *Charter* are fundamental to Canada. They reflect the fondest dreams, the highest hopes and finest aspirations of Canadian society. When universal suffrage was granted it recognized to some extent the importance of the individual. Canada by the broad scope and fundamental fairness of s. 15(1) has taken a further step in the recognition of the fundamental importance and the innate dignity of the individual. That it has done so is not only praiseworthy but essential to achieving the magnificent goal of equality for all. It is the means of giving Canadians a sense of pride. In order to achieve equality the intrinsic worthiness and importance of every individual must be recognized regardless of the age, sex, colour, origins or other characteristics of the person. This in turn should lead to a sense of dignity and worthiness for every Canadian and the greatest possible pride and appreciation in being part of a great nation.

Vriend v. Alberta, [1998] 1 S.C.R. 493 at para. 67

12. This Court re-stated the section 15 analysis in *Law v. Canada (Minister of Employment and Immigration)*. Three questions are involved in a s. 15 analysis:

- (a) does the law: (i) draw a formal distinction between the claimant and others on the basis of personal characteristics; or (ii) fail to take into account the claimant's disadvantaged position, resulting in differential treatment between the claimant and others on the basis of personal characteristics;
- (b) was the claimant subject to differential treatment on the basis of one or more enumerated or analogous grounds; and
- (c) does the differential treatment discriminate in a substantive sense, bringing into play the purpose of s. 15 to remedy prejudice, stereotyping and disadvantage?

Law v. Canada (Minister of Employment and Immigration), [1999]
1 S.C.R. 497 at 547-552

13. There can be no question that the common law opposite-sex requirement for marriage draws a distinction between opposite-sex couples, who can choose to marry, and same-sex couples, who cannot. The distinction is made on the basis of a personal characteristic, namely, sexual orientation. This Court found in *Egan v. Canada* that sexual orientation is an analogous ground. The only question then is whether the distinction discriminates against same-sex couples, that is, whether it violates their human dignity.

Egan v. Canada, [1995] 2 S.C.R. 513 at para. 171-178

14. Pre-existing disadvantage is relevant to the question of whether the common law definition discriminates. This Court recognized in *Egan* that gays and lesbians "whether as individuals or couples, form an identifiable minority who have suffered and continue to suffer serious social, political and economic disadvantage."

Egan v. Canada, supra

15. The nature of the interest affected is also relevant. The denial of marriage to same-sex couples deprives same-sex couples of access to a legal benefit – legally recognized civil marriage – that is available on demand to opposite-sex couples. The common law definition of marriage means that unlike cohabiting opposite-sex couples, same-sex couples cannot choose to marry and to thereby have immediate access to the economic and legal benefits

that are only available to married couples, such as equalization of property and access to the matrimonial home. It was this element of choice that led this Court to conclude in *Nova Scotia v. Walsh* that excluding opposite-sex cohabiting couples from a matrimonial property regime did not violate the *Charter*. The common law definition deprives same-sex couples of that choice.

Nova Scotia (Attorney General) v. Walsh, [2002] 4 S.C.R. 325 at para. 40-49

16. The exclusion of same-sex couples from civil marriage is based upon and perpetuates stereotypical assumptions about same-sex couples: that their relationships are less permanent, that they are incapable of commitment, and that they cannot form healthy families. However, same-sex couples do have relationships of permanence, they do make commitments to each other and they do form healthy families. Their exclusion from the institution of marriage does not in any way correspond to their actual needs, capacities and circumstances.

17. The societal significance of marriage cannot be overemphasized. Marriage is a benchmark by which Canadian society names the everyday development of love and intimacy between a couple. For many people, marriage ritualizes the sanctity of love through the very means by which people convert houses into homes, food into customs of community, and sex into love. Restricting the definition of marriage to opposite-sex couples questions the capacity of gays and lesbians to develop love and intimacy, undermining their human dignity and reinforcing prejudicial attitudes and even promoting violence.

(ii) The discrimination cannot be justified

18. The United Church submits that since the common law rule is a judge-made rule, there is no need to consider section 1 of the *Charter*.

R. v. Swain, [1991] 1 S.C.R. 933 at 978

19. Alternatively, the United Church submits that the common law rule cannot be justified. The United Church does not agree with the AGC that the purpose of marriage is procreation; procreation is one aspect and purpose of marriage but not the defining or only purpose. The other, equally important purposes of marriage include fostering intimacy,

companionship and respect, creating and sustaining community, and, in the case of religious marriage, expressing commitment to and communion with God.

