Court File No.: 29866

IN THE SUPREME COURT OF CANADA

IN THE MATTER OF S. 53 OF THE *SUPREME COURT ACT, 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 CIVIL PURPOSES, AS SET OUT IN ORDER IN COUNCIL P.C. 2003-1055, DATED THE 16TH OF JULY 2003; AMENDED ON JANUARY 28, 2004

FACTUM OF THE INTERVENERS THE HONOURABLE ANNE COOLS, MEMBER OF THE SENATE and ROGER GALLAWAY, MEMBER OF THE HOUSE OF COMMONS

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PART I –STATEMENT OF FACTS

A. Questions Presented

1. This factum will focus on the following questions:

   (a) Should this Court decline to answer the questions submitted in the Reference?

   (b) Is the nature of marriage a part of the original Confederation compact?

   (c) Is the proposed legislation within the exclusive legislative authority of Parliament?

   (d) Should this Court advise the Governor General in Council that the proposed draft bill may only be submitted for consideration by the Parliament of Canada in the form of a resolution for an amendment to the *Constitution Act, 1867*?

B. Brief Answers

2. In this Reference, the Governor General in Council has requested the advisory opinion of this Court on questions relating to the constitutional validity of a proposed draft bill that is intended to fundamentally change the definition of marriage in sections 91 and 92 of the *Constitution Act, 1867*. The Interveners, Senator Anne Cools and Roger Gallaway, M.P., submit that this Court should exercise its discretion and decline to answer the Reference Questions.

3. There are a number of reasons for this Court to decline to give advice in this instance:

   (a) Some questions are inherently political and do not lend themselves to a legal response. The constitutional validity of the trial balloons of the executive fit into this class. It is not that the Reference Questions in issue should never be answered; but simply that they should not be answered at this stage in the political and Parliamentary process.

   (b) This Court does not have a role in the process of creating legislation. This Reference is an unconstitutional and unparliamentary attempt to draw this Court into the legislative process and to blur the distinction between the legislative and the judicial branches. To answer the Reference Questions at this time would

violate the principle of separation of the legislative and judicial functions of government and would threaten the independence of the judiciary.

(c) It is not respectful of the Law of Parliament or of parliamentary process for the Governor General in Council to seek judicial opinion regarding a bill prior to its first reading in a house of Parliament. This Court should refrain from participating in a process that is inconsistent with the *lex parliamenti.*

(d) Most importantly, for the purposes of analysis under the *Canadian Charter of Rights and Freedoms* ("*Charter*") and the *Constitution Act, 1867*, it is premature to subject the Reference Questions to constitutional review. This is because such a review necessarily requires an analysis of both the purpose and effect of the legislation or government action in question. In the approach proposed by Governor General in Council in this Reference, this Court will be asked to place its *imprimatur* upon a statute-to-be prior to a determination of the purpose of the legislation. Even if this Court could assume a purpose for the proposed draft bill, it should not do so. This is because such an approach could provide occasion for a government to avoid responsibility for establishing the purpose of a law. This Court should not risk inadvertently approving colourable legislation. If this approach to creating federal statutes is not repudiated by this Court, the purpose element of constitutional analysis would become no more than a charade, thus exposing the reference process to potential manipulation by the government.

4. The proposed draft bill is not authorized within section 91(26) of the *Constitution Act, 1867*. Furthermore, it is not consistent with the Rule of Law and interpretive principles under the Constitution. The proposed draft bill represents an unconstitutional interference with the jurisdiction of the provincial legislatures over marriage in section 92(12) and with the jurisdiction of the provincial legislatures over same-sex relationships in section 92(13) of the *Constitution Act, 1867*.

5. In the event this Court nevertheless determines that it should answer the Reference Questions, this Court should advise the Governor General in Council that the proposed draft bill

may only be introduced for consideration by Parliament in the form of a resolution for an amendment to the *Constitution Act, 1867.*

PART II - POINTS OF ISSUE

6. The Governor General in Council has referred questions to this Court pursuant to Order in Council P.C. 2003-1055, dated the 16th of July 2003, and amended on January 28, 2004.

PART III – ARGUMENT

A. The Reference Questions are premature

(i) This Court may decline to answer the Reference Questions

7. This Court has the discretion to refuse to answer questions referred pursuant to the *Supreme Court Act.* In *Reference Re Secession of Quebec*, [1998] 2 S.C.R. 217 at 235-36 ("*Secession Reference*"), this Court said that it would not answer a question:

> (a) [I]f to do so would take the Court beyond its own assessment of its proper role in the constitutional framework of our democratic form of government or
>
> (b) [I]f the Court could not give an answer that lies within its area of expertise: the interpretation of law.