20. No rational connection exists between the exclusion of same-sex couples and any of these purposes, including procreation. Same-sex couples can and do have and raise children. They can and do experience intimacy and companionship. They can and do develop relationships of respect which create and sustain community. Accordingly, there is no rational basis to prevent them from marrying.

21. In any event, it is the objective of the impugned provision that must be justified. In this case, that means that it is not the objective of marriage which is of concern, but the objective of the opposite-sex definition. That objective can only be the exclusion of same-sex couples. The United Church agrees with the Ontario Court of Appeal in *Halpern* that an objective which is in itself discriminatory cannot be pressing and substantial.

Halpern v. Canada (2003), 65 O.R. (4th) 161 (C.A.) at para. 117-119

22. Some of the interveners in this Reference will assert that the exclusion of same-sex couples is rationally connected to the goal of preserving marriage because changing one of the “essential” characteristics of marriage will lead to the disintegration of marriage as an institution. However, speculative *in terrorem* arguments made without cogent evidence cannot provide a rationale for a *Charter* violation. In any event, it is absurd to suggest that allowing same-sex couples to have access to the institution of marriage somehow undermines the institution.

Halpern v. Canada, supra at para. 134

23. The rights of same-sex couples are not minimally impaired by the common law definition. The fact that same-sex couples have access to the same rights as cohabiting opposite-sex couples is not a substitute for the legal and societal recognition that comes with marriage. This is especially the case since cohabiting opposite-sex couples can choose to marry at any time, whereas under the common law definition, same-sex couples cannot. Finally, since there is no rational connection to any reasonably justifiable objective, and the definition does not minimally impair the right, there can be no proportionality of effects and objective.

B. Section 1 of the proposed legislation is consistent with the Charter

24. The United Church supports and relies upon the submissions of the AGC in respect of this question. The United Church's additional submissions on this question are set out below.

25. The United Church agrees with the AGC that section 1 of the proposed legislation does not impair any right protected under the *Charter*; rather, it affirms *Charter* values. Extending the right to marry to same-sex couples is consistent both with the right to equality enshrined in section 15 of the *Charter* and with the United Church's understanding of marriage as an expression of the inherent worth and dignity of every individual. The United Church agrees with Cory J. in *Egan*, that gays and lesbians can "form lasting, caring, mutually supportive relationships with economic interdependence in the same manner as heterosexual couples". The proposed legislation recognizes that fact and in so doing recognizes that the love which same-sex couples share should be valued and affirmed.

Egan v. Canada, supra at para. 180

26. Section 15 of the *Charter* requires that same-sex couples receive equal benefit of the law. Access to civil marriage is a benefit under the law. The proposed legislation ensures that same-sex couples all across Canada have the same access to legal civil marriage as opposite-sex couples. As such, it both complies with section 15 of the *Charter* and affirms the purpose of section 15, which is "to prevent the violation of essential human dignity and freedom through the imposition of disadvantage, stereotyping or political or social prejudice, and to promote a society in which all persons enjoy equal recognition at law as human beings or as members of Canadian society, equally capable and equally deserving of concern, respect and consideration".

Egan v. Canada, supra at para. 86

Law v. Canada (Minister of Employment and Immigration), supra
at 529

27. The religious freedom of religious communities who object to same-sex marriage is not infringed by the proposed legislation. They cannot be compelled to offer marriages which violate their religious beliefs. The mere fact that civil marriage is available to same-sex couples does not constitute an attack on the religious beliefs of those who are opposed to same-sex

marriage, any more than the fact that some people do not observe the Christian Sabbath constitutes an attack on the beliefs of those who do. More importantly, the United Church does not believe that the faith stance of a community which supports same-sex marriage undermines the faith stance of a community that does not.

C. **Section 2(a) of the Charter protects religious officials from being compelled to perform same-sex marriages**

28. This Reference is concerned with civil marriage, as were the judgments of the Courts of Appeal of Ontario, British Columbia and Quebec. Clause 1 of the proposed legislation explicitly limits the proposed legislation to marriage for civil purposes. This fact is crucial.