8. In *McEvoy v New Brunswick (Attorney General),* [1983] 1 S.C.R. 704 at 710-17 ("*McEvoy*") this Court reviewed other examples of circumstances where reference questions have not been answered. To the list set forth in *McEvoy* can be added the decision of this Court in *Reference re: Goods and Services Tax (G.S.T.) (Can.)*, [1992] 2 S.C.R. 445 at 485-86 ("*Re: GST*") (refusing to answer question on grounds that it was "hypothetical" and "the answers given would not be precise or useful"). P.W. Hogg, *Consitutional Law of Canada,* 4th ed. (Toronto: Carswell 1997) at 227 ("Hogg"). See also *Re: Resolution to amend the Constitution,* [1981] 1 S.C.R. 753 at 851, cited in *McEvoy* at 714 ("where there is ambiguity… the Court may… refuse to answer").

(ii) The jurisdictional question cannot be answered without a determination of the purpose of the law

9. The Court has from time to time refused to answer a reference question where the purpose of the law in question is not clear. For example, in *Reference re Waters and Water-Powers*, [1929] S.C.R. 200 ("*Re: Waters*"), the following question was before this Court: "where the bed of navigable river is vested in the Crown in the right of the province, has the Dominion power, for navigation purposes, to use or occupy part of such a bed?" [*Re: Waters* at 201.] This Court determined that it could not answer the question because: "[I]t is impossible to affirm, in respect of every "navigation purpose", within the purport of these questions that the authority in relation thereto … invests the Dominion with the right to override by its legislation the proprietary rights of the provinces." [*Re: Waters* at 224.]

10. This analytical approach applies to the Reference Questions with equal strength. The question of jurisdiction under section 91(26) cannot be answered without knowing the purpose of the proposed draft bill annexed to the Reference Questions: "In my view, both purpose and effect are relevant in determining constitutionality; either an unconstitutional purpose or an unconstitutional effect can invalidate legislation." [*Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295 at 331 ("*Big M*").]

11. This Court has established a reliable approach to determining legislative purpose:

> All legislation is animated by an object the legislature intends to achieve. This object is realized through the impact produced by the operation and application of the legislation. Purpose and effect respectively, in the sense of the legislation's object and its ultimate impact, are clearly linked, if not indivisible. Intended and actual effects have often been looked to for guidance in assessing the legislation's object and thus, its validity. [*Big M* at 331.]

12. In *Big M*, Chief Justice Dickson was quick to point out that the purpose of legislation is determined as at the date of the passing of the legislation, and does not thereafter fluctuate with social change: "[t]he theory of a shifting purpose stands in stark contrast to fundamental notions developed in our law concerning the nature of 'Parliamentary intention.' Purpose is a function of

the intent of those who drafted and enacted the legislation at the time, and not of any shifting variable." [*Big M* at 335.]

> See also Pierre-Andre Cote, *The Interpretation of Legislation in Canada,* 3rd ed. (Scarborough: Carswell 2000) at 267 (The words of a statute must be construed as they would have been the day after the statute passed. A statute should not be modified by mere semantic evolution.).

(iii) *Charter* questions cannot be answered without knowing the purpose of the statute

13. For the purposes of analysis under the *Charter*, it is just as premature to answer the Reference Questions. Chief Justice Dickson explained the importance of the determination of the purpose of the law subject to *Charter* analysis in [*Big M* at 331-332]:

> [c]onsideration of the object of legislation is vital if rights are to be fully protected. The assessment by the courts of legislative purpose focuses scrutiny upon the aims and objectives of the legislature and ensures they are consonant with the guarantees enshrined in the Charter. The declaration that certain objects lie outside the legislature's power checks governmental action at the first stage of unconstitutional conduct.

(iv) Independence of the judiciary would be undermined by answering the Reference Questions

14. The relationship between the judiciary and the executive was the focus of this Court in *Valente v. The Queen,* [1985] 2 S.C.R. 673 ("*Valente*"). In *Valente,* this Court made reference to the comprehensive definition of judicial independence set forth by Sir Guy Green, Chief Justice of the State of Tasmania, in "The Rationale and Some Aspects of Judicial Independence" (1985), 59 A.L.J. 135:

> I thus define judicial independence as the capacity of the courts to perform their constitutional function free from actual or apparent interference by, and to the extent that it is constitutionally possible, free from actual or apparent dependence upon, any persons or institutions, including, in particular, the executive arm of government, over which they do not exercise direct control. [*Valente* at 687.]

15. That principle was further affirmed by this Court in *Manitoba Provincial Judges Assn v. Manitoba (Minister of Justice)*, [1997] 3 S.C.R. 3 ("*Provincial Judges Reference*"):

> Notwithstanding the presence of s. 11(d) of the Charter, and ss. 96-100 of the *Constitution Act, 1867*, I am of the view that judicial independence is at root an

> unwritten constitutional principle, in the sense that it is exterior to the particular sections of the Constitution Acts. The existence of that principle, whose origins can be traced to the Act of Settlement of 1701, is recognized and affirmed by the preamble to the *Constitution Act, 1867*. [*Provincial Judges Reference* at para. 83 .]

16. In *Provincial Judges Reference*, this Court discussed the nature of constitutional democracy in Canada, and the importance of the "parliamentary institutions"' in our system of governance. [*Provincial Judges Reference* at paras. 99-105.] In that reference, this Court also discussed Justice Le Dain's opinion that the goal of judicial independence is to ensure that justice is done and to ensure public confidence in the justice system. Without such confidence, the system cannot command the respect and acceptance that are essential to its effective operation. [*Valente* at 688.]

17. In the case of *Younger v. Superior Court* (1978), 21 Cal. 3e 102 at 115-17, the Supreme Court of California explained further why this issue is so important: "The purpose of the (Separation of Powers) doctrine is to prevent one branch from exercising the complete power constitutionally vested in another."

18. On the subject of the separation of powers, Charles De Montesquieu wrote that:

> [T]here is no liberty, if the judiciary power be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would be then the legislator. Were it joined to the executive power, the judge might behave with violence and oppression. [Charles de Secondat and Baron de Montesquieu, The Spirit of Laws (Kitchener: Batoche Books, 1748) at 173.]

19. James Madison recognized the danger inherent in failing to maintain a bright line between the legislature and the courts. He wrote:

> No political truth is certainly of greater intrinsic value or is stamped with the authority of more enlightened patrons of liberty than that on which the objection is founded. The accumulation of all powers legislative, executive and judiciary in the same hands may justly be pronounced the very definition of tyranny. [Jay Hamilton and Madison, "Federalist Paper 47: The Particular Structure of the New Government and the Distribution of Power Among its Different Parts," The Federalist Papers (January, 1788).]

20. It follows that as a matter of representative, responsible, parliamentary government, the Governor General in Council should avoid imposing political questions upon the judiciary.

These principles also lead to the conclusion that the Governor General in Council should refrain from politicizing the judiciary or merging the judicial and political roles.

(v) The processes of this Court should not be trivialized with the trial balloons of the executive

21. Judicial independence, a fundamental component of Canada's constitutional democracy, would be seriously impacted if this Court were to render an opinion on the trial balloons submitted by the Governor General in Council in the form of the Reference Questions. This Court should be alive to the actions of the executive used to divert political issues from Parliament to the courts.

22. Furthermore, unless an act of the Parliament of Canada is repealed by Parliament or declared unconstitutional by this Court, the Rule of Law requires the Attorney General and Minister of Justice to defend and uphold the act of Parliament. The Reference Questions have been submitted to this Court under a process that is inconsistent with this aspect of the Rule of Law. This Court should decline to participate in a process that is not in keeping with the Rule of Law. [Hogg at 351, footnote 18.]

23. There are a number of federal statutes that are inconsistent with the proposed draft bill. The proper approach of the Governor General in Council should have been to refer existing federal legislation for this Court's review. The fact that existing legislation has been ignored is telling. It suggests that the Reference is not actuated by a desire to know what the Constitution means. It also creates unnecessary uncertainty.

24. There is already too much uncertainty in connection with the proposed draft bill. For example, there is nothing to prevent the Attorney General from taking the position that consequential amendments could include amendments to the Divorce Act to provide that any person united in a homosexual civil union in Quebec under *An Act instituting civil unions and establishing new rules of filiation*, R.S.Q. 2002, c. 6 before or after the enactment of the proposed draft bill may only sue for "divorce" under the *Divorce Act*. This ambiguity alone is cause for this Court to refrain from answering the Reference Questions. See *Re Resolution to Amend the Constitution*, [1981] 1 S.C.R. 753 at 851 ("ambiguity" is reason to refuse to answer).

25. This Court should not be required to assume that the Attorney General will act in a manner that is not colourable. Instead, this Court should have been presented with the actual statute upon which the Governor General in Council desires an opinion. The most appropriate way in which to do this would have been for the Governor in Council to refer a bill to this Court after the bill was introduced in the House of Commons or the Senate. This has been the practice in the past. There do not appear to be any examples of proposed draft bills referred to this Court in previous references.

(vi) The proper role of the Court is adjudicative, not legislative

26. This Court should decline the invitation to take on the role of legislative drafter. Through this Reference, the Governor General in Council is attempting to avoid ministerial responsibility for the public policy position contained in the proposed draft bill. This is inconsistent with the system of responsible government adopted in the preamble to the *Constitution Act, 1867*.

27. The Reference Questions will take the Court beyond its proper role in the constitutional design. The Reference Questions elicit a premature judicial analysis of a proposed draft bill. The Reference Questions also engage this Court in issues that lie outside the interpretation of law. The Reference Questions present a conflation of legal, social, moral and political issues that are inextricably enmeshed. This Court will be hard pressed to restrict its answers solely to the legal aspects of marriage under the Constitution.

28. Furthermore, the evidentiary material filed in this Reference should not impress this Court. Most of the research filed amounts to mere opinion and has not been subjected to peer review. More importantly, much of it has not been subject to the rigors of trial and cross examination. There can be no legal certainty when judicial opinions are based upon uncertain facts.