Halpern v. Canada, supra at para. 53

29. Religious marriage is not, and cannot be, affected by the proposed legislation. All religious communities in Canada, whatever their views on same-sex marriage, have the absolute right to determine for themselves who will be eligible for religious marriage within their communities. This includes the right to determine whether the community will offer religious marriages to interfaith couples, to divorced couples, or to couples who are not members of the community.

30. The freedom of religious communities to make their own decisions about whether to offer religious marriage to same-sex couples does not depend in any way on section 2 of the proposed legislation. That provision is merely declaratory of an existing right, the right to freedom of religion and conscience guaranteed by section 2(a) of the *Charter*. The essence of freedom of religion was eloquently described by Dickson, J. (as he then was) in *R. v. Big M Drug Mart*:

Freedom can primarily be characterized by the absence of coercion or constraint. If a person is compelled by the state or the will of another to a course of action or inaction which he would not otherwise have chosen, he is not acting of his own volition and he cannot be said to be truly free. One of the major purposes of the *Charter* is to protect, within reason, from compulsion or constraint....Freedom means that, subject to such limitations as are necessary to protect public safety, order, health or morals or the fundamental freedom of others, no one is to be forced to act in a way contrary to his beliefs or his conscience.

...

...whatever else freedom of conscience and religion may mean, it must at the very least mean this: government may not coerce individuals to affirm a specific religious belief or to manifest a specific religious practice for a sectarian purpose.

R. v. Big M Drug Mart, [1985] 1 S.C.R. 295 at 337, 347 [emphasis added]

31. The United Church recognizes that within its own community, decisions about whether to make marriage services available to same-sex couples must be made on a congregation-by-congregation basis as part of the establishment of the congregation's marriage policy. To that end, the United Church has developed a model process to help congregations make an informed decision about congregational policy regarding same-sex marriage. That model process contains the following steps:

- (a) The congregation or minister receives a request to perform a same-sex marriage, or the congregation decides that it wants to develop a congregational policy regarding same-sex marriage;
- (b) The issue goes to the congregational Session, Board or Council (the governing body of the congregation), which then has several options:
 - (i) The Session, Board or Council discusses the issue, and reviews appropriate background materials. The Session, Board or Council then makes a decision and informs the congregation; or
 - (ii) The Session, Board or Council decides to hold an educational process for the congregation prior to making its decision. Through this process, the Session, Board or Council hears and considers the informed views of the congregation and bases its decision on those views.

Of Love and Justice: Toward the Civil Recognition of Same-Sex Partnerships, pp. 48-49

32. This process has been put into effect in a number of United Church congregations:

- (a) Carol Pastoral Charge in Labrador City, Newfoundland, went through an intentional process so as to be able to include gays and lesbians in all aspects of congregational life, including affirmation of same-sex marriage if it were made legal in the Province of Newfoundland and Labrador. Part of the congregational deliberation that was passed in that congregation was as follows:

Carol United Church would be open to perform same-sex blessing services. And upon the legalization of same-sex marriages in Newfoundland and Labrador, Carol United will perform same-sex marriages.

- (b) The following motion was discussed and ultimately carried in Central-Westside United Church in Owen Sound, Ontario on June 13, 2003:

Should a request for a same-sex marriage be received by the Minister or Church office, we ask that such request be transferred to the Toronto Conference Office to find a suitable person to officiate and that the Church Council of Central-Westside United Church strongly urges the Minister of Consumer and Business Affairs and the Office of the Registrar General to ensure that Section 25(1) of the Marriage Act is proclaimed as quickly as possible to enable the appointment of Marriage Commissioners in the Province of Ontario.

As this resolution suggests, while the congregation itself will not perform same-sex marriages, they understand that same-sex couples want access to civil marriage and thus call upon the Province to appoint officers with the power to do this.

- (c) Elmsdale Pastoral Charge in Elmsdale, Ontario has five congregations within it. In the summer of 2003, the Minister initiated a discussion and education program to which all members were invited to participate, in response to a same-sex couple in one of the congregations who had decided to marry. In September 2003, three of the five congregations made decisions on how they would proceed. One congregation decided

not to vote. One congregation, through their Session, decided they were not ready to accept same-sex marriages in the church building, but would be open to further discussion about the Minister performing marriages outside the church building. The third congregation decided at the Board level not to have a congregational vote, but passed a motion affirming the present marriage policy which is as follows:

That the Minister may marry people at her discretion if they have a valid marriage licence.