29. As well, the answers of this Court to the Reference Questions will foist highly politicized opinions from this Court on Canada's Parliament and legislative assemblies. There is great wisdom in the policy of this Court to refrain from answering hypothetical political questions that have not been subjected to the rigor of debate in Parliament, by the elected and appointed representatives of the people of Canada. [See Hogg at 227; See also *Re: GST* at 485-86.]

30. This Court has, in the past, been of the view that the process of passing legislation is purely a political question and out of bounds for the Court. [*Reference re: Canada Assistance Plan (B.C.)*, [1991] 2 S.C.R. 525 at 545 and 558-59 ("*Re: Canada Assistance*").]

31. In *Re: Canada Assistance* at 558-59, this Court affirmed its discretion to refuse to answer "purely political" questions and referred to the *lex parliamenti* as support for that proposition:

> The respect by the courts for the independence of the legislative power is captured by G.-A. Beaudoin, *La Constitution du Canada* (1990), in the following passage (at p. 92): '[TRANSLATION] The courts do not intervene, however, during the legislative process in Parliament and the legislatures. They have no interest as such in parliamentary procedure. They have made this clear in certain decisions. They respect the *lex parliamenti*." [*Re: Canada Assistance* at 558-59.]

32. The proper role of this Court in this Reference is advisory, not legislative. This Court does not have a constitutionally approved role in the process of creating legislation. The law known as *lex parliamenti* explains why this must be so: "The formulation and introduction of a bill are part of the legislative process with which the courts will not meddle." [*Re Canada Assistance* at 559.] ; See also Sir Edward Coke, *The Third and Fourth Part of the Institutes of the Laws of England* (London: Grayland Publishing, Inc. 1979) at 14-15.

33. This Court has emphasized the importance of the sovereignty of Parliament in the legislative process:

> Ministers of State cannot, however, by means of contractual obligations entered into on behalf of the State fetter their own freedom, or the freedom of their successors or the freedom of other members of Parliament, to propose, consider and, if they think fit, vote for laws, even laws which are inconsistent with the contractual obligations.
>
> While the statement deals with contractual obligations, it would apply *a fortiori* to restraint imposed by other conduct that raises a legitimate expectation. A restraint on the executive on the introduction of legislation is a fetter on the sovereignty of Parliament itself. [*Re: Canada Assistance* at 560.]

34. The Reference amounts to an unconstitutional attempt to draw this Court into the legislative process, violating the functional separation between the executive and the judiciary. The Reference Questions compel this Court to effectively assume the role of parliamentary drafter. This is contrary to the Constitution, which contemplates that primary statute-making

authority may only be exercised by a legislature and which contemplates that the term "legislature" involves some form of representative assembly. [Hogg at 351, footnote 18.]

(vii) Section 18 of the *Constitution Act, 1867* and the *lex parliamenti* precludes this Court from answering the Reference Questions

35. This Court should refrain from answering the Reference Questions, because to do so would create a circumstance under which one side or the other in the political debate could use the advisory opinion of this Court for a purpose not contemplated in the *Supreme Court Act*. The answers of this Court could be used to coerce proceedings in Parliament and to coerce the votes of Members of Parliament, rather than to provide the Governor General in Council with legal advice.

36. The Governor General in Council should act in a manner that will maintain the balance and comity between the institutions of the Constitution. The Governor General in Council must not involve this Court in Parliament's business or proceedings. This could have been assured in this instance through the means of taking the important parliamentary step of introducing the proposed draft bill in Parliament for first reading prior to the initiation of the Reference.

37. Parliamentary privilege and the right of Members of Parliament to freely exercise all the functions that form part of that privilege is fundamental to all constitutional democracies. The English *Bill of Rights, 1689* states "[T]hat the Freedom of Speech, and Debates or Proceedings in Parliament, ought not to be impeached or questioned in any Court or Place out of Parliament." The Senate and the House of Commons hold all the privileges and powers that were held by the House of Commons in the United Kingdom as of 1867 and those privileges are part of the public law of Canada and that judicial notice is to be taken of these privileges and powers. [*Parliament of Canada Act*, R.S.C, c. S-8, sections 4 and 5]. The introduction, debate and approval of bills is arguably the most primary of parliamentary proceedings. This Court ought to avoid any suggestion that its answers might impeach or question a parliamentary proceeding and should decline to answer the Reference Questions.

38. This is not a frivolous concern. Attempting to influence the vote of a member of parliament is generally accepted as a breach of privilege. [Dawson W. F., Fraser, A., Holtby J.A., *Beauchesne's Rules & Forms of the House of Commons of Canada*, 6th Edition (Carswell

Company Limited, Toronto, 1989) page 25, section 93.] The fundamental importance of the rights and privileges of members of Parliament was clearly demonstrated in a recent report from a House of Commons Committee. In his ruling, the Speaker stated:

> The convention of confidentiality of bills on notice is necessary, not only so that Members themselves may be well informed, but also because of the pre-eminent role which the House plays and must play in the legislative affairs of the nation. ... This incident highlights a concern shared by all members of the Committee: apparent departmental ignorance of or disrespect for the role of the House of Commons and its Members. Even if the result is unintended, the House should not tolerate such ignorance within the government administration to undermine the perception of Parliament's constitutional role in legislating. The rights of the House and its members in this role are central to our constitutional and democratic government. [House of Commons, "Report of the Standing Committee on Procedure and House Affairs," No. 14 (9 May 2000), at 3 and 7.]

39. If this Court answers the Reference Questions in the affirmative, the Governor General in Council will, without a doubt, use this Court's opinion to influence the vote of all members of Parliament. The Court should not participate in what may well turn out to be a breach of parliamentary privilege. Following the release of this Court's decision in the *Secession Reference*, the Governor General in Council caused the *Clarity Act 2000*, R.S.C., c. C-26 ("*Clarity Act*") to be introduced in Parliament and later proclaimed into law "to give effect to" an "opinion of the Supreme Court of Canada." The preamble to the *Clarity Act* contains six references to this Court's decision in the *Secession Reference*. It is obvious that the Governor General in Council used this Court's opinion to influence the vote of members of Parliament and it is equally clear that this pattern will be repeated if this Court answers the Reference Questions positively.

40. Section 18 of the *Constitution Act, 1867* accords certain rights, powers and responsibilities to Members of the Senate and of the House of Commons. Included among those rights, powers and responsibilities is the right to the production, introduction, deliberation and debate of motions and bills. This is important to the proper functioning of Parliament, including the actions of Her Majesty the Queen. Bills are in fact petitions from the two houses of Parliament to the Queen seeking enactment of a statute. An affirmative answer to the Reference Questions will amount to the production of a bill for introduction in one of the houses of Parliament. This

would be an exercise by this Court of Parliament's rights, powers and responsibilities under section 18 of the *Constitution Act, 1867*.

41. There are two evils to be avoided here. The first is the transfer of the public policy debate from Parliament's chambers to the Court's chambers. The second is the politicization of the judiciary that this would necessarily engender. The only way for Parliament to avoid this result is for members to abdicate debate in Parliament. This Court should not put Members of Parliament in the position of having to choose to stand down from debate. This is backwards. Debate should occur in the chambers of Parliament before legal argument ensues in the chambers of the law courts.

B. Original Confederation Bargain

(i) The 1867 constitutional compromise and pre-confederation debate

42. If this Court determines that it should provide answers to the Reference Questions, the answers may well turn upon what was intended by the division of jurisdiction over marriage in the *Constitution Act, 1867*. Did those in attendance at the Confederation of Canada intend to carve out specific powers over property and civil rights for Parliament or did they instead intend to grant to Parliament the power to define marriage and, in particular, to define marriage to include same-sex civil unions? The words of the government of the day and of the Constitutional Conference leave no doubt but that the former was intended.

43. On February 3, 1865, in the Legislative Council, Premier Étienne Tachè, of the Province of Canada, moved the motion for the 1864 Quebec Resolutions. That same day, Mr. Cauchon, a Quebec member from Montmorency asked whether marriage was assigned to the general Parliament or to the local legislatures. About Mr. Cauchon, the debates, as recorded in Parliamentary Debates on the Subject of the Confederation of the British North American Provinces, report that:

> There were part of the resolutions about which there might be some misunderstanding and difference of opinion, as for example those clauses by one of which it was stated the civil laws of the country were to be under the control of the local governments, and by the other of which the law of marriage was placed under the control of the General Government. The law of marriage pervaded the whole civil code, and he wanted to know how it could be placed under a different

> legislature from that which was to regulate the rest of the civil law. [Legislative Assembly, *Parliamentary Debates*, 3rd session, 8th Provincial Parliament February 3rd- March 8th 1865 at 578.]

44. Mr. Cauchon's questions were pivotal. The French Canadian Roman Catholics participating in the Confederation debates focused much of their attention on marriage. On February 21, 1865, in the Legislative Assembly, Hector Langevin, the Solicitor General for Canada East, explained marriage to his colleague in this way:-

> The honorable gentleman has asked the Government what the meaning was to be attached to the word "marriage" where it occurred in the Constitution. He desired to know whether the Government proposed to leave to the Central Government the right to decide at what age, for example, marriage might be contracted. I will now answer the honorable gentleman as categorically as possible, for **I am anxious to be understood, not only in this House, but also by all those who may hereafter read the report of our proceedings** (*emphasis added*). And first of all I will prove that civil rights form part of those which, by article 43 (paragraph 15) of the resolutions are guaranteed to Lower Canada. This paragraph reads as follows:
>
> 15. Property and civil rights, excepting those portions thereof assigned to the General Parliament.
>
> Well, amongst these rights are all the civil laws of Lower Canada, and among these latter those which relate to marriage; now it was of the highest importance that is should be so under the proposed system, and therefore the members from Lower Canada at the Conference took great care to obtain the reservation to the Local Government of this important right, and in consenting to allow the word "marriage" after the word "divorce," the delegates have not proposed to take away with one hand from the Local Legislature what they had reserved to it by the other. So that the word "marriage," placed where it is among the powers of the Central Parliament, has not the extended signification which was sought to be given to it by the honourable member. With the view of being more explicit, I now propose to read how the word marriage is proposed to be understood:-
>
> The word marriage has been placed in the draft of the proposed Constitution to invest the Federal Parliament with the right of declaring what marriages shall be held and deemed to be valid throughout the whole extent of the Confederacy, without, however, interfering in any particular with the doctrines or rites of the religious creeds to which the contracting parties may belong. [Legislative Assembly, *Parliamentary Debates*, 3rd session, 8th Provincial Parliament February 3rd- March 8th 1865 at 388.]