As that congregation is in the Province of Ontario, this is now understood to include same sex couples. The couple who wished to marry decided to have a house wedding so the issue of use of the church building was put aside. The wedding was celebrated in the fall of 2003 with many Church members attending.

Affidavit of James Sinclair, sworn May 7, 2004, para. 6-10

33. The United Church submits that the protection for conscientious objection to performing same-sex marriages which is provided by the *Charter* and affirmed in the proposed legislation does not conflict with the right of same-sex couples to marry. As Prowse J. noted in *Egale Canada Inc. v. British Columbia*, freedom of religion does not trump equality and *vice versa*; the rights must coexist. The enactment of the proposed legislation means that same-sex couples will be able to obtain civil marriage on demand. While they may not be able to obtain religious marriage on demand, depending on the views of the particular congregation, that is also the case for many other couples, such as interfaith couples. It does not deprive same-sex couples of their legal right to civil marriage.

Egale Canada Inc. v. British Columbia (Attorney General) (2003)
BCCA 251 at para. 133

34. The United Church supports this Court's statement in *Trinity Western University v. British Columbia College of Teachers* that conflict between allegedly competing *Charter* rights can be avoided by properly delineating the rights involved. In this case, the proper delineation involves distinguishing between the religious sphere and the civil sphere, between

religious marriage and civil marriage. The United Church unequivocally supports the rights of same-sex couples to have access to civil marriage, while at the same time unequivocally supporting the right of religious communities to refuse to perform such marriages.

Trinity Western University v. British Columbia College of Teachers, [2001] 1 S.C.R. 772 at para. 29

D. Conclusion

35. The issue of same-sex marriage must be resolved in a civil, religious and moral context of respect for differing positions, with integrity, thereby leading to principled decisions based on a commitment to justice and law for all. Such decisions result in a more inclusive community, where healing of past divisions can occur, and where the total community becomes healthier and more enriched.

36. The United Church believes that opposition to same-sex families based upon religious, moral and social dimensions is not the only approach that people of faith can bring to the issues in this appeal. It may be the position of other interveners, but they advocate for their members only and not for the United Church. The United Church believes, rather, that a commitment to equality for all people, regardless of sexual orientation, can grow out of religious faith.

37. The United Church believes that marriage is a blessing, which should be available to all. This commitment to equality was best expressed by the Right Reverend Peter Short as follows:

All those, regardless of sexual orientation, who are willing to give themselves to transformation by love in the honourable estate are welcome in marriage ... Love is always a risk. So is life. But we believe in marriage as a good house that shelters the presence of the greatest of gifts. It is a good house for all the people and an honourable estate from which no one should be turned away.

Affidavit of Ian Fraser, sworn March 31, 2004, para. 37

PART IV – SUBMISSIONS ON COSTS

38. The United Church does not seek costs and asks that costs not be awarded against it.

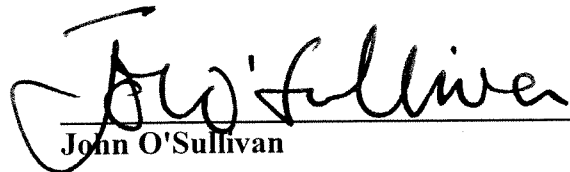
PART V – ORDER SOUGHT

39. The United Church asks that the questions on the Reference be answered as follows:

- (a) Question 1: yes;
- (b) Question 2: yes;
- (c) Question 3: yes; and
- (d) Question 4: no.

*
ALL OF WHICH IS RESPECTFULLY SUBMITTED.

May 7, 2004



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PART VI – TABLE OF AUTHORITIES

Egale Canada Inc. v. British Columbia (Attorney General) (2003) BCCA 251

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

Halpern v. Canada (2003), 65 O.R. (4th) 161 (C.A.)

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

Nova Scotia (Attorney General) v. Walsh, [2002] 4 S.C.R. 325.

R. v. Big M Drug Mart, [1985] 1 S.C.R. 295

R. v. Swain, [1991] 1 S.C.R. 933

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

Vriend v. Alberta, [1998] 1 S.C.R. 493

PART VII – STATUTES, REGULATIONS AND BY-LAWS

None.