45. Later that day, when challenged, the Solicitor General reiterated his position:

> I beg your pardon, it means that a marriage contracted in no matter what part of the Confederacy, will be valid in Lower Canada, if contracted according to the laws of the country which it takes place; but also **when a marriage is contracted in any province contrary to its laws, although in conformity with the laws of another province, it will not be considered valid** (*emphasis added*). [Legislative Assembly, *Parliamentary Debates*, 3rd session, 8th Provincial Parliament February 3rd- March 8th 1865 at 389.]

46. On March 8, 1865, the Solicitor General had one more occasion to emphasise the interpretation of the subject of marriage intended by the Conference:

> I stated before that the interpretation I had given of the word "marriage" was that of the Government and of the Conference of Quebec, and that we wished the Constitution to be drafted in that sense. The honourable member for Vercheres quoted that part of the draft of the civil code which states that one of the articles provides that a marriage contracted in any country whatever, according to the laws of the country in which it shall have been contracted, shall be valid, and he argues from that, that since it was declared by the civil code, there is no necessity for inserting it in the resolutions. But the honourable member must be aware that that part of the code may be repealed at any time, and that if this occurred, parties married under the circumstance referred to would no longer enjoy the protection they now have and which we desire to secure for them under the Constitution. I maintain, then, that it was absolutely necessary to insert the word "marriage" as it has been inserted, in the resolutions, and that it has no other meaning than the meaning I attributed to it in the name of the Government and of the Conference. Thus, the honorable member for Vercheres had no grounds for asserting that the Federal Legislature might change that part of the civil code which determines the age at which marriage can be contracted without the consent of parents Legislative Assembly, *Parliamentary Debates*, 3rd session, 8th Provincial Parliament February 3rd- March 8th 1865 at 781. [Legislative Assembly, *Parliamentary Debates*, 3rd session, 8th Provincial Parliament February 3rd- March 8th 1865 at 781.]

47. Local control over all other aspects of marriage was assumed and celebrated by those at the Conference. There can be no doubt that those in leadership at the Conference that drafted and approved the original Constitution of Canada intended and wanted all those "who may hereafter read the report" of their proceeding to understand that the only power granted to the Federal Parliament with regard to Lower Canada was the power to ensure "that a marriage contracted in no matter what part of the Confederacy will be valid in Lower Canada, if contracted according to the laws of the country in which it take place; but also, when a marriage is contracted in any province contrary to its laws, although conformity with the laws of another province, it will not

be considered valid." [Legislative Assembly, *Parliamentary Debates*, 3rd session, 8th Provincial Parliament February 3rd- March 8th 1865 at 389.]

48. The nature of the Confederation compact was well recognized by the both the Governor General and the Law Officers of the United Kingdom. In 1869, the Governor General transferred authority to grant marriage licences to the provincial Lieutenant Governors. He did this after the Law Officers issued an opinion that affirmed the authority of the provinces over essential matters of marriage. Their opinion reads, in part: "The power of legislating on the subject of marriage licences is conferred on the provincial legislatures by 30 and 31 Vic Chap. 3 and Sec 92 under the words of "solemnization of marriage in the Provinces". [Canada, 4th sess., 3rd Prov. Parl. "Return To an Address of the House of Commons, dated 15th February, 1877; *Vol. 9 Sessional Papers* (No. 89) 40 Victoria (1877), at 339-342.]

49. Although the Governor General had the power to grant marriage licenses before Confederation, all aspects of marriage, including the courts that dealt with marriage were regulated by the provinces. ["On The Legal Degrees Of Marriage In Canada IV" (December, 1881) Vol. I. No. 17 *Canadian Law Times*, at pages 665-68.] The author of the *Canadian Law Times* article argues that the insertion of marriage into sections 91 and 92 was the ground-work for an assimilation of the diverse provincial laws existing before Confederation. Following Confederation, these provincial laws remained intact and subsequently marriage laws were enacted. This author highlights a similarity between the marriage clauses in the *Constitution Act, 1867* and other clauses such as education, which also amounted to a codification of provincial education powers at the time of Confederation. [*Reference re: Bill 30, An Act to amend the Education Act (Ont.)*, [1987] 1 S.C.R. 1148 at 1194-96 ("*Re: Bill 30*")]

50. The 1865-66 Confederation debates reveal a significant constitutional compromise. The colonies insisted on a federal structure so that they would retain power over local matters. Joint authority over marriage was part of this compromise.

(ii) The constitutional principle in the *Bill 30 Reference*.

51. The constitutional compromise that led to the original confederation bargain was the focus of this Court in the *Bill 30 Reference*. [*Re: Bill 30* at 1194-99.] In that reference, this Court first reviewed section 93(1) of the *Constitution Act, 1867* and determined that it should "be interpreted in a way which implements its clear purpose which was to provide a firm protection for Roman Catholic education in the Province of Ontario and Protestant education in the Province of Quebec." [*Re: Bill 30* at 1194-95.]

52. It was argued that sections 2(a) and 15 of the *Charter* changed everything with regard to Roman Catholic separate school rights. This Court rejected that assertion and highlighted instead the original Confederation agreements, concluding that "the agreement at Confederation" was not "displaced by the enactment of the *Constitution Act, 1982*" and that Bill 30 was effectively "insulated from Charter review." [*Re: Bill 30* at 1198-9.]

53. The purpose of section 91(26) and section 92(12) of the *Constitution Act, 1867* is virtually identical to that in section 93(1). The rights of the majority in each of Ontario and Quebec to make laws regarding marriage were to be preserved while the individual rights of members of the majority groups were to be protected in the event they migrated and became members of the minority in the other province. Just as the *Charter* could not be used to prevent the Province of Ontario from funding Roman Catholic education, to the exclusion of other faiths, the *Charter* may not be used to prevent Parliament or the legislative assemblies of the provinces from maintaining a definition of marriage that excludes same-sex unions.

54. The proposed draft bill would have the effect of abrogating an exclusive provincial power. "Marriage," as a head of power was assigned to both Parliament and the provincial legislatures at Confederation. This means that the *Charter* cannot be used to force the elimination of the differences or distinctions that currently exist in Canada as a result of the Constitutional meaning of marriage. See *EGALE Canada Inc. v. Canada (Attorney General)*, [2001] B.C.J. No. 1995 at paragraph 103 ("*EGALE*").

C. The proposed draft bill is not within the exclusive legislative authority of Parliament

(i) Parliament may not unilaterally redefine a head of power in the *Constitution Act, 1867*

55. In *R. v. Blais*, [2003] 2 S.C.R. 236 ("*Blais*") this Court was asked to consider extending the meaning of a constitutional term based on a *Charter* argument. [*Blais* at 255-56.] This Court asserted that it was not free to invent new obligations foreign to the original purpose of the provision at issue. At issue was the question of whether the term "Indians" in the *National Resources Transfer Agreement* could be expanded to include Métis. This Court relied upon Chief Justice Dickson's analysis in *Big M* [at 317-19] to conclude that such an interpretation would not be true to the proper linguistic, philosophic and historical context of the Agreements. [*Blais* at 246 and 255.]

56. Similarly, Justice Binnie emphasized the need for attentiveness to context when he noted in *R. v. Marshall*, [1999] 3 S.C.R. 456 at 473-74 that "'[g]enerous' rules of interpretation should not be confused with a vague sense of after-the-fact largesse."

57. The Honourable Anne McLellan, former Attorney General of Canada, understood the long standing position of the public law of Canada on this subject and confirmed that position during debate in the House of Commons, on June 8, 1999, when she spoke to a resolution on marriage. The Honourable Senator Anne Cools, summarized and reiterated the Minister's position during Senate debate on June 13, 2001:

> In the House of Commons, on June 8, 1999, Minister McLellan spoke on a resolution .... That resolution said:
>
> That, in the opinion of this House, it is necessary, in light of public debate around recent court decisions, to state that marriage is and should remain the union of one man and one woman to the exclusion of all others, and that Parliament will take all necessary steps to preserve this definition of marriage in Canada.
>
> Minister McLellan [opined]:
>
> The definition of marriage, which has been consistently applied in Canada, comes from an 1866 case which holds that marriage is "the union of one man and one woman to the exclusion of all others". That case and that definition are considered clear law by ordinary Canadians, by academics and by the courts. The courts have upheld the constitutionality of that definition.

She then told the House of Commons that the Ontario Divisional Court had upheld the constitutionality of that definition of marriage in the 1993 case *Layland v. Ontario*. She quoted Mr. Justice Southey's judgment that:

Unions of persons of the same-sex are not "marriages", because of the definition of marriage. The applicants are, in effect, seeking to use s.15 of the Charter to bring about a change in the definition of marriage. I do not think the Charter has that effect.

In concluding, the minister said:

I support the motion for maintaining the clear legal definition of marriage in Canada as the union of one man ad one woman to the exclusion of all others.

This motion carried on June 8, 1999 by a vote of 216 to 55.

Honourable senators, I also note that about two months ago we passed the *Federal Law – Civil Law Harmonization Act, No.1*, section 5 of which, with regard to marriage, stated:

Marriage requires the free and enlightened consent of a man and a woman to be the spouse of the other. [Senate of Canada, *Senate Debates,* (13 June 2001) at 1152.]

(ii) Both Parliament and the provincial legislatures have jurisdiction over "marriage"

58. In *Reference re: Marriage Act (Canada),* [1912] 7 D.L.R. 629 at 631 and 636-37 ("*1912 Marriage Reference*") the Privy Council considered the question of whether Parliament could prevent Quebec from prohibiting a marriage between a Catholic and a non-Catholic. The Privy Council denied that the Federal Parliament had the power asserted. [*1912 Marriage Reference* at 631 and 637.] It is clear that the framers of the *Constitution Act, 1867* understood "Property and civil rights" in the same sense it obtained in 1762 and 1774, that is to say, as a compendious description of the entire body of private law that governs the relationship between subject and subject. [Hogg, at 655.] The proposed draft bill interferes with the authority of the provinces in matters of civil rights of persons within the provinces to the same extent as did the bill in question in the *1912 Marriage Reference.*

(iii) Same-sex relationships are a matter of civil rights within a province

59. There is no doubt that the Canadian constitutional framework permits one or the other, but not both, of Parliament and the provincial legislatures to enact legislation that may publicly sanction and recognize same-sex civil relationships. [*EGALE* at 98.]

60. The proposed draft bill intersects with the provinces' legislative power in respect of same-sex civil unions and would consequently subsume this heretofore-provincial field. Parliament may legislate in regard to certain aspects of capacity. However, Parliament does not have the power to legislate in regard to capacity where to do so would trench on provincial powers with respect to property and civil rights [section 92(13)] and obliterate such jurisdiction.

D. The proposed draft bill may only be introduced into Parliament as a resolution for the amendment of the *Constitution Act, 1867*

61. The proposed draft bill amounts to an attempt to create legislation that defines a federal head of power, as opposed to legislation that is under the authority of a federal head of power. If the proposed draft bill is given effect, the very subject matter of marriage would be changed. See *Brinkley v. A-G* (1890), 15 P.D. 76 at 79: "A marriage which is not that of one man and one woman to the exclusion of all others, though it may pass by the name marriage, is not the status which English law contemplates when dealing with the subject of marriage." Furthermore, the proposed draft bill is not a mere expansion of the right to marry, but a fundamental reformulation and alteration of a term that has been established and understood as the union between one man and one woman from the beginning of Western society. [See *Standhardt v. Superior Court of Arizona* (2003), 77 P.3d 451 at 458.]

62. In *Manitoba (Attorney General) v. Canada (Attorney General),* [1981] 1 S.C.R. 753, at 752 this Court quoted Lord Watson in his judgment from *Liquidators of the Maritime Bank of Canada v. Receiver-General of New Brunswick* in which he asserted that Parliament could not, by legislation, make a unilateral change to the Constitution:

> The federal principle [Rule of Law] cannot be reconciled with a state of affairs where the modification of provincial legislative powers could be obtained by the unilateral action of the federal authorities. It would indeed offend the federal principle that "a radical change to ... (the) Constitution (be) taken at the request of a bare majority of the members of the Canadian House of Commons and Senate [Report of Dominion Provincial Conference, 1931, at page 3]."

63. The proposed draft bill would constitute a unilateral change to the Constitution. However, Parliament is not clothed with additional legislative authority as a consequence of the enactment of the *Charter*. [See *Big M* at 355.]

64. The legal nature of marriage is so entrenched and well understood in our society, and in our legal system, that only Parliament and the legislatures, by constitutional amendment, may make a change to the definition thereof. The courts in Canada have long recognized that neither level of legislature may legislate so as to affect the meaning of marriage and that any change in the meaning of marriage would require a constitutional amendment. [*Hill v. Hill*, [1928] 4 D.L.R. 161 at 165 (Alta. S.C.).]

PART IV – SUBMISSIONS CONCERNING COSTS

65. The Interveners seek payment of their reasonable legal fees and disbursements from the Minister of Finance on a solicitor-client basis.

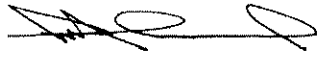
PART IV – ORDER REQUESTED

66. The Interveners seek an order declaring that this Court declines to answer the Questions.

67. In the alternative, the Interveners seek an order declaring that: (a) the nature of marriage is part of the original Confederation agreement; (b) the proposed legislation is not within the exclusive legislative authority of Parliament; and (c) the proposed draft bill may only be submitted for consideration by the Parliament of Canada as a resolution for an amendment to the *Constitution Act, 1867.*

ALL OF WHICH IS RESPECTFULLY SUBMITTED, this 11th day of May, 2004.

CHIPEUR ADVOCATES


Gerald D. Chipeur Dale Wm. Fedorchuk Ivan Bernardo

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